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Assisted by Jeffrey Ross

RESERVE LANDS

GUIDE TO USE

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[RIDDELL, J.]

1907

April 26.

IN RE ARMOUR AND THE TOWNSHIP OF ONONDAGA.

Municipal Corporations—Local Option By-law—Mode of Computing Three-fifths Majority—Qualification of Voters—Finality of Roll—Subsequent Disqualification—Deputy Returning Officers—Right to Vote—Indian Reserve—Necessity for Exclusion—Three Weeks—Computation of—Inclusive of Sundays and Holidays—Irregularities in Meetings of Council—Illegality in Election of Members—Scrutiny—Non-statement of on Face of By-law.

The proper mode of dealing with votes improperly cast on the submission of a local option by-law under 6 Edw. VII. ch. 47 (O.), is to deduct them from the total number cast, and take three-fifths of the remainder.

The Court will not, under sec. 89 of 3 Edw. VII. ch. 19 (O.), inquire into the qualification of those entered on the voters' list.

Regina, ex rel. McKenzie v. *Martin*, 28 O.R. 523, followed.

Objections to the following votes by reason of what had taken place after the final revision of the roll were over-ruled, and the votes held good: (1) Where two farmer's sons were assessed as owners, the father being the owner of the farm, the subsequent death of the father and the devise of the farm to one of the sons; (2) Where a farmer's son was assessed as owner, the father being the owner of the farm, the subsequent sale of the farm by the father, but who acquired another farm before the voting.

The following votes were also held good: (1) Where the son, the voter, lived with his mother, who had a life estate in the property, with a power of appointment amongst a class which included the son; (2) a farmer's son, assessed as owner and living with his father, the owner of the farm, but who subsequently became the tenant; (3) a farmer's son, assessed as owner, living with his father, the owner, but carrying on a blacksmith business off the property; (4) an infant who became of age before the voting took place; (5) a farmer's son, the father and another being tenants in common of the farm; (6) where the property had been acquired after the roll had been made up, but before the final revision thereof; (7) where the property had been sold after the final revision, but another had been acquired before the date of the election.

Deputy returning officers are not entitled to vote on such a by-law; it is not necessary that they should be selected before the publication of the by-law, and their names mentioned therein, nor is it necessary to name a day for the final passing of the by-law, these being cured by 4 Edw. VII., ch. 22, sec. 8 (O.).

An Indian reserve, within the territorial limits of a township, but over which the municipal council has no jurisdiction, need not be specifically excepted in the by-law, for the municipal council must be assumed to have dealt only with the territory within their jurisdiction.

In construing the word "week," in dealing with the required three weeks' publication of the by-law, it must be taken in its ordinary acceptance, which would include Sundays and holidays, and, therefore, not necessarily seven days, exclusive thereof.

Irregularities in the meeting of the township council, or illegality in the election of the members, cannot be raised in a proceeding of this character.

Ex rel. Armour v. *Peddie*, ante, p. 339; *Re Vandyke and Village of Grimsby* (1906), 12 O.R. 211, referred to.

It need not appear on the face of the by-law that a scrutiny has taken place.

THIS was an application to quash by-law No. 201 of the township of Onondaga, a local option by-law.

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IN RE ARMOUR AND TOWNSHIP OF ONONDAGA.

The motion was heard before RIDDELL, J., in the Weekly Court, at Toronto, on April 25th, 1907.

J. B. Mackenzie, for applicant.
W. S. Brewster, K.C., for respondent.

April 26. RIDDELL, J.:—Many grounds were taken and argued most strenuously and exhaustively by the diligent and painstaking counsel for the applicant. I shall dispose of these in the order in which they were presented before me.

1. The votes for the by-law were..... 152
Against..... 91

In all..... 243

The by-law required, under 6 Edw. VII., ch. 47, sec. 24 (O.), to have in its favour three-fifths of 243, or 146 votes, so it will be seen that there were 6 votes to spare.

It was argued that about 19 votes were bad, and that it required only 10 votes to be proved invalid (as 6 equals three-fifths of 10), that the majority should be wiped out. This is bad arithmetic, and therefore bad law—it reminds one of the familiar calculation whereby schoolboys prove 1 equals 2.

The proper course to pursue if and when votes are proven to be improperly cast is to deduct these votes from the total and then take three-fifths of the remainder.

In this case a simple calculation shews that it requires a reduction of 16 votes from the successful side to overcome the majority, thus:

Votes for by-law, 152 minus 16..... 136
Votes against by-law..... 91

Total..... 227

Three-fifths of 227 equals 137 (136.2). Whereas, if only 15 be struck off, we have votes for the by-law, 152 minus 15..... 137
Votes against by-law..... 91

Total..... 228

Three-fifths of 228 equals 137 (136.8), and the vote is sufficient.

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I do not find it necessary to consider anew the question whether I have the power of examining into the propriety of the various names being on the voters' list, or whether I am not bound, under sec. 89 of the Act of 3 Edw. VII., ch. 19, to hold that no such inquiry may be entered into. That is decided by such cases as *Regina ex rel. McKenzie* v. *Martin* (1897), 28 O.R. 523.

It is claimed, however, that many should never have been on the list at all, and that many who may properly have been on the list at the final revision lost their qualification before the election. I shall pursue so far as necessary the latter inquiry.

No. 14, it is said, though entered on the list as owner, was in reality only a "farmer's son," living with his father, the real owner. After the final revision, but before the day of the election, his father died and left him the land whereby he became an owner in fact. I think that as an intending voter may select any form of oath of those given in the statute (see sec. 116), and that no others are to be required of him, once his name is on the voters' list, he may vote, if he can truly take any form. No. 14 could truly swear that *at the date of the election* he was in his own right a freeholder, etc., as the form in sec. 112 requires.

No. 15 is entered as an owner, though it is said that he also was in the same position as his brother just mentioned. He received no property by the will, but he could swear that at the date of the final revision, etc., the deceased was actually owner of the land, and that he (No. 15) was his son and had resided on the property for twelve months next before the said day, etc., as required by sec. 115.

It is to be noted that the Act does not require the farmer's son to live with the owner of the farm, but on the farm: sec. 86 (1) *Fourthly*; and sub-sec. (*b*) seems to contemplate a case in which the father may be dead.

No. 54. Here the son is entered as owner with his father of certain land, though it is alleged that he should have been entered, if at all, as a farmer's son. The father sold his land after the final revision, but before the election. No. 54 can still honestly take oath, sec. 115, the form not requiring the farmer to continue to be the owner of the farm after the final revision.

No. 315. This voter is living with his mother on land for which he and others are assessed as owners. The mother has an estate for life in this farm with power to appoint to a class of whom No. 315

is one. She is, therefore, an "owner," as she is the "proprietor of an estate for life." No. 315 then is a farmer's son. No. 314 is in the same condition. No. 311 is entered also as an owner, though it is said he should have been entered as a farmer's son. He became a tenant, and it is argued that therefore he lost his status as a farmer's son, as a "farmer's son" can only by the statute be a person "not otherwise qualified to vote." But he cannot lose his status without becoming otherwise entitled to vote, and I find no suggestion in the statute that one who has been a farmer's son at the time of the final revision and who can honestly take his oath in sec. 115 loses his right to vote as a farmer's son by acquiring property as tenant or as owner.

No. 321. Under age at the time of the final revision and for more than 60 days thereafter, but of age at the time of the election. This vote is good. All the forms of oath contain the clause "that you *are* . . . of the full age of 21 years." I may say, in passing, that this was so held in the *South Perth Election Case* (1899), 2 Ont. Elec. Cas. 144, by Street and Meredith, JJ.

No. 59. Actually lives with his father upon the farm of the latter, though he does no work, it is said, on the farm, but carries on business for himself as a blacksmith in the hamlet of Onondaga. The statute does not require the son of a farmer to work on the farm, but only to reside on the farm, in order to qualify as a "farmer's son." If No. 59 were a sluggard and lived on the farm and on his father, he might be allowed to vote; and I do not think the statute penalizes industry.

No. 76. Nos. 74 and 75 are owners in common of a farm. No. 76 is the son of one of these, and it is objected that as Nos. 74 and 75 together are the owners of the land, No. 76 could not qualify unless he were the son of both. This argument I do not accede to. An owner is a person who is proprietor in his own right of an estate for life or any greater interest in any land—it does not exclude all but those having the whole fee simple. No. 74 is such an owner, and may have his sons put on the voters' list without resort to the polyandry of Thibet.

No. Jos. D., put on after the first roll was made up, admittedly has qualification at the time of the final revision and of the election, as he received a conveyance of his land on 30th June. In any case, he "at the date of the election" was a freeholder, and that is sufficient.

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No. 139. Assessed as owner, but sold out after the final revision. He, however, acquired other property, and so at the time of the election could take the oath in sec. 112.

Of the above I cannot see the slightest doubt in Nos. 14, 59, 76, 139, 311, 314, 315, 321, or No. J. D.—9 in all; and but little in Nos. 15 and 54. Objection was taken to 20 names and also to the 2 deputy returning officers, in all 22. There can, I think, be no doubt as to 9, leaving 13 as possibly doubtful. So that, even if we were to give all these as voting for the by-law, the necessary three-fifths has been obtained.

2. As to the deputy returning officers, it is said that they voted and that under 3 Edw. VII., ch. 19, sec. 351, the provisions of sec. 179 are excluded in voting in such by-laws as this, and that sec. 179 is the only section which can be found giving deputy returning officers the right to vote. It is answered that sec. 347 of the Act of 1903 contemplates that the deputy returning officers shall have the right to vote. I do not think so. Section 347 is simply sec. 347 of the R.S.O. 1897, ch. 223. This R.S.O. ch. 223 contained a sec. 351 in the same terms as the present sec. 351, but without the words "except sec. 179," these words having been introduced by 3 Edw. VII., ch. 18, sec. 74. The amendment of 1903 takes away from the deputy returning officers the right to vote on such by-laws as this which they enjoyed before that amendment. The sec. 347 was not amended, and still applies to cases of elections where the deputy returning officer may vote. But the number of deputy returning officers is only two, so that the result of the election is still to give three-fifths of the electors voting in favour of the by-law.

3. It is said that this by-law, being for the township of Onondaga, should be considered as intended to be in force throughout the whole township; that a considerable portion of the township is an Indian reserve, and therefore the by-law is *ultra vires*. It is sufficient to say that it is not contended that this by-law is or can be valid in the Indian reserve, and it never was intended to apply to the Indian reserve; and the by-law must be considered as applying to the territory within the jurisdiction of the council: *McLeod* v. *Attorney-General*, [1901] A.C. 455. At p. 459: "They were only legislating for those who were actually within their jurisdiction." See also *Re Milloy and Township of Onondaga* (1884), 6 O R. 573, 579; *Re Metcalfe* (1889), 17 O.R. 357. It was argued that some of the

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voters might have thought that liquor selling was to be by this by-law prohibited in the reserve, and so voted for it. I decline to believe that any voter could be so simple and guileless.

4. The deputy returning officers were not selected before the by-law was published, and therefore as their names were not mentioned in the by-law, it is invalid: *Re McCartee and Township of Mulmur* (1900), 32 O.R. 69.

This seems to be cured by 4 Edw. VII., ch. 22, sec. 8 (O.).

5. And it does not name a day, etc.

This is also covered by the amendment just mentioned.

6. The newspaper in which the notice is published is described as the "Brantford Courier," whereas, it is alleged, the real name is "The Courier." This objection, trivial as it is, proves on the production of the paper itself to be unfounded: while the display head is "The Courier," the sub-title is "Brantford Courier."

7. The voting was within less than three weeks after the first publication of the by-law. This is arrived at by applying sec. 203 which provides that for the purposes of secs. 137 to 201 Sunday and holidays shall be excluded, and by casting out Sundays and holidays, and dividing the remaining number of days by 7, the quotient is less than 3. But the statute does not say 3 times 7 days, but 3 weeks, and that period is well known. No doubt the Legislature might say that 3 weeks for the purpose of their legislation should be 21 days excluding Sundays, etc., or 210 days, or 2,100 days, but so far that has not been done, and still a week is from Sunday morning to Sunday morning or Monday morning to Monday morning.

8. Irregularities took place, it is said, in the meeting of the council.

This objection is not open to the applicant: *Re Vandyke and Village of Grimsby* (1906), 12 O.L.R. 211; even if such irregularities existed in fact, which I am far from asserting or thinking.

9. While it is admitted that a scrutiny took place in fact, no notice is taken of any scrutiny upon the face of the by-law, and therefore it must, for the purpose of this motion, be considered that no scrutiny did take place; and this being so, the date of the final passing of the Act was too late. It is admitted that if there had been no scrutiny the passing was too late, but it is contended that there is no necessity for the fact of a scrutiny appearing on the face of the by-law. I agree in that contention.

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10. The council are not legally a council at all—they were not legally elected.

This objection is disposed of adversely to this applicant in *Rex ex rel. Armour* v. *Peddie* (1907), *ante* p. 339.

I have read the Master's judgment, approve of it, and have nothing to add. And in any case, this is not open to the applicant here: *Re Vandyke and Village of Grimsby*, 12 O.L.R. 211.

11. The councillors did not take the proper declaration.

This objection is also covered in the cases just cited.

The motion fails on all grounds taken, and must be dismissed with costs.

G. F. H.

grant a new trial, we could hardly refuse leave to the plaintiff to amend his declaration.

The damages are very moderate, and the rule, we think, should be discharged.

It seems not to have been noticed that in strictness the defendant was entitled to succeed upon the pleas to which *de injuria* was replied, as the leaving the earth unnecessarily for a great length of time near the plaintiff's house was not charged as excess in answer to this plea.

Rule discharged.

REGINA v. BABY.

Indictment—No new trial under 14 & 15 *Vic. ch.* 13—*Indictment under* 13 & 14 *Vic. ch.* 74, *for purchasing land from Indians without the consent of government—To what lands the Act extends—Scienter—Variance between indictment and proof, as to lands purchased—Meaning and object of the statute.*

The court has no power to order a new trial in a criminal case reserved under 14 & 15 Vic. ch. 13; but only to decide upon any legal exceptions raised, and whether there was legal evidence to sustain the indictment, taking it in as strong a sense against the defendant as it will bear, and supposing the jury to have given credit to it to its full extent.

The 13 & 14 Vic. ch. 74, prohibits the buying or contracting to buy from Indians, not merely any lands of which they are in actual possession, but any lands held by the government for their use or benefit;—but

Quære, whether the clauses of the act relating to trespasses on Indian lands extend to any lands not actually possessed by them.

Held, that the indictment in this case, after verdict, sufficiently averred the lands purchased by the defendant to be Indian lands—*i. e.*, lands held by the crown for them; and *Quære*, whether the act extends only to lands so held, or as well to lands purchased by Indians from individuals.

A guilty knowledge on defendant's part sufficiently averred in the indictment.

Held, also, that no variance was shewn between the lands described in the indictment and that which the defendant was proved to have contracted for.

Held, also, no objection that the purchase was alleged to have been from certain Indians named, whereas it was in fact the tribe through their council.

Held, also, that the evidence in this case was sufficient to sustain the conviction.

Semble, that the meaning of the statute is, that no one shall attempt to bargain with the Indians for the purchase of their lands, until he has first obtained the consent of government; and that it is therefore contrary to the act to make even a conditional agreement, subject to their approval. The proposal should be made to government in the first instance.

SPECIAL CASE, reserved under 14 & 15 Vic. ch. 13.

The defendant was indicted under the statute 13 & 14 Vic., ch. 74, for making a contract with certain Indians, concerning the sale and purchase of certain lands, and of the interest of the said Indians therein.

The indictment charged that Joseph White and two other persons, who were named in the indictment, were and are

Indians of and residing in Upper Canada—to wit, in the township of Anderdon, in the county of Essex—and as such Indians were, on the twenty-first day of June, in the sixteenth year of the reign of her present Majesty, entitled to and claimed certain lands situate in the town of Sandwich, in the said county of Essex (which were particularly described in the indictment): and that the defendant, who was described as an attorney-at-law, well knowing the premises, and that the three persons named were such Indians in Upper Canada as aforesaid, on, &c. at, &c., without the authority or consent of her Majesty the now Queen, unlawfully did make a contract with the said three persons, so being such Indians of Upper Canada as aforesaid, for and concerning the sale and purchase of the said lands, and concerning the sale and purchase of the said lands, and of the interest of the said three persons, as such Indians, therein—against the form of the statute and against the peace, &c.

At the trial at Sandwich, before *Draper, J.*, the following evidence was adduced on the part of the Crown:—

George Jessup sworn.—I married a daughter of the late Mr. Mears. I know a piece of land at the east and northerly end of the town (Sandwich), described by the boundaries in the indictment. I knew the late Mr. Mears twenty years ago. He was then in possession of this land. The Indians near Amherstburg claim this land. I knew Alexander Clark and Joseph White, both Indians, part of those Indians who claim this land.

Cross-examined.—I only speak of the land between the road and the river as being claimed by the Indians.

Alexander Clark sworn.—I claim to be an Indian by usage. I am recognized as such. I know the land spoken of. The Indians claim this land where Mrs. Hand's house is and the steam-mill. I am fifty-four years old. Mears had one part of this land and Mr. Hands one, as long as I can recollect. It was decided by the Indians in our council here, the Indians named in the indictment being parties to the decision, that we did not want this land, and we resolved to take possession first and then to sell. We were prevented taking possession of the vacant lot. We then consulted Mr. Baby, the defendant. We could get no satisfaction from our agent to whom

we applied to sell it. We negotiated with defendant for the vacant lot, which we valued at £250, and he agreed to take it from us at £250, and to run all risks and and bear all expenses, I joined with other Indians in making this contract.

Cross examined.—We tried to take possession before we consulted defendant, but Col. Prince opposed us. We were then only contending for the piece near the river, not for the whole block. We heard of an old lease called the Walker lease. The contract was written down by defendant. It was early in June. We all signed the paper, and afterwards signed another paper (looks at a paper). This is one of the papers, dated 28th of June, 1852; it is executed by me and the other chiefs, at the school house in council, (read).

It is a power of attorney only, from the Indians to defendant. The defendant said it would not be lawful to purchase, except through the government. He drew petitions to the government, which we signed. The result was that, because the defendant was not the recognised agent for the Indians, Colonel Bruce, the chief superintendent, would not recognize him or the petition, (a certified copy of the petition put in by consent of *Prince, Q. C.*). The defendant prepared this petition for us and sent it in. Our first desire was to have the whole sold in a lump, and to get the money to be used at our village for improvements. Afterwards we were willing to sell to the several parties in possession. The defendant told us this was the wish of the government and we refer to this in the petition just read. The defendant was requested by us to attend our councils on the matter. He was acting for our interests, as we employed him.

Re-examined.—Before signing the power of attorney, we sold to defendant for £250 this land, provided the government consented to it—*i. e.*, the upper piece. I don't think this first agreement was in writing. We sold to defendant on condition the government would sanction it. Then we found our right extended to much more land than this piece, and therefore we rescinded the agreement to sell to defendant.

Dominique Langlois, sworn—I am 57 or 58 years old. This property was in a great part occupied by old Williams

for forty years, and Hands occupied another part. I was present when a negotiation took place to sell his land, or an interest in it or part of it to defendant. He was to give $1000 or $1100. This was two years ago last June. I had a paper given to me by Mr. Baby, the defendant, but on search, I could not find it.

Cross-examined.—I went with the Indians to defendant, and know that they empolyed defendant. Previously employed him for myself. He told me, in presence of the Indians, that there could be no purchase or lease from the Indians without the consent of the government. The last witness was there and some other chiefs. Joseph White was there. This was at the same time as the bargain about the sale to defendant. At first the Indians only thought they had a right to a part, but on seeing the old lease defendant said to the Indians they had a right to more. Defendant said "I will give you $1000,"—*i. e.*, to the Indians—"if the government will sanction the sale to me." Except the government did he would not pay them anything at all.

Thomas King, sworn.—At one of the Indain councils, where defendant was, I was present. There was a dispute among the Indians as to the value of these lands. At first they thought they had only two acres, then they found they had more, and they said they should get more. The defendant produced a paper which he said they had signed, and they admitted it. He said it was an agreement made for some land in the town of Sandwich for $1000, but that was to be kept secret. It was said, however, amongst them that it had become null and void, in consequence of something but what I cannot tell. It might have happened at a council held in February, 1853. The conversation referred to an agreement made in June, 1852.

Louis J. Fluette, sworn.—I have heard of this dispute. I have been for ten years in possession of a part of the land. I saw the Indians coming to put up fences, and felt apprehensive of difficulty in consequence of something I heard. I went to defendant and asked if we were to be ousted of our property. He said it was too true; we had no title, and the Indians would oust us. I asked him what would become of

my improvements. He said, you will have to purchase again to get a title. I said I would give anything to make good my title, and he asked me what I had paid. I said $150. He said, "if you and the rest will put your heads together, I will make, or I can make, your title good." He asked $150 to do this. From what defendant said. I understood he had the management of the whole concern in his hands. He said he had been to Toronto to see about it, to the government, and the business was in a fair way.

William Clark, sworn.—I am an Indian. I know this land Our people claim it as part of their property.

The defendant's counsel admitted service of a notice to produce the contract spoken of.

DEFENCE.

Pierre H. Morin, sworn.—The power of attorney put in was witnessed by me—I wrote it, read it to the Indians, and saw them execute it. The defendant was present. A petition to the government was signed at the same time. Nothing was said at that time about any contract between the parties.

Thomas Woodbridge, sworn.—I am in possession of part of this land. I have no fear of what government will do.

The jury were out all night, and on the following morning returned a general verdict of guilty.

Mr. *Cooper* made the following objections in arrest of judgment.

1. The evidence is not sufficient in law to establish the offence created by the statute.

2. If evidence of a contract it was only for a small piece of ground, parcel of that described in the indictment, wherefore the indictment, describing it as one piece by metes and bounds, is not sustained.

3. The evidence not only did not establish anything contrary to the statute, but it did prove an understanding consistent with the statute.

4. The indictment does not charge an attempt to purchase such lands—*i. e.*, lands *de facto* in possession of the Indians—as the statute refers to.

5. The allegation in the indictment is of a purchase from

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certain of the Indians (named), whereas the purchase proved was from the body or tribe of Indians represented in their council.

6. There is no proof that these particular Indians named in the indictment had any interest to sell.

Prince, Q. C., for the crown, had previously agreed that any objection that might be raised to the legality of the conviction should be reserved for the opinion of the court; and as the learned judge entertained some doubt as to the sufficiency, in point of form, of the indictment, though no other objections than those above noted were taken, he reserved the case, without passing sentence, the defendant giving security to appear at the next assizes, for the opinion of the Court of Queen's Bench.

[The statute 13 & 14 Vic. ch. 74, is intitnled "An act for the protection of the Indians in Upper Canada from imposition, and the property occupied and enjoyed by them from trespass and injury."

It recites that "It is expedient to make provision for the protection of the Indians in Upper Canada, who, in their intercourse with the other inhabitants thereof, are exposed to be imposed upon by the designing and unprincipled, as well as to provide more summary and effectual means for the protection of such Indians *in the unmolested possession and enjoyment* of the lands and *other property in their use or occupation.*"

And it enacts "That no purchase or contract for the sale of lands in Upper Canada which may be made of or with the Indians, or any of them, shall be valid, unless made under the authority and with the consent of her Majesty, her heirs or successors, attested by an instrument under the great seal of the province, or under the privy seal of the governor thereof for the time being."

And (sec. 2) "That if any person, without such authority and consent, shall in *any manner or form*, or upon any terms whatsoever, purchase or lease any lands within Upper Canada of or from the said Indians, or any of them, or *make any contract* with such Indians, or *any of them*, for or concerning the sale of any lands therein, or shall in any manner give, sell, demise, convey or otherwise dispose of any such lands,

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or any interest therein, or offer so to do, or shall enter on, or take possession of, or settle on any such lands, by pertext or color of any right or interest in the same, in consequence of any purchase or contract made or to be made with such Indians, or any of them, unless with such authority and consent as aforesaid, every such person shall in every such case be deemed guilty of a misdemeanor, and shall on conviction thereof before any court of competent jurisdiction, forfeit and pay to her Majesty, her heirs or her successors, the sum of £200, and be further punished by fine and imprisonment, at the discretion of the court.]

Before the trial a notice was served upon the defendant that he would be required to produce a certain bond, agreement, and paper in writing, made or purporting to be made between him and others, and certain Indians of the township of Anderdon, in the county of Essex, and a certain person or certain persons on behalf of such Indians, for the purchase, sale, or transfer of the whole or part of the interest claimed by the said Indians in certain lands and premises in the town of Sandwich aforesaid, occupied by, &c. (naming the occupants), and which said bond, agreement, or writing was entered into by him, the defendant and others, the parties thereto, within the last twelve months or thereabouts.

And also a certain power of attorney from the said Indians, or some of them, or their agent, to the defendant, relating to the said lands or to their interest therein; and also all other deeds, bonds, agreements, contracts, and writings made and entered into by the defendant with the said Indians, or any of them, or any agent of theirs, relating to the same lands.

Richards for the Crown.

Cooper, contra, cited—Beasley v. Cahill, 2 U. B. R. 320; Rex v. Robinson, Holt N. P. C. 595; Rex v. Deeley, 4 C. & P. 579; Regina v. Jones, 1 Cox 105; Regina v. Taunton, 1 Moo. C. Ca. 118; Rex v. Great Canfield, 6 Esp. 136; Rex v. Upton-on-Severn, 6 C. & P. 133; Tay. Ev. I. 190; Ross. C. L. 111–112; Cex v. Philpotts, 1 C. & K. 112.

ROBINSON, C. J., delivered the jndgment of the court.

It is scarcely necessary to say that the statute 14 & 15 Vic. ch. 13, under which cases are submitted to us from the

criminal courts gives us no authority to order a new trial, or to prevent a verdict of guilty from going into effect because we may think that the jury would have exercised a sonnder judgment if they had acquitted. We may consider the evidence for the prosecution to be weak; we may find it to be conflicting, and may have a strong impression that if we ourselves had formed part of the jury we might not have been satisfied with it. But it is not in that point of view that we are at liberty to look at any case referred to us under the statute; we have only to pronounce judgment upon any particular legal exceptions which may have been or may be raised upon the pleadings or the *evidence*, or upon the general question, which is strictly one of law, whether there was legal evidence given at the trial sufficient to sustain the prosecution, taking it in as strong a sense against the defendant as it will bear, and supposing the jury to have given credit to it to its full extent.

Now, as to the particular legal objections raised by *Mr. Cooper* in this case, the statute does we think, prohibit the buying from Indians, or contracting to buy from them, without the consent of the Crown, not merely any lands of which they are actually in possession, but any lands held by the government for their use and benefit, whether actually used and possessed by them or not. The consideration of policy which led to the enactment would apply in the latter case as well as in the former, and there is nothing in the language of the clauses relating to this prohibition which would warrant us in giving to it so limited a construction as that contended for. In those parts of the act which relate to the punishment of trespassers on Indian lands, there is some evidence of an intention to confine such provisions to lands actually possessed and enjoyed by Indians, though it is unnecessary now to determine whether they can or cannot be extended further.

Another objection taken to the indictment is, that it does not shew that the land contracted for by the defendant was what is called Indian land—that is, public lands yet vested in the Crown, and held by the Queen for the use and benefit of the Indians.

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It is contended that the prohibition against purchasing without the consent of the government relates to such lands only, and not to any lands which an Indian or Indians may have acquired by purchase from individuals, or may hold like any other person by grant from the Crown; and the objection is that for all that appears in the indictment, the land now in question may have been held under a title of the latter description.

We think the answer which must be given to this objection is, the first and second clauses of the statute are as general in their language as the indictment is; and that, by the 47th clause of our statute 4 & 5 Vic. ch. 24, it is provided that where an offence is created by any statute the indictment or information shall, after verdict, be held sufficient if it describes the offence in the words of the statute creating the offence.

Whether if it had appeared upon the trial that the Indians named were only contracting to sell to the defendant some land which they held by an ordinary title in fee simple, it would have been proper to hold such contract to be within the act, is another question, and one which at present seems to us rather doubtful upon a view of the whole statute. But we cannot doubt from the evidence that the land in question was in fact what we ordinarily understand by Indian lands; and indeed the indictment does contain the averment that White and the others named where, "*as such Indians*, entitled to the land mentioned. We are of opinion, therefore, that we cannot give way to this objection.

It has been argued also that the indictment is deficient in not clearly enough averring a guilty knowledge on the part of the defendant. As to that it must be considered that the clauses of the statute on which it is framed contain nothing in express terms that calls for the introduction of a *scienter;* and, in the next place, that the indictment does nevertheless contain the allegation that the defendant well knew that White and the others named were, as Indians, entitled to these lands. We cannot therefore see that there is any room for this objection.

Another fault found with the indictment, and intended, we think, to be strongly insisted upon, was that there was a fatal variance between the proof and the statement, in this, that

the indictment charges that the defendant contracted to buy certain lands particularly described, being a certain messnage and lands in the town of Sandwich occupied by one George Jessup, and a certain other messuage and lands occupied by one Hannah Easter Mears, widow, which said messnages and lands adjoin each other, and are bounded on the north by a certain run of water near the church line which there empties itself into the river Detriot, on the south by a messuage and premises belonging to Alexander Chewett, Esquire, on the east by the Queen's public highway leading from the town of Sandwich aforesaid to the village of Windsor, and on the west by the river Detroit aforesaid; whereas it is contended that all that can be said to have been proved was, that the defendant contracted to buy the small pieces of land between the public highway and the river, and not the land described in the indictment. We nnderstood this to be the natnre of Mr. Cooper's objection relating to the variance, but it appears to be founded on a misconception of the description in the indictment, for that comprises in reality only the small tract of land between the road and river, and the defendant is not charged with having contracted to buy more than that. There is some ground offered in the evidence for supposing that the written agreement spoken of by the witness King did in fact embrace more land than this, or, at least that the defendant, after he had taken it, claimed that it included more.

If the defendant had produced the writing upon the notice given to him, we should have been able to see exactly what it did include. If it were found only to include the pieces of land between the road and the river—in other words, west of the road—then there would be no ground for the objection of variance, for the indictment and the writing would correspond. If it were found to contain that land as described in the indictment and other lands besides, that would be no variance, for the charge in the indictment would in that case be strictly proved, and it would only appear that the charge might have been carried further. But in the absence of the deed, which for all that appears, it was in the power of the defendant to have produced, we could not hold that any

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variance was shewn. The exact purport of the deed is left in some degree in doubt upon the evidence, and we cannot tell what conclusion the jury came to in regard to the precise land which it contained. All that can be said is, that they could scarcely have doubted that it did include the land in front of the road, if nothing more, which was all that was necessary to support the indictment in that respect.

We do not think that there is anything in the objections taken at the trial, that the indictment alleges that the defendant made a purchase from certain Indians named, whereas the purchase, so far as it was proved, was from the body or tribe of Indians through their council; and also that it was not proved that the particular Indians named in the indictment had any interest to dispose of.

The statute is very general in its terms. It provides that no contract made with the *Indians, or any of them*, for the sale of land in Upper Canada shall be valid; and that if a person shall make *any contract* with the Indians in Upper Canada, *or any of them*, for or concerning the sale *of any lands therein*, without the authority and consent of her Majesty, he shall be deemed guilty of a misdemeanor.

The evidence given upon the trial tended to prove that the defendant did make a contract with certain Indians in Upper Canada for and concerning the sale of lands therein. The persons named were proved to be three of the Indians interested in the land in question, or claiming to be so; and it was proved that they contracted to sell to the defendant for £250 the land named. He knew they had not the legal title, which was vested in the Crown, and not in a tribe of Indians; but what they contracted to sell was the interest of the Indians in it, including their own interest, which is what the indictment charges, and is within the letter and the spirit of the act.

If there appeared to us to be a clear objection to the conviction on any ground, however technical, we should have no disinclination to give effect to it; for we have received the impression from the evidence that the defendant very probably either made his contract or commenced his treaty with the Indians in igorance of the prohibition contained in the

act of parliament and of the heavy penalty which it imposes; or that, if he was aware of these, it is doubtful whether he ever anticipated making a bargain otherwise than the subject to the condition understood between him and the Indians that it should receive the sanction of the government. And, whatever effect this could be allowed to have in saving him from the penalties of the statute, it would go very far to relieve the defendant from the charge of criminal intention, if we could see clearly and certainly that such had been his conduct.

Being of the opinion however that none of the legal exceptions taken are fatal to the conviction, we have to consider the case as it stands upon the evidence, and to determine whether, upon the broad ground on which it was mainly argued, the defendant has been lawfully convicted of an offence within the statute. In determining this point, the impression which we have just intimated, that the defendant was perhaps ignorant of the terms of this statute on which he has been prosecuted, can have no influence upon our decision. He was bound, as others are, to know the law and to observe it, and we cannot be satisfied that he did not know it.

Upon what point it was that the jury had difficulty in coming to a conclusion does not appear, but it seems they were out a whole night; and I confess that, as a juror, I should have had some difficulty, merely upon consideration of what was safe and reasonable in convicting the defendant upon the account that was given of his conduct. The statute gives no power to mitigate the penalty according to the apparent degree of criminality, and every scruple would therefore be felt to apply with greater force.

But, upon an anxious consideration of the evidence, we cannot pronounce that in our opinion it does not in point of law sustain the conviction, and that, the jury have given an illegal verdict.

It was desirable certainly that it should have been made plainer and more certain what was the precise nature of the contract into which the defendant entered. There was evidence on his own admission, and some evidence otherwise,

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of a contract in writing for the sale to him of this Indian land. That writing must be assumed to be in his possession, and he had notice to produce it. He did not attempt to contradict the evidence that there was a written contract in fact, nor give any reason for his not producing it. It is just therefore, under such circumstances, to take the account that was given of the purport of that contract most strongly against the defendant since, for all that appears, he had it in his power to shew the jury the real particulars of his contract by producing the writing which he had taken and, it is reasonable to suppose he would have done so if that would have disproved or weakened the charge against him.

It stands uncertain upon the evidence whether the defendant in the first instance fairly told the Indians that he could not and would not make any bargain with them except subject to the consent of the government, or whether, after he had made his bargain and had offended against the statute, whether in ignorance of it or not, and perhaps after his own conduct had been complained of by some of the parties interested, he made the Indians aware that he could not insist upon his bargain unless the government would sanction it.

It does not appear either, whether in the writing any reference is made to the consent of the government as a necessary condition of the contract.

That the defendant had not in fact the consent or authority of the government seems clear upon the correspondence produced.

We can easily believe it possible that this defendant or any other person wishing to buy lands from the Indians, might be under the impression that if he entered into the contract only conditionally and openly and avowedly made his agreement subject to the consent and approbation of the government, he would not be offending against the act; and we can believe that if the jury in this case had been satisfied upon the evidence that the defendant had acted openly in that spirit and upon that understanding and no other from the first, they would probably not have found the defendant guilty. The learned judge who tried the cause is under the impression that, from the observations with which he gave the case to

the jury, they would have acquitted the defendant if they had taken that view of his conduct on the evidence. It may be that the difficulty which the jury had in coming to a conclusion arose from the necessity of their considering very carefully the bearing of the evidence in that respect. But upon that point two considerations arise—first, if the jury had acquitted the defendant expressly upon the ground that he had only made his agreement subject to the approval of the government, would that have been taking a correct view of the intention and spirit of the statute? At present we will only say that we look upon that as very doubtful; for there is much force and reason in Mr. Richards's argument, that the considerations of policy which gave rise to the statute, and, as we must suppose the intention of the legislature, are at variance with that construction.

