1964

Mar. 20, 21
Apr. 1, 2

June 12

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

HARRY S. DEVEREUX .....DEFENDANT.

Crown—Indian Act, R.S.C. 1952, c. 149, ss. 18(1), 20, 24, 25(2), 28(1), 31(1), 37, 45(1), 48, 49, 50, 58(1)(c) and (3)—Indian Act, R.S.C. 1927, c. 98, s. 34(2)—Indian Act, S. of C. 1951, c. 29, s. 18(1)—Right of Indian Band to possession of Reserve Land—Right of Band to possession of Reserve Land suspended or terminated in certain cases—Right to possession lawfully acquired by individual member of band is assignable and transmissable subject to the provisions of the Statute—Right to possession vested in band or in individual Indian but not in both at same time.

In this action the Crown claims on behalf of the Six Nations Band of Indians possession of a farm forming part of the Six Nations Indian Reserve near Brantford, Ontario, on which the defendant has resided since 1934, at which time it was lawfully in the possession of Rachel Ann Davis, the widow of a member of the Six Nations Band. The defendant worked the farm under a leasing agreement with Mrs. Davis from 1934 to 1951, when, at the request of Mrs. Davis and the defendant, a lease of the farm was granted by the Crown to the defendant for a term of ten years. The defendant purchased the livestock and farming implements belonging to Mrs. Davis and took possession of the farm although Mrs. Davis continued to reside there until her death in 1958. She devised her rights in the farm to the defendant, who continued in possession for the balance of the term of the lease and, for the terms of two subsequent one-year permits granted by the Crown and was still in possession at the time of the trial. After the termination of the Crown lease in 1961 the Crown advertised for tenders for the farm from members of the Six Nations Indian Band and four tenders were received, the highest one, submitted by one Clause, being accepted. The Administrator of Indian Estates, purporting to act as the administrator of the estate of Mrs. Davis, executed an agreement to sell the said lands to Clause. By agreement between the defendant and the Crown and on the application of Clause and the defendant, the defendant was granted the right to use and occupy the property for one year ending November 30, 1961 and by a similar agreement the said rights of the defendant were continued until November 30, 1962, these two agreements being the two one-year permits referred to earlier. Clause agreed with the defendant to apply for a five-year lease of the farm to the defendant and for renewals thereof until the purchase price should be paid but the application was opposed by the Band Council and it was not approved by the Minister. In May 1962 Arnold and Gladys Hill, who knew of the arrangements between Clause and the defendant, purchased from Clause his right in the property, the assignment of Clause's rights to them being approved by the Administrator of Indian Estates as Administrator of the Davis estate.

In November 1962 the Council of the Band notified the defendant to vacate the property at the expiration of the second one-year Crown permit and took other steps to force the defendant to leave the property, culminating in this action. The resolution by which the Band

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Council instructed the Attorney General of Canada to institute this action was an assertion by the Council of a right of the Band as a whole and not of any right of Arnold and Gladys Hill. There was no evidence adduced of any transfer or assignment to the Band of the right of possession of the property either from the executor of the Davis estate or from the Administrator of Indian Estates, or from Clause, or from the Hills.

Held: That the main issue in the action is not whether the defendant has any right to remain in possession of the land in question, but whether the Six Nations Indian Band, on whose behalf the action has been brought, is entitled to the possession claimed on its behalf.

2 That s. 31(1) of the *Indian Act* confers no new substantive right but simply provides a procedure for the enforcement of existing rights of an individual Indian or of a Band.

3. That in this case the action is to enforce a right of possession asserted by the Band and on the facts it has not been established that the Band has any such right in the land in question.

4. That the action is dismissed.

ACTION by Crown to recover possession of land on behalf of the Six Nations Band of Indians.

The action was tried before the Honourable Mr. Justice Thurlow at Brantford.

N. A. Chalmers for plaintiff.

P. A. Ballachey, Q.C. for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (June 12, 1964) delivered the following judgment:

In this action the Crown claims on behalf of The Six Nations Band of Indians possession of a farm consisting of portions of lots 52 and 53 of what is known as the River Range in the township of Onondaga near Brantford, Ontario. The farm in question forms part of an area known as the Six Nations Indian Reserve, which is administered by the Department of Citizenship and Immigration as a reserve to which the *Indian Act* applies and the action is brought at the instance of the Council of the Band pursuant to s. 31(1) of the *Indian Act* R.S.C. 1952,c.149, by which it is provided that:

31. (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been

(*a*) unlawfully in occupation or possession of,

(*b*) claiming adversely the right to occupation or possession of, or

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(c) trespassing upon

a reserve or part of a reserve, the Attorney General of Canada may exhibit an Information in the Exchequer Court of Canada claiming, on behalf of the Indian or the band, the relief or remedy sought.

