1942

Oct. 29 & 30.

Nov. 12.

BETWEEN:

HIS MAJESTY THE KING on Information of the Attorney-General of Canada, and on behalf of the Brokenhead Band of Indians ..... PLAINTIFF;

AND

KLYM WEREMY ..... DEFENDANT.

Crown—Real property—Action for recovery of possession of Indian reserve land—Dominion Lands Surveys Act, R.S.C., 1927, c. 117, s. 62—Boundaries—Ascertainment of boundaries by means of monuments—Validity of the Indian Act, R.S.C., 1927, c. 98, s. 39.

The action is one for the recovery of possession of land forming part of an Indian reserve.

Held: That the boundaries of the land concerned as defined by the monuments placed at the corners thereof shall be deemed to be the true boundaries.

2. That the indication on a plan of a certain acreage in a particular quarter section of land was not a warranty by the Crown to its grantee or his successor in title.

3. That the Indian Act, R.S.C., 1927, c. 98, s. 39, is *intra vires* of the Parliament of Canada.

INFORMATION by the Attorney-General of Canada to recover possession of certain land now in the occupancy of defendant, part of an Indian reserve.

(1) (1917) P.D. 198 at 208.
(2) (1914) 21 Ex. C.R. 183.
(3) (1924) Ex. C.R. 53.
(4) (1895) 4 Ex. C.R. 461 at 466.

1943

THE KING
v.
WEREMY.

The action was tried before the Honourable Mr. Justice Robson, Deputy Judge of the Court, at Winnipeg.

C. V. McArthur, K.C. and *F. R. Evans* for plaintiff.

W. A. Molloy for defendant.

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

ROBSON, Deputy Judge, now (November 12, 1942) delivered the following judgment:

This action was brought in the name of His Majesty the King on the information of the Attorney-General of Canada, and on behalf of the Brokenhead band of Indians. It is alleged that the defendant, a farmer and adjoining proprietor, wrongfully entered upon and occupied and still occupies a portion of the reserve allotted to the band. The land in question is hay land and is of comparatively small acreage, namely, 42·4 acres. The defences raised will appear as I proceed to discuss the case. One issue was to the location of the line between the reserve and defendant's land. There was a trial with witnesses at Winnipeg, on the 29th and 30th of October, 1942, when judgment was reserved.

It is unnecessary to go into such matters as the recognition of the primitive Indian rights, or the duty towards our Indians assumed by the Dominion on the acquisition of Rupert's Land at the time of the surrender by the Hudson's Bay Company. We know that treaties were made and that they are recorded in official publications. Also that the originals of the band which became known as the Brokenhead band were a portion of the larger number of Chippewas and Swampy Crees, whose surrender of the indefinite Indian title, on terms as stated, was set out in Treaty No. 1, (3rd August, 1871). It is natural to suppose that the band immediately in question were those Indians who, in choosing a habitation after the Treaty, eventually settled in the area watered by the Brokenhead river (flowing northwest into Lake Winnipeg, near the south end), and became known as the Brokenhead band. This is all mere introduction for the fact is that in due time the band fixed itself to the locality now in mind.

The original survey of the reserve took place before the township and range and sectional survey preparatory to

1943

THE KING v. WEREMY.

Robson J.A.

settlement. The original survey of the reserve was made in 1873, but owing to uncertainty as to the boundary on the northwest, confirmation of the reserve by Order in Council did not take place till 1916. When the township surveys were undertaken the northerly limit of section 25, township 15, range 6, east of the principal meridian, coincided with the southerly limit of the reserve (subject to a road allowance in between). But because of the proximity of the reserve the north half of section 25 was fractonal, meaning in this case that it did not contain the normal 320 acres; that the northwest quarter was accordingly fractional and did not contain 160 acres. "Fractional," of course, may mean that the normal figure is either reduced or exceeded; here it means reduced. This is all due to surveyor's problems on the ground which need no further elaboration.

The defendant's land, northwest quarter of section 25, was originally part of what were known as swamp lands conveyed by the Dominion to the Province. The Province granted the land described as "all of section 25, south of the Indian reserve" to C. W. Fillmore, and there were other conveyances down to the acquisition of the northwest quarter by defendant to be mentioned.

In 1925 the defendant entered into an agreement for the sale to him by one McLean of the northwest quarter of section 25. This was completed in November, 1926, and defendant then obtained a certificate of title. In the agreement and in the certificate of title the land was merely described as "the fractional quarter section 25" and no acreage was stated.