The meaning probably is, that no one shall attempt to traffic with the Indians for the purchase of their lands, till he has first obtained the authority and consent of the government for entering into a contract with them. The Indians would not seem to be adequately protected against the evils recited in the statute if persons were allowed first to enter into a treaty with them, and after the Indians had compromised themselves as to price and terms of payment, to apply then for the confirmation of the crown. It would appear to be a more effectual protection if no one were allowed to enter into a conditional bargain with them for their land without obtaining previously the authority of the government to make such bargain; for if the government were appealed to before any specific proposal were made to the Indians, the course which we may suppose would be taken would be such as would leave not merely the Indians but the government in a position to act much more freely then by the other course, where, by declining to confirm, the government would in fact be annulling a bargain already made. The government, if applied to before any treaty as to price or terms had been entered into, would first have to consider whether it would be proper to allow the Indians to sell, and if so, they could take care that before any of the Indians had committed themselves to a bargain from which they might think it dishonor-

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able to retact, the proposal to purchase should be opened and discussed at a council fairly representing the tribe and in the presence of some public officer, who might see that everything was duly considered and understood, and fully agreed to. If we look at the letter of the statute. we think it can hardly be denied that a person who without authority of the government makes a bargain with the Indians to buy certain lands from them for a certain sum of money *provided the government will give its consent*, does without authority of the government make a contract with the Indians concerning the sale of their lands; and we would recommend all persons who are inclined to bargain with the Indians for their lands, to go in the first place to the government and make the proposal to them, for we think that is what the legislature intended.

But it is really not necessary that we should pronounce upon this question, because we are not warranted in assuming that the jury were satisfied that the defendant openly and avowedly, and from the first, dealt with the Indians named upon the express understanding that the bargain was to go for nothing unless the government approved of it.

The evidence tends a great deal the other way, though it was sworn that the defendant did state that everything must depend upon the consent and approval of the government, and that may have been at the time that the contract of purchase was made; but there was no proof that anything to that effect was inserted in the writing. The defendant seems to have taken a writing which the Indians understood and intended was only to relate to the small piece of land in front of the highway, though he afterwards, according to some or the testimony, asserted under it an interest in the large tract on the east side of the road; and although he was long afterwards in communication with the Indian department of the government, endeavoring to procure permission to the Indians to make sale of their land, he does not seem in any of his letters, or in the documents, sent to the government, to have conveyed the intelligence that he had himself concluded on his own account any purchase, conditional, or otherwise; but held himself out as interceding for the Indians as their

agent merely, and without any intimation, so far as appears, that he had a personal interest in soliciting the consent for which he applied. This, conpled with the defendant neither producing the writing, nor giving any reason for not producing it, left his conduct subject to any construction which the evidence would warrant; and we cannot on any clear ground hold that he was illegally found to have offended against the statute in any manner charged in the indictment. If by referring to any points that were proved, and others that were omitted to be proved upon the trial, the defendant can shew his conduct to be entitled to be viewed in a different light from that in which we must suppose the jury to have viewed it, he must submit himself to the consideration of the executive government. We consider the conviction legal upon the indictment and evidence.

Conviction affirmed.

BECKETT v. FOY.

Will—Construction of—Terms vested in executors—Descent under 14 & 15 *Vic. ch.* 6.

R. died in 1847, having devised to T., the defendant's son, the land in question. He also devised to one B. another lot of land not quite paid for, declaring it as his wish that the land devised to T. should remain in the hands of his executors until a deed should be obtained for the lot left to B., and the executors were to make the necessary payments from the rents of his real and personal estate.—It was proved that the land devised to B. had been paid for, but the deed had not been obtained, as there were rival claimants, and the vendor required indemnity.

Held, that the land devised to T. would vest on payment of the money for B.'s lot, though the deed had not been executed.

Both plaintiff and defendant claimed by deed from T.'s sister, the plaintiff having the first conveyance. It was not distinctly proved at the trial when T. died, nor was it left to the jury to find whether he died before or after the 1st of January, 1852, when the 14 & 15 Vic. ch. 6, came into force—this point having escaped attention. If he died before, then the defendant would be entitled as claiming under his sister, who would be his heiress—if after, the defendant would be entitled, as his mother, in preference to his sister.

A new trial was therefore ordered, with costs to abide the event, in order to give the plaintiff an opportunity of establishing his case on this point.

EJECTMENT for part of lot 6 in the 1st concession of Thurlow.

The cause was tried in May 1854, at Belleville, before *McLean, J.* It was admitted that one George Reid, deceased, had lived upon the premises in question. He died soon after the 22nd of February, 1847, having made a will duly executed,

QUEEN'S BENCH, APPEAL SIDE. } DISTRICT OF QUEBEC.

Before:—DUVAL, Chief-Justice, DRUMMOND, BADGLEY and MONDELET, Justices.

BASTIEN, *et ux*,.....*Appellants.*

and

HOFFMAN, *et vir*,.....*Respondents.*

Held:—That since the passing of the law respecting Indians and Indian lands (C. S. L. C. c. 14,) all rights of action relating to those lands, whether founded upon ownership or occupancy, are vested in the Commissioner appointed under that Act; and no individual member of an Indian tribe can maintain a real action in his own name concerning lands appropriated for the use of the tribe.

Jugé:—Que, depuis la passation de l'acte c. 14, S. R. B. C., concernant les Sauvages et les terres des Sauvages, le commissaire appointé par cet acte est investi, par rapport à ces terres, de tous les droits d'action résultant de la possession ou du droit de propriété; qu'aucun membre d'une tribu de Sauvages ne peut soutenir isolément en son nom une action réelle, au sujet des terres appropriées pour l'usage de sa tribu.

Judgment rendered the 19th June, 1867.

The appellants, by their declaration, alleged that they were proprietors, by prescriptive possession of thirty years and upwards, of "an emplacement of forty-five feet front "by a half arpent in depth, situate in the parish of St. "Ambroise, bounded to the east by the street of the "Indian village of Lorette, to the west by the river St. "Charles, to the north by Charles Picard, and to the "south by J. B. Sébastien;" that the respondent, F. M. Hoffman, separated as to property from her husband, had constructed and kept up, for the use of a mill which she worked in the neighborhood, a wooden flume, by means of which she carried through the property alleged to belong to the appellants, the waters of the river St. Charles, causing thereby to the appellants damages to the amount of £50 per annum. They concluded by demanding the demolition of the flume, and that Mrs. Hoffman be condemned to pay to them the amount of £75 damages, for past occupation.

The respondents met this action, 1o. by the general issue; and 2o. by the following allegations in their pleadings: 1o. That the plaintiffs are Huron Indians, that the property is sitnated in the Indian village of Lorette, and is vested by law in the Commissioner of Indian Lands for Lower Canada; 2o. That by the law and custom of the tribe, a family cannot possess more than one emplacement or habitation, and that the appellants are elsewhere provided in the village; 3o. That Indians are not allowed to accumulate emplacements in the village as property, the land being the common property of the tribe; 4o. That the appellants never had the lawful possession of the emplacement in question; 5o. That the respondents erected the mill race or flume with the permission of the chiefs, of the commissioner, and of the appellants themselves.

After issue joined, proof adduced, parties heard, the Superior Court, (Taschereau, J.,) pronounced judgment as follows:

" La Cour ayant examiné la procédure et la preuve de " record, et entendu les parties par leurs avocats respectifs " finalement au mérite; considérant que le terrain que les " demandeurs allèguent leur appartenir, décrit en leur " déclaration en cette cause, est situé dans les limites d'un " village sauvage, en la paroisse Saint Ambroise, dans le " district de Québec, destiné à l'usage de la tribu des Sau- " vages Hnrons, et occupé par les membres de la tribu; " considérant que la possession et occupation de toutes et " chacune des terres dn dit village, et notamment du ter- " rain en question, sont en loi censées être et résider dans " le Commissaire des Terres des Sauvages, qui seul a droit " en son nom d'exercer tous et chacun les droits de pro- " priété ou de possession, relatifs aux dites terres, apparte- " nant au propriétaire, possesseur ou occupant de telles " terres ou lots de terre; considérant que l'action en cette

" cause, pour les causes et considérations exprimées en la " déclaration des demandeurs, savoir, comme ayant trait à " la propriété et possession d'nn terrain formant partie des " terres affectées à l'usage de la dite tribu des Sanvages " Hurons, ne leur compétait pas en leur propre et privé " nom, mais qu'icelle action anrait dû être instituée par et " au nom du dit Commissaire, maintient l'exception pé- " remptoire en droit perpétuelle des défendeurs, et renvoie " l'action des demandeurs, avec dépens."

Langlois, for appellants:—Les appelants ponvaient-ils diriger eux-mêmes leur action, on devait-elle être institnée au nom dn Commissaire des Terres des Sanvages? Pour résondre ce point, il faut référer an statut refondu du Bas-Canada, ch. 14, sec. 7: " The Governor may appoint from " time to time a Commissioner of Indian Lands for Lower " Canada, in whom and in whose snccessors by the name " aforesaid, all lands or property in Lower Canada, appro- " priated for the use of any tribe or body of Indians, shall " be vested in trust for such tribe or body, and who shall " be held in law to be in the occnpation and possession of " any lands in Lower Canada actually occnpied or possess- " ed by any snch tribe or body in common, or by any chief " or member thereof or other party for the nse or benefit " of such tribe or body, and shall be entitled to receive and " recover the rents, issnes and profits of snch lands and pro- " perty, and shall, in and by the name aforesaid, subject " to the provisions hereinafter made, exercise and defend " all or any of the rights lawfully appertaining to the pro- " prietor, possessor or occnpant of such lands or property." Et section 10: " Nothing herein contained shall be con- " strued to derogate from the rights of any individual Indian " or other private party, as possessor or occupant of any " lot or parcel of land forming part of or inclnded within " the limits of any land vested in the Commissioner afore- " said."

Ce statut a été passé en l'année 1850. Les terres réservées pour les tribus des sauvages étaient alors comme anjonrd'hui, occupées partie en commun, et partie par les individus de la tribu. Par exemple, il y a la forêt où ils prennent en commun leur bois de chauffage, les rues et les chemins et les places publiques ponr l'nsage de la tribu. Ces parties sont possédées en commun, et pour la protection des droits et des intérêts de la tribu, il convenait de nommer un administrateur, et c'est là ce que le statut a eu pour but. Qnant aux lots de terre possédés par les membres de la tribn, la section 10 leur réserve expressément leurs droits. Ce statut n'a donc pas eu pour but de mettre les individus de la tribu sous la tutelle du commissaire, mais seulement de donner à la tribu un représentant pour les choses possédées par elle en commun. Il semble qne cette Cour lui a donné cette interprétation dans la cause Nianentsiasa et Akwirente, *et al.* (1)

Une antre prétention des intimés, est, que les appelants ayant un antre lot de terre qu'ils occupent dans le village, n'ont pas droit à celni dont il s'agit. Ils invoquent snr ce point une prétendue coutnme chez les sauvages. La preuve qu'ils ont produite pour établir cette coutnme ne les justifie pas entièrement dans cette prétention. Il est vrai qn'nn individu, voulant s'établir dans le village, doit faire anx chefs la demande d'nn lot ponr y bâtir sa maison, et qu'il n'a pas droit d'en obtenir plns d'nn. En effet, il serait injuste envers les autres membres de la tribu de lui en accorder plus d'nn. Mais si, possédant déjà un lot pour sa résidence et celui de sa famille, il lui en échoit un autre par succession de son père ou de sa mère, ou de tout autre parent, ou si, étant veuf, il se remarie à une veuve qui en possède elle-même un, rien dans cette contume ne l'empêche de jonir des denx lots de son vivant, et de les trans-

(1) 3, L. C. Jurist, p.31

mettre à ses descendants ou autres parents. Les témoins mêmes des défendeurs reconnaissent ces exceptions. Les appelants, à ce sujet, se trouvent dans un cas analogue à ceux qui viennent d'être cités. L'appelant occupe avec sa famille le lot qui lui vient de son père, et le lot qui forme le sujet de ce procès est échu à son épouse et à ses trois sœurs, par succession de leur grand'mère, Marie Simon Ignace.

PARKIN, Q. C., for respondents.—The vesting in the Commissioner is matter of public law; while the customs are fully proved by the chiefs of the tribe, and indeed result from the tenure itself, which is only usufructuary, to be equally divided among a number of individuals, under the control of the body of directors, which, in this instance, is the ancient and national council of chiefs.

The appellants, while fully admitting the fee simple to be in the Commissioner, claim under sec. 10. of the Act cited, as possessors or occupants. It is clear that they never were occupants. Nor have they ever been lawful possessors. The only possession they urge is, having seized upon the lot *de facto*, and to give them colour of *seizin* having erected a portion of a habitation to comply with the law requiring actual occupancy. But this building is only a pretence, having never assumed the condition of a habitable house, while the appellants have long possessed another dwelling in which they have always resided. But the possession itself which they invoke was in its origin vicious, having originated in fraud and violence. (1) The alleged possession of thirty years is without proof, and even if proved could give no title, being a possession contradictory of the legal title, and the mere possession of a usufructuary.

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(1) Pothier, Possession, Nos. 17 et seq.

DRUMMOND, J.—That the property in question forms part of a large tract of land appropriated for the use of the Huron tribe of Indians admits of no doubt. All the Indians of that tribe, recognized as such, whether of pure or mixed blood, or adopted according to Huron customs, were, and continue to be, proprietors *par indivis*,—or to use the English term perfectly analogous, tenants in common, of the whole tract. From the time of the first grants for the use of the Indian tribes in Lower Canada, the property thus held in common was usually managed by the chiefs elected from time to time by each tribe. In these chiefs was recognized the power of apportioning out the tract under their control to heads of families,—one building lot or emplacement to each,—with the right of possession of the land occupied by the buildings and improvements, but with no right of property in the soil, beyond that which each held as one of the tenants in common of the whole tract. It was also held by the usages of the various tribes that the chiefs had the right of disposing of certain lots, for the interest of the community at large. But the administration of these properties by the chiefs having proved unsatisfactory and inefficient, the Executive of the day thought proper to propose, for the adoption of the Legislature, the bill which now forms the 14th chapter of the Consolidated Statutes of Lower Canada. By this statute, it was enacted amongst other things as follows: section 7., "The Governor may appoint from time to "time a Commissioner of Indian Lands for Lower Canada, in "whom and in whose successors, by the name aforesaid, all "lands or property in Lower Canada, appropriated for the "use of any tribe or body of Indians, shall be vested "in trust for such tribe or body, and who shall be held in "law to be in the occupation and possession of any lands "in Lower Canada actually occupied or possessed by any "such tribe or body in common, or by any chief or "member thereof, or other party, for the use or benefit of

" such tribe or body, and shall be entitled to receive and " recover the rents, issues and profits of such lands and pro- " perty, and shall, in and by the name aforesaid, subject to " the provisions hereinafter made, exercise and defend all " or any of the rights lawfully appertaining to the pro- " prietor, possessor or occupant of such lands or property."

It is therefore clear that, since the passing of this law, all rights of action, whether founded upon ownership or occupancy, are vested in the Commissioner of Indian Lands for Lower Canada, in whose person the Executive Government has wisely combined this office with that of Assistant Commissioner of Crown Lands.

The 10th section of this Act, invoked by the appellants, which runs as follows: " Nothing herein contained shall " be construed to derogate from the rights of any indivi- " dual Indian or other private party, as possessor or occu- " pant," was evidently intended to protect such rights of occupancy, founded on usage, as have been above alluded to, and as are mentioned by Elie Siouï, one of the oldest chiefs, in his deposition, page 13, of the respondents' case, in the following terms: " Au dit village les sauvages ne " sont pas maitres du terrain; ils n'ont que la maison bâtie " dessus pour leur occupation." The rights protected are possessory, not real. They import a defensive, not an aggressive power.

Now the appellants found their right upon a title alleged to have been acquired by prescriptive possession. The uninterrupted possession of thirty years is far from being clearly proved, even as to the skeleton house built upon the property, and is not proved at all in relation to the space occupied by the flume which they seek to demolish. But even if it were fully, clearly, indubitably proved, as to the whole, and even if all rights of action relating to these

Huron Lands had not been vested by our Legislature in a commissioner, the plaintiffs would have no right of action, because neither they nor any other individual member of the Huron tribe possess one foot of property in which the whole *communauté* or tribe has not a share, and because no tenant in common, *propriétaire par indivis*, can acquire by prescription, or plead prescription, against his co-tenant. The judgment appealed from should therefore, in my opinion, be confirmed, with costs in both Courts.

Judgment confirmed, (Mondelet, J., *dissentiente.*)

CASAULT, LANGLOIS, ANGERS, & COLSTON, for appellants.

PARKIN, Q. C., for respondents.

IN CHAMBERS.

BLACK v. KENNEDY.

Indian—Indian Reserve—Mortgage on land in Reserve—Ejectment thereon—Hab. fac. poss.—Liability of Sheriff to execute.

A mortgage made by an Indian living on a Reserve of land in the Reserve is void, and judgment in ejectment recovered thereon is also void, and a Sheriff is not bound to execute a writ issued thereon.

Mandamus is not the proper proceeding to compel a Sheriff to execute a writ. A motion for a Rule should be made.

MOTION for a mandamus to the Sheriff of Manitoba, commanding him to execute a writ of *habere facias possessionem* issued on a judgment in ejectment. A summons for the writ had been granted by Betournay, J., which was now moved absolute.

The facts of the case were that the defendant was an Indian, and lived upon a piece of land forming part of the Indian Reserve in the Parish of St. Peter's, in the County of Lisgar, where or upon which he resided prior to the setting apart of the Reserve. This Reserve was set apart for the Indians, known as the St. Peter's Indians, or Prince's Band of Indians, in or about the year 1871. Subsequently, and in or about July, 1873, the plaintiff took from the defendant, then and now residing on the land in question, a mortgage, or some deed of conveyance in the nature of a mortgage, of the parcel of land in question, and under this deed brought an action of ejectment in this Court against the defendant for the recovery of possession of the land. The defendant appeared by attorney, and the case was tried at the October Assizes, 1876, before Betournay, J., and resulted in a verdict for the plaintiff. It appeared that the Court was not informed that the defendant was an Indian and the land part of the Indian Reserve. On this verdict, in December, 1876, judgment was entered, and in

the month of January, 1877, a writ of *hab. fac. pos.* and *fi. fa.* for costs was issued and delivered to the sheriff to be executed. The sheriff, on going to execute the writ, found out the true state of facts, viz., that the defendant was an Indian residing on the land in question in the Indian Reserve. Thinking he had no power or authority to execute the writ, he declined doing so, and informed the plaintiff's attorney of his resolution. The plaintiff now applied for a mandamus.

WOOD, C. J.—This certainly is a novel application. The execution and return of a writ of *habere facias possessionem*, are, as a rule, governed by the same principles, and fall within the same category as ordinary writs of *fieri facias*. The practice and procedure in cases of this kind may be found in Chitty's Archbold (*a*). The common and ordinary course is, if the sheriff do not return the writ within a proper time in that behalf, to obtain a rule or order for him to do so. In the case of a writ returnable immediately after execution, strictly speaking, the writ may not be returnable until executed; yet, the Court, or a Judge, may order a sheriff to return what he has done upon it, or to answer why he has not, or does not, execute it; and so in a certain sense to make a return of the writ (*b*). If the sheriff does not return the writ according to its exigency he may be ruled, and if he obey not the rule he may be attached (*c*). If the return be false, or not sufficient in law on the face of it, ulterior proceedings may be had and taken according to well settled principles of practice. I cannot see why a departure from the normal mode of procedure should have been adopted in the present case.

I am disposed to think, without going into the merits of the case, I should be inclined to refuse this application, and leave the plaintiff to the ordinary remedies of enforcing a return to the writ, and the taking of such proceedings thereon, if any, as he might be advised. But, perhaps,

(*a*) 12th Ed., pages 593 to 640.
(*b*) *Lewis* v. *Holmes*, 10 Q. B. 896.
(*c*) Chitty's Archbold, pp. 627, 628, 632.

now that the matter is before me, even in this exceptional manner, it is better that I should shortly express an opinion upon the merits of the case.

By 34 Vict. cap. 13, 32-33 Vict.. cap. 6 (D) intituled, "An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, chapter 42," was extended, and was made applicable to Manitoba. The Statute 31 Vict. cap. 42, was, therefore, in full force in Manitoba, when the transaction arose, and the mortgage covering the land in question, was executed; and the rights of the mortgagee, the plaintiff, under it must be controlled by, and be subject to the provisions of that Act. The Indian Reserve, of which the said lands form part, was set apart, located, and defined, long prior to the making of this mortgage.

By reference to the latter Act, I find by section 6, that, "All lands reserved for Indians, or for any tribe, band or body of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions; and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purposes of this Act."

By section 8 no release or surrender of lands reserved for the use of the Indians, or of any tribe, band or body of Indians, or of any individual Indian, shall be valid or binding except on condition that such release or surrender shall be assented to by the chief or a majority of the chiefs of the tribe, band or body of Indians, assembled for that purpose, at a meeting to be held in the presence of the Secretary of State, or of a duly authorized officer from the Governor-General; and the fact of the assent to such release or surrender must be certified to by the Secretary of State or other officer duly attending in that behalf; and by section 10 no release or surrender of any such lands to any party other than the Crown, shall be valid. Section 15

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defines who are Indians. The defendant is clearly within the definition.

Section 17 is as follows :—"No persons other than Indians and those intermarried with Indians, shall settle, reside upon or occupy any land or road or allowance for roads running through any lands belonging to or occupied by any tribe, band or body of Indians; and all mortgages or hypothecs given or consented to by any Indians or any persons intermarried with Indians, and all leases, contracts and agreements made, or purporting to be made, by any Indians or any person intermarried with Indians, whereby persons other than Indians are permitted to reside upon such lands, shall be absolutely void."

I have examined the mortgage given or consented to by the defendant in this case, and not only as a mortgage is it within this Act, but as a contract and agreement it is equally within the express words of the Act, and under the provisions thereof must be *absolutely void.*

Then follow sections which provide that any encroachment upon any lands reserved for the use of Indians may be visited with the most summary and sharp proceedings; and finally by section 28 it is enacted "that in all cases of encroachment upon any lands set apart for Indian Reservations or for the use of the Indians, not hereinbefore provided for, it shall be lawful to proceed by information in the name of Her Majesty in the Superior Courts of Law or Equity, notwithstanding the legal title may not be vested in the Crown"—provisions sufficient I should imagine, to make both the sheriff and the plaintiff pause before attempting to execute a writ of *hab. fac. pos.* by turning off or expelling an Indian from land on which he was residing in and forming part of an Indian Reserve, and putting the plaintiff into the possession and occupancy of the same. I do not well see how the sheriff could do this without subjecting himself to the penalties imposed by the statute; and even if he had placed the plaintiff in possession and occupancy of these lands, the plaintiff and those holding

under him might, under the Act, have been summarily ejected and expelled from the Reserve (*d*), and the sheriff be obliged to execute these warrants of ejectment and expulsion.

The Act 39 Vict. cap. 18 (D) intituled "An Act to amend and consolidate the laws respecting Indians," passed on the 12th of April, 1876, repeals 34 Vict. cap. 13, but substantially re-enacts it, and collects and consolidates into one Act all the then existing statutes relating to Indians, with some modifications and some additional provisions; but it in no respect changes or alters the provisions of 34 Vict. cap. 13 to which I have referred.

I may remark that this statute was passed before this action was brought. Section 66 is as follows:—"No person shall take any security, or otherwise obtain any lien or charge, whether by mortgage, judgment, or otherwise, upon any real or personal property of any Indian or non-treaty Indian within Canada, except on real or personal property subject to taxation under section sixty-four of this Act: Provided always, that any person selling any article to an Indian or non-treaty Indian may, notwithstanding this section, take security on such article for any part of the price thereof which may be unpaid."

The exception provided in section sixty-four is as follows:—"No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds real estate under lease or in fee simple, or personal property, outside of the Reserve or special Reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate."

In whatever way the matter is viewed under the statutes to which I have referred, the lien or charge of the plaintiff on the lands covered by his mortgage, and in question in this application, is absolutely void, and the

(*d*) Secs. 18 to 24.

judgment obtained thereon is of necessity equally void. In fact the whole proceeding to judgment and the judgment itself is *coram non judice.*

I must therefore discharge this summons with costs. If the plaintiff thinks he has any reasonable grounds for this application, I reserve him leave to move in next term to rescind my order and for a rule for a writ of mandamus.

Summons discharged.

IN THE MATTER OF W. B. THIBEAUDEAU, AN ATTORNEY.

Attorney and client—Employment of attorney to purchase land scrip—Misconduct—Liability of attorney to summary application.

S. employed T., an attorney, to purchase Half Breed land scrip, and for that purpose gave him $30. T. purchased the scrip, and drew and got executed an assignment thereof to S. When the scrip became distributable, T. refused to disclose to S. the name of the Half Breed from whom he had bought the scrip, and also refused to produce the assignment. He further procured the Half Breed to apply for and obtain the scrip, which he afterwards sold without accounting to S.

Held, that the transaction for which T. had been employed was one which required legal knowledge to complete it by drawing a conveyance; that, therefore, he had been employed in his professional capacity and was liable to the summary jurisdiction of the Court for misconduct in the transaction.

Held, also, that if he had been in possession of the scrip at the time of the application, the Court would have ordered him to deliver it to S., but on this application he could only be ordered to refund the money originally intrusted to him, with interest, as the loss of the client on the land was unliquidated.

MOTION to compel W. B. Thibeaudeau, an attorney, to deliver to one Sutherland, certain Half Breed land scrip purchased by the attorney for Sutherland with money furnished by Sutherland for that purpose.

There was a conflict of evidence upon the affidavits as to some of the facts, but the undisputed facts were as follows:—

Mr. Thibeaudeau was a solicitor, attorney and barrister. Mr. Sutherland, the applicant, in or about the month of December, 1875, had a conversation with Mr. Thibeaudeau

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IN THE EXECUTIVE COUNCIL.

[Before the Hon. the Chief Justice; the Hon. Jonas Jones, Ex. C.; the Hon. J. B. Macaulay, Ex. C.; the Hon. Mr. Justice McLean; and His Honour the Vice-Chancellor of Upper Canada.]

MARCH 16, 17, AND APRIL 6, 1846.

ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR OF UPPER CANADA.

Between JOHN YOUNG BOWN.....*Appellant.*

AND

ALDEN BAKER WEST .....*Respondent.*

INDIAN RIGHTS—RESCISSION OF CONTRACT.

Where a party, complaining of fraud in the execution of a contract, filed a bill to have it rescinded, and it appeared that after discovering what was alleged as fraud on the part of the vendor, the vendee had continued to deal with the property, the subject of the contract:

Held; That on that account, if even the fraud had been clearly established, the vendee was not entitled to the relief prayed, and that the same rule must prevail in granting or refusing relief in cases where the title to the lands in question is vested in the crown, as where the lands have been granted. (*a*)

Blake and *Brough*, for appellant.

Sullivan and *Esten*, for respondent.

ROBINSON, C. J., delivered the judgment of the court. The plaintiff in this cause complains of the defendant having deceived him in the sale of some real property, or rather of the defendant's interest in it; and he prays to have the contract rescinded on the ground of fraud, or that compensation may be made for an alleged deficency in the quantity of land which he was led to believe he was acquiring. Enough is disclosed in the case to enable us to see, that the contract between these parties was for the sale of what is commonly called in this country Indian lands, being part of the large tract upon the Grand River, in the district of Gore, which the government of the Province of Quebec, before the division of the province into Upper Canada and Lower Canada, set apart and reserved for the exclusive

(*a*) See this case, 2 Jurist, 287.

occupation of the six Nations of Indians, who at the conclusion of the American Rebellion were compelled to abandon their former possessions in the revolted colonies, on account of their adherence to the British Crown.

The government, we know, always made it their care to protect the Indians, so far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants. What particular regulations have been make with this view, was not in evidence in this cause; but we cannot be supposed to be ignorant of the general policy of the government, in regard to the Indians, so far as it has been made manifest from time to time by orders of council and proclamations, of which all people were expected and required to take notice. In the second year of Queen Victoria, a statute was passed (ch. 15), the object of which was to prevent trespasses upon lands reserved for the Indians; it has no provisions which can affect the case before us. But we know that besides this attempt to restrain people from intruding as trespassers upon Indian lands, the government has always been desirous to deter and prevent white inhabitants from bargaining with the Indians for the purchase of their lands, though their efforts to that end had been very far from being effectual. In the case of Doe on the demise of Jackson v. Wilkes, to which his Honour the Vice-Chancellor alluded in his judgment in this cause, the nature of the Indian title or right *to this territory* upon the Grand River, came under the consideration of the Court of King's Bench, and what was before known to every person conversant with the public acts of the government of Upper Canada at an early day, was in that case proved. This large tract of land on the Grand River, extending from the mouth of the river on Lake Erie, to its source, and comprising a breadth of six miles on each side of the river, having been with other lands purchased by the government from its aboriginal inhabitants of the Chippawa nation, was set apart by the government for the exclusive use and *occupation* of the Six Nations of Indians; and the intention of the government to retain it always for their use and benefit, was formally declared in an instrument signed by General Haldimand, Governor in Chief of the

Province of Quebec, in the year 1784, and sealed, not with the great seal of the province, which would have been necessary to constitute it a patent, but with the seal at arms of General Haldimand. The Government of Upper Canada, acting not by any means in derogation of the right of the Six Nations of Indians, but acting on their behalf and for their benefit, and upon a full under-standing with them, has disposed from time to time of parcels of this territory in order to raise funds for the support and assistance of the Six Nations. In the ejectment case in the King's Bench, which has been referred to, Jackson, the lessor of the plaintiff, was a purchaser of a small piece of this land which had been thus sold for the Indians through the agency of the government, and he claimed under a patent from the crown, which had been issued to him in 1835, on the completion of his purchase. Wilkes, the defendant, being in occupation of that piece of land (but by what right it did not appear), endeavoured to maintain himself in possession by contending that the patent to Jackson was invalid, by reason that the crown had divested itself of the legal estate in the land by the instrument made by Governor Haldimand, in 1784, and was therefore not in a condition to make the grant to Jackson in 1835, under which he claimed. The Court of King's Bench decided against the objection, for the reasons given in their judgment, and upheld Jackman's title, considering that the crown was not divested of the legal estate by the instrument which Governor Haldimand had signed. I am not surprised that it should have appeared to his Honour the Vice-Chancellor to follow, as a consequence of this judgment, that the interest which Bown, the plaintiff in this suit, represents himself to have bargained for with the assignee of the Indian, Duncan, was not such an interest as can form the foundation for a bill for relief. The truth, no doubt is, that he and the defendant West, were bargaining about lands which, though they have been attempted to be passed from one person to another by various transfers, belonged all the time wholly to the crown; they were lands which the whole of the Indians in a body could not have alienated, because they had no legal estate in them,

and of which any individual Indian could still less pretend a right to alienate any particular parts.

This was undoubtedly the fact, looking merely at the actual state of the legal title, and without considering the proclamations which are known to have been issued from time to time by the government, forbidding people from presuming to purchase what it was declared the Indians had no right to sell; and which proclamations, though they might not be allowed to affect the legal rights of parties, might perhaps be found entitled to weight in considering a claim to equitable relief. If the government indeed had been determined rigidly to prevent all trafficking with the Indians for the lands which they were allowed to occupy, they could perhaps not have taken any measure more effectual and expedient for that purpose, than by procuring a legislative provision, that no right or interest which any party should pretend to acquire by any such transfer, should be made the subject of any suit or remedy in courts of law or equity. But in the absence of any such enactment, I think we cannot go the length of holding that no equity could grow out of the dealing which the parties in this suit have had, and for this reason only, that the lands, respecting which the plaintiff says he was bargaining, belonged at the time to the crown; and we are the more unable to refuse to go into the case upon that ground, when we find it relied upon as a part of the plaintiff's case, and not denied, and when indeed every one knows the fact to be, that the government, in proceeding as they have done, to sell portions of this Indian tract for the benefit of the Indians, have in general made it their rule to protect the white men whom they find in possession of portions of the lands under purchases or agreements with the Indians, to this extent, that they reserve to them a right of pre-emption in the lands which they have occupied and improved. This may in some cases, according to the extent and value of the land occupied, be a very substantial interest, and such as a court of equity could hardly refuse to acknowledge when they are applied to with a view to obtaining a remedy against positive fraud. These dealings in this country respecting land of which the legal estate is still in the crown, or which the crown has

divested itself after it had become the subject of contracts and agreements between individuals, are very likely to give rise to peculiar equities, which the courts here may have to decide upon without the aid of cases adjudged in England upon the same points. The case of Jeffreys v. Boulton, which was determined by this court last year, in appeal from the Court of Chancery, is one of that description; and it seems to have presented itself to the Vice-Chancellor as material to be considered in connexion with the case now before us. But an examination of the grounds on which that case was decided, which was fully stated in giving judgment, will shew, I think, that we cannot derive much aid from it in deciding the present. What seems to have struck his Honour the Vice-Chancellor as a point in that case which might apply in this, was, that the Court of Appeals objected to entertaining alleged equities as arising out of transactions between individuals respecting lands, the legal estate in which was at that time wholly in the crown; but that was not exactly the ground. There the king, while he owned the estate, had leased it for a term of years, and the lessee had sublet a small portion of the land, and had assigned his interest in it, respecting which small portion of the lot there had been several transactions; and afterwards when the term had expired, and the crown sold the whole lot to a purchaser, who in regard to any real or supposed right of renewal represented the lessee of the whole lot, the person who had held the temporary interest in the small portion under the first lessee, set up a right to be allowed to acquire the fee in that small portion by purchase, to the exclusion of the purchaser of the whole lot. The government took the claims of the parties into their consideration, and on their views of what was reasonable declined to separate the small portion of the lot from the other on the sale, and made their patent for the whole lot to the person claiming it under the original lessee. It appeared to the court, that it would be unreasonable in itself, and would tend to unsettle titles to a degree very unjust and prejudicial, if after the government, in such cases, had decided upon the claims of parties, and had issued their patent upon their view of what each had a righ

expect from them, the parties who had been urging their claims before the government, should be afterwards allowed to go behind the patent, and attack each other upon equities growing out of their contracts antecedent to its issuing.

This was one consideration of several on which the case of Jeffrey v. Boulton was decided. To what extent it would be right to maintain that principal, it was not necessary to determine, because the court independently of it, and upon the facts shown by the parties, was of opinion that the plaintiff did not make up a claim to such a degree as he prayed for; and besides, that case did not, as regards any consideration of this kind, resemble the present, where the crown has made no patent to either of the contending parties, or to any one, and when other facts on which the bill is founded have not, as it appears, been decided upon by the government, or in any manner brought under their notice. It will be found on examining the case of Jeffrey v. Boulton, that the Court of Appeal did not lay down a principle so broad, as that there could not be a suit in law or equity growing out of a contract between parties, respecting an interest in lands which at the time were legally vested in the crown. Questions of this kind are amongst the most important, from local circumstances, that can arise in our courts. It is of great consequence, that we should be as consistent as possible in the view which we take of them, and this we can be best insured by endeavouring to keep the way clear as we proceed. Upon the merits of the case before us, after the best consideration which I have been able to give to the pleadings and evidence, I coincide in the opinion of the Vice-Chancellor, that he could not properly do otherwise than dismiss the bill.

