A GREAT LEGAL CASE.

The Queen v. St. Catharines Milling and Lumber Co.

The appeal in this case is from the decision of Chancellor Boyd, rendered last spring in favour of the Ontario Government, in this action brought to restrain the defendants from cutting timber on a certain part of the "disputed territory" declared by the judgment of the Privy Council to belong to the Province of Ontario. The judgment of the Privy Council as to this is not questioned, but the defendants are cutting timber on the property, a tract of 55,000 square miles, under a license from the Dominion Government, and claim, through a treaty with the Saltos Indians, a tribe of the Ojibbeways, known as the "North-west Angle Treaty," whereby the lands in question were ceded to the Crown, as represented by the Dominion Government, in consideration of certain moneys paid and of reserves of farming lands and rights of hunting and shooting over the Territory. The Chancellor decided in favor of this Province on the question thus raised, and the appeal is on behalf of the defendants from his decision. Mr. McCarthy, Q.C., Mr. A. R. Creelman, and Mr. Wm. Creelman appeared for the appellants, and Mr. Attorney-General Mowat, Mr. Walter Cassels, Q.C., and Mr. David Mills (London) for the Crown.

Mr. McCarthy said that the question largely turned upon the construction of the British North America Act. The Ontario Government could not succeed unless they brought the case within sec. 92, article 5, which gives the Provinces the exclusive power of management and sale of public lands and timber thereon. Sec. 91, article 5, gives the Dominion Government jurisdiction over Indians, and lands reserved for Indians, and it is upon this article that the contention of the defendants rests. Sections 102 and 126 deal with the distribution of the assets of the Province at the time of Confederation. A line had to be drawn at that time. If this property did not pass to the Province then, it has not passed since, and if it passed then it was under sec. 109 of the Act, by which all lands belonging to the Provinces shall continue to belong to the Provinces. There was no intention to hand over private property to the Provinces, only public lands, and if this was private property it did not pass. The Main Question, therefore, is: whether the Indians had any such beneficial estate in the lands as made it impossible to say that they were transferred to the Province as an asset at the time of Confederation. Practically there has been a recognition of the beneficial ownership of the Indians in the soil they occupy. As between the different nations who have colonized this and other new countries, discovery, followed by possession and colonization, has, as a matter of international law, vested the soil in the sovereign state, but not as against the aborigines, who have always been treated as having a beneficial interest. The assumed ownership of the estate is a right of "eminent domain," and nothing more. He contended that *prima facie* it must be assumed that the Indians, having ceded these lands to the Crown, they had the right to do so; and the burden was upon the other side to show that these lands were not Indian lands. The judgment below was wrong because the word "reserves" has not the limited signification which the Chancellor placed upon it. All the lands of the country which the Indians occupied must be considered as Indian reserves. If this is not so, these lands are not included in either sec. 91 or sec. 92 of the B. N. A. Act, and as such belong to the Dominion, because all as sets not specified in the Act became Dominion assets at Confederation.

Mr. A. R. Creelman followed Mr. McCarthy for the appellants. He argued that the treaty with the Indians under which the defendants claimed was not an extinguishment of the Indian title, as held by the Chancellor, but a transfer of it, referring to the language of the treaty in question and other treaties. Mr. Creelman also went over the Chancellor's judgment minutely, taking exception to the different findings of fact and law in it.

Mr Attorney-General Mowat, for the respondant, began his argument at about half-past two. He expressed his admiration for the ingenuity and industry of his learned friends in making so strong a case as they had for a construction of the B. N. A. Act different to that which had been universally placed upon it since Confederation. The word "royalties" in sec. 109 of the Act has an important bearing on this case. The Mercer case shows that an escheat is included in the word "royalty"—*a fortiori* it covers a case of this kind. Unless it be made out that there was no interest at all remaining in the Crown these lands passed to the Province by the Act. The only interest the Indians have is by grace of the Crown. Unenumerated property goes not to the Dominion, but to the Province, under section 117. Unenumerated legislative power goes to the Dominion, but not property. In ascertaining what the construction of the Act is in regard to the question here raised, we must find a construction applicable to all the Provinces. The doctrine that it is necessary to have the Indian title extinguished before making grants from the Crown has never prevailed in any Province except Ontario. The very treaty under which the defendants claim states that the alleged consideration is paid to the Indians "out of Her Majesty's bounty and benevolence." The Crown as represented by the Dominion Government was very careful not to acknowledge any title in the Indians. Her Majesty makes the Indians "a present of $12 each." In every one of the Provinces there was a large quantity of land reserved for the Indians which were called in the statutes and public documents 'reserves' and when we find the British North America Act speaking of "reserved lands" conclusion is almost irresistible that the words must refer to what where then known as "reserves" or "reserved lands." The Indian title, if extinguished, enures to the benefit of the province of Ontario, which is entitled to all the estate in these lands, which is not in the Indians. The lands belong to the Province, subject to the extinguishment of the Indian title and they belong to the Province absolutely when the Indian title is extinguished.