Defendant admits that at the time of this agreement he had his mind directed to the question of acreage. He said he inquired of a Provincial Government surveyor and was shown a plan of survey (evidently a copy of a Dominion township plan) in which the acreage of the northwest quarter of section 25 was given at 127·28 acres; that he could not afford a survey or other means of verification, and was satisfied with what he saw on the plan. He says that he made certain measurements and thought that his acreage extended to the 42·4 acres which it is now alleged are part of this reserve, and on which it is alleged defendant is a trespasser. Defendant says he bought the

land by the acre, that he worked himself and employed men to work in making a ditch to drain the land, and that he has paid taxes in respect of the disputed area. It is testified by Mr. Donnelly, the Dominion Land Surveyor, that the road allowance was not opened between section 25 and the reserve. Mr. Donnelly said there was no occupation within some miles to the north.

According to one of the departmental township plans, dated 23rd December, 1896, compiled from surveys in 1874, 1884, and 1888, the northwest quarter of section 25 contains 127·28 acres. It is said that the acreage is actually only 65·4 acres, but that was not explained and for the present purpose is immaterial. It will do the defendant no harm if I accept for the present purpose defendant's contention that when he bought from McLean he was to get 127·28 acres. I infer that the 127·28 acre content marked on the plan was calculated by the surveyor as the area of the abbreviated quarter section less the road allowance between the reserve and the northwest quarter of section 25.

Mr. Donnelly, D.L.S., was called as a witness by the Crown. He testified that from actual examination he found that defendant had fenced and occupied the 42·4 acres. There was no relevant impeachment of the surveys from which the plans produced were made, or of the testimony of Mr. Donnelly, and I must find that he located the southern boundary of the reserve as originally laid out and as confirmed by the Order in Council by means of original monuments and his own accurate survey and found that it was south of the 42·4 acres and that therefore defendant had no title to that portion and was in fact a trespasser.

It is unnecessary to go into a discussion of the various plans and field notes that were adduced in evidence. Suffice to say that these all, aided by Mr. Donnelly's testimony as to discovery of the monuments, convince me as above stated. According to section 62 of the Dominion Land Surveys Act it is the monuments that count. See *Cain* v. *Copeland* (1) and *Kristiansson* v. *Silverson* (2). I see no possibility, in view of the evidence, of the application of section 56 of the Surveys Act, (for the correction of errors) referred to by Mr. Molloy.

(1) (1922) 2 W.W R 1025. (2) (1929) 3 W W R. 322

1943

THE KING v. WEREMY.

Robson J.A.

I must hold that the indication on the plan of an acreage of 127·28 acres in the northwest quarter of section 25 was not a warranty by the Crown to Fillmore or his successors in title, nor could there possibly be estoppel. It was at defendant's own risk to be satisfied as to the area and as to its exact limits on the ground. (See Section 62 of the Surveys Act.) It is unfortunate that owing to his lack of skill he did not look for the monuments, or at least the monuments indicating the southwest corner of this reserve contiguous to his own land, and which Mr. Donnelly found on his ascertainment of the lines. It can only be said as a matter of law that defendant had no right to enter upon the 42·4 acres which he occupied and which were in fact part of the reserve. While not wishing to find defendant untruthful but rather suppose him to be ignorant, on the evidence it would be hard to find as a fact that defendant was actually misled by the plan he saw into believing that his land extended so far as the north limit of the fence he erected—as it turns out, on the reserve.

Defendant's counsel raised the objection in point of law that section 39 of the Indian Act (Cap. 98, R.S.C., 1927) was *ultra vires* of Parliament. That section authorizes proceedings by the Attorney-General on instructions of the Superintendent General of Indian Affairs for recovery of possession of reserves. The instructions of the Superintendent General of Indian Affairs were given in this case. I gave close attention to the earnest argument of counsel for the defendant on this point, but I must say there is in my mind no room for the slightest doubt that the section was thoroughly well founded; *The King* v. *McMaster* (1). Aside from that, however, the title here was in the Dominion Crown, subject to its treaty obligations to the Indians. In addition there was the right to protect the property of the Crown held for its wards. See paragraph 11 of the Manitoba National Resources agreement (Stat. Can., 1930, Cap. 29) which preserved the title in the Dominion Crown.

I think there must be judgment for the Crown for possession of the 42·4 acres. The Crown does not ask for profits. In *R.* v. *McMaster* (*supra*) the late President

(1) (1926) Ex. C.R. 68

1943

THE KING v. WEREMY.

Robson J.A.

of this Court did not award costs. I think the circumstances here equally justify me in following that course, so there will be no costs. I would recommend that defendant be given a reasonable time to remove his fence and anything else he may have on the disputed land.

Judgment accordingly.