The plaintiff's statements in his bill, amount in substance to this: first, that the defendant, in the early part of September, 1843, agreed to sell him, for 265*l.*, *all the estate, right, title, interest, and possession of him the defendant*, of and in a certain one hundred and thirty-four acres of land in the township of Brantford, which are described by metes and bounds in the bill. Secondly, that in pursuance of this agreement, the defendant did, on the 14th September, 1843, execute a writing under his hand and seal, by which he granted

bargained, sold, &c., to the plaintiff, his heirs and assigns, all the right, title, claim, possession, and demand whatsoever of him the defendant, in and to certain deeds of assignment therein specified, which deeds are described in the instrument executed by the defendant, viz: "of and in "*the annexed assignment or quit-claim from John McDon-*"*ald to the said Abraham Bradley and from the said Abra-*"*ham Bradley to Alden Baker West.*" thirdly, that when defendant agreed (as plaintiff states) "to sell him all his estate, "right, title, interest and possession of and in the one hundred "and thirty-four acres described in the bill," and (as I understand the plaintiff's statement) before the deed of 14th September, 1843, was executed, he, the defendant, represented himself as having a leasehold, or some valuable and transferable estate of and in the one hundred and thirty-four acres described in the bill, and as being entitled to the possession, and being in fact in possession thereof. Fourthly, that the plaintiff paid 112*l.* 10*s.* on account of the purchase-money before and at the time of the bargain, and gave his note at seven days' sight for the residue of the 265*l.* agreed to be paid by him as the purchase money. Fifthly, that the purchase having been thus far completed, the plaintiff's agent in the transaction, Robert R. Bown, after the execution of the assignment of 14th September, 1843, went with the defendant to view the premises, and received possession. That he then received possession of a tavern, situated on the said tract, which was occupied by a tenant of the defendant; and that the plaintiff believed that the possession so given to him of the tavern, was given as possession of the whole one hundred and thirty-four acres. Sixthly, that some days after this, the plaintiff was informed by one Hanson, the tenant of the defendant, and then for the first time learned, that the defendant had only an interest in thirty acres of the one hundred and thirty-four, and had been in possession of no more. Seventhly, that the 112*l.* 10*s.*, paid by the plaintiff, is more than those premises are worth, of which he obtained possession. Plaintiff charges that the defendant, when he agreed to sell him the property, well knew that he had no valuable interest in the whole one hundred and thirty-four acres, and that he neither had, nor

was entitled to have, possession of more than thirty acres; that he induced the plaintiff to enter into the agreement by misrepresentations and suppression of the truth of matters within his own knowledge; and that he, the plaintiff, has in fact received no consideration for the promissory note which the defendant holds for the unpaid portion of the purchase money; and he prays to have the contract rescinded, and the note ordered to be delivered up to him; or that compensation may, if he elects it, be decreed by an abatement in price.

In those parts of his answer which the plaintiff has read in evidence, the defendant admits, that about the year 1834, one William Parker was in possession of about fifteen or twenty acres of Indian land, being part of the Indian tract near Brantford, with a dwelling house thereon; that he entered into treaty with Parker for the purchase of his right and interest in and to these premises; and that in the course of their treaty, Parker produced as evidence of his title to the premises, an assignment from one Duncombe, (otherwise, it seems, called Duncan) an Indian, whereby he conveyed to Parker all his right, interest, and possession of and in *the said dwelling house, and the land thereto adjoining,* containing one hundred and thirty-four acres more or less, as surveyed by Mr. Lewis Burwell, and including the cleared and improved land which Parker had offered to sell him; and the defendant admits, that he believes the one hundred and thirty-four acres to be the same tract as is described in the plaintiff's bill. That he believed, that by taking an assignment of this deed, which Parker held from Duncan and by taking possession of the dwelling house and cleared land; (which were the immediate objects of his purchase) he would acquire not only a right to keep possession of the dwelling house and cleared land, but also a right to enter on the remainder of the surveyed tract of one hundred and thirty-four acres, and to take actual possession by clearing and fencing. That under this impression he gave 125*l.* for the purchase, and took an assignment of Duncan's deed, and was put into possession of the dwelling house and cleared land adjoining, and remained in possession from that time till the sale to Robert R. Bown, plaintiff's agent.

This is the account he gives of the origin, nature, and extent of his own title. He then says, that while he was thus in possession he cleared and improved about fifteen or twenty acres more of the tract of one hundred and thirty-four acres, and enclosed the whole cleared land being about thirty-five acres, and built a tavern thereon with out-houses. That one Bradley, while defendant was in possession, held the deed from Duncan to Parker, and the assignment of it to the defendant, as a security for a debt due to him by the defendant; of which circumstance the defendant informed Robert R. Bown, who thereupon advanced him 62*l.* 10*s.*, in order to enable him to pay Bradley his debt and take up the deeds, which the defendant had told him must be done before he could *transfer the writings to him.* That the defendant then paid Bradley, and got his deeds, including (as the answer says) the deeds from Duncan to Parker, and from Parker to the defendant, (what other deeds besides these there could have been we are left to conjecture, for no other deeds than those two had been hitherto mentioned, either in the answer or the bill.) He says he exhibited these deeds to Robert R. Bown, who examined them, and expressed himself perfectly satisfied with them. This is the whole amount of defendant's admissions read in evidence. On the other hand he denies, in his answer (folio 27), that such negotiation as is mentioned in the bill, or any other negotiations, except such as he the defendant relates, was at any time concluded, "or that the plaintiff agreed to purchase the "interest or possession of defendant, or any other estate, "interest or possession of or in the premises in the said bill "mentioned."

The defendant states, that when the agreement was made and until after the transfer by him had been actually signed, he knew nothing of any one but Robert R. Bown in the transaction, and considered he was dealing with him as principal, and not with the plaintiff his son. It is possible therefore, that in the last section of this part of his answer, he may only intend to deny that he made with the *plaintiff* any such agreement as is stated in the bill; but still he does deny in general terms any negotiations about a purchase, except such as he himself sets out; and in folio 24

of his answer, he expressly declares that except as he has stated in his answer, "no agreement was at any time entered "into by and between defendant and plaintiff, *nor any agree-* "*ment by or between any other parties for the sale or pur-* "*chase of the premises in the said bill mentioned, or any part thereof;*" so that the answer does in fact deny any agreement by the defendant for sale of the premises, except such an agreement as he himself states; and does therefore deny the allegation in the bill, on which the whole equity was founded, that in September 1843, he agreed to sell to plaintiff, for 265*l.*, "all the estate, right, title, interest, and possession of "the defendant of and in the one hundred and thirty-four acres of land described in the bill;" unless the agreement as it is stated in the answer amounts to that. That depends upon the construction which it is fair to give the words "*premises*," "*premises aforesaid*," &c., as used in various places between the third and ninth folios of the answer. The point does not seem very clear, and indeed so far as anything said by the defendant, in these parts of his answer last referred to, could furnish any admission of an agreemeet not proved by writing, and thus serve to help the plaintiff, were the difficulty created by the Statute of Frauds it is to no purpose to weigh their precise import, because the plaintiff has not made those statements in the answer evidence by reading them. It is only necessary to consider the transfer in connexion with such parts of the answer which refer to them under the saving words "except as aforesaid," with a view to discover what the defendant can be properly said to have denied on his oath, and what the plaintiff is consequently under the necessity of proving by such evidence as the practice in equity requires. Having read over these passages repeatedly, and with attention, I cannot satisfy myself that we can justly understand the defendant as saying anything more in his account of the bargain, as given in his answer from the beginning to the ninth folio, than that he bought from Mr. Barker the premises which he occupied, namely, the house and cleared land of which he was in possession, hoping to acquire, by such purchase and subsequent extension of his improvements, an interest in a further part of the one hundred and

thirty-four acres, or in the whole of it, through Duncan's deed to Parker, of which he took an assignment; and when he states in the 5th folio, that he cleared fifteen or twenty acres more, and fenced the whole clearing of thirty-five acres, and built there a tavern and outhouses, and directly after states that Robert R. Bown came and offered him $1000 *for the premises aforesaid*, I think he means for the premises which he had so described, and which he had reduced to possession, that is, the tavern and cleared land which he could deliver over, and not the unimproved remainder of the one hundred and thirty-four acres, which he had merely hoped to add to his possession in proportion as he could clear and improve it; but which unimproved remainder of the tract (as Burwell had surveyed it,) he does seem to have been quite willing that Bown should have the same claim to, that he had, that is, the claim of making whatever he could of it, under the writings which he was transferring to him. Thus stands the case upon the bill and answer, in regard to the plaintiff's first allegation as to the extent of the interest and property sold to him; but independently of any question on the Statute of Frauds, which it will be necessary hereafter to consider. In regard to the plaintiff's next allegation of what the defendant did actually assure by the deed of 14th September, 1843, there is no question, because the deed is truly set out, and speaks for itself. Then as to the plaintiff's statement, that "defendant represented himself as having a leasehold or some "valuable and transferable estate *of and in the one hundred "and thirty-four acres described in the bill*, and as being "*entitled to the possession, and being in fact in possession there-"of*," the plaintiff has certainly not read from the answer any admission of that charge, and the answer (folios 10, 16, and 23,) negatives such representation, not perhaps in terms so precise as it might have done; though when the defendant in folio twenty-three, swears, that "*except as aforesaid*," he did not at any time represent himself as having any valuable or transferable, or other estate or interest of or in the tract of land, in the said bill described, (that is the whole of the one hundred and thirty-four acres,) either as being entitled to, or being in fact in the possession thereof; and when

there is nothing in the answer acknowledging any such representation, or amounting to it, we cannot say that there is not such a denial of the representation alleged as throws upon the plaintiff the whole burthen of proving it. The statements in the bill, of the defendant having gone after the sale and put plaintiff's agent in possession of the tavern, giving it to him as possession of and for the whole one hundred and thirty-four acres, are clearly and explicitly denied; and as to the charge, which is indispensible to the case as one of fraud, viz: that the defendant well knew, when he made the agreement, that he had no interest in the one hundred and thirty-four acres, and that he neither had, nor was entitled to have, possession of more than thirty acres, he, the defendant, denies that he had ever represented himself to be so entitled, or in possession of the one hundred and thirty-four acres; it was not necessary for him to disclaim any knowledge of his want of interest or title to such possession, for the purpose of relieving himself from a charge of positive misrepresentation; but so far as it might be necessary to relieve himself from the charge of fraudulent concealment of his knowledge of the non-existence of certain facts which he must have known the plaintiff to have believed in, and by which he must have supposed him to have been influenced in making the purchase, it would be material to the defendant to deny the guilty knowledge imputed to him, notwithstanding he had made no direct representation imconsistent with it. The answer does contain such a denial, for the defendant swears (folio 57), that except as he had before stated, he did not know that he had not any valuabie or assignable interest in the whole of the premises in the bill mentioned, or that he neither had, in fact, nor was entitled to have, the possession thereof, nor any greater portion than thirty acres or thereabouts. What he did know on the subject, is what the deeds disclosed, and what he has before stated as to the condition of the premises. Thus the case appears to stand upon the bill and answer.

Then we have to consider that the plaintiff grounds his claims to relief on an allegation that the defendant agreed to sell him "all his estate, right, title, interest and possession "of and in the certain one hundred and thirty-four acres

"described by metes and bounds in the bill," and he produced the deed made upon the occasion of the sale, which instead of conveying "*all the defendant's right*," &c., to any particular one hundred and thirty-four acres of land, merely assigns and transfers all defendant's right, title, claim, possession and demand of, in and to "*a certain paper annexed to the deed*," which is therein described as an assignment or quit-claim from one McDonald to Bradley, and from Bradley to the defendant. Assigning all a man's right and interest in a certain tract of land is a very distinct thing from assigning all his right and title to a certain paper which concerns that land, even supposing the land referred to in the one case and in the other to be clearly and completely identical.

Besides, the deed from McDonald to Bradley did not assume to convey a title to any land, but only assigned to Bradley his right and claim *in a certain sheriff's deed or assignment annexed*. McDonald's deed was made on 12th January, 1842; the sheriff's deed annexed, was made 29th March, 1838, and purported that upon a writ of *fi. fa.*, in which one Barry was plaintiff against this defendant West, and one Lodor, defendants, he the sheriff had seized, as a chattel of Lodor's, an unexpired term of twenty-one years, in certain lands specified in an assignment thereunto annexed, dated 28th July, 1835, from Parker; which assignment one would expect to find was an assignment to Lodor, but it is in fact an assignment to this defendant West, the other debtor in the *fi. fa.*, who it appears did on the 8th February, 1837, assign to Lodor, by writing endorsed, all his interest in the instrument executed to him by Parker, and the sheriff by his deed assigns to McDonald, for 96*l.*, as being purchaser at the sale, "*the residue of the term of twenty-one years assigned by "Parker to defendant West;*" but first created by a deed of the Indian Duncan, made 20th December, 1831, granting a lease for twenty-one years, to Parker.

Then, when we come to look at the deed by which Parker assigned to West, and which is the foundation up to that time of all this chain of title, we find it a deed by which Parker assigns to West, not any one hundred and thirty-four acres of land, but "*all his improvements in a certain one hun-*

"*dred and thirty-four acres of land, described by metes and* "*bounds*" in the deed, and which is the same as the plaintiff described in his bill. There seems to be some confusion in the matter, for this deed, instead of being what the sheriff's deed describes it, an assignment of a term of twenty-one years, is a convevance to hold to West *in fee*; but in the *habendum*, as well as in the granting part, the conveyance is confined to *the improvements and buildings only*. I mean that the deed does not profess and assume to make a title to any thing else, but it does in the conclusion add, that the grantor thereby assigns to West, his heirs and assigns, "all right, "title and interest which he has or can pretend to and in "*the land above described* (that is the one hundred and thirty-"four acres) *substituting the said West in his full right to, and* "*place in, the premises above described*," and concluding thus "*turning and transferring from me, to and in favor of the* "*said West, &c.*, the said lands and premises with all that has "followed or may follow them." It can hardly fail to strike one here, how differently Parker, from whom this defendant received his title, ventured to deal with the one hundred and thirty-four acres generally, and with that part of it which he had cleared and occupied; the latter portion he takes upon himself to convey as people ordinarily convey an estate, but when he speaks of *the whole lands* above described, including the one hundred and thirty-four acres, he ventures only to "turn over his right to West," and puts him in "*his place*," with "*all that may follow them.*" I mention this as tending to make very probable the defendant's statement, that he had made his agreement with the plaintiff with similar caution to that which had been used in selling out this non-descript title to himself. When Parker made this deed to West, he held a deed made 10th March, 1834, made by the Indian Duncan to him, assigning as Parker afterwards did his *buildings and improvements made on the one hundred and thirty-four acres*. And this deed is more remarkable, because Duncan *covenants* only that "*he is the true owner of* "*the improvements and buildings, according to the custom of* "*the Indians, by his own labour having made the same;*" and he therefore takes upon himself to convey the buildings and improvements *to Parker in fee*, and to give this covenant that

he had a right to sell them. But in the same spirit that Parker afterwards acted in assigning to West, he quits claim and surrenders up in addition, all the right and interest (whatever it might be) which he had to the whole described tract of one hundred and thirty-four acres; engaging that if ever the Indians should yield up the land to the king, whereby Parker might have an opportunity to purchase, he would do nothing to oppose his claim, and would not cause or advise any other Indian to make claim to it; but as far as he could, he would protect him in the peaceable possession of it. It does not appear from these papers, from what quarter the sheriff could have taken his idea of a term of twenty-one years; but the document printed as exhibit K. explains it. That was a deed made 20th December, 1831, by Duncan to Parker, leasing for a small annual rent, for twenty-one years, two hundred acres of land described by metes and bounds, *which carry the limits on one side "to the "farm* or land *occupied or possessed by the widow Tuttle"*— (which is important as shewing, that no one, claiming under this deed at least, could suppose he had a right to interfere with Mrs. Tuttle's possession). In this deed Duncan covenants, that Parker shall enjoy all the premises demised during the term. Of course, if the one hundred and thirty-four acres, as described, form part of the tract described in this lease, then the deed to Parker, in 1834, from the same person, of all his interests in the lands, would extinguish the term that was by this deed granted to him; but still, as the sheriff did sell the residue of a term only, specifying its commencement and duration, and not *all the interest* which the debtor had in the land, and sold it under a writ against chattels, which can only operate upon a term, we cannot look upon this plaintiff as being entitled to more under the said assignment of the sheriff's deed, than the deed could convey, and nothing more is in fact assigned by defendant's deed to the plaintiff, than the mere "*deeds* or *writings*," from McDonald to Bradley, and Bradley to West. And, admitting that we can by construction understand the assignment of those deeds to be an assignment of the estate and interest conveyed by them, still that interest is nothing but an unexpired term of twenty-one years, and not what the plaintiff

states it to be in his bill, an assignment of *all the defendant's title*, and interest in the one hundred and thirty-four acres of land; and if when the sheriff's deed is so precise as this is, selling only the residue of a specific limited term, we could extend the effect of the sale and conveyance so as to make it embrace all that the deed from Parker to West could cover, both as to estate and quantity of land, (which I think we could not do), then we must see what the effect of that deed is; and we find, as I have already stated, that all that it pretends to convey or assure absolutely, is *the improvements or buildings*, and that as to the rest, it merely gives over whatever claim Parker had.

The plaintiff does not complain that he was imposed upon by being drawn in to sign a deed fraudulently made by the defendant, to express something different from what was intended by him; nor does he pray for relief on the ground of mistake. It was the plaintiff who drew the deed which the defendant signed, and the deeds which are referred to in it were in his hands. If under such circumstances he could come for relief against the deed, on the ground of imposition or mistake, he does not come with any case of that kind; but he asks us to look upon him as having purchased one thing, when the deed drawn by himself, and which he does not complain of as being executed under any circumstances of fraud or mistake, in regard to what it contained, shews that he purchased another thing. This then is a plain case of seeking to add to, or alter, a written instrument by parol evidence, not an agreement alleged to be subsequently made by parol, and modifying a prior written agreement, in which case such evidence might be received at least to rebut the plaintiff's equity when he is praying specific performance (*a*); but the plaintiff sets up, that the sale, when it was made, was not really the sale of such an interest as the deed imports, but of something more extensive. This is doubly objectionable; it puts forward a parol agreement for an interest in land which the Statute of Frauds requires to be in writing, and puts it forward to overrule the deed which *was executed* between the parties as

(*a*) 2 Ves. 299, 376.

the evidence of the transaction, thereby violating a principle of the common law. It is to no purpose to examine whether such a parol agreement has been proved by the witnesses, for such evidence could not legally be admitted. If there had been no deed or writing, then the only question would be, whether the defendant has by his answer admitted a parol agreement such as the plaintiff sets out, and submitted to abide by it, waiving any objection under the Statute of Frauds. I think we cannot say upon reading the answer, that he has done so; and I take it to be clear that a case of this kind could not be helped by part performance, because it is a part performance in favour of the plaintiff, so far as taking possession goes; and as to the payment of the money by the plaintiff, it is only evidence that there has been an agreement to sell, which the deed itself imports; it is consistent with the deed, and furnishes no excuse for travelling out of it in order to set up by parol evidence a different contract. Otherwise, where a man had paid money upon a purchase of a lot of land, and taken a deed for it, he might, under the pretence of part performance, offer parol evidence, that he had bought two lots instead of one.

Indeed I look upon the Statute of Frauds, as being out of the question here, strictly speaking, because there has been not only a writing, but a solemn deed executed in evidence of this transaction; and to that the parties are held, (*a*) so that the question is not whether there should not have been a writing, but whether when there has been a writing, it can be passed by and rendered of no avail to the defendant, by setting up a parol agreement different in its terms, as having been made before or at the time of the deed being executed; and this without any allegation of fraud or mistake in the wording of the deed. If there had been no writing between the parties, and the only difficulty had been that presented by the Statute of Frauds, we should then have had to keep in view the distinction established by many decisions, between receiving parol evidence of a contract respecting an interest in land for the purpose of rebutting an equity, upon which a plaintiff is seeking to obtain

(*a*) 4 B. C. C. 514; 6 Ves. 334, 328; 2 Atk. 303; 3 Wills. 275; 1 B. C. C. 62; 1 Ves. 241; 2 B. C. C. 219.

a decree of specific performance, or is praying for any other interposition of a court of equity, in order to change the situations in which the parties would stand at law; and the receiving parol evidence as the foundation of a plaintiff's case, when he desires the active interposition of the court in his favour, to enforce the performance of an alleged agreement respecting lands, such as can only be proved by a writing, and of which he has no written evidence. In the latter class of cases, the courts feel bound to acknowledge the obligation of the statute, because it applies directly and in terms; in the former they have felt themselves at liberty to say that the Statute of Frauds does not direct that every agreement in writing respecting lands *shall be* enforced in equity, whether it be just or unjust; but only that no person *shall be charged* either at law or in equity *upon* any agreement respecting lands, which is not in writing; and wherever there is parol evidence, which satisfies the court that the plaintiff is desiring to enforce an agreement against the honesty of the case, they decline lending him their assistance, leaving him to prosecute his legal rights as he can. Here, I think, the plaintiff fails in the very foundation of his case, for he charges an agreement respecting lands, which he does not shew by legal evidence, and while it is shown on the contrary by writing that the agreement which was made was essentially different. It is not material to consider whether the charge in the bill of the plaintiff being induced to enter into the alleged agreement by a fraudulent misrepresentation, or concealment of facts, is supported by proof; because if no such agreement, as the plaintiff alleges, can be legally held to have been entered into, it becomes idle to enquire about the inducements to do that which was not done. In point of fact, however, I do not see that there is satisfactory evidence of such misrepresentation or concealment as is alleged, respecting the defendant's title to, and possession of, the one hundred and thirty acres. The bill does not charge that the defendant said he had seventy acres cleared, but only describes the tract as having in fact that proportion cleared; and as no such representation is in issue, the evidence of witnesses on that point signifies nothing; and besides, it is not proved how much of the land is

cleared. Looking at all the evidence, if the case turned upon a proof of such a fraudulent misrepresentation or concealment as is alleged, I cannot say that I should feel satisfied with the proof of it, so as to feel warranted in making the fraud charged the ground of a decree. For such a purpose, the evidence shoud be clear and conclusive; for fraud is not to be imputed to a man upon probabilities, or slight surmises, or upon a nice balancing of evidence.

There is a good deal in the accounts given by some of the witnesses, to throw suspicion on the defendant's conduct in this transaction. After reading the evidence, I am not satisfied that it was perfectly upright, and that he was open and candid; but it would not be enough to have doubts on that point; we should see some clear misrepresentation or some undoubted suppression of a material fact. Now here, as to the defendant representing that he had some valuable interest in the whole one hundred and thirty acres, there can be no reasonable doubt upon Bradley's evidence, nor indeed without it, that the elder Mr. Bown, who made the bargain, knew perfectly well what was the nature of the defendant's interest in these Indian lands, if it could be called an interest; there is nothing to fasten upon the defendant a precise allegation that the whole one hundred and thirty acres was held by him under the same circumstances, and with the same strength of claim from actual occupancy, so that he could transfer as good a claim in every part of it as he could in the cleared land. Mr. Bown's evidence, and Mr. Walter Bown's evidence, prove nothing more on this point than what is very probable, that he spoke of his deeds as covering one hundred and thirty acres, and so they did. The deeds were in the hands of the agent, and open to the inspection of the plaintiff; they explained the nature of the case fully. Mr. Bown expressed himself satisfied with them, and drew himself the deed, after reading them, which the defendant signed. I do not see what room there would be for the application of the doctrine *caveat emptor* in any case, if the purchaser with such deeds as those before him, and declaring himself satisfied with them, could complain afterwards, upon anything that is here shown by the plaintiff, of the interest not being such as he expected. In point of

fact, for all that is proved, the legal interest is the same in one part of the estate as in another; and so far as actual cultivation and occupancy was necessary to strengthen what was a mere claim to the indulgent consideration of the government, the plaintiff and his agent, or his agent at least, must well have known that the one hundred and thirty acres were not all occupied and improved; they lived near the property, saw it often, had every opportunity of viewing it, and they had its exact boundaries expressed in writing. As to the alleged misrepresentation by the defendant, that he was entitled to the possession, and was in fact in possession of the whole one hundred and thirty acres, it certainly is not found that he made any such statement; and if by possession he meant actual visible enjoyment and use of the land, it would have been absurd in him to have made such a statement, for the parties with whom he was contracting knew that the fact was otherwise. Indeed, in the argument, the equity of the plaintiff's case was rested rather upon an imputed fraudulent suppression of the fact, that another person or other persons were in possession of parts of the one hundred and thirty acres adversely to the defendant's claim, than upon any actual misrepresentation made on that point, But as weak a part as any of the plaintiff's case, and perhaps the weakest, is that we are not shewn, nor is it even stated by the plaintiff in his bill, what other person was in possession of any definite portion of the one hundred and thirty-four acres, excluding him from that portion, nor the right or claim of such person to possession, nor whether he persisted in keeping the plaintiff out, nor whether he had the power to do so, nor whether the plaintiff had found that in consequence of such possession his claim to pre-emption in such portion of the land would not be recognized by the government, nor what disadvantage he had suffered or was likely to suffer by reason of the possession of any person. The plaintiff says he for the first time *learned* from Hanson, that defendant had only been in possession of thirty acres; that he *ascertained* afterwards, that that information *was correct*, but that is no positive and direct affirmation that any other person *was in possession* of any particular part of the land; and for all that is stated in the bill, and even for all

that is proved, there may be in fact no other person in possession of any considerable portion of the land upon such a claim as the government would prefer to that which the defendant had held; or the plaintiff might, for all that he has stated or proved, find no one resolved to contest the possession with him in any part of the one hundred and thirty acres, if he were to go forward and assert his right. Surely the plaintiff should have charged and proved not merely that the defendant had not been *in possession* of all the one hundred and thirty acres, but that some other person to his knowledge was in actual possession, or had a better title of a certain part, which he maintained to the prejudice of the plaintiff. And yet if the plaintiff had made out a *prima facie* case of misrepresentation by his bill and evidence, Mr. Burwell's evidence, it appears to me, must destroy it, unless we take upon ourselves to discredit him, or unless we treat his testimony as inadmissible; for he swears distinctly that before the bargain was concluded he made the plaintiff's agent fully aware of the very facts which he now complains of (so far indeed as he can be properly said to complain of any specific grievance), and that the agent admitted to him that the defendant had made him acquainted with it all before. Of course if his evidence is admitted and believed, it would make an end of the case upon the broad merits, and independently of all legal and technical objections. With regard to rejecting Mr. Burwell's account as incredible, I see nothing which would have justified the Vice-Chancellor in doing so. He knew perfectly well the nature of such matters as he was speaking of; he had been employed by both parties in the course of these transactions, and he is not shewn to be connected with either, or to have any interest whatever on either side. It would certainly be strange if a court were to rescind the contract between these parties on the ground of fraud, in the face of all his clear and direct testimony under oath, showing that no such ground existed. How could the court arbitrarily look upon him as unworthy of belief, merely because the agent denies his statement, when no attempt was made to impeach his character. If the story he tells were hard to be believed, from its extreme improbability, that would furnish a ground; but we can surely

have no difficulty in thinking it possible that the plaintiff would, with a full knowledge of all that he now complains of, make the bargain that he has made, when we find it proved that after all *he is receiving an annual rent of* £37 10*s. for the tavern and thirty-five acres, of which he was put in possession*, and for which (if he made good no claim to any more land) he will pay £265. A purchase that yields more than fourteen per cent interest on the cost, certainly raises on the face of it no evidence of a fraud upon the purchaser. We can very readily believe that the plaintiff, or any one, would willingly consent to close the bargain on the understanding that he was to be clearly in the possession of the tavern and thirty-five acres of inclosed land, and to take his chance (as the very deeds placed before him clearly shewed he must do,) of getting the rest of the one hundred and thirty-four acres; and it is remarkable, that while no witness gives any certain account of there being any more of the one hundred and thirty-four acres cleared and occupied than that which the defendant held, and which he delivered over into the plaintiff's possession, the defendant swears distinctly and positively that there is none, But it is contended that Mr. Burwell's evidence of his conversation with the plaintiff's agent, before the bargain was concluded, is not receivable. He was a witness for the defendant. The plaintiff relies on his evidence for the purpose of establishing that the defendant had not been in possession of all the one hundred and thirty-four acres, and that some one else had been long occupying a part. What he did say on that point is not satisfactory, and could not prevail alone over the distinct denial in the answer, that there was any improvement beyond the defendant's thirty-five acres; but I do not see that the plaintiff could be allowed to use his evidence for establishing *that* fact, and at the same time object that he could not be a witness at all, because he had not been called to speak to anything that was put in issue by the pleadings. But surely this part of Mr. Burwell's evidence does bear distinctly upon the main point in issue, viz: the alleged fraudulent misrepresentation; for if it be true that the agent, before he completed the purchase, acknowledged that the defendant had informed him accurately of the condition of the property,

what becomes of the fraudulent misrepresentation or concealment by which he charges he was imposed upon? It is hardly worth while to go minutely into these questions, for the plaintiff's case is in my opinion so wholly unsustainable. and on several distinct grounds, that it is unimportant to dispose of every doubtful point. If the plaintiff could have proved by legal evidence, and had proved, such a contract as he stated, and that the defendant had fraudulently misrepresented or concealed some specific facts; and if the true state of these facts had been stated in his bill, and proved by evidence; and if he had shewn that the fraud of which he complained was such in its effects that he could not have under his contract that which he was entitled to expect—still there would remain not merely the consideration, that for all that appeared he had made an exceedingly good bargain, and had got more than the worth of his money, but this more material cosideration, that after he had discovered the true state of things according to his own admissions, so far from repudiating the contract on the ground of fraud, he has acted upon it, as if it were valid, has leased the property through his agent, and has received rent upon his lease, and at this moment uses and enjoys it as his own, not even shewin that he had before done what he could to abandon it. We could not possibly hold that there is no consideration for the note which he has given, while he thus retains the possession of his purchase, and has done so for more than two years, receiving rent from a tenant, to whom he has made a lease since his knowledge of the alleged fraud. Upon this point I refer to the very strong case of Campbell v. Fleming et al., 1 Ad. and Ell. 40; in that case the plaintiff had purchased some shares in a mining company, upon representations contained in printed advertisements, and which were grossly fraudulent, and the whole scheme was a deception; but after discovering the fraud he nevertheless disposed of some of the shares so as to realize a considerable sum of money. After he had done this, he discovered for the first time a new feature in the fraud, viz: that an outlay on the mines, which the vendors had stated to him amounted to £35,000, had not in fact amounted to £5000. In consequence of this he brought an action to recover back

his money, his counsel contending that as it was clear the transaction was a fraud *ab initio*, no contract could arise upon it; and that even admitting that the plaintiff could waive the fraud and adopt it as an existing contract, yet he was entitled to repudiate it on discovering a fraud of which he was before ignorant, and which he therefore could not be held to have waived. He was nonsuited at the trial, and the court all concurred in the propriety of the nonsuit. Littledale, J., said, no doubt there was at the first a gross fraud on the plaintiff, but after he had learned that an imposition had been practised upon him, he ought to have made his claim; instead of doing so, he goes on dealing with the shares. Parke, J., says, "after the plaintiff, know-"ing of the fraud, had elected to treat the transaction as a "contract, he lost his right of rescinding it." The fact of the discovery of a new fraud was a strong one, which does not exist in this case; but the court were unanimous in holding, that even that could not overcome the fact of the plaintiff having acted on the contract as valid, after discovering that he had been imposed upon. Patterson, J., meets the whole case in very explicit terms, and I think what he says applies with irresistible force to this plaintiff: "no contract," he says, "can arise out of a fraud, and an action brought "upon a supposed contract which is shewn to have arisen "from fraud, may be resisted. In this case the plaintiff has "paid the money, and now demands it back on the ground "of the money having been paid on a void transaction; to "entitle him to do so, he should at the time of discovering "the fraud, have elected *to repudiate the whole transaction*. "Instead of doing so, he deals with that for which he now "says he never legally contracted. Long after this, as "he alleges, he discovers a new incident in the fraud. "This can only be considered as strengthening the evidence "of the original fraud, and it cannot revive the right of re-"pudiation which has been once waived." It is impossible that we could treat as *a repudiation of the whole contract*, the arrangement which the plaintiff alleges, but has not sufficiently proved, that he was in treaty with the defendant's agent for converting the purchase into a transaction of a loan, which would have given the plaintiff about £35 a year

for the interest of £112 10*s.*, a proposition which the defendant swears was not made to him, and which, according to what the plaintiff has shewn, was not professed to be grounded on any repudiation of the former contract as fraudulent. The evidence of the plaintiff having leased to one Leonard, by the year, the tavern and thirty-five acres, is given by Robert R. Bown himself, the plaintiff's witness and agent; and it is evidence that must, I think, be admissible under the pleadings, upon that part in this case which charges that in consequence of the fraud practised the plaintiff has no consideration for the note given by him. There was some points discussed in the argument connected with the evidence which I have not entered into, because they could not be material in my view of the case, but I have carefully considered all the evidence. It is in some points inconsistent, and it is in general very inconclusive; the facts upon which it would be necessary that the court should be precisely informed, are not brought out; and in my opinion it is not in any one essential point so satisfactory upon the merits as to have warranted a decree in the plaintiff's favor, if there had been no legal difficulties in the way occasioned by the rules of evidence. The principles which govern the administration of equity in cases of fraud, were correctly and forcibly stated by Mr. Blake on the part of the plaintiff, and were not contended against by the defendant. The question turns, as is commonly the case, upon their application to the facts. The position cannot be denied, that a person inveigled into a contract by a fraudulent misrepresentation is entitled to have it rescinded, and that although a vendor may not commit himself by any positive representation, yet his suppression or concealment of material facts within his knowledge is equally a fraud, and will equally invalidate the contract; but except in very plain cases, questions may arise depending upon the subject matter of the contract, the spirit in which the representation was made, as for instance, whether the seller was merely in general terms commending his article, as dealers commonly do in the course of their trade; whether the defect which has been discovered, was latent or patent, and if patent, whether the buyer had fair opportunity to inspect for him-

self, so that he could be treated as purchasing upon his own judgment; or whether he so clearly relied upon the statements of the seller, as to have acted wholly on that confidence, and so to have saved himself from the application of the maxim "*caveat emptor.*" In the case before us, besides discussing these points, it was thought essential to the plaintiff's case to urge, that if the defendant were found by the evidence to have made assertions to the plaintiff respecting the extent of his possession, such assertions, though made after the contract was completed, might supply evidence of deception before the contract, by affording a reasonable presumption of what the defendant had undertaken to convey; and further, that conversations preliminary to the contract, might furnish good evidence of what the sale made afterwards was intended to transfer; and that a wilful suppression of material facts bearing upon the value of the estate, in the course of such preliminary negociations, would invalidate the contract, not on the ground of fraud intrinsic in the contract, but fraud extrinsic in the inducements which led to the contract. Admitting that the authorities cited on these points would justify us in carrying these positions to the full extent contended for, and even in the case of a contract carried into execution by a deed executed between the parties under all the circumstances found here, still I consider that this consequence only would follow, that the plaintiff was in a situation to shew a good case for equitable relief, by stating the contract truly as it stands in the deed; that is, that he had bought from the defendant "*the assignment* or *quit-claim from McDonald to Bradley, and from Bradley to defendant*;" in other words, the paper title transferred under the sheriff's sale (let that be what it might); that he had been led to buy such right or claim by the defendant's assurance that he was in actual possession of the one hundred and thirty-four acres; that the fact was, that at the time of such purchase made by him one——was in actual possession of a certain part, to wit, —— acres of the said one hundred and thirty-four acres, to the exclusion of the said defendant, and claiming adversely to him; and that although the defendant well knew that fact, yet he fraudulently concealed it from the plaintiff, and so induced him to

make the purchase in ignorance of the truth. Instead of this, however, he stated the contract (which we can only take from the deed) untruly, by asserting that he agreed to buy from the defendant *all his estate, right, interest, and possession of and in the land, &c.* If the Vice-Chancellor had thought fit to direct an issue at law, in order to ascertain what the defendant actually did sell; I conceive that the deed, and that alone, could have been legally received as evidence upon that point; and the rule applies equally in equity, when the deed was executed deliberately, and was even drawn by the vendee or his agent, with the prior titles in his hand, shewing what interest it was that the vendor could pretend to convey; and when no fraud is charged in the wording or execution of the deed itself, a court of law would undoubtedly say. We cannot hear verbal accounts from witnesses of what passed before the making of the deed, as to what one meant to buy or the other meant to sell; they may have had various intentions and various degrees of information as to their respective claims and expectations at different stages of the negociations; but what they did at last settle down in, and what the one actually bought and the other sold, we can only learn from the deed; otherwise there would be no use or safety in written instruments. And it certainly is my impression that a plaintiff resting his case at law upon the assertion of such a contract, as the plaintiff has stated in the commencement of this bill, must on the production of the deed be nonsuited, for there can be no two things more distinct than selling all a man's right *to or under a certain paper title regarding* a term of twenty-one years in one hundred and thirty-four acres of land, and selling all a man's right, title, and possession *in the same land.*

To be sure, the fact may be, that the vendor may have no other right than under the paper title referred to, and in that case the transfer, as the deed states, would assign in effect all his right; but how that fact was we are not to conjecture or assume, and cannot learn it from parol evidence, in order to make the deed speak a wholly different language from what it does speak. I revert to this point in the case which I have before noticed, because it is in my opinion an

objection lying at the foundation of this case, which could not be got over, and which, as well as several of the other difficulties in the plaintiff's way, applies as much against the making a decree on the principle of compensation, as against a rescinding of the contract.