While there is no reason to question that the Six Nations Indian Reserve of which the farm in question forms part is a reserve within the meaning of the statute no evidence was offered of the origin of the reserve or of the nature of the rights of the Six Nations Band of Indians in it.

The defendant, who is not an Indian, has resided on the farm in question since 1934. At that time the farm was lawfully in the possession of Rachel Ann Davis, the widow of a member of the Six Nations Band and the defendant moved there pursuant to a leasing agreement with her under which he was to work the farm on shares. While this arrangement appears to have been void under s. 34(2) of the *Indian Act* R.S.C. 1927, c. 98. insofar as it purported to give the defendant possession of the premises and the right to reside thereon, it continued until 1951 when, at the request of Mrs. Davis and the defendant, a lease of the farm was granted by the Crown to the defendant for a term of 10 years commencing December 1, 1950, embodying most of the terms of a new arrangement which had been made by Mrs. Davis and the defendant. At that time the defendant purchased the livestock and farming implements belonging to Mrs. Davis and became possessed of the farm under the lease though Mrs. Davis continued to live there and to occupy certain portions of the premises under the terms of the arrangement until her death in April 1958. By her will, probate of which was granted on May 30, 1958 by the Surrogate Court of the County of Brant to the executors therein named, Mrs. Davis gave her rights in the farm to the defendant and following her death the defendant continued in possession and despite the expiration of the lease and of two one year permits to use and occupy the land for agricultural purposes, subsequently granted by the Crown pursuant to s. 28(2) of the Act, remained in possession at the time of the trial of the present action.

As I view it, the main issue in the action is not whether the defendant has any right to remain in possession of the land in question but whether the Six Nations Indian Band,

on whose behalf the action has been brought, is entitled to the possession claimed on its behalf. By s. 18(1) of the Act it is enacted that:

18. (1) Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; . . .

but by ss. 20 to 28 inclusive, provisions are made under which individual members of a band may acquire a right to possession of land in a reserve which right is transferrable under specified conditions to other members of the band, the band itself being entitled to come into possession as reversioner in certain specified situations.

With respect to the transmission or disposition of a right to possession of land in a reserve on the death of a member having such a right the statute in s. 48 makes provision for distribution of the estates of Indians who die intestate and in ss. 45(1), 49 and 50 provides as follows:

45. (1) Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will.

49. A person who claims to be entitled to possession or occupation of lands in a reserve by devise or descent shall be deemed not to be in lawful possession or occupation of that land until the possession is approved by the Minister.

50. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

(2) Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the nighest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.

(3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

(4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.

It is I think of importance to observe at this point that the only situation in which the right of possession reverts to the band under these provisions is that described in s.

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50(3) that is to say, when no tender has been received within the specified time.

Turning now to the facts the evidence discloses that at the time of her death Rachel Ann Davis held a certificate of possession of the land in question issued under s. 20 of the *Indian Act* and had the right to possession of the land subject only to the lease existing at that time which had been made by the Crown at her request to the defendant. This right was not sold immediately after her death but on January 4, 1961, following the termination of the defendant's lease the Indian superintendent at Brantford advertised for tenders for the property from members of the Six Nations Indian Band, such tenders to be submitted by the end of March 1961, and as a result four tenders varying in amount and in terms of payment were received from members of the band including one from Hubert M. Clause and another from Arnold D. Hill and Gladys Hill. The tender of $15,000 by Clause was the highest in amount and subsequently by an agreement dated August 21, 1961, Arthur C. Pennington, the administrator of Indian Estates, purporting to act as administrator of the estate of Rachel Ann Davis, as vendor, agreed to sell the land to Clause for $15,000 of which $1,000 was payable on execution of the agreement and the remainder in yearly payments of $800 with interest on the balance at 6 per cent. per annum. The contract provided *inter alia* that immediately on execution of it Clause should have the right to possession of the land and that no assignment of the agreement by him should be valid or of any effect between the vendor and him until approved by the Minister of Citizenship and Immigration. Whether the contract itself or possession of the property by Clause was ever approved by the Minister for the purposes of s. 50(4) of the Act was not established but it appears that on the application of Clause and the defendant the latter was by an agreement between himself and the Crown dated May 12, 1961, granted the right to use and occupy the property from December 1, 1960, to November 30, 1961, at a rental of $350, and it also appears that by a similar agreement made at the request of the defendant and of Clause dated November 16, 1961, the defendant was granted the right to use and occupy the property from December 1, 1961, to November 30, 1962, at a rental of $1,020.