Mr. David Mills followed the Attorney General on behalf of the Crown. He said that the questions in dispute were, first, the ownership of the lands north of the height of land, and, 2nd, if the ownership is in the Province of Ontario, whether it is subject to an Indian title which has enured by extinguishment to the benefit of the Dominion. If these nomad Indians scattered over the Province have a title paramount to the soil, it is the same in all the Provinces, and a precedent for dealing with these lands will be found in the case of Newfoundland, where the Indian lands were not surrendered at Confederation, and it was contemplated that these lands should be surrendered to the Province, if it became a province. When we look at the earlier settlement of this Continent we find it assumed that the king acquired the right of property in the soil, and granted charters professing to convey away the right in fee simple to the soil, without any attempt at the extinguishment of the Indian title. No such thing as Indian title has been recognized in the Maritime Provinces. If the appellants' contention here should succeed the Province of Ontario would be placed in a wholly different position from any other Province. The fact that a few Indians reside there gave them no property in the soil. The general grant in the B. N. A. Act is to the Provinces. Where the Dominion is intended to take there is a special grant. These lands have vested in the Province and have never been divested. There is no doubt that in New England purchases were made from Indians of lands which the Crown had previously assumed to grant, but it was as a matter of public policy to conciliate the Indians, not to acquire the title. The Indians, not having any government, laws, or usages akin to laws, or any settled places of abode, were always treated as not having any property in land. Locke, in his essay on Government so states. The notion that the Indians had property in the soil was not their own, but was imparted to them by white people. Mr. Bentham, in his work on the Theory of Legislation, ch. 7, points out that the notion of property rests upon the notion of law. Where there are no laws there is no property. Anterior to law and apart from it there can be no such thing as the right of property. It is clear that the title paramount was in the Crown, that the Crown is represented by the Province, and that the Dominion Government cannot pretend to interfere because of their jurisdiction over Indians and lands reserved for Indians. The policy of the Crown has always been, after granting lands formerly occupied by Indians, to leave the grantee to deal with them, and there is therefore no excuse for the interference of the Dominion Government here, the lands being the property of the Province. Mr. Mills concluded his argument at half-past one and the Court adjourned for luncheon.

After recess Mr. McCarthy began his argument in reply. He asserted that the proposition of fact which he had started with had not been displaced, viz.: that ever since this country has been settled by those representing the British Crown, the Indian title has been recognized, the land has been bought from them, and they have been dealt with as owners. The only person who could buy from the Indians was the Sovereign. The Indians were protected from dealings with private persons for very good reasons, but with that restriction as to purchasers, the Indians were always treated as selling the land which they occupied. Occupants of the soil, who can cut and sell timber, who can hunt and fish over the land, keep out other people, and sell to the Crown, must have a title. True that their right is not spoken of as a title in the early days of descovery, and a good reasons, the title has grown out of the causes of dealing of the Crown with the Indians. All that is said in the opinions and cases cited for the respondents is that no one but the Crown can buy from the Indians. This question of the Indian title has never been brought up in our Courts before. This land could not have come to the Province under the word "royalties" in the B. N, A. Act. Escheats and things of that nature come to the Crown under that word, but nothing which can be purchased. The word "surrender" used in the treaty implies a vested title, without which would be nothing to surrender. The transfer of the Indian title cannot enure to the benefit of the Province; the treaty is made with the Crown, and the Crown is not represented by the Lieut.-Governor, as held by the Supreme Court in Lemon v Ritchie, nor is the treaty making power in the Province.

Mr. McCarthy concluded his argument about half-past three.

The Chief Justice said that the case had been argued with great clearness and ability, and that much industry had been shown by counsel in collecting authorities. Judgment was, of course, reserved.

[NOTE.—We consider that Mr. McCarthy has much the best argument in this important case. By the following extract, taken from an English paper of 1836 which our readers will find interesting and directly bearing upon this subject, it would appear that the matter in point was discussed at that early date, and the discussion arrived "is of incalculable advantage to the Indians."]

Lieutenant Colonal Sir Angustus d'Este, and the Rev. Robert Alder, had an interview with Lord Glenelg at the Colonial Office, on Saturday last, for the purpose, as we understand, of communicating with his lordship on the subject of the Indian reserves in the province of Upper Canada. The treaty which was entered into by Sir F. B. Head, with a portion of the Saugeeng Indian, for the relinquishment, on their part, to the crown, of their territory in the Huron tract, comprising a million and a half of acres of the finest land in the province, in connection with other measures adopted by the executive towards that deeply injured race, produced a degree of distrust and apprehension in the minds of the Christian Indians at the different Mission Stations in Upper Canada, under the care of the Wesleyan Missionary Society, which greatly interrupted their progress in the path of improvement and have been the means of breaking up one or two of those settlements. Under these circumstances the committee of that society have on various occasions brought this very important affair under the consideration of her Majesty's Principal Secretary of state for the colonies, and it is due to the noble lord who filled that high station, to add that we have been informed, that he has manifested the utmost willingness to listen to their representations, and to redress the wrongs of the poor Indian. It will afford great satisfaction to the friends of the Missions, and especially to those who take a deep interest in the progress of scriptural Christianity amongst the red men of the West to learn that a despatch has been addressed by Lor, Glenelg to the present excellent Lieutenant Governor of Upper Canada, on the subject of Indian Title Deeds, which will secure to the evangelized Indian and their posterity, the possession in perpetuity of the lands on which they are located, and which they have to some extent improved and cultivated. The statement of this question is of incalculable advantage to the Indians, and the announcement of it to them will contribute to bind them still more closely to the mother country, an object of great national importance in the present critical state of the Canadas. It is a remarkable fact, and one which must greatly contribute to encourage the friends of missions to persevere in their efforts to diffuse the knowledge and influence of the gospel amongst the Aborigines of America, that while during the four years that immediately preceded the establishment of the Wesleyan mission at the river St. Clair, the annual average number of deaths was forty-seven, and only twelve of these from natural causes, the rest having been chiefly occasioned by drunken quarrels and accidents occaioned by intemperance, the average annual number of deaths during the four years that have elapsed since their conversion to Christianity has been *three* from natural causes, and from other causes *not one*. The rejection of the New Zealand Colonization Bill, and the boon granted to the Indians, are triumphs in which, for the sake of humanity, we greatly rejoice.