In my opinion the judgment of his Honour the Vice-Chancellor should be affirmed, and the appeal dismissed with costs.

The other members of the court concurring—

Judgment below affirmed, and the appeal dismissed with costs.

IN THE EXECUTIVE COUNCIL.

(Before the Hon. J. B. Robinson, Chief Justice; the Hon. Jonas Jones, Ex, C.; the Hon. L. P. Sherwood, Ex. C.; His Honour the Vice-Chancellor; and the Hon Mr. Justice McLean.)

THE 8th, 18th, AND 22ND MARCH, 1845.

ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR OF UPPER CANADA.

Between GEORGE STRANGE BOULTON .....*Appellant.*

AND

ANDREW JEFFREY.....*Respondent.**

Where the executive government have examined into and considered the claims of opposing parties to lands leased from the crown, with a claim of pre-emption, and have ultimately granted them to one of those parties, the Court of Chancery has not any authority, where no fraud appears in obtaining the grant, afterwards to declare the grantee of the crown a trustee of any portion of such lands for the opposing party, on the ground that he had previously acquired an equitable interest therein. And *quære*, if even there had been fraud, whether the court under such circumstances would have authority to interfere at the instance of the party.

H. J. Boulton and *Esten*, for appellant.

Sullivan and *Blake*, for respondent.

The facts of this case sufficiently appear in the opinion of—

ROBINSON, C. J., who delivered the judgment of the court.

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* This case having been referred to in the judgment of the court in Bown v. West, I have obtained a copy of the judgment, and consider it may be useful now to publish it.

Rose observes, "where a bankrupt has *no* property, and the "petitioning creditor, well knowing the fact, issues a fiat "against him, not for the purpose, of course, of any dis- "tribution of property, but for the purpose of enabling the "bankrupt to obtain his certificate, and get discharged from "his debts without paying one farthing in the pound; in that "case, it is impossible to deny that the fiat is void on the "ground of fraudulent concert; for in order to render a fiat "good which has issued against a trader who has no property, "it ought, at least, to appear in evidence that there was some "prospect of property to be got from issuing the fiat. *The "question here is, whether besides the concert there is fraud.*"

MONDAY, 15TH DECEMBER, 1845.

BOWN V. WEST.

INDIAN RIGHTS—RECISSION OF CONTRACT—COMPENSATION.

A bill being filed to rescind a contract for the purchase of an Indian right to certain lands on the Grand River, and to set aside the assignment executed in pursuance thereof, on the grounds of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in the quantity of the lands: Held, that as the whole estate, both legal and equitable, was in the Crown, it was not a case in which the Court would interfere, even if the plaintiff had established the case stated in the bill by evidence; and that no fraud having been proved, the bill ought to be dismissed with costs.

The bill filed in this cause stated that in the early part of the month of September, 1843, the defendant, "*pretend- "ing to have, and representing himself as having a leasehold "or some valuable and transferable estate or interest of and "in the parcel or tract of land and premises hereinafter par- "ticularly described, and as being entitled to the possession, "and as being in fact in possession thereof, agreed with the "plaintiff to sell him, and the plaintiff agreed to purchase for "the sum of 265l., all the said estate, right, title, interest and "possession of him, the said defendant, of and in the said "parcel or tract of land and premises; which said parcel or "tract of land and premises consists of about 134 acres, where- "of about 70 acres are cleared and improved, in the vicinity "of the town of Brantford,*" being &c., and described, &c.

That the treaty for the sale was carried on by plaintiff's

agent. That plaintiff had paid 112*l.* 10*s.*, and given a note of hand for the balance of the purchase money agreed upon.

That after execution of assignment, and the delivery of the title deeds, &c., to plaintiff, and a notice to the tenant of defendant to pay rents to plaintiff, plaintiff's agent had gone to the premises with the defendant, and found them to agree in quantity and extent of improvements with the representations made by defendant, and was put in possession of a tavern on the premises, and believed such partial possession was given as and for possession of the whole parcel of 134 acres; and it was not till some days afterwards that plaintiff, for the first time, learned from the person in possession of the tavern, that the defendant had not been entitled to the possession of the whole tract of 134, *but had a valuable and assignable interest* in 30 acres only, or thereabouts, and had in fact been in possession of that quantity only,—which information he found upon enquiry to be correct, and thereupon saw defendant, and proposed to rescind the contract, &c., which defendant refused to accede to: but it was afterwards verbally agreed between plaintiff and defendant, that plaintiff should retain possession of the tavern and thirty acres of land, of which he was in possession, with liberty for defendant at any time within two years to repay the sum of 112*l.* 10*s.*, and re-possess himself of lands, &c.; and that defendant should forthwith deliver up the note given by the plaintiff for the balance of the purchase money; but if the defendant should fail to repay the said sum of 112*l.* 10*s.* within the period of two years, that then the plaintiff should retain possession of the said premises without further consideration beyond that sum.

That defendant had refused to give up the note without a bond from plaintiff for the due performance of his part of the agreement; which plaintiff went and had prepared accordingly; but on his return with the bond, he found the defendant had gone away, and from that time further negotiation ceased. That the sum of 112*l.* 10*s.*, paid by plaintiff, on account of purchase money, was more than the portion of the premises which plaintiff had been put in posession of was worth.—*To be continued.*

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THE

UPPER CANADA JURIST.

IN CHANCERY.

(IN REVIEW).

MONDAY, 15TH DECEMBER, 1845.

BOWN V. WEST.

(*Continued from page* 288.)

The bill charged that the defendant had commenced an action against plaintiff for recovery of the amount of note—that defendant, at the time of entering into the agreement, knew that he had not any valuable or assignable interest in the whole tract of 134 acres, and that he had not in fact, nor was he entitled to have the possession of a greater portion thereof than 30 acres, or thereabouts; and that the defendant had induced plaintiff to enter into the agreement by misrepresentation or suppression of the truth and matters within his knowledge.

And plaintiff submitted that he was entitled at his election to have the contract wholly rescinded, or carried into effect, so far as defendant could do so, with abatement of purchase-money, &c.; and prayed that the contract might be rescinded, and defendant ordered to deliver up the promissory note of plantiff, and pay all costs, &c., incurred by plaintiff in respect of the contract and the action at law. Or, if plaintiff should elect to have the contract carried into effect, so far as defendant could execute it, then a reference to the master to enquire what compensation plaintiff is entitled to, in respect of the difference in quantity between the parcel of land comprised in the agreement and the portion

thereof in which plaintiff had actually acquired an interest from defendant; and if it should appear upon such enquiry that the defendant had received more than the value of the interest and possession so acquired by the plaintiff, then that defendant might be ordered to repay such excess, the plaintiff offering to pay such further sum, in addition to the sum of 112*l.* 10*s.*, as might appear just. That the defendant might be ordered to deliver up the note of hand given by plaintiff, and for injunction, &c.

The defendant by his answer set forth, that about the year 1843, one W. Parker was in possession of 15 or 20 acres cleared and improved land near Brantford, (part of Indian tract), with a house thereon. And about that time defendant entered into treaty with Parker for the purchase of his right to the said dwelling-house and parcel of land, who produced to defendant in course of such treaty, as evidence of his title, certain instruments in writing, signed by one Isaac Duncombe, one of the Six Nations Indians, resident on the Grand River tract, whereby Duncombe conveyed, or assumed to convey to Parker, for a valuable consideration, all his (Duncombe's) *right, interest* and *possession* to the said dwelling-house and the land thereto adjoining, containing 134 acres, more or less, as Surveyed by Lewis Burwell, Esquire, D. P. S., including the improved land adjoining the house, and was the same as mentioned in the bill.

That defendant then understood and believed that by taking an assignment from Parker to himself of the said instruments of conveyance, and entering into actual possession of the said dwelling-house and the clear land adjoining, (he the defendant) would acquire a right to keep possession not only of the dwelling-house and cleared land, but also a right to enter on the remainder of the said tract of 134 acres, and take actual possession thereof, by clearing and fencing it. And under such impression, and being satisfied with Parker's title, defendant purchased his interest in the premises for 125*l.*, and took an assignment in writing of the said instruments of conveyance, and was put into possession of the dwelling-house and cleared land adjoining thereto, and so remained in possession until the sale to the agent of plaintiff; and while so in possession, defendant cleared and improved about 15 or

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20 acres more of the said surveyed tract of 134 acres, and fenced the whole clearing of about 35 acres, and built thereon a tavern and out-houses.

That in September, plaintiff and Robert R. Bown (the agent of plaintiff), waited on defendant, and offered him $1000 for the premises aforesaid; which offer was declined by defendant; but afterwards on the same day he left word at residence of said R. R. Bown, that he would take $1100. Next day, R. R. Bown, stated to defendant that he would give $1060 in cash, if defendant would give possession on the morrow. That defendant had taken the writings, including the conveyance from Duncombe to Parker and the assignment thereof to defendant, and exhibited them to R. R. Bown, who examined them and expressed himself satisfied therewith. That during the treaty for sale, and before the completion thereof, defendant had observed to R. R. Bown, that he supposed he (Bown) was aware of the nature of Indian lands; and that Bown had replied he knew all about it as well as he (defendant) did, and that defendant had stated that he would put him in possession of that part of the premises that was under fence, and the buildings; but for the woods, meaning all the rest of the said tract, Bown must look out for himself, who expressed himself fully content on that behalf to rely on the said papers of defendant. That thereupon an assignment was drawn up and executed, and part of purchase money paid, and note of hand given for the balance.

The next day defendant had gone to the premises with R. R. Bown, and took him over the tavern, out-houses and cleared land thereto adjoining, and gave him possession thereof, being under fence, and containing about 35 acres, and then told the said R. R. Bown that what was under defendant's fence, meaning the said 35 acres, he gave him possession of, but as to the rest of the said tract of 134 acres he (Bown) must look out for himself, and that defendant knew nothing of it: and that Bown replied, that he knew that.

That before leaving the premises defendant had stated to plaintiff that he had sold the place, meaning the premises, too cheap; and offered Bown to return the note of hand, if he would give defendant four years to repay the amount

of cash (112*l.* 10*s.*) paid to defendant, and defendant would allow him (Bown) to hold the premises in security; to which Bown replied that he never made "children's bargains." Defendant denied having agreed to rescind the contract as in the bill stated.

That about two months after the completion of the sale, R. R. Bown had stated to defendant that he (Bown) could not hold as much land as the lease specified; to which defendant replied, that he could not help it, that he had sold it for better or worse, as it was, and that he had not sold any land, but only the right defendant had under the papers; that R. R. Bown then expressed his readiness to accept the offer formerly made by defendant to rescind the bargain, &c., but defendant declined to accede thereto, as Bown had not accepted such offer at the time, &c. That the premises in the actual possession of plaintiff, were worth the full amount agreed upon (265*l*). The answer also denied all knowledge by defendant of the badness of his title, and all misrepresentation, &c.

R. R. Bown, and some of the members of his family who had been examined as witnesses on the part of the plaintiff, stated in their depositions, that at the time of making the bargain respecting the sale of the premises in question, defendant represented that he had about 130 acres, about 70 of which were cleared, and had produced a map of the premises in question.

R. R. Bown also stated, in his evidence, that before the note became due, he had accompanied defendant to the land to take possession in the name of plaintiff, and walked around the boundaries with defendant: that he then thought part of the land on which defendant took him, was not his, and for the first time he found he had been deceived by defendant; that part of the land on which he had been taken, was improved land, and ascertained afterwards that it was not the property of defendant; that defendant, in offering to sell, did not pretend to sell the fee-simple, but merely the right he had under his deeds to Indian lands; *that he never had any conversation with Mr. Burwell respecting the purchase from defendant;* that when defendant put him in possession of the premises, *he did*

not give him possession of 30 acres alone, informing him that he must look out for himself for the rest, nor did the witness reply that he knew it; that defendant, at the time, professed to give possession of land which was found to belong to another person; that defendant never made the proposition for rescinding the bargain and repaying the purchase-money in four years, the only proposition to that effect was made by witness, and that he had never made use of the expression, "*he never made children's bargains;*" and that after a document (in evidence) for the purpose of rescinding the contract had been prepared by Mr. Lewis Burwell, according to the mutual agreement of all parties, defendant refused to sign it.

Other witnesses proved that defendant had stated that he had sold his right or interest in 134 acres to plaintiff; that defendant had never lived on the premises; that upon being told that plaintiff had said that defendant had only 30 acres, defendant answered that he had only sold his right to the land in question; that defendant had said that there was not the quantity of land he had proposed to sell.

On the part of the defendant, Mr. Lewis Burwell stated he had surveyed the premises in question, and the value of them, if held in fee-simple, would be above 500*l.*; that defendant, so far as he knew, had never been in possession of the whole tract, but only of 33 or 34 acres—the remainder, for the last 20 or 30 years, had been in possession of one Tuttle and his representatives. Tuttle's possession was held under a lease from a number of the chiefs and others of the Six Nations Indians. That about the time of the execution of the assignment to plaintiff, R. R. Bown had gone to witness's office, and employed him to draw up a paper between the parties to this suit—could not recollect whether such paper was prepared at the time—but R. R. Bown told witness that he was about to purchase in the name of his son (the plaintiff), the possession of the defendant of the said premises; and that witness then told him that defendant could not sell more than 33 or 34 acres, and that the remainder was in the possession of Mrs. Patterson, formerly Mrs. Tuttle, and one Johnson; that witness told him that defendant had had a trial before the magistrates with Mrs Patterson and her husband, for an alleged trespass in respect

of the premises, in which defendant had failed, the former having established their possession; and stated to him that Wm. Parker had been deceived in purchasing originally from the Indian, Duncan, and advised Bown to take an assignment of what defendant had in his possession; to which Bown answered, that the defendant had made him acquainted with the circumstances, as stated to him by witness, and that he was only purchasing the quantity that he was in the actual possession of, but would take an assignment of his interest in all that Parker's lease covered, and perhaps he might be able to get it; and that he considered the part he was purchasing and getting possession of, was worth the money he was paying for it, as it lay so near the town of Brantford. That on a subsequent occasion, about the 18th or 19th September, 1843, R. R. Bown stated to witness that he wished an alteration in the contract with defendant, and employed witness to draw up an instrument for that purpose; and that he had subsequently, at the request of the plaintiff, made a survey of the lands in question, the object of the plaintiff being to ascertain the precise quantity of land the defendant had put him in possession of, and desired the plan also to embrace the lines contained in lease from Davis or Duncan (the Indian), to Parker.

Abram Bradley.—Owns the farm adjoining the premises in question. In selling Indian lands, a quit claim deed of the right of the seller is usually given—such seller being in possession of the land, and entitled, or supposee to be entitled, to a right of pre-emption,—leases were often made to embrace more land than was under improvement, *but not more than the seller claimed*. Defendant was in actual possession of about 34 acres, with buildings, &c. Witness had conveyed to defendant, and informed him at the time of doing so, that the person who had conveyed to witness, he (witness) had been told, had conveyed only 34 acres. Witness knew nothing of the possession or claim of any one to any other part of the 134 acres. R. R. Bown had been engaged in purchasing Indian properties—had bought three. Witness, when he held the deeds of the premises in question, had told R. R. Bown that he owned them and the farm adjoining, and that witness had 80 acres in the farm, and 34 in the premises in

question—had pointed out to R. R. Bown the line fence between the premises in question, and those of one Paterson. Annual value of the 34 acres and buildings, about 36*l*.

At the hearing of the cause, the counsel for the plaintiff submitted, there could be no doubt that the bill asserts that the defendant professed to sell the right of possession of one hundred and thirty-four acres, or thereabouts, and there is no principle clearer than that the plaintiff had a right to that possession; no matter if it were only a possession at will, still for that possession he had bargained with the defendant, and was entitled to obtain it. Had the contract been concerning the sale of a fee simple, the authorities are clear to the point, that if the vendor is aware of any material defect in his title, and conceals such defect from the vendee, the latter will not be held to the sale; and a party purchasing only the possession, would also be entitled to come to this court to rescind a contract concerning the sale of such possession, on the ground of such fraudulent concealment; in the present case there can be no doubt of such concealment, for the defendant himself has not even denied, but shews clearly, that he concealed the defective nature of his title. The only question for enquiry being, whether or not the defendant was aware of such defect in his title at the time of entering into the contract, on this point the evidence given by Mr. Burdwell is clear to show, not only that defendant never had had possession of what he professed to sell the plaintiff, but also, that in certain proceedings which had been had against West, the right of Patterson to certain portions of the premises had been established.—Citing Besant v. Richards, Tam. 509; Winch v. Winchester, 1 V. & B. 375; Partridge v. Usborn. 5 Russel, 195; Edwards v. McClay, Cooper, 308; Dobell v, Stevens, 3 B. & C. 625; Hill v. Bulkley, 17 Ves. 394; Balmanno v. Lumley, 1 V. & B. 224: Milligan v. Cooke 16 Ves. 1.

For the defendant, it was contended that the bill did not state, nor did the evidence shew with any precision, in what respect the title of the defendant was defective.

The statement in the bill was too vague and general, it should have set forth the custom of the Indians to sell

certain portions of the lands set apart for their use, which the crown, of its mere grace and favour, had been in the habit of recognising, and granting a patent of the lands so sold to parties holding the conveyances from the Indians.

There is nothing shown, either in the bill, answer, or depositions, upon which the court can found any decree.

The bill also calls upon the court to make abatement, on the ground, that the plaintiff has not possession of the whole of the premises in question; but it does not appear that the plaintiff here has not a right to apply to the government for a grant of the whole tract originally conveyed by Duncombe, and the court will not presume that such right would not be recognized by the crown. The instrument (*a*) which the defendant had executed, itself shows that the possession was not what was agreed to be sold, but it was intended merely to assign the leases under which the defendant claimed, and all interest that he held in the lands under such leases.

The statements made by the bill are not supported by the evidence; there is no absence of the land mentioned and described in the several assignments, the title is admitted by the bill to be good for thirty-four acres, and there is nothing stated in the bill to shew that any other person had a better right than the defendant to the remainder, nor is any person shown to be in possession. The plaintiff and his agents both resided near the premises, and must have been aware if any person had been in possession of the rest of the tract, and he also knew that defendant had a claim to the whole; that claim he had purchased, and such as it was, it had been assigned to him. There could not, therefore, have been any misrepresentation, made by the defendant, and if any had been made, it was clear that the plaintiff could not have been prejudiced thereby, for the evidence shows that it had been previously mentioned to the agent of plaintiff.—Citing E. India Compy. v. Henchman, 1 Ves. Jr. 287; Cressett v. Mytton, 1 Ves. Jr. 449; Serjeant Maynard's case, 1 Sug. 555, 8, 9, 62 & 3 (9th Ed.); Early v. Garrett, 4 M. & R. 687; Thomas v. Powell, 2 Cox., 394; Cann v. Cann, 3 Sim. 447; Bree v. Holbeck,

(*a*) Set out in the judgment of the court.

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Doug. 654, Free. 2; But. note 1, Co. Litt. 34. a.; Cator v. Lord Bolingbroke, 1 B. C. C. 301, 2 ib. 282.

Blake and *Brough*, for plaintiff.

Sullivan and *Esten*, for defendant.

Tuesday, 13th January, 1846.

THE VICE-CHANCELLOR.—This is a bill to rescind a contract for sale; or to decree compensation by an abatement of price proportioned to the difference in the quantity of land comprised in the agreement, and the portion in which the plaintiff considers that he has actually acquired an interest.

Among some conflicting evidence which, according to my view of the law, it is not important to sift or decide upon, the main facts of the case I take to be as follows:

On the 10th of March, 1834, a sale is made from Isaac Davids alias Isaac Duncan, an Indian of the Mohawk tribe, in consideration of 50*l.* to one William Parker, of "all and "singular certain improvements and buildings lying and "being situate on a certain parcel or tract of land which is "composed of part of the Indian territory on the Grand "River, bounded as follows, &c., containing one hundred and "thirty-four acres;" with the form of a covenant, "that he "the said Davids is the true, lawful and rightful owner of "all and singular the said improvements and buildings, ac-"cording to the custom of the said Six Nations Indians in "apportioning and settling the lands amongst each other."

After various assiguments of the right, whatever it may be, to these improvements, it vests in the defendant Alder Baker West. What improvements existed at the time of the sale from the Indian, does not appear: but at the commencement of the suit, somewhere about 34 acres had been cleared and fenced, partly by the defendant, and a tavern built upon the land on the road between Brantford and Hamilton.

The next important document, dated 11th Septemper, 1843, is as follows: "Know all men by these presents, that I, Alder "Baker West, of the town of Brantford, &c., blacksmith, for "and in consideration of the sum of £265 of &c., to me in "hand paid by John Young Bown of the same place gentle-"man, the receipt &c., hath granted, sold, assigned and set "over to him the [said] John Young Bown, his heirs and "assigns, all and singular my right, title, claim, possession

"and demand whatsoever, in and to the annexed assignment "or quit claim from John McDonald to [*the said*] Abram "Bradley, and from the said Abram Bradley to the said Alder "Baker West, and to have and to hold the same unto the said "John Young Bown, his heirs and assigns, &c."

Together with this, all the previous transfers, each assigning the rights supposed to attach to its predecessor, were handed over to the plaintiff. Part of the purchase money was paid, and a note given for the remainder.

After somewhat hastily, as it might seem, concluding this transaction, the plaintiff examined the land described in the instrument from the Indian, and had reason to believe that the amount which he states that the defendant represented himself to be in possession of, was not near so much as he had stated. Indeed it is not pretended that the portion fenced and cultivated in the visible possession of the defendant or his tenant, much exceeded thirty-four acres; the rest was in a great measure forest land undivided by enclosures. He discovered, it appears, that there was some conflicting claim to a portion at least of the enclosed lands, originating in a similar source from which sprung that of the defendant. As to what these claims are, or to what extent, or how indicated on the land, we have no evidence whatever, except from one of the defendant's witnesses, Mr. Lewis Burwell, who states that the portion not cleared and possessed by the defendant, had long been in the possession of Stephen Tuttle and his representatives. He says, "Tuttle's possession was, I believe, under a lease "from a number of the chiefs and others of the Six Na- "tions Indians." What Mr. Burwell meant by possession, does not appear. On the small plan drawn by him, and referred to in the evidence for the plaintiff, the name "Tuttle" is inscribed on land adjoining, but forming no portion of this irregular block of 134 acres.

On this the plaintiff, after some unsuccessful negotiation with the defendant, files his bill for relief in this court.

If the bill itself were alone to be viewed as the statement of an alleged case of equity, it would present this state of facts only: That one party sells, and the other purchases the right to the possession of Indian, that is of Crown Lands,

such right of possession never having been out of the Crown, but specially appropriated to the use of the Six Nations Indians, under the proclamation of Governor Haldimand. The nature of this tenure by the Indians, and their incapacity either collectively or individually to alienate or confer title to any portions of such lands, might have been sufficiently plain, even though the point had not been raised in Doe Jackson v. Wilkes,(a) and the whole matter maturely and lucidly considered and decided on by the Court of King's Bench.

There is one fact, however, which if it had been stated in the bill, and the present averment in the bill proved, would have shewn that the plaintiff might have had a sort of possible contingent title to the land in question, supposing the defendant's rights had been such as he contracted to sell; which is, that in settling the lands of the Indians, surrendered by them to the Crown for sale and settlement for their express benefit—using the word surrender merely as meaning that their express concurrence is in such case given, and that the alienations by the Crown are not against the faith of Governor Haldimand's proclamation—where in many cases, (putting the Brant Leases out of the question), individual Indians had assumed separate apportionments of these lands, and made improvements, and then sold them, the purchasers have, where the transactions bore evidence of bona fides, been generally preferred in some cases I believe even to the extent of having free grants; the Indians themselves in these cases having by their custom sanctioned such alienations, being compelled to do equity. This practice, however, is the exception; the general rule having been to consider sales of lands or exclusive local rights by Individual Indians, as a fraud upon the whole body, for whose use it was set apart.

This custom or equitable practice in the Crown Land Department, however, has not been alluded to in the bill; neither is it attempted to be shewn what is "the custom of "the Six Nations Indians, in apportioning and settling their "lands among each other," as referred to in the instrument

(a) Easter Term, 5 Wm. IV.

which forms the ground-work of this claim; and it is only on knowledge dehors the pleadings, that we can understand any thing like an approach to a right to the land in question. But for the benefit of the plaintiff I choose to allude to the fact as within my own knowledge instead of binding him down to the uncertainty of his bill. On the face of it there appears simply a case of parties calling upon the court to deal with a contract affecting property, on both hands confessedly belonging to a third party, and assumed by them without that party's consent or concurrence—merely self-constituted rights—the real owner a stranger to the transaction. Had it been competent to a party joining in such an agreement, to say that his own act was not a contract, and that the bargain in which he was concerned was one which could not be supported in equity, the bill would have been demurrable; but as he cannot demur, it is for the court to do it, if it sees clearly that it ought not to entertain jurisdiction in the matter. If this be a contract such as a court of equity can deal with it at all, it must be reciprocal, one which it can enforce as well as rescind. But how could the court enforce such a contract as this, and (supposing the alleged counter claims or rights of other lessees out of the question) decree that the defendant shall put the plaintiff in *possession* of the excess of 134 acres of Crown lands beyond the 34 of which he is, as was the defendant before him, in the visible possession and occupation? I cannot comprehend how any possession of the unsurveyed lands of the Crown can be had even by implication, except by the actual clearing, fencing or cultivation of a particular spot, which to strangers would afford a presumption of the right of possession. But the court can never decree possession to be given of property which each party has admitted and shewn belonged to neither.

It does not appear clear that, beyond the 34 acres in the visible possesssion of the defendant, any part of the 134 acres (the *improvements* upon which, not the *land*, were assigned by the Indian Davids or Duncan,) has ever been enclosed or cultivated; or that there is any tangible or manifest possession in the person or persons alleged but not proved to have claims thereto, inconsistent with those assigned by the defendant to the plaintiff, nor is the nature of these sug-

gested claims set forth: nor, assuming that they were such as the Crown would entertain, whether they were anterior, or in any respect paramount to those of the defendant at the time of the assignment. The objection is taken chiefly from Mr. Burwell's evidence that the defendant was not in possession of the whole, but that one Tuttle or his representatives had certain anomalous claims or rights such as those relied on by the defendant: but as already remarked, no evidence is produced that there was any visible possession known to the defendant, and such as might have put the purchaser even of such a claim as this upon his guard, had he taken common precaution.

Giving then the benefit to the plaintiff of having stated in his bill the custom of the Indians and practice of the Crown in its land-granting department, by which peculiar favour has been in certain cases shown to purchasers of Indian rights by free grants or privilege of pre-emption, it does not appear that the plaintiff ever tested the goodness of the claim he had purchased, by applying for the recognition of it by the Crown, and for a grant of land upon any conditions;—for however weak his title is, there is no proof that any but the Crown has a better. He knew that he was purchasing that which could only be valuable on the contingency of the Crown confirming it, and yet he himself obstructs the happening of that contingency. It may turn out to be that the assignment from Davis or Duncan of his improvements, however small they may have been compared with the tract of land they profess to carry with them, may be favourably viewed by the Crown, and the claims stated to be in conflict with it not so; in which case it will probably be a very beneficial purchase, for its value if confirmed by grant, is stated to be very much beyond what was to be paid for the right such as it exists.

In the absence of direct decisions, and referring to first principles and a supposed analogy to English decisions on questions of Tenant right, I did entertain jurisdiction in the case of Jeffrey. v. Boulton, in dealing with equities arising between parties in relation to claims to property, the absolute right to which was still in the Crown. But that it was a very different case from the present. There

the possession had for a long period been by its own act out of the crown, first under a lease, and then under a contract for sale and payment accepted; a contract it is true not enforceable, for it is a legal impossibility that the Crown can violate its contract. It appeared to me that under such a partial or incohate alienation of Crown lands, there might arise tangible rights between parties interested in such lands that would be recognized by the Court of Chancery, and enforced *inter se*, though the patent had not yet issued from the Crown. The Court of Appeal however thought otherwise: and probably by their decision have prevented the court from straying beyond the legal landmarks to grasp at moral subtleties. In the present case there is no recognized possession out of the Crown, except the occupation of the Indians, who cannot alienate; and as no equitable title can be discussed, except as between the equitable and at least *apparent* legal owner; and as in this case the legal owner is the Queen, I cannot settle claims affecting her lands between parties who are in a manner co-trespassers, or make any decree upon this bill.

The second alternative of the prayer of course falls to the ground. If the contract cannot be enforced or rescinded in the whole, it cannot be enforced or rescinded in part.

Notwithstanding my unwillingness to assume jurisdiction in this case, in relation to the subject matter of the suit, I should have no hesitation in so doing as regards costs, had those charges been well substantiated which impute fraud and misreprentation to the defendant; as to the nature of the property, or rather the chance of acquiring property, sold, I do not see clear evidence of such fraud. He is charged with selling "a transferable interest," whereas he had not in fact any such interest. Such interest as he had, was apparent upon the face of the papers, and was clearly understood by the plaintiff; even setting aside that part of Mr. Burwell's testimony which shews that he cautioned him with regard to the defendant's questionable claim to any part of the 134 acres, except the portion which he had in his manifest possession and occupation. That this claim had been treated as a tranferable interest is clear, for it had not only passed through several hands, but had actually been sold at

sheriff's sale under an execution. The instrument of sale itself already quoted, drawn by the plaintiff. only professes to convey the defendant's right, not to the land, but to *the several quit-claims*, on the evidence of which there rested the hope of acquiring the land. He must be intended therefore, were there not direct evidence of the fact, thoroughly to have understood the nature of the right he was purchasing. The defendant is a man in a humble sphere of life, and there appears no reason to doubt, believed in the efficacy of the evidences of title he was assigning: the plaintiff, a man in a superior grade, from his intelligence perfectly aware of the nature of the right he was purchasing properly called, "an Indian title,"—his agent and relative residing near the spot, with abundant facilities before entering into the bargain of ascertaining facts of which complaint is now made of concealment and misrepresentation,—buying too at a low price when compared to the value of the land itself, from which may be inferred, that the purchase was not unencumbered with difficulties. There is no reason to doubt that the defendant thought he was selling him all he professed to do, and if it be found that obstacles exist to the plaintiff's urging his claim upon the Crown, I do not see that they arose or were concealed by the fraud of the defendant. This question has relation only to costs. If fraud were to be inferred, I could only have dismissed the cause generally—but as it is, I think the defendant has been erroneously brought before the court, and must be released with his costs.

Bill dismissed with costs.

COUR SUPÉRIEURE.

MONTRÉAL, 14 novembre 1901.

Présent: LANGELIER, J.

BOUCHER v. MONTOUR.

Acte des Sauvages—Nullité des ventes ou locations des biens compris dans une réserve de sauvages—Cette nullité est-elle relative ou absolue.—61 Vict. (Can.) ch. 34, art. 2.

JUGÉ: — La nullité des ventes ou locations de biens compris dans une réserve de sauvages, édictée par l'acte 61 Vict., (Can.) ch. 34, sec. 2, n'est qu'une nullité relative, et elle ne peut être invoquée que par les sauvages; ceux qui ont traité avec eux ne peuvent s'en prévaloir.

LANGELIER, J.:—

Le défendeur, qui est un sauvage établi sur la réserve de Caughnawaga, étant poursuivi en paiement d'un compte pour marchandises vendues, plaide en compensation du loyer que le demandeur lui devrait en vertu d'un bail pour un terrain situé dans la réserve.

Le demandeur attaque ce plaidoyer en droit, et dit que le bail invoqué est nul d'après la loi qui régit les sauvages, et que, partant, il n'a pu avoir l'effet de l'obliger à payer ce loyer.

Le statut 61 Vict., ch. 34, sect. 2, qui amende la loi concernant les sauvages, déclare nuls tous actes de vente ou de louage ayant pour objet des terrains compris dans une réserve de sauvages s'ils n'ont pas été autorisés par le commissaire des sauvages. Il n'y a donc aucune difficulté sur l'existence de la nullité invoquée par le demandeur.

Mais quel est le caractère de cette nullité? Est-ce une de ces nullités qui rendent inexistants les actes dans lesquels elles se rencontrent? Ou bien est-ce simplement une nullité relative introduite en faveur de certaines personnes seulement, et qui ne peuvent être invoquées que par elles?

Pour résoudre cette question, il faut examiner l'ensemble de la loi des sauvages, dont cette clause n'est qu'une partie. Or, de l'ensemble de cette loi, il résulte clairement que le

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législateur a voulu traiter les sauvages comme des mineurs dont le commissaire des sauvages est le tuteur. C'est pour cela que cette loi, dans la clause que j'ai déjà cité, subordonne la validité des ventes ou locations de terrains compris dans les réserves au consentement de ce commissaire.

La conséquence à tirer de cela, c'est que la nullité édictée par cette clause 2 est du même genre que celle des actes faits par des mineurs: c'est une faculté de restitution qu'elle édicte en faveur des sauvages pour les protéger contre leur inexpérience ou leur imprévoyance. Eux seuls donc peuvent s'en prévaloir, et les tiers qui ont traité avec eux ne peuvent l'invoquer.