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In March 1962 while the second of these agreements was in effect Clause, who at all material times had intended to raise at least part of the money to make the payments on his contract by having the land leased by the Crown for his benefit to the defendant, by a further contract obligated himself to the defendant to apply for a five year lease of the premises to him and for renewals thereof until the purchase price should be paid. The form which this transaction took appears to have been dictated by ss. 28(1) and 58(3) of the Act. By s. 28(1) it is provided that

> . . . a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

It is also provided in s. 37 that

> Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

By s. 58(3) however the Minister is empowered to

> . . . lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered.

The application referred to in Clause's contract with the defendant was prepared and forwarded but the council of the band was opposed to it and it was not approved by the Minister. In May 1962 Arnold and Gladys Hill, who I think knew enough of the arrangements existing between Clause and the defendant to fix them with notice thereof, purchased from Clause his rights in the property and by an indenture dated June 1, 1962, concurred in by Arthur C. Pennington as administrator of the estate of Rachel Ann Davis, Clause assigned his rights in the property to them. The document bears an "approved" stamp with a signature under which is the word "Director", but whether or not this indicates approval by the Minister was not established. A second application for a five year lease to the defendant was prepared by his solicitor and forwarded to the Hills for signature but they do not appear to have signed it and the lease was not granted.

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As the termination of the second of the two permits granted to the defendant by the Crown approached, the council of the band came into the picture. In November 1962 it notified the defendant to vacate the property at the expiration of his permit and in January 1963 it passed a resolution requesting the Indian superintendent at Brantford to notify the defendant to quit and remove from the reserve on or before January 31, 1963. This the superintendent did. On that date and on February 12, 1963, as well, summonses were issued on informations laid by the chief councillor of the band in both cases charging that the defendant on the respective dates "did unlawfully trespass on the Six Nations Indian Reserve contrary to section 30 of the Indian Act". Both charges were dismissed. Thereafter on July 4, 1963, the council passed a resolution stating:

> That the Six Nations Band Council alleges that Harry Devereux is unlawfully in possession of that parcel or tract of land and premises situate, lying and being in the Six Nations Indian Reserve No. 40, in the Province of Ontario and being composed of lots 52 and 53 in the River Range in the Township of Onondaga, containing by admeasurement an area of 225 acres, more or less, and that the Six Nations Band Council instructs the Attorney-General of Canada to exhibit an Information in the Exchequer Court of Canada, pursuant to S. 31(1)*a* of the Indian Act to recover possession of the said lands on behalf of the Six Nations Band.

The present action was then brought.

It will be observed that this resolution is an assertion by the council of a right of the band as a whole. It is not an assertion of the right of Arnold and Gladys Hill and it was expressly stated by counsel for the Crown in the course of the trial that he was not asserting any right of the Hills. Moreover there is no evidence of any transfer or assignment to the band of the right of possession of the property either from the executors of the Davis estate or from the administrator of Indian Estates or from Clause or from the Hills.

In William and Yates on Ejectment, Second Edition, the fundamental principles applicable in actions to recover possession of land are expressed as follows at pages 1 to 3:

> To entitle a plaintiff to bring an action for the recovery of possession of land he must have a right of entry either legal or equitable. A right of entry means a right to enter and take actual possession of lands, tenements, or hereditaments, as incident to some estate or interest therein.
>
> . . .
>
> A person in possession of land in the assumed character of owner, but without any title, has a good title against all the world except the rightful owner, and he can recover possession from any person, except the rightful owner, who deprives him of possession.

Before the Judicature Acts this right of entry must have been, in any court of common law, a *legal* right; a mere equitable title would have been insufficient to support an action of ejectment. Since the Judicature Acts all the courts are bound to give to a plaintiff, or to a defendant, the same relief upon an equitable title as the Court of Chancery would formerly have given, even against the Crown. Now, therefore, a plaintiff claiming possession under an equitable title will succeed upon proof of an equitable right to the actual possession; but it may be necessary to make the person in whom the legal estate is vested a party to the proceedings.