La cause actuelle montre à quelles conséquences absurdes conduirait la prétention du demandeur. Voilà une loi qui n'a certainement pas été faite pour sa protection, et qui a eu pour objet de protéger le défendeur. Or, si cette prétention était maintenue, il en résulterait que le défendeur serait plus mal que si cette clause n'eût pas été mise dans la loi. Car, sans cette clause, il pourrait certainement invoquer la compensation qu'il plaide. Alors cette clause aurait pour conséquence de le priver d'un droit qui appartient à tout le monde.

La réponse en droit du demandeur est donc mal fondée et doit être renvoyée avec dépens.

Lighthall, Harwood & Stewart, avocats du demandeur.
Hutchinson & Oughtred, avocats du défendeur.
(P.B.M.)

SUPERIOR COURT.

MONTREAL, 13 December, 1901.

Coram DAVIDSON, J.

LATOUR v. YASINOVSKI.

Compensation—Damages—Contract.

HELD:—Where an action is brought on a contract, and the defendant pleads non fulfilment of contract, he may offer in compensation damages which are alleged to have directly resulted from the negligence and defaults of the plaintiff in connection with the contract sued on.

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MINISTER OF NATIONAL REVENUE v. THIBAULT

Kearney J.

closer examination of the facts some striking differences appear which I think afford sufficient grounds for holding that the sum in issue falls on the non-taxable side of the dividing line.

In my opinion, in the light of the exceptional circumstances disclosed in this case the weight of evidence adduced on behalf of the respondent is such as to reasonably establish that the respondent had ceased to be engaged in business, within the meaning of the Act, six months prior to May 15, 1956, when she effected the sale of the property in issue, and that the said profit had the attributes of a capital accretion and did not constitute income from a business.

For the above reasons, I consider that the appeal should be dismissed with costs.

Judgment accordingly.

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Mar. 20, 21

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Aug. 12

BETWEEN:

BRICK CARTAGE LIMITED .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Negligence—Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1) and 4(4) and (5)—Indian Act, R.S.C. 1952, c. 149, ss. 34, 35 and 39 to 41—Possessory right of Indians in lands of Indian Reserve—Maintenance of bridge on Indian Reserve—Whether Indian Band or Council or employee an agent or servant of Crown in right of Canada—No reason to believe bridge structurally defective—No evidence that those responsible for maintenance of bridge were negligent either as occupiers or as municipality charged with maintenance of highway.

The suppliant claimed compensation for damage to its truck and for loss of use resulting from the collapse of a bridge on the Six Nations Indian Reserve near Brantford, Ontario while the truck was crossing it, alleging that the bridge had been allowed to depreciate and was in a state of disrepair through the failure and default of the Six Nations Band Council, under whose sole jurisdiction it was, to keep it in repair.

Held: That the petition of right does not make out a cause of action under s. 3(1) of the *Crown Liability Act* unless the Six Nations Indian Band Council or its agents or servants are, as a matter of law, servants of Her Majesty in right of Canada, or Her Majesty in right of Canada, as a matter of law, owns, occupies, possesses or controls the bridge in question in such a way as to impose on Her Majesty a duty to maintain it through the operations of the Band Council, its servants or agents.

2. That under the Royal Proclamation of 1763 and the *British North America Act of 1867*, the Crown in right of Ontario has a bare legal title in Indian lands in Ontario, it being subject to a possessory right of the Indians in the lands in which possessory right is vested in the Indian band until some part of the land is allocated to an individual Indian, is surrendered and sold or is expropriated, the Parliament of Canada having exclusive legislative jurisdiction in relation thereto.
3. That for all practical purposes, possession by an Indian band of land is of the same effect in relation to day to day control thereof as possession of land by any person owning the title in fee simple and neither the Crown nor any government official has any right or status to interfere with such possession by the band except when such right or status has been conferred by or under statute.
4. That the bridge in question was in the possession of the Indian band at all relevant times.
5. That maintenance of roads in the reserve was carried on by the band through its elected representatives, with the same help and supervision from the Provincial authorities as a municipal corporation in Ontario received and with the same supervision and control in relation to expenditure of band or public monies as is imposed generally by the *Indian Act*.
6. That no possible basis in law has been put forward for regarding the band, its council or any officer or servant employed by it as being an agent, officer or servant of the Crown in right of Canada.
7. That there is no evidence to support in any way that the Crown in right of Canada or any officer or servant thereof had any authority, responsibility or control, either in fact or in law, in relation to the bridge in question or its maintenance.
8. That there was no basis in law pleaded and no evidence adduced to establish any liability of the respondent under the only statutory authority for such liability to which any reference was made, viz. s. 3(1) of the *Crown Liability Act*.
9. That the bridge in question was very old and served as a connection in a lightly travelled gravel road but there was no evidence that two surveys that had been made had disclosed any structural defects in it nor was there any evidence that any reasonable inspection of the bridge would have revealed any cause to be apprehensive of its ability to sustain any traffic that might be expected.
10. That the suppliant's truck and the one that immediately preceded it over the bridge were both in excess of the weights permitted by Ontario provincial law on secondary roads.
11. That there is no evidence upon which to base a finding that the authorities responsible for the maintenance of this bridge were guilty of any negligence, whether the matter is viewed from the point of view of the liability of an occupier to an invitee or of an Ontario municipality to maintain a highway within *McReady v. County of Brant* [1939] S.C.R. 278.
12. That a person who sends a modern vehicle weighing many tons over rural roads that were constructed when vehicles of such great weight were unknown has a very heavy onus to satisfy himself that a particular road is fit to receive his vehicle before moving it over it.
13. That the amount of damages has not been proven since no person with any personal knowledge of all the relevant facts gave evidence with respect thereto.

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BRICK CARTAGE LTD. v. THE QUEEN

PETITION OF RIGHT for damage to a motor vehicle.

The action was tried by the Honourable Mr. Justice Cattanach at Brantford.

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

N. A. Chalmers for respondent.

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

CATTANACH J. now (August 14, 1964) delivered the following judgment:

This is a Petition of Right for damages to a motor vehicle, known as a "boom transport", sustained when a bridge on the Six Nations Indian Reserve, near Brantford, Ontario, collapsed while the vehicle was crossing it. The Petition of Right, in addition to damages for physical injuries to the vehicle, claimed damages for loss of use, but this claim was abandoned at trial. A Counterclaim by the Crown was also abandoned at trial.

The Petition of Right alleges that the bridge in question was under the sole jurisdiction of the Six Nations Indian Band Council and that it was in a state of disrepair and had been allowed to depreciate to the knowledge of the Council and its servants and agents "to the extent that the supporting abutments of the bridge, had dèteriorated to the point that they allowed the bridge to collapse." It also alleges that the damages complained of were caused by the failure and default of the Six Nations Band Council to keep the bridge in repair. On these allegations relief is sought against Her Majesty in right of Canada, under section 3(1) of the *Crown Liability Act*, c. 30, Statutes of Canada, 1952-53, which reads as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (a) in respect of a tort committed by a servant of the Crown, or
>
> (b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

The Petition of Right does not make out a cause of action under this provision unless, on the one hand, the Six Nations Indian Band Council or its agents or servants are, as a matter of law, servants of Her Majesty in right of Canada or, on the other hand, Her Majesty in right of Canada, as a matter of law, owns, occupies, possesses or

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controls a bridge on the Six Nations Indian Reserve in such a way as to impose on Her Majesty a duty to maintain it through the operations of the Band Council, its servants or agents.

The case was argued by counsel for both parties on the assumption that the Indian Reserve on which the accident occurred was in an area to which the reasoning of the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen*[1] is applicable. It would have been preferable if there had been evidence to show that the area in question is land that was subject to the Royal Proclamation of 1763 and that it was in the occupation of the Indians at the time of that Proclamation together with evidence that it had never been surrendered by the Indians. However, as the area in question is in Ontario, and as it appears from the evidence that it has not been surrendered, I propose to view the case on the assumption that those facts have been established.

I do not propose to repeat the careful exposition of the legal rights in relation to Indian lands that can be found in Lord Watson's judgment in the above case at pages 53 and those following. It is sufficient for the purposes of this judgment to enumerate the significant points, which are:

(1) the Royal Proclamation of 1763 conferred on the Indians a possessory right in lands occupied by them at that time in the territories to which the Proclamation applied;

(2) those lands (hereafter referred to as "Indian lands") were vested in the Crown subject to the Indians' possessory rights;

(3) upon surrender or other extinguishment of the Indians' possessory right, the Crown's title became a right to full and restricted ownership;

(4) by virtue of the Proclamation of 1763, the Indian possessory right could only be extinguished by a formal contract, duly ratified at a meeting of the Chiefs, for surrender to the Crown;

(5) the Imperial Government assumed the responsibility for the welfare of the Indians and of supervising relations between the Indians and others, to the exclusion of the colonial governments (the Imperial Government did not surrender this function until 1860);

(6) immediately prior to 1867, the Crown title in Indian lands was vested in Her Majesty in the right of the pre-confederation Province of Canada;

(7) by the British North America Act, 1867, the Crown title in Indian land in Ontario became vested in Her Majesty in right of Ontario, with the consequence that, upon a surrender or other extinguishment of the Indian possessory right, the full and

[1] 14 App. Cas. 46.

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unrestricted ownership would become vested in Her Majesty in right of Ontario (since 1924, there has been a Dominion-Provincial agreement designed to ensure to the Indians the full benefit of Indian land—see chapter 48 of the Statutes of 1924);

(8) by the British North America Act, 1867, the Parliament of Canada acquired exclusive legislative jurisdiction in relation to Indians and lands reserved for the Indians.

In the exercise of its legislative authority in relation to "Indians and lands reserved for the Indians," the Parliament of Canada has enacted the *Indian Act*, 1952 R.S.C. c. 149, as amended, by section 18 of which the Crown is declared to hold Indian lands "for the use and benefit" of the respective bands, i.e. the Indians' possessory title under the Proclamation of 1763 is recognized by Parliament and assigned to the respective bands. This Act contains provisions under which a band's possessory right in particular parts of a reserve may be vested in an individual Indian and thus attain, for all practical purposes, all the incidents of common law ownership of land in fee simple. It also contains provisions for electing band councils and confers on a band council power to make by-laws for various purposes, including "the construction and maintenance of . . . roads, bridges . . . and other local works". There is also a provision, being section 34, that a band shall *inter alia* ensure that the roads and bridges within the reserve occupied by the band are maintained in accordance with instructions issued from time to time by the Superintendent, who is an official under the Minister of Citizenship and Immigration. Other provisions in the Act to which reference should be made are section 35, under which lands in a reserve may be taken for public purposes, and sections 39 to 41, under which lands in a reserve may be surrendered by the Indians for disposition to third persons.

The situation appears to be that the Crown in right of Ontario has a bare legal title in Indian lands in Ontario during the continuance of the possessory right of the Indians. It further appears that the possessory right of the Indians is vested in the band, i.e. the particular group of Indians as a group, until some part of the land is allocated to an individual Indian, is surrendered and sold or is expropriated.

For all practical purposes, possession by an Indian band of land is of the same effect in relation to day to day control thereof as possession of land by any person owning the

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title in fee simple. Neither the Crown nor any government official has any right or status to interfere with such possession by the band except when such right or status has been conferred by or under statute.

There is no evidence that the bridge that is the subject matter of this Petition of Right has ever been allocated to an individual Indian, surrendered or expropriated. I should also say that there is no evidence of any instruction of the Superintendent with regard to the maintenance of bridges under section 34 of the *Indian Act* and there is no evidence of any by-law in that connection passed by the Band Council. I, therefore, find that the bridge was in the possession of the Indian Band at all relevant times.

There is no sufficient evidence as to who constructed and maintained the roads in the reserve and particularily the bridge in question, but what evidence there was convinces me that maintenance, at least, was carried on by the band through its elected representatives, with the same help and supervision from the Provincial authorities as a Municipal Corporation in Ontario received, and with the same supervision and control in relation to expenditure of band or public monies as is imposed generally by or under the *Indian Act*. No possible basis in law has been put forward for regarding the band, its council or any officer or servant employed by them as being an agent, officer or servant of the Crown in right of Canada.

There is no evidence that suggests in any way that the Crown in right of Canada or any officer or servant of the Crown in right of Canada, had any authority, responsibility or control, either in fact or in law, in relation to this bridge or its maintenance.

There is no basis in law pleaded, and no evidence was led, to establish any liability of Her Majesty in right of Canada under the only statutory authority for such liability to which any reference was made, namely, section 3(1) of the *Crown Liability Act*.

The foregoing reasons, effectively conclude the matter and. in my view, the suppliant is not entitled to the relief sought in its Petition of Right.

However, I do not propose to leave the matter without expressing my conclusions on the questions of fact concerning the alleged negligence of those who did have responsibility for the maintenance of the bridge and the quantum of damages.

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The simple facts are that:

(1) the bridge in question was built in the "horse and buggy" days in the early years of this century;

(2) in 1961, the bridge still served as a connection in a lightly travelled gravel road and was maintained to the same standards as were the many other bridges of the same kind that still continued to be used in the province at that time;

(3) the normal capacity of the bridge, according to an expert called by the suppliant, was in the neighbourhood of 30,000 pounds;

(4) the bridge had been recommended for immediate replacement on the grounds that it was poorly located, it was a very old bridge and it was narrow but, notwithstanding, evidence of two different surveys by representatives of the interested authorities, there was no evidence that such surveys had disclosed any defects of a structural nature in the bridge;

(5) there was no evidence that any reasonable inspection of the bridge before its collapse would have revealed any cause to be apprehensive of the ability of the bridge to sustain any traffic that might be expected;

(6) the suppliant's truck was a very large special piece of equipment, with a loading and unloading boom on it, that weighed 17,000 pounds empty and on the day in question carried a load of 27,000 pounds (some part of this load had been removed prior to the accident);

(7) the suppliant's truck crossed the bridge immediately after a truck that had a weight, including its load, between 43,500 and 46,500 pounds;

(8) both of these trucks were, at the time, in excess of the weights permitted by Ontario Provincial law on secondary roads.

The evidence of expert examination of the ruins of the bridge failed to reveal what had happened to cause its collapse. The sixty foot members were intact and had not failed so that the concrete abutments on which they had rested must have moved, crumbled or been gouged out, but there was no evidence to establish which of these had happened. One expert expressed the opinion that the abutments

had moved over the years but he did not support his opinion by the evidence (but only as being his conjecture as the most likely thing to have happened) and he did not say that there was anything to indicate that any reasonable inspection would have revealed anything to those responsible for the bridge that should have made them apprehensive that there was any danger of collapse.

I do not overlook the evidence that one Martin, an employee of the Band, had indicated to the drivers of the two trucks that they should proceed by a route over this bridge and had told the driver of the leading truck, with whom he was riding, that he knew of no load limit and that the township or band trucks had gone over the bridge many times. There is, however, no evidence that Martin had any authority or special knowledge in respect of the roads and bridges maintained by the Band. Neither do I overlook the presence of a sign visible to traffic coming from the opposite direction to which these trucks were coming, cautioning the drivers to proceed at their own risk.

I find no evidence upon which to base a finding that the authorities responsible for the maintenance of this bridge were guilty of any negligence, whether the matter is viewed from the point of view of the liability of an occupier to an invitee or from the point of view of the liability of an Ontario municipality to maintain a highway within, *McReady v. County of Brant*[1].

Furthermore, I am of the view that a person who sends a modern vehicle weighing many tons over rural roads that were constructed when vehicles of such great weight were unknown, has a very heavy onus to satisfy himself that a particular road is fit to receive his modern heavy vehicle before moving his vehicle over it. In my view, such a person uses such roads at his own risk and cannot transfer the responsibility to his customer or any other person to whom he directs enquiries for information except, possibly, those responsible for the maintenance of the road.

Finally, with reference to the quantum of damages, I find that, notwithstanding, that there was no admission by the respondent concerning either the nature of the physical damages sustained by the vehicle or the reasonableness of the charges, no person with any personal knowledge of all

[1] [1939] S.C.R. 278.

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the relevant facts gave evidence with respect thereto. I cannot, therefore, find that the amount of the damages has been proven. I must also add that I am not able to find on the evidence that the bill for the specialized adjuster's services can be regarded as representing a cost of repairing the physical damages to the truck.

Having regard to the findings I have made, I do not have to form an opinion under subsection (5) of section 4 of the *Crown Liability Act*. There is, however, a question in my mind as to whether, when lack of notice under subsection (4) of section 4 is pleaded by the Crown, the suppliant can ask the Court to make the required finding under subsection (5) unless its reply pleads both the lack of prejudice and the injustice contemplated by subsection (5). In this case, the reply did not plead the injustice contemplated by subsection (5).

There will, therefore, be judgment that the suppliant is not entitled to any portion of the relief sought by its Petition of Right herein and the respondent is entitled to costs.

Judgment accordingly.

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May 4, 6, 7

Aug. 17

BETWEEN:

JOSEPH A. VILLENEUVE .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148—Profit on sale and expropriation of real estate—Income or capital gain—Onus on taxpayer to disprove basis of assessment—Evidence given by taxpayer at trial of purpose of acquisition of property not conclusive of his true purpose at time of acquisition.

In 1952 and 1953 the appellant purchased two farms about one-half mile apart in the Township of Cornwall on the outskirts of the City of Cornwall, the first being of one hundred acres and the second of eighty-five acres. At no time did he make any attempt to farm either property nor had either property been worked intensively by its previous owner. The houses on both properties were rented by the appellant, who also arranged to have the tenants on the one hundred acre property operate it as a farm, the appellant supplying stock and equipment. In 1955 the Hydro Electric Power Commission of Ontario expropriated a part of each of the properties for relocation of railway lines resulting from the St. Lawrence Seaway development.

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October 31.

DOE DEM. BURK *v.* CORMIER, ET AL.

Indian Reserve — Title to — British North America Act, secs. 91, 92 — Ejectment — Tenants in common — Father and sons in occupation — Presumption of possession.

The title to land in this Province reserved for the Indians is in the Provincial Government, and not in the Dominion Government. (Per ALLEN, C. J., and FRASER, J.

C. and his three sons (being of age) lived on a lot of land, two of them with their father, and the other in a house by himself. They all worked on the land without any division. C. mortgaged the land to the lessor of the plaintiff. In ejectment against C. and the sons, they appeared jointly and entered into the common consent rule, and a verdict was given for the plaintiff against all defendants. On a motion for a new trial:

Held per ALLEN, C. J., and FRASER, J., that in the absence of any evidence of a separate occupation by the sons, it might be presumed that C. alone was in the occupation of the land, and that it was not a joint occupation of him and his sons.

Held also, that though C. was estopped by his mortgage from disputing the title of the lessor of the plaintiff, his sons were not estopped; and that the lessor of the plaintiff, having proved no title except the mortgage, there should be a new trial.

Per WETMORE and TUCK, JJ., That the sons of C., not having shewn any title to the land, the possession would be presumed to be in C., and that the verdict should stand.

This was an action of ejectment for one hundred acres of land in the County of Kent, being part of the Buctouche Indian Reserve.

In order to make out his title, the lessor of the plaintiff gave in evidence a mortgage to himself of the land in dispute from Sylvain U. Cormier, one of the defendants, dated the 19th February, 1878, for the payment of $79 in two years from the date. This mortgage contained a power of sale in case default was made in payment of the money.

Default having been made, the property was sold under the power and purchased by one Gallant, to whom it was conveyed by the lessor of the plaintiff on the 9th February, 1889, and on the 15th of the same month Gallant reconveyed it to the lessor of the plaintiff.

The lessor of the plaintiff also gave in evidence a grant of the land in dispute from the Crown to himself under the great seal of Canada, dated the 11th Aug., 1882, in which the land

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was described as being a part of the Buctouche Indian Reserve in the County of Kent, in New Brunswick, set apart for the use of the Buctouche Indians. This grant was executed with all the formalities required by the 45th section of "The Indian Act," (Rev. Stat. Can., cap. 43).

The defendants, Sylvain U. Cormier, the mortgagor, and Oliver S. Cormier, Thaddy S. Cormier and Joseph Lucien Cormier, the sons of Sylvain, entered into the common consent rule to confess lease, entry and ouster, and that they were in possession of the land described at the time of the service of the declaration in the action.

They all lived on the 100 acres in dispute, on which there were two houses, in one of which the defendant, Oliver, lived, and Sylvain and the other defendants in the other house. At the time the mortgage was given, the three sons of Sylvain were all of mature age, varying from 25 to 40 years. There was no evidence of any separate occupation of the land by either of them, beyond the fact that they resided in different houses.

This was all the evidence given by the plaintiff, and the defendants gave no evidence. They were not shewn to have been in any way connected with the mortgage, or to have recognized it in any way.

At the trial, which took place before His Honor Mr. Justice Tuck, at the Kent Circuit in September, 1889, a verdict was entered for the plaintiff by consent, with leave to the defendants to move to enter a nonsuit if the Court should be of opinion that the title to the land—the Indian Reserve—was in the Provincial Government; and that the case depended on that question. The Court also to be at liberty to draw inferences of fact from the evidence.

June 14, 1890. *Geo. F. Gregory* moved pursuant to leave for a nonsuit, or, failing that, for a new trial. The plaintiff can not get any benefit from the Dominion grant of the land in dispute. The case of *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1), places the matter beyond doubt, that the title to the Indian reserves in this Province, vests in the Provincial

(1) 1 App. Cas. 46.

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Government. If, therefore, the plaintiff is entitled to hold his verdict, it must be through the mortgage from Sylvain U. Cormier, the father of the other defendants. Admitting that Sylvain is estopped by his mortgage from disputing the plaintiff's title, the other defendants are not so estopped. The evidence shews that the defendants lived in separate houses upon the land, and that they were not in joint possession of the land. Where several defendants appear and enter into the consent rule and plead jointly, the plaintiff must prove joint possession of all. Adams on Ejectment, p. 328. This he has failed to do. It is also sufficient in an action of ejectment to prove title out of the lessor of the plaintiff. *Doe dem. McGowan* v. *McColgan* (1).

Rainsford, contra. Sylvain is estopped by his mortgage from disputing title in the plaintiff. The other defendants were his sons, and there was sufficient evidence to go to the jury that they were living with their father and occupying the land jointly with him. It will be presumed from the fact that the father was in possession, that the sons were living with him, unless there is evidence to the contrary. By the agreement at the trial, this Court are to draw inference of fact: if therefore there was sufficient evidence of joint possession to be submitted to the jury, the Court must now sustain the verdict. It is also submitted that all the defendants having joined in the consent rule, they are now estopped from claiming that they held separately. As to the grant to the plaintiff from the Dominion government:—the Indian Reserves in this Province are in a different position from those in Ontario, and the case of *St. Catherine's Milling and Lumber Co.* v. *The Queen* does not apply. The fact that the rights of the Indians in the Ontario lands had been surrendered to the Government of the Dominion, entered into the decision of that case. The moment the Indians gave up their rights, the lands vested in the Crown, and became part of the Crown lands of Ontario. The Indian lands in this Province were reserved to them at the time of Confederation, and under sec. 91, sub-sec. 24 of The British North America Act, the Dominion Government has absolute control of the lands.

Gregory, in reply.

Cur. adv. vult.

(1) 1 Han. 542.

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The following judgments were now delivered:

TUCK, J. The plaintiff gave evidence that before action brought he had demanded possession of the property from the defendants, and they had refused to give it up to him. He said also that all the defendants lived and worked on the land; that Oliver lived in one house and the old man lived in the other with the other boys. Sylvain is the father of the other defendants. Burk could not say that the defendants farmed on the land together; that they are not farmers; that they live principally by day's laboring outside. He said he first found out it was Indian land when the government of Canada made it known, that those working on Indian land had to apply to the government to get grants, and that was eight or nine years before. In answer to the question, "So you know that that land is Indian land?" He said: "Was Indian land at that time—Indian reserve. But I had understood at the time of the grant, that old man Cormier had bought this land from the Indians the same as others had done."

The defendants moved for a nonsuit, on the ground that the grant from the government of Canada gave no title to Burk, as the crown lands of the Province, including lands called Indian reserve, were in the separate Provinces, under the British North America Act, relying upon *St. Catherine's Milling & Lumber Co.* v. *The Queen* (1).

The defendants' counsel also took the ground, that if old Sylvain Comier had no title he could confer none, and if it should be contended that he was estopped by the mortgage, still he could not convey away the rights of the other co-tenants. By agreement a verdict was entered for the plaintiff with leave to the defendants to move to enter a nonsuit, the Court to draw inferences of fact from the evidence.

With my view of this case it is not necessary to consider the question which government has the title to Indian reserve lands in this Province.

In my opinion the evidence fails to establish that the other three defendants had a separate occupation from that of the defendant Sylvain Cormier, and he is estopped from setting

(1) 13 Can. S. C. R. 577: 14 App. Cas. 46.

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up title in another by the mortgage which he gave to the plaintiff. Even if the beneficial interest in this land passed to the Province under section 109 of the British North America Act, yet the defendants ought not to derive any benefit from that fact in this action.

Any evidence there is shows that there was either a joint tenancy, or that the occupation by the sons was no more than the possession of the father. Sylvian alone gave a mortgage of the whole property to Burk, and it does not appear that either of the sons ever set up a claim to a separate occupation of any part of the land. If either of them had any right, it was open to him to have shewn what it was at the trial. The very fact that neither of the defendants gave evidence, goes far to shew that they did not think they had any legal claim. The plaintiff says that they all worked on the 100 acres of land; that there were two houses on it; that Oliver lived in one, and the old man lived in the other, with the other boys. Now, to my mind, that is quite consistent with a joint occupation, or with the other view that the whole possession was that of the father, and that the sons were there by his permission.

I think that a rule to enter a nonsuit must be refused, and that the verdict should stand.

WETMORE, J. I agree with my brother TUCK.

SIR JOHN C. ALLEN, C. J. after stating the facts as given above, continued:—So far as Sylvain Cormier is concerned, there is no doubt that he is estopped by the mortgage from disputing the plaintiff's title. I am also inclined to think that the Court would be justified under the evidence, in presuming that the occupation of the land by the defendants was as tenants in common, and that the lessor of the plaintiff, having the legal title of Sylvain by the mortgage, would be a tenant in common with the other defendants, and that a special consent rule should properly have been entered into, according to the practice. See Earle's Rules, 113; Adams' Eject. 263.

But as this point was not raised at the trial, and if it had been, the consent rule would probably have been amended, if necessary, I do not think the defendants (except Sylvain)

should be precluded by it now, but that there should be a new trial unless the plaintiff is entitled to recover under his grant; which, I think, was the real question reserved.

I think the question of the plaintiff's title under his grant is concluded by the case of *The St. Catherine's Milling & Lumber Co.* v. *Reg.* (1).

The question there was whether certain lands which had been ceded to the Crown by a treaty with several Indian tribes, in the year 1873, belonged to the Dominion Government, or to the Province of Ontario, in which the lands were situated; and it was held that they belonged to the latter under the terms of The British North America Act, 1867.

The portions of the British North America Act bearing on this question are: section 91, sub-sec, 24; sec. 92, sub-sec. 5; and sec. 109.

Section 91, relating to the Legislative power of the Dominion, declares that it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons to make laws in relation to all matters not coming within the classes of subjects assigned by the Act exclusively to the Provincial Legislatures; but for greater certainty it was declared that the exclusive legislative authority of the Parliament of Canada extended to all matters coming within certain enumerated classes mentioned; among which are—

24—"Indians, and Lands reserved for the Indians."

Section 92 deals with the exclusive powers of Provincial Legislatures; and declares that in each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects thereinafter enumerated.

Among the subjects so assigned exclusively to the Provincial Legislature, is the following: 5—"The management and sale of the public lands belonging to the Province, and of the timber and wood thereon."

Under the title "Revenues, Debts, Assets, Taxation," section 109 declares that "All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums due or payable for such lands, etc., shall belong to the several provinces of Ontario,

(1) 13 Can. S. C. R. 577; 14 App. Cas. 46.

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Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that in the same."

It will be observed that the exclusive power given to the Dominion Parliament by the 24th sub-sec. of sec. 91, is to legislate on the subject of the "Indians and lands reserved for the Indians;" and Parliament did so legislate by "The Indian Act" (Rev. Stat. Can. cap. 43); but that chapter has no bearing on the present question—the title to the lands reserved for the use of the Indians.

In the case of the *St. Catherine's Milling and Lumber Co.* (1), Ritchie, C. J., said: "I am of opinion that all ungranted lands in the Province of Ontario belong to the Crown as part of the public domain, subject to the Indian right of occupancy in cases in which the same has not been lawfully extinguished; and when such right of occupancy has been lawfully extinguished, absolutely to the Crown, and, as a consequence, to the Province of Ontario."

These observations will apply with equal, if not greater, force to the Indian Reserve lands in this Province, which would not be affected by the Royal Proclamation of 1763, which recognized the right of possession of several tribes of Indians to lands in old Canada and elsewhere; nor to the treaty of 1873, by which the Indians within the limits of the Province of Ontario surrendered their right of possession to the Government of Canada, reserving certain privileges of hunting, etc.

It was one of the contentions before the Privy Council, in the *St. Catherine's Milling and Lumber Co. Case* (1), that the grant to the Dominion Parliament, by sec. 91 of the British North America Act, of the legislative power over lands reserved for the Indians, carried with it by implication a grant of the proprietary right, and any interest which the Crown might have had in the reserved lands. But Lord Watson, delivering the opinion of the Judicial Committee, said on this subject: "Their lordships are unable to assent to the argument for the Dominion, founded on sec. 92 (24). There can be no *à priori* probability that the British Legislature, in a branch of the statute-

(1) 13 Can. S. C. R. 577. (2) 14 App. Cas. 46.

which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets (sec. 109). The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion, is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title."

Here, again, it seems to me that the arguments used in favor of the provincial rights are stronger than in the St. Catherine's case, because, in this Province, the estate of the Crown in the land in dispute in this action is not encumbered (so far as appears by the evidence) by any Indian title.

Referring to sec. 109 of the British North America Act, Lord Watson says: "The enactments of sec. 109 are, in the opinion of their lordships, sufficient to give to each Province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under sec. 108, or might assume for the purposes specified in sec. 117. (Fortifications or defence.) Its legal effect is to exclude from the 'duties and revenues' appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the Provinces."

There never has been any doubt in this Province, that the title to the land in the Province reserved for the use of the Indians, remained—like all the other ungranted lands—in the Crown, the Indians having, at most, a right of occupancy. The Act 7 Vic. cap. 47, passed with a suspending clause, and confirmed by the Queen in 1844, fully recognized this. That Act was continued by the Revised Statutes of the Province, cap. 85, enacted in 1854. That chapter, of course, ceased to have any operation when the Dominion Parliament legislated on the subject; but the right of the Crown, as represented by the Government of this Province, to manage and sell the lands

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reserved for the use of the Indians, remained in the Executive Government of this Province, under sub-section 5 of section 92 of the British North America Act.

I therefore think that the grant under which the plaintiff claimed was inoperative, and conveyed no title; and that there should be a new trial, as there was no evidence to sustain the verdict against the defendants, Oliver, Thaddy and Joseph Lucien Cormier.

FRASER, J. I agree with the learned Chief Justice.

PALMER and KING, JJ., not having heard the argument, took no part.

The Court being equally divided, the verdict stood.

1890.

October 10.

WINSLOW v. VERNER.

Principal and surety—Promissory note—Accommodation indorsement—Amount of note, when paid, to be credited on mortgage held by creditor—Sale of property under mortgage without indorser's knowledge—Whether liability as surety discharged—Equitable plea.

C. purchased from P. a ferry boat, on which there were two mortgages, the first of which was held by the plaintiff, and gave in part payment a promissory note, indorsed by defendant as surety for C., plaintiff knowing that fact. It was agreed at the time between C. and P. that the amount of the note, when paid, was to be credited on the mortgage. After the note fell due and was dishonored, plaintiff, at the request of C. and P., but without defendant's consent, sold the boat under his mortgage, and it was purchased by C., it being agreed that when the note was paid the title should be transferred to C. In an action by plaintiff on the note:

Held, on demurrer to defendant's plea (PALMER, J., dissenting), that even if the sale of the boat by the plaintiff without any transfer of the title would prejudice the defendant's right as surety, such a ground of defence would only be available as an equitable plea, and that such pleas were not authorized by the practice of this Court.

This was an action by the indorsee against the indorser of a promissory note for $650, made by one Amasa E. Coy in favor of the defendant.

The defendant pleaded (*inter alia*) as follows:

4th. That he indorsed the note for the accommodation of

place in the presence of the defendant, without any legal objection on his part. He has now brought his action to set aside the *decret*. We think he is not entitled to succeed in this action, and that the judgment at Industry Village must be confirmed.

MONK, A. J.—The publications were regularly made in the *Canada Gazette*, but were entirely omitted at the Church door. He was of opinion that in this case the writ of *rend. ex.* might go ont, as previous publication would be an utterly useless waste of money.

BERTHELOT, J., dissented from the majority of the Court, being of opinion that the publication of the sale under the execution should have been made at the church door, and that the absence of this formality invalidated the sale under the *venditioni exponas*.

RUSSY *v.* LAMOUREUX.

Action to recover damages. Judgment dismissing the action confirmed.

BADGLEY, J.—This was a case from the District of Richelieu. The action was brought to recover damages for injuries alleged to have been sustained by the *Seaflower*, in the spring of 1862, at Sorel. The vessel was lying on the North shore when the ice in the Sorel harbour gave way, and carried down the *Seaflower* to the middle of the channel. As in this position she impeded the efforts which were being made to save the vessels, and as she had no known proprietor, the Harbour Master, with the consent of Voligny, agent of the Richelieu Company, brought her to her former position, and it was supposed that she had been secured in a place of safety. But some nights after, when the water rose from the St. Lawrence ice coming down, the vessel not being fastened to the shore was carried down and landed on the river's bank, half a mile lower down, where she lay during the ensuing summer and was much injured. The value put upon the vessel had been greatly exaggerated; but, apart from this, the defendant could not be held responsible for damages, the act complained of being the act of the Harbour Master with the consent of the agent of the Richelieu Company; and therefore the judgment dismissing the plaintiff's action would be confirmed.

COMMISSIONER OF INDIAN LANDS *v.* JANNEL.

HELD—*That the sale of Indian Lands without authority from the Commissioner is illegal.*

BADGLEY, J.—The defendant having bought a piece of land from the Abenaqui Indians without any authority from the Commissioner, the latter brought the present action to revendicate this land, as sold without any authority from him. The plea was that the land was out of the precincts of the Indian Village. The statute did not draw any distinction of this kind. It extended to all the lands of the tribe. The defendant never got any authority, though others did. There was no doubt about the land in question belonging to the Indian tribe. The statute was precise: and therefore the judgment of the court below in favour of the plaintiffs must be confirmed.

SUPERIOR COURT.

Montreal, 30th December, 1865.

BERTHELOT, J.

IRISH *v.* BROWN.

Motion to reject exception à la forme attacking the truth of bailiff's return, dismissed.

In this case a writ of *saisie-arrêt* before judgment had issued, and a motion was made to reject the exception *à la forme*, because it attacked the bailiff's return, and it was contended that the bailiff's or sheriff's return could only be attacked by an inscription *de faux*. The defendant replied to this that it was necessary in the first place to fyle an exception a la forme in order that there might be some proceeding on which to base an inscription *de faux*, if he chose to take that proceeding subsequently. Motion for rejection of exception dismissed.

CIRCUIT COURT.

FERGUSON *v.* JOSEPH.

Prescription of thirty years for overhanging trees.

This was an action to recover $100 damages, said to have been caused to the garden and fruit trees of the plaintiff, by the growth of seven poplar and willow trees close to the fence dividing the plaintiff's property from that of the defendant. The plaintiff alleged that these trees had extended their roots and branches so that the latter overhung his property, and that caterpillars, insects and worms had migrated from the defendant's poplar and willow trees to the plum and other fruit trees of the plaintiff, and had done considerable injury. The plea of the defendant was that the poplar and willow trees had stood there for more than thirty years, in fact for fifty or sixty years, without any objection being raised by plaintiff or his predecessors, and that prescription had been acquired. The Court was of opinion that prescription had been proved, and that it was not through the fault or negligence of the defendant that the damage complained of had been suffered. The plaintiff's action would therefore be dismissed with costs.

MONK, J.

LEROUX *v* BRUNEL.

Action to recover damages for slander; $50 awarded.

This was an action of damages for slander. The defendant was about to purchase some property from Lachapelle, a brother-in-law of the plaintiff, but he had refused to execute the deed, at the instigation of the plaintiff, and an action had been brought against him which was now pending. On the 5th of April, 1864, Lachapelle received a most extraordinary letter, in which the defendant (who seemed to be a man of education, and who was probably annoyed that Leroux should have interfered with the sale) proceeded to put Lachapelle on his guard against his brother-in-law, the present plaintiff, and depicted him as a scoundrel in almost every form that could be imagined.

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BETWEEN:

HIS MAJESTY THE KING on the Information of the Attorney General of Canada, ... PLAINTIFF;

AND

COWICHAN AGRICULTURAL SOCIETY, ... DEFENDANT.

Crown—Indian Act, R.S.C. 1906, c. 81, s. 51—Lease of surrendered Indian Reserve lands not valid without direction of Governor in Council—No estoppel to defeat express requirements of statute.

The plaintiff sought a declaration that a lease of certain lands, dated October 16, 1912, and made by the Superintendent General of Indian Affairs to the defendant, was null and void on the ground that it had been made without the direction of the Governor in Council. The lands are at Duncan on Vancouver Island in British Columbia and formed part of the Indian Reserve of the Somenos Band of Cowichan Indians. They had been surrendered by the Indians on June 29, 1888, on certain conditions and leased for 21 years by the Superintendent General to the defendant to enable it to erect an agricultural hall and lay out the grounds to hold annual exhibitions. The lease was renewed on November 29, 1905, for a further period of 21 years and subsequently a new lease, dated October 16, 1912, for 99 years was made. The surrender was accepted by the Governor in Council by Order in Council P.C. 1880, dated August 16, 1888, which gave authority for the issue of a lease to the defendant but no Order in Council was ever passed with reference to the lease of October 16, 1912.

Held: That section 51 of the Indian Act requires a direction by the Governor in Council before there can be a valid lease of surrendered Indian lands, that the responsibility for controlling the leasing of such lands thus vested in the Governor in Council cannot be delegated to the Superintendent General of Indian Affairs or any one else and that a lease of such lands without the direction of the Governor in Council is void. *St. Ann's Island Shooting and Fishing Club Ltd. v. The King* (1950) Ex. C.R. 185; (1950) S.C.R. 211 followed.

2. That there cannot be an estoppel to defeat the express requirements of a statute, particularly when they are designed, as section 51 of the Indian Act is, for the protection of the interests of special classes of persons.

ACTION for a declaration that a lease of surrendered Indian Reserve lands made without the direction of the Governor in Council is null and void.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Victoria.

F. A. Sheppard K.C. and *A. H. Laidlaw* for plaintiff.

D. M. Gordon for defendant.

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

THE PRESIDENT now (October 21, 1950) delivered the following judgment:

This is an action for a declaration that a lease of certain surrendered Indian Reserve lands made by the Superintendent General of Indian Affairs to the defendant, dated October 16, 1912, is null and void.

The facts have been agreed upon in a statement with supporting documents. The defendant was incorporated in 1888 under the name of Cowichan and Salt Spring Island Agricultural Society and changed its name to its present form in 1913. The lands in question are on Vancouver Island in British Columbia in what is now the City of Duncan and form part of the Indian Reserve of the Somenos Band of Cowichan Indians. On March 24, 1888, the defendant applied to the Department of Indian Affairs for a lease of the lands, comprising 5 acres more or less, to enable it to erect an agricultural hall and lay out grounds to hold annual exhibition shows. On June 29, 1888, the Chief and principal men of the Somenos Band of Cowichan Indians surrendered the lands to Her Majesty the Queen subject to the following conditions:

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to lease and surrender the same to the Cowichan and Salt Spring Island Agricultural Society upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the lease and surrender thereof, shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever.

By Order in Council P.C. 1880, dated August 16, 1888, the said surrender was accepted by the Governor in Council and authority was given for the issue of a lease to the defendant, "at a nominal rental, but on the condition that the Indians of the Somenos Band shall have the right to use the grounds should they at any time wish to hold an Agricultural Exhibition." In November, 1888, the Superintendent General of Indian Affairs executed a lease of the lands to the defendant for a term of 21 years to be computed from September 1, 1888, at a rental of $1.00 per year,

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with the condition that the defendant "will allow the Somenos Band of Cowichan Indians to have the use of the property hereby demised should they at any future time or times wish to hold a separate exhibition." On July 9, 1894, the defendant applied to the Superintendent General for a Crown grant of the lands on the grounds that the defendant had put up buildings and made improvements worth $3,000 or $4,000 and that "greater encouragement would be given to the Society to improve the said property were it their own." On October 29, 1894, the Chief and principal men of the Somenos Band of Cowichan Indians surrendered the lands to Her Majesty the Queen "in trust to sell the same to the Cowichan & Salt Spring Agricultural Society". This surrender was never accepted. On January 15, 1895, the Superintendent General informed the defendant by letter that the Department of Indian Affairs could not give the defendant title in fee simple because of the unsettled question between the Government of British Columbia and the Federal Government as to the reversionary right of the former in Indian Reserves but that it would be prepared to renew the lease for as long a period as desired and follow the same up with a patent when the general question affecting the title to Indian Reserves was disposed of. On March 8, 1904, the defendant wrote to the Indian Agent at Duncan asking, if it was still impossible to grant a patent, to have the existing lease cancelled and a new lease granted for 50 years, the reason for the request being that the defendant contemplated making extensive improvements to its Agricultural Hall and that before starting on this work it would like to have a renewal of the lease for a longer period. On June 29, 1904, the Secretary of the Department of Indian Affairs informed the defendant that "in view of representations made that an extension of the lease is desired in view of contemplated extensive improvements to Agricultural Hall, the Department will renew the present lease at its expiration on the 1st September 1909, for a further term of twenty-one years, upon the same terms." On November 29, 1905, the Deputy Superintendent General without waiting for the expiry of the lease, extended it for a further period of twenty-one years from

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December 1, 1909, "upon the same terms and conditions" by an endorsement thereon. On a further request for a longer lease the Assistant Deputy Superintendent General, on July 13, 1912, informed the Indian Agent at Duncan that it had been decided to issue a new lease to the defendant for a term of 99 years. On September 5, 1912, the defendant in consideration of a new lease surrendered its lease of September 1, 1888, and the renewal thereof. On September 9, 1912, the Cowichan Indians through their solicitors protested against a further lease of their reserve, to which the Assistant Deputy Superintendent General replied on October 11, 1912, that the surrender of the Indians was absolute and the Department was satisfied that the proposed lease was not detrimental to the interest of the Indians. On October 7, 1913, the Superintendent General wrote to the defendant asking whether it would agree to pay $450 yearly as rental for the leased lands, being on the basis of 3 per cent of their alleged value of $15,000. On October 28, 1913, the defendant replied that the suggested terms were not satisfactory. On November 28, 1913, the Deputy Superintendent General informed the defendant that "it is considered that the Company (meaning the defendant) have a vested interest in the property in question, entitling them to favourable consideration as to extension of lease, and it has, therefore, been decided to extend the lease for a term of ninety-nine years, at a nominal rental." The clause permitting use of the property by the Somenos Band of Indians in case they desired at any future time to have a separate exhibition was retained. The new lease, dated October 16, 1912, was sent to the defendant for signature and was returned signed on December 9, 1913. Shortly thereafter the lease was executed by the Deputy Superintendent General and on December 15, 1913, an executed copy was sent to the defendant. No Order in Council was ever passed with reference to the extension of the lease of September 1, 1888, on November 29, 1905, or to the lease of October 16, 1912. By provincial Order in Council No. 1036 (B.C.), dated July 29, 1938, the title to all Indian Reserve lands in the Province of British Columbia was settled in the Dominion of Canada subject to the terms and conditions thereof.

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On April 11, 1944, the defendant wrote to the Indian Commissioner for B.C. referring to the letter from the Deputy Superintendent General, dated January 15, 1895, and requesting that, since the general question affecting Indian Reserves had been disposed of and the Department was now in a position to issue patents, means should be taken to grant the defendant a patent. On May 30, 1944, the Indian Commissioner for B.C. informed the defendant that the only valid surrender was that executed by the Indians in 1888, that such surrender was in trust to lease the lands, and that the Crown could not under the circumstances give title to the defendant without a further surrender from the Indians giving consent to such a transfer.

It was further agreed in the statement of facts that the defendant built a hall and other improvements on the leased lands in 1889, and built a new and larger hall in 1914 at a substantial cost, the funds being largely raised by the sale of debentures, that the Indian Agent at Duncan knew of these improvements, that the defendant had no notice until 1944 that the plaintiff or any one on his behalf questioned the validity of any of the leases to the defendant, and that the rents due under the respective leases had at all times been kept up by the defendant and accepted by the Indian Department.

Counsel for the plaintiff submitted that there were two reasons for finding that the lease of October 16, 1912, was void, the first being that it was not directed by the Governor in Council and consequently not authorized as required by section 51 of the Indian Act, R.S.C. 1906, chap. 81, and the second that it was a condition of the surrender of June 29, 1888, that the proceeds from any lease should be invested for the Indians, which connoted a lease at a substantial rent, and that since the lease was only for a nominal rental there had been a breach of this condition.

Whether effect should be given to the first reason depends on the construction to be placed on section 51 of the Indian Act of 1906, which read as follows:

> 51. All Indian lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part.

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The section was in substantially the same form in the 1886 Revision, R.S.C. 1886, chap. 43, section 41, and remained unchanged in the 1927 Revision, R.S.C. 1927, chap. 98, section 51.

Counsel for the defendant argued that no specific Order in Council was required for the 1912 lease, that section 51 contemplated merely a control by the Government of general matters of policy affecting surrendered Indian Reserve lands and that this did not extend to administrative details such as the issue of a particular lease, that the Order in Council of August 16, 1888, accepting the surrender, gave authority for the issue of a lease to the defendant and that this gave the Superintendent General of Indian Affairs authority to issue not only the lease of September 1, 1888, but also successive leases, such as the extension of November 29, 1905, and the 99 year lease of October 16, 1912, and that consequently this lease was valid although there was no specific direction for its issue by the Governor in Council.

I am unable to agree that the statutory requirements imposed by section 51 of the Indian Act are subject to the limitation implied in this argument. In my judgment, the decision in *St. Ann's Island Shooting and Fishing Club Ltd.* v. *The King* (1) is conclusively against such a narrow view of the section. There the claimant sought a renewal of a lease of certain surrendered Indian lands in the County of Kent in Ontario, dated May 19, 1925, made by the Superintendent General of Indian Affairs to trustees for the claimant, pursuant to a provision in the lease for such renewal, but the validity of the lease was called in question on the ground that there had been no Order in Council directing it, although an earlier lease, dated May 30, 1881, had been confirmed by an Order in Council. The issue before the Court was thus the same in principle as that now under discussion. And the claimant's arguments in support of the validity of the lease were similar to those advanced in this case. These were carefully considered by Cameron J. and rejected. He was of the opinion that section 51 of the Indian Act was imperative in its requirements that only by a direction of the Governor in Council could surrendered Indian lands be validly managed, leased

(1) (1950) Ex. C.R. 185; (1950) S.C.R. 211.

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or sold, and that the disposition of such lands was thereby placed directly under the control of the Government. His conclusion was that the section required an Order in Council as the necessary preliminary to the validity of the 1925 lease and that since there was no Order in Council referable to it there had been non-compliance with the imperative provisions of the section and the lease and the provisions for renewal therein were void. In the Supreme Court of Canada the judgment of this Court was unanimously affirmed. Kerwin J. agreed with the opinion of Cameron J., and Taschereau J., speaking also for Locke J., took the same wide view of section 51 of the Indian Act and held that although the original lease of 1881 had been approved by an Order in Council this did not authorize the Superintendent General of Indian Affairs to make the lease of 1925 and the imperative terms of section 51 required a new Order in Council for its validity. And Rand J., speaking also for Estey J., agreed that section 51 required a direction by the Governor in Council for a valid lease of Indian lands. At page 219 he gave a convicing reason for the wide view that ought to be taken of the section:

> The language of the statute embodies the accepted view that these aborigines are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.

It was his opinion that the efficacy of the Order in Council confirming the original lease was exhausted by it and that before a new lease could be considered valid it must appear that it was made under the direction of the Governor in Council.

The principles thus laid down in the *St. Ann's* case (*supra*) ought to be applied in this one. It must, I think, be considered settled law that section 51 of the Indian Act requires a direction by the Governor in Council before there can be a valid lease of surrendered Indian Reserve lands, that the responsibility for controlling the leasing of such lands thus vested in the Governor in Council cannot be delegated to the Superintendent General of Indian Affairs or any one else and that a lease of such lands with-

out the direction of the Governor in Council is void. It follows that since the lease of October 16, 1912, was made without a direction by the Governor in Council it is void and the Court so declares.

This finding makes it unnecessary to deal with the second reason advanced for submitting that the lease was invalid. Moreover, the question whether a lease at a nominal rental was inconsistent with the conditions of the surrender of 1888 and, therefore, void could properly be the subject of judicial determination only if there were a lease at a nominal rental that had been made under the direction of the Governor in Council and such is not the case here.

There remains only the submission by counsel for the defendant, which he made one of his main arguments, that by reason of standing by and allowing the defendant to proceed with substantial improvements on the lands in question the Crown is estopped from contending that the lease is invalid for non-compliance with the requirements of section 51 of the Indian Act. I have considered the authorities submitted to me, including *Ramsden* v. *Dyson* (1), and the doctrine of equitable estoppel of which it was said to be the source, but have come to the conclusion that the authorities upon which the defendant relied do not apply to the facts of this case and that the defendant cannot set up any estoppel. In my judgment, there cannot be an estoppel to defeat the express requirements of a statute, particularly when they are designed, as section 51 of the Indian Act is, for the protection of the interests of special classes of persons. I follow the opinion on this subject expressed by Rand J. in the *St. Ann's* case (*supra*), although there was no argument on the subject of estoppel in that case when it came before the Supreme Court of Canada, and the views of Cameron J. in this Court who held, after full argument on the subject, that the Crown could not be estopped from alleging that the requirements of section 51 of the Indian Act had not been complied with.

For the reasons given there will be judgment declaring that the lease of October 16, 1912, is null and void. The plaintiff is also entitled to costs.

Judgment accordingly.

(1) (1866) 1 H.L. 129.

BETWEEN:

DIMENSIONAL INVESTMENTS LIMITED .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Toronto 1965 Nov. 22-26 Ottawa 1966 Feb. 25

Crown—Constitutional law—Indian lands—Contract for sale of surrendered Indian lands—Default in payment of price—Provision for termination of contract and retention of money paid—Whether a penalty or pre-estimate of damages—Petition of right—Right to repayment of money in excess of value of land acquired under contract—Equitable jurisdiction to relieve against penalty—"Penalty", meaning of—Exchequer Court Act s. 48—Construction of—Whether limited to public works—Unconscionability of retaining both land and payments.

By a contract dated March 14th 1959 the Crown agreed to sell suppliant some 3,100 acres of Indian lands at Sarnia, Ontario, which had been surrendered for sale. The price was $6,521,000 (approx.) of which $323,000 (approx.) was payable to individual Indians and $750,000 to the Crown on execution of the contract, $600,000 to the Crown in instalments within the following year and the balance on March 15th 1961. Interest was payable on the unpaid balance at 5% per annum. The contract entitled suppliant to obtain grants of portions of the land on making additional pre-payments calculated on the area and location of the land to be granted but suppliant was not otherwise entitled to possession of any land until the price was paid in full. The contract provided that on failure by the purchaser to remedy any default in payment after 30 days' notice the vendor might terminate the contract and retain any moneys paid thereon as liquidated damages and not as a penalty, and time was declared to be of the essence. Suppliant paid $2,323,000 (approx.) under the contract, of which $973,000 (approx.) was attributable to land actually taken up, but suppliant failed to make the final payment of $4,300,000 (approx.) due on March 15th 1961 or to remedy the default within 30 days of notice, and the Crown terminated the agreement on April 17th 1961. Suppliant had paid the Crown $1,350,000 more than the amount required for the lands granted, but $375,000 of that sum was paid by the Crown to individual Indians as required by the surrender and the Crown retained only $975,000 at the time suppliant presented this petition of right for repayment of the $1,350,000. Suppliant was not in a position to make any further payments on the contract.

Held, the petition must be rejected.

(1) While the provision of the contract that on default the Crown might retain sums paid as liquidated damages and not as a penalty was a penal provision rather than a genuine pre-estimate of damages, s. 48 of the *Exchequer Court Act* required that it be construed as importing an assessment of damages by mutual consent, thereby excluding the equitable jurisdiction to relieve against penalties. The word "penalty" in s. 48 means a pecuniary amount. *In re Dagenham (Thames) Dock Co., Ex. parte Hulse* (1873) L.R., 8 Ch. App. 1022 per Mellish L.J. at

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p. 125; *Kilmer v. B.C. Orchard Lands Ltd.* [1913] A.C. 319 per Lord Moulton at p. 325 referred to; *Dussault et al v. The King* (1917) 16 Ex. C.R. 288, distinguished.

(2) Section 48 of the *Exchequer Court Act* is *intra vires* Parliament so far at least as it purports to apply to the legal effect of contracts entered into by or on behalf of the Crown in right of Canada (*Att'y Gen. Can v. Jackson* [1946] S.C.R. 489 per Kellock J. at p. 496), at any rate where the contracts relate to land reserved for Indians, a subject within the exclusive legislative competence of Parliament under s. 91(24) of the *B.N.A. Act*.

(3) Having regard to its plain and unambiguous language s. 48 of the *Exchequer Court Act* cannot be construed as restricted to contracts for the construction of public works and is broad enough to include the contract under review.

Semble, if the equitable jurisdiction to relieve against penalties were not excluded by s. 48 of the *Exchequer Court Act*, suppliant would be entitled to the relief sought on proper terms, which would include an opportunity for the Crown to set off any loss sustained from suppliant's failure to make payments when due and limit the amount to be repaid suppliant in any event to the $975,000 in the Crown's hands at the time the petition of right was presented.

There is equitable jurisdiction to grant relief if it would be unconscionable for the vendor to retain both the land and the money paid therefor, notwithstanding that there was no sharp practice by the vendor and although the purchaser is unable to complete the contract. *Stockloser v. Johnson* [1954] 1 Q.B. 476; *Walsh v. Willaughan* (1918) 42 D.L.R. 581, discussed; *Galbraith v. Mitchenall Estates Ltd.* [1964] 3 W.L.R. 454; *Campbell Discount v. Bridge* [1961] 1 Q.B. 445; *Steedman v. Drinkle* [1916] 1 A.C. 275; *Snell v. Brickles* (1914) 49 S.C.R. 260 per Duff J. at p. 371; *Boericke v. Sinclair* [1929] 1 D.L.R. 561, referred to.

PETITION OF RIGHT.

R. N. Starr, Q.C. for suppliant.

N. A. Chalmers and *A. M. Garneau* for respondent.

THURLOW J: This is a petition of right claiming the return of moneys paid by the suppliant under the terms of a contract for the sale to it by the Crown, represented by the Minister of Citizenship and Immigration, of a tract of some 3,100 acres of land at Sarnia, Ontario, being part of an Indian reserve surrendered to the Crown by the Indian band for the purpose of such sale. The suppliant having failed to make the final payment when it fell due the Crown terminated the contract pursuant to one of its provisions and in these proceedings takes the position that the suppliant's rights in the land (other than that conveyed pursuant to the contract) are at an end and that the Crown is entitled to retain the moneys paid by the suppliant on account of the purchase price. That the contract in terms so

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provides is not in doubt but the suppliant asserts that it is unconscionable for the Crown to retain the moneys and that relief from their forfeiture should be granted. The petition also includes several claims for damages for alleged breaches of the contract by the Crown but these were abandoned in the course of the trial.

The contract, which was dated March 14th, 1959, called for payment of a total purchase price of $6,521,946. Of this $323,763.63 was payable to individual Indians on execution of the agreement. The remainder was payable to the Receiver General of Canada over a two year period. Of the amount payable to the Receiver General $750,000 was to be paid on execution, a further $500,000 was to be paid in ten monthly instalments of $50,000 each, a further $100,000 in four quarterly instalments of $25,000 each, all within the space of one year or thereabouts after the execution of the contract and the balance on or before March 15th, 1961. In addition, the suppliant agreed to pay interest at the rate of 5 per cent. per annum on the unpaid balance "both before and after default and both before and after maturity" half yearly on the 15th days of March and September in each year but was entitled to pay any further amounts or the whole balance owing at any time without notice or bonus. Under further provisions the suppliant was to be entitled to a grant of the lands sold only on payment in full of the purchase price but in the meantime, when not in default, was entitled to obtain grants of portions of the land on making certain additional prepayments calculated on the area and location of the land to be conveyed. The suppliant was, however, not entitled to possession of any of the lands agreed to be sold until the same were granted or until the suppliant became entitled to a grant thereof and then only after sixty days' notice to the individual Indian occupying the same or in the case of land upon which an Indian was residing only after six months' notice. Paragraph 10 read as follows:

> The Purchaser convenants and agrees that if default be made in payment of the said purchase price and interest, and any part thereof, upon the days and times herein before provided, or if default be made in the performance or observation of any of the covenants, agreements and stipulations to be performed and observed by the Purchaser, the Minister shall be entitled to give the Purchaser thirty days' notice in writing requiring it to remedy such default, and upon such notice having been given and such default not having been remedied, this agreement shall, at

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the option of the Minister, be terminated and all rights and interest hereby created or then existing in favour of the Purchaser or derived by it under this agreement with respect to the lands not already granted to the Purchaser shall cease and determine, and the Minister shall be entitled to retain any moneys paid under this agreement as liquidated damages and not as a penalty.

By paragraph 13 it was agreed that time should be of the essence of the agreement and that no extension of time for any payment by the suppliant or for rectification of any breach should operate as a waiver of the provision as to time being of the essence with respect to any other payment or rectification or extension of time except as specifically granted in writing by the Minister.

The suppliant paid the sums payable on execution of the contract and, though it initially defaulted in paying several of the monthly and quarterly instalments of purchase price and several interest payments when due, it succeeded in making each of such payments in full prior to the termination of the thirty-day period provided for in paragraph 10 and on March 14th, 1961 was not in default. In the meantime following the making of the agreement the suppliant had paid for and obtained grants to its nominees of certain portions of the land and on March 15th, 1961 the balance of the total purchase price remaining unpaid stood at $4,198,549.15. That amount together with $107,408.28 for interest fell due on March 15th, 1961 and was not paid. On that or the following day the Minister pursuant to paragraph 10 gave the suppliant thirty days' notice to remedy the default and on April 17th, 1961, the money not having been paid, the Minister terminated the agreement.

From its inception the principal promoter of the suppliant company had been a Mr. S. Ray, a man of experience in the real estate business. He had invested a large part of his means in the venture but had become incapacitated in February 1960 by an illness from which he subsequently died. From the time when he took ill his son, Howard Ray, a pharmacist, assumed and thereafter conducted the affairs of the suppliant company. Having committed the remainder of his father's means in making an interest payment of more than $100,000 Howard Ray endeavoured to interest persons of means in backing the venture and as the time for payment of the final instalment of the price approached he succeeded in interesting at least two financially capable

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prospects to the extent given the time to look thoroughly into the situation either might have been prepared to put up funds in the vicinity of $1,000,000 to be paid on account on the granting of further time in the order of three years to pay the balance. Overtures were therefore made to the Minister with a view to obtaining an extension of the time for payment but came to nought.

The total amount which had been paid by the suppliant on account of the purchase price was $2,323,396.85 which amount, it is agreed was $1,350,000 in excess of what was required under the terms of the contract to pay for land granted to the suppliant or its nominees. Of the $1,350,000, however, $375,000 had been paid out to individual members of the Indian band in accordance with one of the provisions of the surrender requiring the Crown to disburse at once to members of the band one-half of certain moneys received in respect of the band interest in the land. The surrender itself is referred to in all three recitals of the contract for the sale of the land and distribution by the Crown in accordance with the terms of the surrender of moneys paid by the suppliant must, I think, be treated as having been within the contemplation of the parties to the contract. At the time of the commencement of these proceedings, however, at least $975,000 of the amount paid by the suppliant had not been disbursed but remained in the hands of the Crown as trustee for the Indian band.

The suppliant's case is that the provision of paragraph 10, that on termination of the contract the Crown might retain any moneys paid under the agreement "as liquidated damages and not as a penalty", was not a genuine pre-estimate or assessment by the parties of damage likely to result from breach but was in the nature of a penalty, that in the circumstances of the case it is unconscionable for the Crown to terminate the suppliant's rights in the land and retain the $1,350,000 as well, that the evidence shows that the Crown, having retaken the land, suffered no damage as a result of the suppliant's failure to pay the balance of the purchase money and that on the equitable principles expounded by the majority of the Court of Appeal in *Stockloser v. Johnson*[1] the $1,350,000 should be repaid.

[1] [1954] 1 Q.B. 476.

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The Crown answers this case at three points. It submits, first, that on ordinary principles of interpretation the provision in question was not of a penal nature but a genuine pre-estimate of damage, secondly, that in any event s. 48 of the *Exchequer Court Act*[1] requires that the provision be so interpreted and that when so interpreted the suppliant must fail, and, thirdly, that even on the principles of the *Stockloser* case upon which the suppliant relies, it is not unconscionable in the circumstances of this case for the Crown to forfeit the suppliant's rights in the land and to retain the money in question as well and that no case for equitable relief has been established. Several further points of a more technical nature were also raised in defence but though they were not abandoned neither were they pressed and in view of the conclusion I have reached it is not necessary to state or deal with them.

The first question to be determined is accordingly whether the provision of clause 10 of the contract authorizing the Crown to retain the money paid on account of the purchase price should be interpreted as being a genuine pre-estimate by the parties of the damages expected to result from breach of the contract by the suppliant. It was conceded that the suppliant must fail if the provision is to be interpreted as a genuine pre-estimate of such damage but the question is not resolved merely by referring to the assertion to that effect in the provision itself and cases are not hard to find wherein sums have been held to be liquidated damages though called penalties in the contracts and *vice versa*.[2] Here despite the fact that the contract provides for the retention of the money "as liquidated damages and not as a penalty" in my opinion the whole of paragraph 10 is a penal provision and the provision for retention of the money is a penalty in the sense in which that term is commonly used to refer to a pecuniary amount to be paid or forfeited as a punishment in a particular situation.

The principle which, in my view, leads to this conclusion was stated by Mellish L.J. in *In re Dagenham (Thames)*

[1] R.S.C. 1952, c. 98.

[2] *Vide Clydebank Engineering and Shipbuilding Co. Ltd. v. Castaneda* [1905] A.C. 6 and *Kemble v. Farren* (1829) 6 Bing. 141; 130 E.R. 1234.

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Dock Company, Ex. Parte Hulse[1], and was later approved and followed by the Privy Council in *Kilmer v. British Columbia Orchard Lands Limited*[2] and *Steedman v. Drinkle*[3]. In the *Dagenham* case Mellish L.J. put the point as follows at page 1025:

> I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty. Here, when you look at the last agreement, it provides that if the whole £2000 with interest, or any part of it, however small, remains unpaid after a certain day, then the company shall forfeit the land and the portion of the purchase-money which they have paid. It appears to me that this is clearly in the nature of a penalty, from which the Court will relieve.

Here paragraph 10 provides for the same consequences if default is made "In payment of the purchase price and interest, or any part thereof" upon the days and times thereinbefore provided—in which case the real damage might be very large or very trifling—and this appears to me to be precisely the kind of provision to which Mellish L.J. was referring. Moreover, the total money from time to time paid on account was to increase by payments during the first year and in this respect the case resembles the *Kilmer*[4] case where Lord Moulton said at page 325:

> The circumstances of this case seem to bring it entirely within the ruling of the *Dagenham Dock Case* L.R. 8 Ch. 1022. It seems to be even a stronger case, for the penalty, if enforced according to the letter of the agreement, becomes more and more severe as the agreement approaches completion, and the money liable to confiscation becomes larger.

Paragraph 10 therefore appears to me to be clearly of a penal nature and to constitute a mere security for the performance of the contract.

It was submitted on behalf of the Crown that the practical danger of loss to the Crown inherent in the making of this contract lay in the chance that the purchaser might abandon the contract after paying for and obtaining conveyances of the best of the land during the two year period leaving the Crown with unsaleable and perhaps landlocked portions, that this was the possibility against which paragraph 10 was intended to provide and that since the land

[1] (1873) L.R., 8 Ch. App. 1022.
[2] [1913] A.C. 319.
[3] [1916] 1 A.C. 275.
[4] [1913] A.C. 319.

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would have been tied up during the two year period and might in the meantime have fallen in value there might be great difficulty experienced in making an accurate assessment of the Crown's loss in the event of the purchaser abandoning the contract and that in these circumstances the provisions for retention of the money by the Crown was in fact a genuine pre-estimate of anticipated damage. While this submission is not unattractive I do not think it can prevail. The suggested inference as to the purpose of the paragraph is, I think, considerably weakened by the fact that the contract itself provides different prices to be paid by the purchaser to obtain conveyances of different parts of the land. But apart from this the fact is that the provisions of paragraph 10 apply in many possible situations other than that suggested and the fallacy in the submission becomes I think apparent when one considers that the same amount would be retained as "liquidated damages" even if what had been taken up had been the least saleable portions of the land. Accordingly I reject this submission and but for s. 48 of the *Exchequer Court Act* I would hold that paragraph 10 was a penal provision.

I turn therefore to the Crown's alternative submission that s. 48 of the *Exchequer Court Act* applies and requires the Court to interpret paragraph 10 as importing "an assessment by mutual consent of the damages caused by" the suppliant's default even though on ordinary principles of construction the paragraph might be interpreted otherwise. Since the construction of s. 48 depends on the preceding section I quote it as well.

> 47. In adjudicating upon any claim arising out of any contract in writing the Court shall decide in accordance with the stipulations in such contract, and shall not allow
>
> (a) compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein, or,
>
> (b) interest on any sum of money that the court considers to be due to the claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown.
>
> 48. No clause in any such contract in which a drawback or penalty is stipulated for on account of the non-performance of any condition thereof, or on account of any neglect to complete any public work or to fulfil any covenant in the contract, shall be considered as commina-

tory, but it shall be construed as importing an assessment by mutual consent of the damages caused by such non-performance or neglect.

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Before considering the question of the applicability of s. 48 it will be convenient to deal with a submission put forward on behalf of the suppliant that the provision interferes with property and civil rights in the province and is *ultra vires*. Sections 47 and 48 have been in the *Exchequer Court Act* with but immaterial alteration since their enactment by c. 16 of S. of C. 1887. By s. 15 of the same statute the jurisdiction of this Court was redefined so as to make it clear that the Court had jurisdiction in respect of claims arising upon contracts entered into by or on behalf of the Crown in right of Canada, and it is worthy of note that in *The King v. Paradis & Farley*[1] Taschereau J. (as he then was) in considering s. 47 first referred to the provision by which the jurisdiction in respect of claims on contracts was conferred. As the subject matter with which s. 47 deals is what this Court may do "in adjudicating upon any claim arising out of any contract in writing" it seems clear that what is being referred to is the kind of contract upon which claims may arise in respect to which the jurisdiction of the Court may be exercisable. From this it appears to me that s. 47 refers, at least for the most part, if not exclusively, to claims arising on contracts entered into by or on behalf of the Crown in right of Canada. Since the contracts to which s. 48 applies are defined by the words "any such contract" the same comment appears to me to apply to the scope of that section as well. Though I am not aware of any case in which the precise point has been determined, I am of the opinion that it lies within the legislative competence of Parliament with respect to "matters not coming within the classes of subjects by this Act[2] assigned exclusively to the legislatures of the Provinces" to prescribe the legal effect of contracts to be entered into by or on behalf of the Crown in right of Canada, whether such effect is to be decided in this or any other court,[3] and to the extent that s. 48 purports to apply to such contracts (which is sufficient for the present case) if not to any further extent, it is, I think, *intra*

[1] [1942] S.C.R. 10 at p. 18.

[2] *B.N.A. Act*, 1867, s. 91.

[3] See Kellock J. in *Attorney General of Canada v. Jackson* [1946] S.C.R. 489 at 496.

See also the analysis of the subject of the rights and responsibilities of the Crown in *The Queen v. Murray et al.*, [1965] 2 Ex. C.R. 663.

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vires. Moreover even if, contrary to this view, the prescribing of the legal effect of contracts to be entered into by or on behalf of the Crown in right of Canada is not in all cases within the legislative competence of Parliament, the prescribing of the legal effect of such contracts where the same relate to "lands reserved for the Indians" seems to me to fall within the legislative competence of Parliament under s. 91 (24) of the *British North America Act*, 1867 and this alone appears to me to furnish a sufficient basis to support the provision in its application to the present case. I therefore reject the suppliant's submission.

To what contracts of the Crown then do these sections apply? On this question counsel for the suppliant made two submissions, first that s. 48 must be read along with ss. 46, 47 and 49 and that when so read it becomes clear that s. 48 is intended to apply only to the types of contracts for the construction of public works referred to in s. 47, and secondly that since s. 48, when applicable, abrogates what would otherwise be the rights of parties to contracts it should be construed strictly and applied only to contracts falling clearly within its terms, that when read strictly the section is ambiguous and that it should not be allowed to apply to a contract of the kind here in question which is not clearly one of the kind contemplated.

I am unable to accept either of these submissions. Sections 46 and 49 do not deal with claims arising upon contracts but with principles to be applied by the court in determining compensation for injury to property or for property taken for or injuriously affected by a public work. While their proximity to ss. 47 and 48 as well as their inclusion in the group of sections headed "*Rules for Adjudicating Upon Claims*" may suggest that the draftsman's attention may have been principally occupied with situations in which public works would be involved I do not think that anything in the heading or in ss. 46 and 49 can be allowed to restrict the plain meaning of the language used in ss. 47 and 48. There does not appear to me to be any limitation by reference to subject matter on the kinds of contracts to which s. 47 refers and indeed there seems to be no limitation of the meaning of the word "contract" in the section beyond (1) that implicit in the reference to adjudication by the court which, as I have indicated, appears to me to limit the kind of contracts referred to to

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those upon which claims in respect of which this court has jurisdiction may arise and (2) that found in the words "in writing". This, I think, is the scope of the kinds of contracts referred to in the first clause of s. 47, which is a positive provision, and as I read the section nothing in the two specific prohibitory clauses which follow serves to narrow or restrict that scope. It is contracts of the same kind to which the expression "any such contract" in s. 48 in my opinion refers and while I do not quarrel with the submission that the section should be applied only to cases falling clearly within the meaning of the expressions used I think that the expression used in s. 48 is not ambiguous and is broad enough to include the contract in question in these proceedings.