. . .

The right of entry must be a right to the immediate possession of the property. A reversionary or other future estate is not sufficient until it has become an estate in possesion by the forfeiture, defeasance, or expiration of the prior estate. If, therefore, it is shown that there is a tenancy existing in any other person which is good against the plaintiff he cannot recover possession. So also if there is an outstanding term which has not been surrendered.

With respect to the right to possession of land in an Indian reserve, whatever may have been the exact legal position prior to the enactment of *The Indian Act* S. of C. 1951, c. 29 of 1951, s. 18(1) of that Act makes it clear that thenceforth subject to the provisions of the Act, reserves are held by the Crown for the use and benefit of the respective bands for which they were set apart, and this appears to me to vest in the band a right to the use and to the benefit of the land including the right to possession of it. The provisions of s. 24 providing for sale to the band by an Indian of his right of possession and of s. 25(2) and 50(3) providing for reversion of an individual Indian's right of possession to the band in certain situations lend support for this conclusion. But this right is subject to the other provisions of the statute and accordingly is suspended or terminated with respect to the land involved in situations which under other provisions of the act are inconsistent with the band's right of possession as for example when a lease is granted pursuant to s. 58(1)(*c*) or when an individual member of the band lawfully obtains possession of land in a reserve pursuant to s. 20.

Now when an individual member has lawfully secured possession of land in a reserve he has under the statute a right to possession which is assignable and transmissible subject to and in accordance with the provisions of the statute and which, as I read the Act, continues to be vested in him or in anyone who takes by assignment from him or on his death in the same way and to the same full extent as title to land outside the reserve would continue to be

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vested in him or his assignee or successor, subject only to any provisions of the statute which may be inconsistent therewith. It is thus conceivable that a right of possession once lawfully obtained by an individual member of a band may persist for an indefinite period and may pass on numerous occasions to other members of the band and such a right does not become extinct even when the party beneficially entitled to it is one who is not personally qualified to exercise it. To my mind such a right is clearly inconsistent with the existence at the same time of a right of possession in the band and it appears to me to follow from this that when a member of a band obtains lawful possession of land in a reserve the right which the band would otherwise have to possession of that land is at an end, though circumstances may arise in which the band may once again have a right of possession either by purchase of the individual member's right or on reversion of the right to the band under ss. 25(2) or 50(3). The statutory scheme accordingly in my opinion contemplates a statutory right of possession of any part of a reserve being vested in an individual member of a band, or in the band itself, but not in the band when it is vested in the individual member.

In the present case the band at no material time had a right to possession since Mrs. Davis undoubtedly had (subject to the outstanding lease to the defendant) the right to possession of the land described in the certificate issued to her under s. 20 of the Act and since this right never reverted to the band under s. 50(2), which is the only provision of the Act under which it could have so reverted, because that provision never came into operation inasmuch as tenders were received within six months after the right was offered for sale.

In this view it is unnecessary to consider any question as to the validity or effect of the sale to Clause or of the assignment by him to the Hills and while the right to possession may have passed to Clause and then to the Hills under these transactions, it is also unnecessary to determine in whom the right is now vested since the only material question is whether it has been shown to be vested in the band.

In the course of argument reliance was placed by counsel for the plaintiff on the judgments of this Court in *The*

King v. McMaster[1] and *The King v. Easterbrook*[2] and the judgment of the Supreme Court of Canada[3] affirming the judgment in the latter case but the question which Maclean P. considered in the *McMaster* case at p. 74 was quite different from that which arises here and neither in that case nor in the *Easterbrook* case was there any question of the right to possession of the land being vested in an individual member of the band. I am accordingly of the opinion that these cases do not apply in the present situation.

It was also submitted that s. 31(1) confers on a band a statutory right to the relief claimed in an action brought by the Attorney General of Canada at its request pursuant to the section. As I read it, however, this subsection confers no new substantive right but simply provides a procedure for the enforcement of existing rights of an individual Indian or of a band. In the present case the action is to enforce a right of possession asserted by the band and on the facts it has not been established that the band has any such right in the land in question.

The action therefore fails and it will be dismissed with costs.

Judgment accordingly.

[1] [1926] Ex. C.R. 68. [2] [1929] Ex. C.R 28.
[3] [1931] S.C.R. 210.