A further point as to the application of s. 48 is whether the provision in paragraph 10 of the contract authorizing the Crown to retain the money was one stipulating for a "penalty" within the meaning of that term in s. 48. The meaning of the word "penalty", when used as a noun, can vary depending on the context in which it is found. In s. 48 the context by referring to a "drawback" and to "an assessment by mutual consent of damages" suggests to me that "penalty" is used in the sense of a pecuniary amount rather than in the broader sense in which it may refer to other types of punishment as well. Subject to this, however, in its context the expression "in which a drawback or penalty is stipulated for" appears to me to be concerned with the substance or character of what is stipulated for rather than with its form or the manner of its enforcement and to contain no limitation by reference to the form or the manner of enforcement of the stipulation.

In the present case what paragraph 10 provided was that upon the suppliant's default continuing beyond the thirty-day period, the Crown might terminate the suppliant's rights in the land and retain the money paid on account as well. But for the latter provision, on termination of the contract, a right to the return of the money paid on account would have arisen in favour of the suppliant[1] and the provision for the abortion of this right appears to me to

[1] *Mayson v. Cluett* [1924] A.C. 980; *Dies v. British and International Arms Co.* [1939] 1 K.B. 724; *Cronholm v. Cole* [1928] 3 D.L.R. 321; *York v. Krause* [1930] S.C.R. 376.

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have in itself all the attributes of and to be a pecuniary penalty.

The only reported case on the interpretation of s. 48 of which I am aware is *Dussault et al v. The King*[1] where Audette J. after posing a series of questions with respect to its application seems to have held, though not without hesitation, that the section would not apply where no damage arises from the breach for which the penalty is stipulated. In the Supreme Court,[2] however, the judgment turned on other provisions of the contract to which s. 48 did not apply.

As what s. 48 prescribes is a rule of construction, which it seems to me must be applicable at and from the time when the contract is made, I have some difficulty in understanding how that construction can be affected by a subsequent event, that is to say, that the Crown happens to suffer no damage from the breach, but in any case I do not think the *Dussault* case applies in the present instance since I do not think it has been shown that the Crown suffered no damage to which that expression in the section could apply. There were answers given on discovery as to prospective and actual damage which were read at the trial and some answers were given as well in the course of the evidence of David Vogt but all that appears to me to have been established by them is that on the assumption that the Crown would be in a position to terminate the suppliant's rights in the land and keep the money paid on account of the price as well no loss was expected to result or did result from breach or default on the part of the suppliant and that there may or may not have been damage through decline in value of the land during the two year period when the contract was in force. In the *Dussault* case the fact that the Crown had suffered no loss from the suppliant's breach of contract clearly appeared. The situation in the present case is thus distinguishable on the facts from that considered by Audette J. and I am unable to see any other means of escape for the suppliant from s. 48. As the effect of that section is that the provision for retention by the Crown of the money must not be considered as punitive but on the contrary must be construed as importing an assessment by mutual

[1] (1917) 16 Ex. C.R. 228 at 236 *et seq.*
[2] (1917) 58 S.C.R. 1.

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consent of the damage caused by the breach, there appears to me to be no basis on which the suppliant can be afforded any of the relief claimed.

As this conclusion disposes of the case it is not strictly necessary to express any view on the complex and rather contentious question whether the suppliant would be entitled to relief even if s. 48 did not apply but since this judgment is based on s. 48 alone it may be desirable that I should express my view briefly in case it should be of some importance in the event of an appeal.

On this question it should first be noted that what the suppliant seeks by its petition of right is neither specific performance of the contract nor specific performance and, failing that, repayment of moneys paid on account. The suppliant is not in a position to pay the balance of the purchase price and interest, or to offer to perform the contract, so as to put the court in a position to decree that the money heretofore paid ought to be returned unless the Crown elects to waive the provisions of paragraphs 10 and 11 and to complete its part of the contract on the usual terms as to payment of the balance of the price and interest. In the course of an examination for discovery held in September 1963 counsel for the suppliant stated that if given two years to do so the suppliant would raise the necessary funds and complete payment for the property but notwithstanding the size of the amount required I do not think an offer to pay requiring so long an extension can be regarded as a reasonable offer to carry out a contract which stipulated that time was to be of the essence and that payment in full should be made in two years ending in March 1961.

There is a body of judicial opinion which holds that in the absence of fraud, sharp practice or other unconscionable conduct on the part of a vendor equitable jurisdiction to order repayment of purchase money paid on account in a situation of this kind, that is to say, where the purchaser has defaulted and the contract provides for retention of the money by the vendor on termination by him of the contract, depends on the readiness and willingness of the purchaser to complete the contract and can be exercised only as an alternative remedy where, though the purchaser is ready and willing to complete the contract, the court is not

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in a position to give the defaulting purchaser further time and to decree specific performance.

This appears to have been the opinion of Farwell J. in *Mussen v. Van Deimen's Land Co.*[1] and of Romer L.J. in *Stockloser v. Johnson*[2] and the basis of the judgment of the Appellate Division of the Supreme Court of Ontario in *Walsh v. Willaughan*[3].

Thus in *Stockloser v. Johnson* Romer L.J. said at p. 501:

> There is, in my judgment, nothing inequitable per se in a vendor, whose conduct is not open to criticism in other respects, insisting upon his contractual right to retain instalments of purchase-money already paid. In my judgment, there is no sufficient ground for interfering with the contractual rights of a vendor under forfeiture clauses of the nature which are now under consideration, while the contract is still subsisting, beyond giving a purchaser who is in default, but who is able and willing to proceed with the contract, a further opportunity of doing so; and no relief of any other nature can properly be given, in the absence of some special circumstances such as fraud, sharp practice or other unconscionable conduct of the vendor, to a purchaser after the vendor has rescinded the contract.
>
> My brother Denning in his judgment has referred to the hypothetical case which was suggested during the argument of a purchaser who buys a pearl necklace on terms that the purchase price is to be payable by instalments and that the vendor is to be entitled to get the necklace back and retain all previous payments if the purchaser makes default in the punctual payment of any instalment, even the final one. It would certainly seem hard that the purchaser should lose both the necklace and all previous instalments owing to his inability to pay the last one. But that is the bargain into which the purchaser freely entered and the risk which he voluntarily accepted. The court would doubtless, as I have already indicated, give him further time to find the money if he could establish some probability of his being able to do so, but I do not know why it should interfere further; nor would it be easy to determine at what point in his failure to pay the agreed instalments the suggested equity would arise.

This opinion was also adopted and followed in *Galbraith v. Mitchenall Estates Limited*[4], where Sachs J. preferred it to the opinions of Somervell and Denning L.JJ. in the *Stockloser* case and drew support for his preference from the opinions of several members of the Court of Appeal in *Campbell Discount v. Bridge*[5].

[1] [1938] Ch. 253.
[2] [1954] 1 Q.B. 476.
[3] (1918) 42 D.L.R. 581.
[4] (1964) 3 W.L.R. 454.
[5] [1961] 1 Q.B. 445. Reversed on another point [1962] A.C. 600.

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In *Walsh v. Willaughan*[1] the rule was stated by Mulock C.J. Ex., who spoke for the majority of the Court, as follows at page 585:

It is not the law that in all cases, upon the rescission of a contract by the vendor, the purchaser is entitled to a return of moneys paid on account of the contract. The conduct of a purchaser, as in this case, may fully justify rescission by the vendor and entitle to retain moneys paid on account of the contract.

Further, the conduct of the parties, after rescission, may be considered in determining whether a purchaser is entitled to relief from forfeiture of payments made on account. In support of his proposition Mr. Beck relies on *Boyd v. Richards*, 29 O.L.R. 119, 13 D.L.R. 865, and *Steedman v. Drinkle*, [1916] 1 A.C. 275, 25 D.L.R. 420. *Those cases do not decide that, under all circumstances, where a vendor rescinds a contract for sale of land, the purchaser is entitled to return of moneys paid on account of the purchase-money, but merely that, where a purchaser is ready and willing to carry out his contract and seeks specific performance, and where the circumstances are such that it would be inequitable to allow the vendor to retain the land and the money, then relief from forfeiture may properly be given.*

Riddell J. also said at page 590:

Very many cases were cited to us not unlike the present in some particulars, in which such a provision as we have in this case, has been called a penalty and has been relieved against at the instance of a purchaser; but it has been relieved against in order to allow the purchaser who was willing and able to carry out his contract (except in the matter of time) to do so on proper terms. It is unnecessary to enumerate these cases—the most important and authoritative is *Kilmer v. British Columbia Orchard Lands Limited*, [1913] A.C. 319, 10 D.L.R. 172. I add to those cited in the argument only *In re Dagenham (Thames) Dock Co.* [1873], L.R. 8 Ch. 1022.

The part payments might be recovered back (on proper terms) if specific performance were refused: the latest case of this kind in the Judicial Committee is *Steedman v. Drinkle*, [1916] 1 A.C. 275, 25 D.L.R. 420; and that this is the law is indicated in *Brickles v. Snell*, [1916] 2 A.C. 599, at p. 604, 30 D.L.R. 31. The case of *Labelle v. O'Connor*, 15 O.L.R. 519, is to the same effect.

But there is no case in which one who is unable to carry out his contract has been allowed to abandon his purchase and claim the return of his part payments, when the vendor has given formal notice of cancellation. In the language of Kekewich J., "that would be to enable him to do the very thing that Lord Justice Bowen said he ought not to be allowed to do, namely, taken advantage of his own wrong—I mean wrong, not in the moral sense, but in the sense that he could not perform his contract:" *Soper v. Arnold* [1887], 35 Ch. D. 384, at p. 390.

If the scope of equitable jurisdiction, in the absence of fraud, sharp practice or unconscionable conduct on the part of the vendor, is so limited, it is plain that on the facts

[1] (1918) 42 D.L.R. 581.

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which I have summarized the suppliant is not in a position to obtain the relief claimed for the suppliant does not ask for specific performance and is not in a position to offer to complete the purchase. An attempt was made to establish sharp practice on the part of officials of the department in three incidents occurring while the contract was in effect and in one further incident occurring during the course of these proceedings but I am of the opinion that the incidents relied on do not constitute sharp practice in any relevant sense and that no equity of such a nature has been established.

On the other hand if the jurisdiction of equity, as exercised in *Steedman v. Drinkle*[1], to decree return of purchase money notwithstanding the provision of the contract for its retention by the vendor, is not a mere adjunct of procedure for specific performance to be called into operation only when the vendor is insisting on his contractual right to keep the property and the money too, despite the purchaser's readiness to complete, but is part of the jurisdiction of a court of equity to relieve from penalties and forfeitures, (and this was the legal basis on which the arguments of counsel were mainly developed), other principles apply and the readiness and willingness of the purchaser to complete, though important, is not critical and becomes but a circumstance, to be taken into account as part of the whole situation in determining whether the case is one in which relief should be granted. This was the view held by Somervell and Denning L.JJ. in *Stockloser v. Johnson*[2].

Somervell L.J. put the matter as follows at page 484 to page 487:

> Various arguments were developed before us. I am clear that the plaintiff could only recover if he could satisfy the court that it was unconscionable in the defendant to retain the money. I agree with the judge that he fails to do this and the analysis which I have made of the instalments and the sums which might have been anticipated reinforces the conclusion. Where instalments are to be paid over a period in which the plaintiff has the use or the benefit of the subject-matter the burden of showing unconscionability is not a light one. The judge, I think, proceeded on the basis that it could not be discharged unless the plaintiff was ready and able to complete the purchase, although the defendant having rescinded, no decree for specific performance could be made.

[1] [1916] 1 A.C. 275.
See also *Boericke v. Sinclair* [1929] 1 D.L.R. 561.
[2] [1954] 1 Q.B. 476.

I have had the advantage of reading the judgments which will be delivered by my brethren. My brother Romer comes to the conclusion that after rescission by the vendor relief would only be given if there were some special circumstance, such as fraud, sharp practice, or other unconscionable conduct, and that before rescission a buyer would only get relief if willing and able to complete. In other words, the only relief would be further time. *I think that the statements of the law in the cases to which I will refer indicate a wider jurisdiction. I think that they indicate that the court would have power to give relief against the enforcement of the forfeiture provisions, although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance. It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances.*

Somervell L.J. then proceeded to discuss *In re Dagenham (Thames) Dock Co.*[1], *Kemble v. Farren*[2] and *Steedman v. Drinkle*[3] in the course of which he said at page 486:

As it seems to me, James L.J. (in the *Dagenham* case) is assimilating the retention of instalments, if the result would be penal in its nature, to a provision for the payment of a penalty sum on a breach or breaches. It is a question of the effect of the clause and not of the defendant's conduct.

If that is right, it would seem wrong and, as I think, illogical to hold that no relief could be given where the plaintiff in default was unable to complete. If the Lords Justices had had any such limited principle in mind they would, I think, have worded their judgments differently. I think that this view is supported by *Steedman v. Drinkle* [1916] 1 A.C. 275, although I agree that sentences in that case could be relied on as supporting the narrower view. There was a provision for forfeiture of instalments, time was of the essence and the buyer defaulted. The buyer sought a decree of specific performance, but as time was of the essence and the defendant was unwilling it was held that this claim failed. The Judicial Committee, however, were of the opinion "that the stipulation in question was one for a penalty against which relief should be given on proper terms." The terms were not settled, and the plaintiff was left to apply to the court of first instance. That, therefore, was a case in which the readiness and willingness could not lead to a decree for specific performance, but if the narrower argument is right, readiness and willingness is a condition precedent to any relief being given. This, as I have already said, seems illogical to my mind, if these forfeiture clauses are, as was said in the *Dagenham* case L.R. 8 Ch. 1022, in the same general category as penalty clauses. I am not, of course, suggesting that the plaintiff's readiness in *Steedman's* case [1916] 1 A.C. 275 was not relevant to the question whether relief should be given. I am only not satisfied that it is the sole condition of relief. If the Judicial Committee had intended to lay down this limitation it would have done so.

Denning L.J. summed up the position thus at page 489:

It seems to me that the cases show the law to be this: (1) *When there is no forfeiture clause.* If money is handed over in part payment of the

[1] (1874) L.R. 8 Ch. 1022.
[2] (1829) 6 Bing. 141; 130 E.R. 1234.
[3] [1916] 1 A.C. 275.

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purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money; but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see *Palmer v. Temple* (1839) 9 Ad. & El. 508; *Mayson v. Clouet* [1924] A.C. 980; 40 T.L.R. 678; *Dies v. British and International Co.* [1939] 1 K.B. 724; Williams on Vendor and purchaser, 4th ed., p. 1006. (2) *But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause)*, then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in *Steedman v. Drinkle* [1916] 1 A.C. 275, where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Sumner.

The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somervell L.J. has said about it, differing herein from the view of Romer L.J. Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money.

If it were necessary for the purposes of this case to reach a concluded opinion on the extent of equity jurisdiction in matters of this kind I would adhere to the opinion of Somervell L.J. It seems to me that his view follows logically from what Duff J. (as he then was) referred to in *Snell v. Brickles*[1] as the traditional view of Courts of Equity that the substantial interest of the vendor in a contract of sale lies in his right to demand and enforce payment of the purchase price. In this view the amount of the puchase price, as of the day when it is due, is the measure of the vendor's interest in the contract and his rights under a provision such as paragraph 10 are neither in addition nor alternative to that interest but are ancillary to and a means of realizing it. It seems to me to follow from this that relief from the strict terms of a penal provision should be obtainable to the extent that the provision that he may retake the land and retain the money paid on account of purchase price as well gives the vendor more than full compensation for the purchase money, interest and any loss or expense to which he may have been put. This, to my mind, is what the

[1] (1914) 49 S.C.R. 260 at 371. See also Jessell, M.R. in *Lysaght v. Edwards* (1876) 2 Ch. D. 499 at 506 and Kay L.J. in *Law v. Local Board of Redditch* [1892] 1 Q.B. 127 at 133.

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order "for sale and payment, as in the ordinary case of vendor's lien" offered by the Master of the Rolls in the *Dagenham* case was intended and calculated to accomplish. Had the offer been accepted any surplus proceeds of the sale over the amount required to pay to the vendor the balance of the purchase price, interest and costs would plainly have been payable to the purchaser.

The *Dagenham* case was one in which the purchaser had had possession of the property under the agreement for several years but one-half of the purchase price had been paid, and it is, therefore, not difficult to see a basis upon which the court could regard it as unconscionable, in the sense in which the word is I think used by Somervell L.J., for the vendor to retake the land and keep the money as well. The same result, however, would not necessarily be appropriate in a case where a very small portion of the purchase price has been paid unless other circumstances are present which make retention of the money by the vendor as well as the land unconscionable.

Turning to the situation as I see it in the present case, as already mentioned, a number of incidents were put forward as constituting sharp practices on the part of Crown representatives and as being sufficient to bring the suppliant's case for relief even within the exception reserved by Romer L.J. but I am not persuaded that there is anything in any of the incidents which afford an equity in favour of the suppliant or advances its case. Moreover, it seems clear that no one acting on behalf of the Crown at any time gave the suppliant any reason to think that strict performance of the contract would not be insisted upon or that the time for making the final or any other payment would be extended.

There is also the fact, which militates, if at all, against the suppliant that the suppliant defaulted in paying the final instalment and interest when due and that through inability to raise the funds, rather than through any desire to abandon the purchase, it has never been in a position to offer to make the payment. With this there is I think to be weighed the fact that there has never been any indication of readiness on the part of the Crown to waive the strict terms of the contract on being paid the balance of the purchase price and interest and the further fact that the Crown is no longer in a position to complete even if the

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suppliant were in a position to offer the necessary payment since in the meantime a small portion of the land has been sold. To my mind the latter facts tend to neutralize the effect of the fact that the suppliant has not come forward with the necessary money since they tend to make the position somewhat similar to that in which the purchaser offers the money but the vendor relying on the contract will not take it. In the cases, such as *Steedman v. Drinkle*[1] and *Boericke v. Sinclair*[2], in which repayment was ordered there appears to have been an unconscionable insistence by the vendor on having the land and the money too, a fact which the unaccepted offer to complete even at a late stage was calculated to establish. Here though the suppliant has been unable to offer to complete the contract the material fact of the intention of the Crown (whether conscionable or not I come to next) to insist on having the land and the money too is I think apparent from the facts which I have mentioned.

I turn next to the picture presented by the Crown terminating the suppliant's rights in the unconveyed land and retaining $1,350,000 of the purchase price, (not being money paid as a deposit) as well. Of the total amount of $2,323,396.85 paid by the suppliant on account of the purchase price $973,396.85 appears to have been attributable to land actually taken up, leaving $5,548,549.15 of the total purchase price to represent the price of the remaining land. Of this amount the $1,350,000, even after deducting therefrom about $125,000 for interest to which the Crown was entitled under the contract up to the time of its termination, represented something in excess of 22 per cent. In the meantime while the contract was in effect the suppliant had not had possession of the land or revenue therefrom and the Crown had received interest on the unpaid portion of the purchase money. On the evidence there is thus nothing that the Crown could, as I see it, claim to set off as loss recoverable from the $1,350,000 with the possible exception of (1) some amount for fees of solicitors or agents of its own; (2) the commission of an agent whose services might be required to re-sell the property, the total of both of which items should I think be unlikely to reach 10 per cent. of the $5,548,549.15; and (3) any loss that might result

[1] [1916] 1 A.C. 275. [2] [1929] 1 D.L.R. 561.

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from inability to realize that amount from the land. In these circumstances I should have thought that the suppliant was entitled to relief from the forfeiture of the $1,350,000 on proper terms including an opportunity for the Crown to establish and set off any loss which it may have sustained from the failure of the suppliant to complete payment of the balance of the purchase price and interest when due[1] and including, as well, a term limiting the amount to be repaid in any event to the $975,000 thereof which remained in the hands of the Crown at the time of the presentation of the petition of right.

However, in view of the conclusion which I have reached on the effect of s. 48 of the *Exchequer Court Act*, though not without some hesitation arising from the reflection that but for that provision I should have thought the suppliant entitled to relief, I am of the opinion that the judgment must be that the suppliant is not entitled to any of the relief claimed.

The Crown is entitled to its costs.

[1] *Vide Benson v. Gibson* (1746) 3 Atk. 395; 26 E.R. 1027. *Commissioner of Public Works v. Hills* [1906] A.C. 368 at 376.

Ottawa
1966

April 18-20

May 25

BETWEEN:

AKHURST-UBJ MACHINERY LIMITED ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE and P. B. YATES MACHINE COMPANY LIMITED ..... RESPONDENT.

Customs Duty—Appeal from Tariff Board—Whether imported machine of "class or kind made in Canada"—Tariff item 427(1)—Planer and matcher used in lumber industry—Whether Board erred in law—Difference between machines dimensional only—Customs Act, R.S.C. 1952, c. 58 s. 45(1).

Appellant imported from the United States a heavy-duty planer and matcher for use in the lumber industry. The Tariff Board determined that the machine was of a class or kind made in Canada by respondent company and therefore subject to a higher duty under Tariff item 427(1). Appellant appealed. Under s. 45(1) of the *Customs Act*, R.S.C. 1952, c. 58, the appeal was limited to a question of law.

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*Nov. 4.
*Dec. 15.

FRANCIS N. EASTERBROOK (DEFENDANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Indian lands—Lease to private person from Indian chiefs—Action by Crown for possession, against occupant claiming under lessee's title—Invalidity of lease—Claim by occupant to compensation for improvements—Claim by Crown to payment for occupation after demand for possession.

By a document dated March 10, 1821, "the British Indian Chiefs of St. Regis," "for themselves and on behalf of their tribe (whom they represent)" purported to lease to C., his heirs and assigns, certain land (part of Crown land reserved for the Indians, and not ceded or surrendered to the Crown by the Indians) on Cornwall Island in the river St. Lawrence, for 99 years, "and at the expiration thereof for another and further like period of 99 years and so on until the full end and term of 999 years shall be fully ended and completed." The Chiefs covenanted "that they are the representatives of the said tribe of St. Regis as well as trustees of their estate and as such that they have a perfect right" to make the lease. The consideration was $100 cash and a yearly rent of $10. C. entered into possession on March 10, 1821, and possession was continued in successive assignees, and it was admitted in this action that defendant was in possession as assignee of whatever rights C. had under the lease. The rent was paid yearly to March 10, 1920, when the Crown refused to accept further rents. From about 1875 the rent was paid to the Department of Indian Affairs, for the benefit of the Indians. The lease was registered at the Department of Indian Affairs in 1875. There was in evidence a letter of February 26, 1875, from an official of the Department to one B., an Indian, (in reply to a letter from B., not produced) in terms apparently recognizing rights of C. under the lease. The Crown notified defendant to give up possession at the expiration (March 10, 1920) of the term of 99 years; and, defendant not complying, it took proceedings to recover possession of the land, as ungranted Crown lands reserved for the Indians.

Held (1) The Crown was entitled to possession. The lease was invalid in law; the chiefs had no power to make it (*St. Catherines Milling & Lumber Co.* v. *The Queen*, 14 App. Cas. 46); and the taking of it violated the Proclamation of 1763 respecting Indians and Indian lands, and subsequent enactments (Reference to Order in Council of Lieutenant-Governor of Upper Canada of November 10, 1802, in evidence; to C.S.U.C., 1859, c. 81, ss. 21 *et seq.*; and to the *Indian Act*, R.S.C., 1886, c. 43, ss. 38-41, and subsequent revisions). The receipt of rent

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Cannon JJ.

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at the Department could not serve to validate the lease; nor had anything done created any obligation on the Crown to recognize the right to possession claimed by defendant.

(2) The defendant was not entitled to compensation for improvements. There was no statutory liability on the Crown; and defendant had not established any act or representation for which the Crown was responsible whereby he was misled to believe that he had a title which could be vindicated in competition with that of the Crown, or whereby the Crown had incurred any equitable obligation to recognize a right to compensation; defendant and his predecessors knew that there had been no surrender, and that they had no grant from the Crown; and all the circumstances justified the conclusion that they were not, at any time, in ignorance of the infirmity of their title. (*Ramsden* v. *Dyson*, L.R. 1 E. & I. Ap., 129, at 168, cited).

(3) The finding in the Exchequer Court that the Crown should recover $400 per annum for defendant's use and occupation from March 10, 1920, should, on the evidence as to value, be sustained.

Judgment of the Exchequer Court (Audette J.), [1929] Ex. C.R. 28, affirmed.

APPEAL by the defendant from the judgment of Audette J. in the Exchequer Court of Canada (1) holding: that the lease in question, bearing date March 10, 1821, between the British Indian Chiefs of St. Regis and one Chesley (under which the defendant claimed title) was null and void *ab initio;* that the Crown (plaintiff) was entitled to recover possession forthwith from the defendant of the land in question, with the appurtenances; that the Crown recover from the defendant, for the use and occupation of the land and appurtenances by him, the sum of $400 per annum, to be computed from March 10, 1920, until the delivery of possession by him to the Crown; and that defendant's claim for compensation for improvements made, by him or his predecessors in occupation, upon the land, be dismissed.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

G. I. Gogo K.C. for the appellant.

W. C. McCarthy for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The Attorney-General of Canada, by Information filed in the Exchequer Court of Canada, seeks to recover, as ungranted Crown lands reserved for the In-

(1) [1929] Ex. C.R. 28.

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dians, the possession of the lands hereinafter described, situate on Cornwall Island, in the River St. Lawrence, opposite the town of Cornwall. The island is said to be five miles long; to average in width three-quarters of a mile, and to comprise 3,500 acres. There is in proof a report of Mr. Davidson, an Indian Agent, dated 3rd June, 1878, wherein it is stated that this island is exclusively occupied by Indians, except the Chesley farm (the subject of this action), containing about 200 acres, and that there are thirty-seven houses on the island, inhabited by about forty families. It is shewn elsewhere that the farm extends across the island from one side to the other, thus dividing into two sections the lands which remain in the possession of the Indians. The dichotomy is explained by the circumstances in which the claim has its origin.

There is in evidence a document, dated 10th March, 1821, executed at Cornwall

by and between the British Indian Chiefs of St. Regis, in the Province of Lower Canada, of the first part and Solomon Youmans Chesley, of the said Town of Cornwall, gentleman, of the second part;

Whereby the said Indian Chiefs, for themselves and on behalf of their tribe (whom they represent) for and in consideration of the sum of One Hundred Dollars to them in hand paid by the said Soloman Youmans Chesley, before the signing, sealing and delivering of these presents as well as the rents and covenants hereinafter mentioned do by these presents lease, convey and to farm let unto the said Solomon Y. Chesley, his heirs and assigns all and singular that certain parcel of land and premises situated on Cornwall Island in the River St. Lawrence and being composed of that portion of it which lies immediately south and in front of the said Town of Cornwall containing by admeasurement one hundred and ninety-six acres more or less which piece or parcel of land and tenement is butted and bounded as follows, viz:—Commencing at the water's edge on the north side of said Cornwall Island nearly opposite to the Court House in said Town and at the mouth of a ravine or gully immediately below Nett Point where a white ash post is planted and running south ten degrees east fifty-two chains more or less across said Island to the south bank thereof, thence following the water's edge downwards a distance at a right angle from the base line of forty-five chains to a white oak post, thence northward on a line parallel to said base line across said Island to the water's edge on the north side thereof, thence following the water's edge upward or against the current to the place of beginning. To have and to hold the said land and premises with all and singular its appurtenances unto him the said Solomon Y. Chesley, his heirs and assigns for and during the full end and term of ninety-nine years to be fully ended and completed and at the expiration thereof for another and further like period of ninety-nine years and so on until the full end and term of nine hundred and ninety-nine years shall be fully ended and completed. He, the said Solomon Y. Chesley, his heirs and assigns yielding and paying therefor to the said Chiefs of St. Regis and their successors yearly and every year on the tenth day of February, the

sum or rent of ten dollars of lawful money of Canada, and the said Chiefs do hereby covenant with the said Solomon Y. Chesley, his heirs and assigns, that they are the representatives of the said tribe of St. Regis as well as trustees of their estate and as such that they have a perfect right to make, execute and deliver this lease in good faith upon the terms and conditions herein already expressed.

And there are covenants on the part of Mr. Chesley with the Indian Chiefs, expressed as follows:

And the said Solomon Youmans Chesley, for himself, his heirs and assigns doth hereby covenant and agree to and with the said Indian Chiefs of St. Regis and with their successors in manner and form following, that is to say: that he the said Solomon Y. Chesley being put into peaceable and quiet possession of aforesaid described lands and premises shall and will on the tenth day of February, one thousand eight hundred and twenty-two, pay unto the said Indian Chiefs or their successors, the sum or rent of ten dollars, at the Town of Cornwall aforesaid and in like manner, so long as he the said Solomon Y. Chesley, his heirs and assigns shall be kept and assured in peaceable and undisturbed possession of said lands and premises, so long as he, his heirs and assigns continue to pay the said annual sum at rent of ten dollars on the tenth day of February in each succeeding year to the end and term of nine hundred and ninety-nine years.

And further that should he the said Solomon Y. Chesley, his heirs and assigns allow the said rent of ten dollars to remain unpaid by the space of one month after the same shall have been due in any year to come and after the same may have been legally demanded, he and they shall renounce the said land and premises and return the same to the said Indian Chiefs or their successors.

The original document is not produced upon this appeal; but it purports, so it is said, to be executed under seal, on behalf of the parties of the first part, by nine individuals, said to be Indian Chiefs, and by Mr. Chesley, the party of the second part. There is no evidence whatever as to what were the powers or authority of the British Indian Chiefs of St. Regis, but it is admitted that the premises, being Crown Lands, had not been ceded or surrendered to the Crown by the Indians; and, therefore, as a matter of law, the Chiefs could not dispose of the reserve or any part of it, or of any estate therein. *St. Catherines Milling and Lumber Company* v. *The Queen* (1). And there is an additional reason in this case why the alleged lease, in the absence of proof to the contrary, should be regarded as invalid, seeing that the Chiefs, whatever powers they may have possessed during their tenure of office, profess to grant an estate in the land, to commence at a time ninety-nine years after the date of the instrument. It is very carefully stated that the term is to endure for

(1) (1888) 14 App. Cas. 46.

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ninety-nine years to be fully ended and completed and at the expiration thereof for another and further like period of ninety-nine years and so on until the full end and term of nine hundred and ninety-nine years shall be ended and completed.

Strong J., who certainly did not speak without information as to the facts, tells us in his dissenting judgment in the *St. Catherines Milling* case (1), that

the control of the Indians and of the lands occupied by the Indians had, until a comparatively recent period, been retained in the hands of the Imperial Government; for some fifteen years after local self government had been accorded to the Province of Canada the management of Indian Affairs remained in the hands of an Imperial officer, subject only to the personal direction of the Governor General, and entirely independent of the local government, and it was only about the year 1855, during the administration of Sir Edmund Head and after the new system of Government had been successfully established, that the direction of Indian affairs was handed over to the Executive authorities of the late Province of Canada.

There is no evidence that either the Imperial Superintendent of Indian Affairs or the local government was, at the time, consulted or became in anywise party to or concerned in, or even informed as to the transaction of 1821 between the Chiefs and Mr. Chesley, which certainly was brought about in breach of the prohibition expressed, and repeated more than once by the proclamation of 1763, as essential to the interest of the British Crown and the security of its colonies. The governors and commanders-in-chief in America are forbidden to grant warrants of survey, or to pass any patents upon any lands whatever which, not having been ceded to or purchased by the Crown, are reserved to the Indians, or any of them; and all British subjects are strictly forbidden, on pain of the royal displeasure,

from making any purchases or settlements whatsoever, or taking possession of any of the lands above reserved (which include the lands now in question), without our special leave and licence for that purpose first obtained.

Also, it is provided that:

And We do further strictly enjoin and require all persons whatsoever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

Moreover the policy of the Crown is further emphasized by the following injunction:

And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of Our interests

(1) (1887) 13 Can. S.C.R. 577, at 614.

and to the great dissatisfaction of the said Indians; in order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of Our Justice and determined resolution to remove all reasonable cause of discontent, We do, with the advice of Our Privy Council, strictly enjoin and require that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of Our colonies where We have thought proper to allow settlement; but that, if at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for Us, in Our name, at some public meeting or assembly of the said Indians, to be held for that purpose by the Governor or Commander-in-Chief of Our colony respectively, within which they shall lie.

These provisions have persisted, both under British and Colonial administration; and there is in evidence an Order in Council of the Lieutenant-Governor of Upper Canada, dated 10th November, 1802, and certified for publication, which comes out of the custody of the Dominion Archives, and reads as follows:

His Excellency the Lieutenant-Governor in Council hereby gives notice, to all whom it may concern, That no leases which have been, or shall be Granted, or pretended to be Granted, by or under the authority of any Indian Nation, will be admitted or allowed—And this Public Notice is given in order that No person may pretend ignorance of the same.

See the clauses relating to Indian lands in the Consolidated Statutes of Upper Canada, 1859, chap. 81, secs. 21 *et seq.;* also the *Indian Act* as enacted by the Dominion, R.S.C., 1886, chap. 43, secs. 38-41 inclusive, and in the subsequent revisions.

Looking at the provisions of the lease itself, which have been fully quoted above, it is difficult to avoid a reasonable inference that Mr. Chesley was fully aware of the precaricus nature of the estates evidenced by the instrument of 10th March, 1821. It will be perceived that he paid the chiefs $100 in hand; and, beyond that, the consideration on his part for the valuable concession which he stipulated for consists only of the annual rent of $10. It is not suggested that there was any meeting of the band to authorize or approve the grant; and Mr. Chesley's security, *quantum valeat,* consists in the covenant of the chiefs, " that they are the representatives of the said tribe of St. Regis as well as trustees of their estate and as such that they have a perfect right to make, execute and deliver this lease in good faith upon the terms and conditions herein already expressed." Mr. Chesley, upon his part, covenants for payment of the rent to the chiefs at Cornwall " so long as he

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the said Solomon Y. Chesley, his heirs and assigns shall be kept and assured in peaceable and undisturbed possession of said lands and premises"; and, finally, it is provided that if he, Mr. Chesley, his heirs and assigns, "allow the said rent of ten dollars to remain unpaid by the space of one month after the same shall have been due in any year to come and after the same may have been legally demanded, he and they shall renounce the said land and premises and return the same to the said Indian Chiefs or their successors."

It would seem not improbable that the lease first came to the knowledge of the Department of Indian Affairs when, on 18th February, 1875, Mitchell Benedict, an Indian of the St. Regis settlement, wrote to the Superintendent General, or the Deputy Superintendent General, presumably making enquiries about the validity of Mr. Chesley's title. Immediately following this letter, on 24th February, 1875, the lease was registered at the Department, as certified by the initials of Mr. Van Koughnet, the Assistant Superintendent General; and a letter was written to Benedict on 26th *idem*, signed, as I infer, by Mr. Van Koughnet, and saying:

> I have to state in reply to your letter of the 18th inst., that the lease to Mr. Chesley of 196 acres of land on Cornwall Island in the St. Lawrence River is dated March 10th, 1821, and is for 99 years, renewable at the end of each such period until the full term of 999 years has expired on payment of the annual rental of $10.00. Mr. Chesley has complied with the terms of his lease, and has a right to sublet the land as he has been in the habit of doing for years.

A memorandum, written by Mr. Chesley, is also introduced by the defendant, which reads as follows:

> In reply to a letter from Mitchell Benedict an Indian of Cornwall Island addressed to the Indian Department under date the 18th February, 1875, enquiring whether the ownership and possession of a farm on Cornwall Island by Solomon Y. Chesley was known to me and recognized by the said Department. A letter was addressed to the said Benedict by direction of Mr. Laird the Superintendent General, under date the 24th February, 1875, stating that Mr. Chesley held a lease for 196 acres of land on Cornwall Island dated 10th March, 1821, to run 999 years from date at a rental of $10 per annum. That Mr. Chesley having fulfilled his engagements under said Lease he had a right to said land and to sublet same as heretofore.
>
> The said lease is registered in the Book of the office of the Indian Department on the 24th February, 1875, as appears indorsed on the back thereof. Certified by the initials of Lawrence Van Koughnet, Asst. Supt. Genl.

But there seems to be some confusion about the minutes relating to this subject, because it is stated by counsel for the defendant, and admitted by counsel for the Crown, that

> the endorsement upon our original lease at Cornwall shows that the late Mr. Van Koughnet made a memorandum on the back of the lease that it was originally in the Department on the 24th September, 1875.

It is admitted, in the following terms, that Mr. Chesley entered into possession on or about 10th March, 1821, and that

> the present defendant is in possession as assignee of whatever rights Solomon Y. Chesley had under that original lease. There is a chain of assignments but they admit that they have been in possession.

Then, immediately following,

> The Crown admits that during that period rents were paid by the occupant and received by the Crown, or the Department of Indian Affairs, for the benefit of the Indians.

And this, as I interpret it, is intended to mean that during the period of the defendant's possession, the rent, instead of being paid directly to the Indian Chiefs, as it was at the beginning, was paid to the Department for the benefit of the Indians, although there is evidence in another place that the first payment of rent to the Department was made in 1877, three years before the defendant was born.

The defendant continued to pay the rent until the expiry of the term of ninety-nine years provided for by the lease; and there are Admissions:

> That all rents provided by the lease in question herein have been paid by the original lessee and successive occupants to 10th March, 1920, since which time the Respondent (the Crown) has refused to accept further rents.
>
> That the Respondent served Appellant with Notice to Quit and demand for possession in due time prior to the expiration of the first 99 year period of the lease in question herein.
>
> That the Appellant has remained in possession of the lands described in said lease since the 10th March, 1920, and is still in possession of same.
>
> That the Appellant is the successor in title to such rights as the original lessee from the Indian Chiefs may have had and has been in continuous possession thereof since on or about the 28th October, 1904.

The facts are not set out or introduced in a very orderly fashion and the reader is left in some perplexity to ascertain precisely the order of events and what the truth is; but nevertheless, it seems to be clear enough that although the lease was ineffective and void at law, by reason of the absence of any authority on the part of the grantors to make it, and for non-compliance with the peremptory requirements of the proclamation, which have the force of

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statute, an officer of the Department, constituted after the union of the provinces in 1867 for the administration of Indian Affairs, registered the lease, not earlier than 1875; and, from that time until the expiration in 1920 of the demised term of ninety-nine years, received, for the Indians, the annual rent of $10, as it accrued from year to year. But the Department then ceased to tolerate the defendant's possession and gave notice to quit in a manner which, it is admitted, satisfied the requisites, as in the case of a tenant from year to year; refusing to receive any further rent, or in any manner to recognize a tenancy. And so the case passed to the Attorney-General, who filed his Information on 18th October, 1921; but the defendant remained in possession, and, pending the litigation, has enjoyed the benefit of the use and occupation.

The defendant alleges four grounds of appeal: first, that the alleged lease was not void *ab initio;* secondly, that the learned judge erred in holding " that the appellant was not entitled as of right to compensation for permanent improvements "; thirdly, he denies that the proclamation of 1763 affects the transaction; and, fourthly, he denies that the Crown is entitled to $400 a year for the occupation of the premises after 10th March, 1920.

The learned judge found no difficulty in disposing of the case, and I have no doubt that his conclusions must be maintained. By the formal judgment he declared that the lease of 10th March, 1821, was and is null and void *ab initio,* and that the King was entitled to recover forthwith the possession of the lands described with their appurtenances. He found the value of the defendant's use and occupation, computed from 10th March, 1920, until delivery of the possession, to be at the rate of $400 per annum; and, moreover, he held that the defendant's claim for compensation for improvements made by him or his predecessors should be dismissed.

There is some conflict of opinion as to the annual value of the premises, but the evidence certainly preponderates in favour of an estimate not less than that found by the learned judge; and, therefore, his finding in that particular ought not to be disturbed.

As to the defendant's claim for compensation for the improvements to which he asserts a right, there is no statu-

tory liability upon the Crown; and I agree with the learned judge that the defendant has entirely failed to establish any act or representation, for which the Crown is responsible, whereby he was misled to believe that he had a title which could be vindicated in competition with that of the Crown. There is no claim to recover compensation for the use of the premises during the period of the first term, which, in the words of the instrument, is "fully ended and completed"; and, to that extent, the defendant has profited by the unauthorized and illegal transaction. The learned judge refers to the leading case of *Ramsden* v. *Dyson* (1); and I cannot avoid the conclusion that the defendant and his predecessors were not, at any time, in ignorance of the infirmity of the title which they claim to have derived from the Indians; and, certainly, they knew that there had been no surrender, and that they had no grant from the Crown. The law, as applicable in such cases, is very aptly stated by Lord Wensleydale at page 168, where he says:

> If a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it. If a tenant of mine does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.

The letter from the Indian, Mitchell Benedict, is not produced, and without it one cannot interpret the reply with certainty; moreover the introduction of secondary evidence by Mr. Chesley's memorandum, admitted to be inaccurate in a material particular, does not add to the proof. Whether Mr. Laird or Mr. Van Koughnet was the writer, he was evidently under an utter misapprehension if he intended to assure the Indian of the validity of the Chesley lease, and these gentlemen should have sought the advice of the law officers; but, anyhow, Mr. Chesley was not a party to the correspondence, and it contains no representation by which the Crown is bound to him. If he were looking for an assurance from the Indian Department to strengthen his title, why did he not approach the competent authorities in a straightforward manner? Neither

(1) (1866) L.R. 1 E. & I. Ap. 129.

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the Crown, as to its title, nor the Indians, as to their burden upon the lands, are to suffer deprivation by the facts which this incident discloses or suggests.

It is true that, during the latter part of the term of ninety-nine years, the annual rent of $10 was received at the Department of Indian Affairs, and presumably distributed as belonging to the income of the band or the Indians of the reserve; but that circumstance could not serve to validate a lease which was void at law, nor even to create a tenancy from year to year under conditions which the law prohibited. In any event, the defendant and his predecessors have had the full benefit of possession for the term during which the rent was paid; and, for the period which has since elapsed, and for the future, the Crown has not, so far as I can perceive, incurred any obligation, legal or equitable, to recognize the defendant's possession or right to compensation.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *George I. Gogo.*

Solicitor for the respondent: *William C. McCarthy.*

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*April 23.

DALLAS ET AL. (PLAINTIFFS).....APPELLANTS;

AND

DALLAS OIL CO. LTD. (DEFENDANT);

AND

WEBSTER (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Contract—Agreement for sale of shares—Findings against alleged abandonment by purchaser

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1), dismissing their appeal from the judgment of Ives J., dismissing their action, which asked for a declaration that the

*PRESENT:—Newcombe, Rinfret, Lamont, Smith and Cannon JJ.

(1) 24 Alta. L.R. 445; [1930] 2 W.W.R. 301.

period, and years after, the Treasurer duly performed the duties of his office, and the liability of the defendant ceased under the bond, and that at the time of the nomination of the defendant and of his election, he had no interest in a contract with the corporation arising under the bond in question. This application must therefore be discharged.

It is not necessary that I should give any judgment on the other point raised. I however considered the question, and I arrived at the conclusion that, as the defendant's qualification was not objected to at the nomination, but at the time of the polling, when the electors could not nominate another candidate, it would be unjust to the electors, and unreasonable under such circumstances, to deprive them of a further opportunity of electing a person of their choice.

The application must be discharged with costs.

Order accordingly.

REGINA EX REL. GIBB V. WHITE.

Municipal election—Disqualification—Indians—Enfranchisement.

An Indian, who is a British subject, and otherwise qualified (in this case, by holding real estate in fee simple to a sufficient amount), has an equal right with any other British subject to hold the position of reeve of a municipality, even though not enfranchised, and though receiving, as an Indian, a portion of the annual payments from the common property of his tribe.

[CHAMBERS, March 23rd, 1870.—MR. DALTON.]

O'Brien, for the relator, obtained a *quo warranto* summons to try the validity of the election of the defendant to the office of Reeve of the Township of Anderdon, in the County of Essex.

The statement of the relator complained that Thomas B. White had not been duly elected to the office of Reeve of the Township of Anderdon, and usurped the office under the pretence of an election held on the first Monday in January;

and that Dallas Norvell, of Anderdon aforesaid, merchant, was duly elected thereto, and ought to have been returned at the said election ; and the following causes were stated why the election of the said T. B. White to the said office should be declared invalid and void, and the said Dallas Norvell be duly elected thereto, namely : that the said Thomas B. White was an Indian, and a person of Indian blood, and an acknowledged member of a tribe of Indians, and not in any way enfranchised or exempted from the disabilities of Indians; and as such was disqualified from holding the property qualification necessary to entitle him to such office, and that therefore he had not the necessary qualification, either of property or otherwise, and that the said Dallas Norvell was the only other candidate for the said office, and should be declared elected.

There appeared to be no dispute about the facts of the case. The defendant was born in Ontario, as was his father before him ; he was the son of the chief of the Wyandottes, or Huron Indians, of Anderdon ; he was never "enfranchised" under our statute, and from time to time received his portion of the annual payments from the property of his tribe ; he had for the last twelve years been engaged in trade—of late, rather extensively ; he had been for some years the owner in fee simple of patented lands in Anderdon, on which he lived ; and these lands were not allotted to him from the lands of the tribe, but were acquired by himself : the value was beyond the necessary qualification.

Osler shewed cause.

O'Brien, contra.

Con. Stat. Can. cap. 9 ; Con. Stat. U. C. cap 81 ; 31 Vic. (Can.) cap. 42 ; 32, 33 Vic. (Can.) cap. 6 ; Treaty and Proclamation in Public Acts, 1763 to 1834 [20]. [32] : *Reg.* v. *Baby*, 12 U. C. R. 346 ; *Totten* v. *Watson*, 15 U. C. R. 395 ; *The Cherokee Nation* v. *The State of Georgia*, 5 Peters 60 ; 2 Kent's Com. 72, 73 ; 3 *Ib.* 381, were cited on the argument.

MR. DALTON.—There is a marked difference between the position of Indians in the United States and in this Province. There, the Indian is an alien, not a citizen. See the case in 5 Peters 1, 27, 58, 60: "The Act of Congress confines the descriptions of aliens capable of naturalization to *free white persons*. * * * It is the declared law of New York, South Carolina, and Tennessee, and probably so understood in other States, that Indians are not citizens, but distinct tribes, living under the protection of the government, and consequently they can never be made citizens under the Act of Congress."—2 Kent's Com. 72, 83.

In this Province Indians are subjects. Con. Stat. Can. cap. 9, so speaks of them (see preamble, and sec. 1, also the 16th section of the Act of last session). But authorities are needless for such a proposition. Chapter 9 (now repealed), was the Act in force for many years down to 1869, declaring the rights, and providing for the management of the property of the Indians; and its provisions have much to do with the present matter. The word *Indian* in that Act, (sec. 1) is defined to mean only Indians, or persons of Indian blood, or intermarried with Indians, acknowledged as members of Indian tribes or bands, residing upon lands which have never been surrendered to the Crown, or which having been so surrendered, have been set apart, or are reserved for the use of any tribes or band of Indians in common, *and who themselves reside upon such lands*. But any Indian (sec. 2) who is seised in fee simple in his own right of patented lands in Upper Canada, assessed to $100 or upwards, is excluded from the definition, and is not an Indian within the meaning of the Act. The Act goes on to provide means for the "enfranchisement" of the Indians, meaning the class so defined, and the apportioning to those enfranchised, of parcels of the lands of the tribe, to be held by such enfranchised Indians in severalty. And it confers certain immunities on the Indians, and subjects them to certain disabilities, always having reference, as I understand, to the above description of the class to which the Act applies. If this Act were

now in force, whatever effect it might have on the defendant's position to be within it, I suppose he would not be within it, for he does not live with the tribes on their reserved land, but is the owner in fee simple of patented lands of greater assessed value than $100, not set apart from the lands of the tribe, but acquired by himself.

That Act however is repealed, and the Acts now in force are 31 Vic. ch. 42, and 32 & 33 Vic. ch. 6 of Canada. The only immunities or disabilities of an Indian now, whether enfranchised or unenfranchised, relate to the property he acquired from the tribe, and that no person can sell to him spirituous liquors, or hold in pawn anything pledged by him for spirituous liquors. But Indians may now sue and be sued, and have, except as above, so far as I can see, all the rights and liabilities of other subjects.

In *Totten* v. *Watson*, 15 U. C. R. 392, the Court of Queen's Bench, in the time of Sir John Robinson, decided that the prohibition of sale of lands by Indians, applied only to reserved lands, not to lands to which any individual Indian had acquired a title; and from this case and sec. 2, cap. 9, Con. Stat. Can., it is quite plain that an unenfranchised Indian might purchase and hold lands in fee simple. The defendant then has the necessary property qualification. Being a subject he must have all the rights of a subject which are not expressly taken away; then why is he not qualified to be Reeve of a township? It is certainly for the relator to shew why. I think that he is qualified, and that judgment must be for the defendant with costs.

Judgment for defendant with costs.

SIR LOMER GOUIN, procureur général de Québec, mis en cause et intervenant-appelant, et THE STAR CHROME MINING COMPANY, demanderesse-appelante v. Dame THOMPSON, défenderesse-intimée, et C. J. DOHERTY, procureur général du Canada, mis en cause et contestant-intimé.

Réserve des sauvages—Acte d'abandon—Fidei-commis—Propriété—Gouvernements fédéral et provincial—Lettres patentes—13-14 Vict. (1850), ch. 42—14-15 Vict. (1851), ch. 106—30-31 Vict., imp. (1867), ch. 3, art. 92, §§ 24, 109 (Acte de l'Amérique B. du Nord.)

1. L'acte d'abandon fait par les sauvages Abénakis de la réserve de Coleraine, le 14 février 1882, en faveur du gouvernement fédéral, et accepté par lui, par un ordre en conseil du 3 avril 1882, n'est pas un abandon pur et simple, mais est un fidéi-commis, en vertu duquel le gouvernement fédéral a obtenu le droit de vendre ces terrains pour le bénéfice des sauvages de cette réserve.

2. Le gouvernement fédéral a pu légalement disposer de ces terrains par l'émission de lettres patentes, et conférer un bon titre à l'acquéreur.

3. Le gouvernement provincial n'a acquis aucun droit en ces lots de terre à la suite de l'acte d'abandon ci-dessus mentionné.

MM. les juges Lavergne (dissident), Cross, Carroll, Pelletier et Roy, *ad hoc*.—Cour du banc du roi.—No 452.—Montréal, 20 novembre 1917.—L.-A. Rivet, C. R., avocat de l'appelant.—Charles Lanctôt, C. R., conseil.—St-Germain, Guérin et Raymond, avocats de l'appelant.—Surveyer, Ogden et Coonan, avocats de l'intimé.—E.-Fabre-Surveyer, C. R., conseil.—St-Jacques, Filion et Lamothe, avocats de l'intimée.

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Le jugement de la Cour supérieure qui est confirmé, a été rendu par M. le juge Lafontaine, le 7 mai 1915.

La question en litige est de savoir si le gouvernement fédéral avait le droit de vendre, comme il l'a fait par lettres patentes à un nommé Têtu, le 2 juillet 1889, cinq terrains situés dans une réserve de sauvages au canton de Coleraine, (Beauce), dont l'abandon lui avait été fait antérieurement en fidéi-commis par les sauvages Abénakis de Bécancourt. Le corollaire de cette question est ce qui suit: lorsque ces sauvages ont abandonné leur réserve, les terres sont-elles tombées dans le domaine du gouvernement de la province de Québec ou bien sont-elles restées entre les mains du gouvernement fédéral aux conditions de l'acte d'abandon?

Les notes suivantes de M. le juge Carroll exposent sommairement les faits:

M. le juge Carroll. La principale question à décider dans cette cause est celle-ci: Le gouvernement fédéral a-t-il le droit d'octroyer des lettres patentes pour des lots situés sur la réserve des sauvages, dans le canton de Coleraine, P. Q.?

Les faits de la cause peuvent se résumer comme suit:— En 1882, les sauvages Abénakis de Bécancourt abandonnèrent au gouvernement fédéral les terrains de leur réserve à Coleraine, afin (*with the object*) de faire vendre ces terrains pour en acquérir d'autres, ou de placer l'argent provenant de la vente, et ce, pour leur avantage.

L'abandon fait par les Abénakis fut accepté le 13 avril 1882, par arrêté du comité du Conseil privé, à Ottawa, avec mention expresse que les conditions de l'abandon sont acceptées.

Le 2 juillet 1887, Cirice Têtu a acquis les lots 4, 5, 6 et 7 du 13e rang du canton Coleraine. Ces lots sont si-

tués dans la réserve. Le prix d'acquisition était de $648. Au décès de Cirice Têtu, son épouse, comme héritière, est devenue propriétaire de ces lots, qui furent subséquemment vendus par le shérif du district d'Arthabaska à Joseph Lamarche, lequel, à son tour, les revendit à Cléophas Beausoleil.

En 1904, Beausoleil disposa de trois des lots en faveur de dame Rosalie Thompson qui, à son tour, en disposa en faveur de la Star Chrome Mining Company.

En 1907, la Star Chrome Mining Co. demanda l'annulation de la vente, parce que le gouvernement de la province de Québec, avait concédé deux des lots et réclamait le droit de disposer du troisième. Madame Thompson appela en garantie Mme Beausoleil, héritière de feu Cléophas Beausoleil.

Après enquête, le gouvernement de la province de Québec est intervenu dans la cause pour faire maintenir ses prétentions à émettre des titres pour ces lots.

Il s'agit donc de décider si le titre conféré à Cirice Têtu par lettres patentes du gouvernement fédéral est valide, ou bien si le terrain de la réserve des Abénakis est devenu, lorsqu'il a été abandonné par ces sauvages, la propriété du gouvernement provincial.

Le gouvernement fédéral invoque divers moyens additionnels à ceux donnés par le jugement de première instance. La Cour supérieure a déclaré que, dans cette cause-ci, il ne s'agit pas de biens vacants et sans maître, ou de terrains abandonnés revenant à la Couronne en vertu de ses droits et de ses prérogatives; qu'en aucun temps les sauvages de la tribu des Abénakis, en faveur desquels les terrains en question ont été réservés, n'ont abandonné ces terrains, mais que la cession qu'ils ont faite au gouvernement fédéral est une cession d'un caractère fiduciaire, pour

leur propre bénéfice et avantage, et que si, maintenant, il était permis au gouvernement de Québec de s'emparer de ces terres et d'y exercer un droit de propriété, les sauvages seraient complètement dépouillés de leurs biens et seraient frustrés des avantages qu'ils ont droit d'attendre de la cession qu'ils ont faite au gouvernement du Canada, et que s'il fallait mettre de côté les lettres patentes émises par le gouvernement fédéral à la suite de la cession à lui faite par les sauvages, il faudrait aussi mettre de côté cette cession et remettre les choses dans leur état antérieur.

La Cour supérieure ajoute, dans d'autres considérants, qu'il ne s'agit pas, dans l'espèce, de terrains vagues comme ceux mentionnés dans la proclamation royale de 1763, mais qu'il s'agit de terrains sur lesquels les sauvages ont un titre et que ces Abénakis ont été invités à s'établir sur cette réserve sous le régime français.

Le jugement dit de plus que le titre du shérif est un titre parlementaire conférant un droit absolu aux acheteurs: que l'annulation de la saisie et de la vente par le shérif n'est pas demandée, et que, depuis l'émission des lettres patentes par le gouvernement fédéral, la province de Québec n'a fait aucune démarche pour en obtenir l'annulation.

Le procureur général de la province de Québec conteste la validité des motifs exposés au jugement dont il demande l'infirmation par une intervention produite dans la cause. Il dit qu'après l'abandon par les sauvages de leur réserve à Coleraine, les terrains de cette réserve sont passés au gouvernement de la province de Québec, qui devait en retirer les bénéfices.

Dans mon opinion, quand bien même les Abénakis auraient été invités à s'établir au pays par les gouverneurs sous le régime français, il appert par les documents historiques que ces gouverneurs n'ont jamais eu l'intention de con-

céder des titres de propriété collective aux tribus sauvages qui appuyaient la colonie française dans ses guerres contre les Anglais. Ces gouverneurs attiraient ici les sauvages qu'ils croyaient sympathiques à leur cause, dans un but spécial et dans l'intérêt de l'Etat. Par ces motifs, auxquels il faut ajouter des raisons de philanthropie et de religion, l'autorité traitait bien les sauvages et les laissait en libre possession d'un territoire qu'on leur permettait d'occuper comme territoire de chasse et de pêche.

Les Français ont acquis sur ces tribus une influence considérable, grâce au courage des missionnaires qui ont pénétré chez elles et ont réussi à les christianiser en grand nombre; mais à l'exception des territoires qui auraient été concédés soit par le roi de France, soit par les seigneurs du temps sous le régime français, il est impossible de dire que l'invitation générale aux tribus sauvages de s'établir sur certains territoires vagues et indéterminés ait conféré des titres de propriété individuelle ou collective à ces tribus. D'ailleurs, ces sauvages n'avaient aucune notion de la propriété collective ou individuelle, tel que ce mot est compris par les blancs.

Telle était la situation sous le régime français, et la proclamation royale de 1763 n'a eu pour effet que de confirmer les sauvages dans l'occupation des territoires qu'ils détenaient ainsi de la Couronne, mais à titre précaire.

Le gouvernement anglais a continué à traiter convenablement les sauvages au point de vue politique et humanitaire, mais il ne parait pas avoir eu l'intention, par cette proclamation royale, de leur conférer des titres de propriété.

C'est ce qui a été décidé par les tribunaux de la province d'Ontario, par la Cour suprême et par le Conseil pri-

vé dans la cause de *St Catherine Lumber & The Queen,* (1) et dans la cause de *Seybold* v. *Ontario Mining Co.* (2). Il s'agissait dans ces deux causes de terrains vagues occupés par les sauvages, sans autre titre que celui conféré par la proclamation royale. Ces tribus avaient fait l'abandon de leur territoire au gouvernement fédéral, à condition que ce dernier utilise les terrains à leur profit. Le gouvernement fédéral croyant avoir domaine souverain (eminent domain) sur ces terrains qui lui revenaient, a accordé des lettres patentes aux deux compagnies mentionnées dans les causes que je viens de citer. Le gouvernement d'Ontario a contesté la validité de ces lettres patentes fédérales, et les tribunaux lui ont donné raison.

Peut-on faire l'application des principes exposés dans ces deux causes à la cause qui nous est soumise? Je ne le crois pas.

Une législation spéciale s'applique à la tribu sauvage des Abénakis. Elle est contenue aux statuts 13-14 Vic. ch. 42 et 14-15 Vic. ch. 106, et se lit comme suit:

" 13-14 Vic. ch. 42.—.....Il est par le présent statué " qu'il sera loisible au gouverneur de nommer, de temps à " autre, un commissaire des terres des sauvages pour le " Bas-Canada, lequel, ainsi que ses successeurs sous le " nom susdit, seront par le présent investis, pour et au " nom de toute tribu ou peuplade de sauvages, de toutes " les terres ou propriétés dans le Bas-Canada, qui sont et " seront mises à part ou appropriées pour l'usage d'aucune " tribu ou peuplade de sauvages, et qui seront censés en " loi occuper et posséder aucune des terres dans le Bas- " Canada, qui sont actuellement possédées ou occupées par

(1) 14 Appeal Cases, p. 46.
(2) Appeal Cases, 1903, p. 73.

" aucune telle tribu ou peuplade, ou par tout chef ou mem-
" bre d'icelle ou autre personne pour l'usage ou profit de
" telle tribu ou peuplade; et ils auront droit de recevoir
" et recouvrer des rentes, redevances et profits provenant
" de telles terres et propriétés, et pourront, sous le nom
" susdit, mais eu égard aux dispositions ci-après établies,
" exercer et maintenir tous et chacun les droits qui ap-
" partiennent légitimement au propriétaire, possesseur ou
" occupant de telle terre ou propriété: pourvu toujours
" que cette section s'étendra à toutes les terres dans le Bas-
" Canada, maintenant possédées par la Couronne en fidéi-
" commis ou pour l'avantage de toutes telles tribus ou peu-
" plades de sauvages, mais ne s'étendra pas aux terres
" maintenant possédées par aucune corporation ou com-
" munauté légalement établie et habile en loi à citer et
" ester en justice, ou à toute personne ou personnes d'ori-
" gine européenne, bien que lesdites terres soient ainsi
" possédées en fidéi-commis, ou pour l'usage de telle tribu
" ou peuplade.

" Et qu'il soit statué que ledit commissaire aura plein
" pouvoir et autorité de concéder ou louer, ou grever toute
" telle terre ou propriété comme susdit, et de recevoir et
" recouvrer les rentes, redevances et profits en provenant,
" de même que tout propriétaire, possesseur ou occupant
" légitime de telle terre pourrait le faire, mais il sera sou-
" mis en toute chose aux instructions qu'il pourra recevoir
" de temps à autre du gouveneur.....

" 14-15 Vic. ch. 106.—Attendu qu'il est expédient de
" mettre à part certaines terres pour l'usage de certaines
" tribus de sauvages dans le Bas-Canada, il est par le pré-
" sent statué que des étendues de terres n'excédant pas en
" totalité deux cent trente mille acres pourront, en vertu
" des ordres en conseil qui seront émanés à cet égard, être

"désignées, arpentées et mises à part par le commissaire "des terres de la Couronne, et lesdites étendues de terres "seront et sont par les présentes respectivement mises à "part et appropriées pour l'usage des diverses tribus sau- "vages du Bas-Canada, pour lesquelles, respectivement, il "sera ordonné qu'elles soient mises à part par tout ordre "en conseil qui sera émané comme susdit; et lesdites "étendues de terre seront en conséquence, en vertu du pré- "sent acte, et sans exiger aucun prix ou paiement pour "icelles, dévolues au commissaire des terres des sauvages "pour le Bas-Canada, et seront par lui administrées con- "formément à l'acte passé dans la session tenue dans les "treizième et quatorzième années du règne de Sa Majesté, "intitulé: "Acte pour mieux protéger les terres et les "propriétés des sauvages dans le Bas-Canada."

De ces textes il résulte que la propriété des réserves des sauvages, repose sur la tête du commissaires des affaires indiennes, plus tard le surintendant des affaires indiennes, en fidéi-commis pour les sauvages. Ce commissaire a droit de vendre les terres ou de les louer, et il possède au nom de la tribu. Cette législation a eu pour effet de faire sortir ces terres du domaine de la Couronne et d'en investir le commissaire pour l'avantage des sauvages.

Il y a une grande différence entre le droit d'occupation conféré par la proclamation royale, qui n'accordait qu'un titre précaire, et cette appropriation de terres pour les sauvages en vertu de la législation que je viens de citer. Ce qui est connu dans notre droit parlementaire et constitutionnel sous le nom de réserve pour les sauvages, ce sont des territoires qui ont été spécifiquement appropriés pour l'usage de telle ou telle tribu.

Et lorsque, cette appropriation étant faite, les terrains ont été arpentés et que toutes les conditions mentionnées

au statut ont été observées, ces territoires deviennent ce qu'on désigne sous le nom de réserve des sauvages.

Les terrains vagues dont il a été question dans la cause de *St. Catherine Lumber Co.* et dans celle de *Ontario Mining Co.* n'étaient pas, à proprement parler, des réserves de sauvages. C'est là la distinction qui existe entre ces causes-là et celle-ci. Les terrains que les tribunaux ont déclaré appartenir à la province de l'Ontario n'avaient jamais été appropriés spécialement pour des réserves de sauvages, et l'on a jugé que ces terrains appartenaient à la Couronne, représentée par la province de l'Ontario et que lors de la confédération, ces terrains étaient restés la propriété de la province de l'Ontario, en vertu de l'art. 109 de l'"Acte de l'Amérique britannique du Nord".

Il ne faut pas oublier que, lors de la confédération, tous les terrains n'ont pas été accordés aux provinces. Les terrains qui ont été spécialement réservés et appropriés pour l'usage des sauvages en vertu du paragraphe 24 de l'art. 91 de l'Acte de l'Amérique britannique du Nord, ont été mis sous la juridiction du Dominion sous le nom de "Indian Lands".

S'il en est ainsi les terres destinées aux sauvages étant revenues sous le contrôle du gouvernement fédéral, ce dernier a le pouvoir d'émettre des lettres patentes pour les lots situés dans les réserves, la concession étant faite pour le profit et avantage des sauvages. Ces lettres patentes sont valides au point de vue de la loi. Les Abénakis ont abandonné la réserve en litige à condition que le gouvernement fédéral leur achète d'autres terres ou qu'il utilise pour leur bénéfices l'argent provenant de la vente. Si nous annulions ces lettres patentes, les sauvages seraient dépouillés de leur propriété et seraient frustrés des avan-

tages qu'ils se sont réservés dans l'acte d'abandon qu'ils ont fait au gouvernement fédéral.

Il me semble que cette cause peut se résumer comme suit: Les sauvages étaient en possession, par l'entremise de l'officier qui les possédait en fiducie pour eux, d'une étendue de terrains qu'ils ont consenti à abandonner à certaines conditions. Le gouvernement fédéral a accepté l'abandon et s'est engagé à exécuter ces conditions. Si, aujourd'hui, nous mettions de côté la convention intervenue, les choses ne pourraient pas être remises dans l'état où elles étaient avant l'abandon. Je ne dis pas qu'il ne pourrait pas se présenter des cas—très rares— où ces terrains deviendraient, éventuellement, la propriété de la province. Ainsi, je suppose,—ce qui est bien improbable,—qu'après l'abandon et avant la vente des terres au profit des sauvages de la réserve, la tribu entière disparaitrait, ne pourrait-on pas alors dire que ces terrains ne font plus partie de la réserve et qu'ils doivent revenir à la Couronne, représentée par le gouvernement de la province. Mais il est inutile de faire des suppositions sur cette éventualité improbable.

Je crois que le paragraphe 24 de la section 91 de l'Acte de l'Amérique britannique du Nord a eu pour effet de conférer à la Couronne, représentée par le Gouvernement fédéral, le contrôle des terres des sauvages, et que, pour cette raison, le titre octroyé par le gouvernement fédéral est valide, et que le jugement doit être confirmé.

Par ces motifs, je crois que l'appel devait être rejeté avec dépens.

Judgment:—"Considering that the recitals of the said judgment to the effect that the Crown in right of the Province of Quebec made no claim to the ownership or possession of the lands in question after surrender thereof by

the Abenaquis Indians, and that its demand in respect thereof ought, consequently, to be directed against the Government of the Dominion and not against private acquirers thereof by formal title deeds; and to the effect that the ownership of the said lands by the said Abenaquis Indians was recognized and affirmed by the Governors of New France before the cession of Canada by France to Great Britain and Ireland, set forth matters not necessary for the decision of the cause, but that apart from the said recitals (and expressing an opinion upon the matters therein set forth), there is no error in the said judgment appealed from;

"Doth dismiss the said appeals, etc.

Mr. Justice Lavergne dissenting.

ROSS v. AMIOT et autre.

Promesse de vente—Paiement—Titres—Franc et quitte—C. civ., art. 1494, 1499.

Dans le cas d'un promesse de vente d'immeubles pour $31,000, payables $3,000 comptant, $3,000, trois mois plus tard, et le solde à divers termes, l'acheteur ayant droit à un acte de vente au temps du deuxième paiement, avec la clause de "franc et quitte", le vendeur devant fournir tous ses titres et un certificat de recherches, l'acheteur ne peut être tenu de payer ces derniers $3,000, avant que le vendeur lui ait fourni ses titres et un certificat du régistrateur.

MM. les juges Archibald, juge en chef suppléant, Fortin et Greenshields.—Cour de revision.—No 3156.—Montréal, 29 mai 1917.—Cotton et Westover, avocats du demandeur.—Lamothe, St-Jacques et Lamothe, avocats des défendeurs.

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definition above referred to, and their Lordships were, therefore, compelled to hold that the taxation was not "direct taxation," and that the enactment was, therefore, ultra vires on the part of the Provincial Government. On that ground, therefore, the appeal must be allowed.

Their Lordships would humbly advise his Majesty that the appeal of Charles S. Cotton and another be allowed, and the cross-appeal of the Crown dismissed. That was equivalent to directing that the decision of the Court of King's Bench (appeal side) be restored. The respondent to the principal appeal would pay the costs of the appeal to the Supreme Court of Canada, and of these appeals.

NOVA SCOTIA.

SUPREME COURT.

AUGUST 27TH, 1913.

REX v. HEISLER.

Indian Lands—Reserve in Lunenburg County—Location and Extent Doubtful—Evidence of—Acts of Possession by Indians—Plan in Public Records of Province Adhered to.

Where oral evidence of acts of possession by the Indians, extending the boundaries of their reserve beyond the limits of a plan of the reserve in the public records of the province, was unsatisfactory the boundaries laid down on such plan were adhered to.

Arthur Roberts, for the plaintiff.

H. Mellish, K.C., for the defendant.

RUSSELL, J.:—The only question in this case is the location of the Indian Reserve at Gold River in the county of Lunenburg, which it is claimed includes and covers a lot of land between Gold River and the road from Beech Hill, which is in the occupancy of the defendant. I have examined all the plans and documents produced at the trial. They are not consistent with one another, but I feel safe in assuming that when Mr. Howe took charge of the Indian Department and made a painstaking and thorough inquiry

into the condition of the Indians, he must have discovered the proper location of their reserves. In his detailed and interesting record of his "Western Tour" in 1842, he refers to the Gold River settlement as almost the only one to be found on the whole south-western shore where anything like an approach to settlement, combined with some agricultural improvement, was perceptible. The reserves have, he says, embraced 40 acres of land on the eastern side of the river, chiefly interval, skirting the margin of the river for about a quarter of a mile above and below the bridge over which the post road passes and 960 acres on the western side of the river. The 40 acres are on the side of the river opposite to the lot claimed by the defendant, whose occupancy is on the western side of the river. The 960 acres reserved on the western side of the river are west of the Beech Hill road and do not cover the portion between this road and the river claimed by the defendant. There was evident occupation of the Indians' grant, but the only names referred to were those of the Indian witness Frank Pennall which was west of the Beech Hill road and that of his father which was east of the river. No doubt the Indians moved over the land between the river and the road, cut ex handles and paddles and used the wood for other purposes, but I do not think there is anything in such evidence as this to aid in locating the grant and in any event I could not accept it as satisfactory against the plan annexed to Mr. Howe's report in 1820; or, if I am wrong in understanding it to be so annexed, let me refer to it as the one in the book containing the correspondence on Indian Affairs, 1842-3, being No. 9432 of the Public Records of Nova Scotia.

The minutes of the Council in 1820 do not define the boundaries at all. In one copy of those minutes there is a blank which indicates that a description was to be filled in, but it seems never to have been supplied. The plan in the book referred to indicates that the eastern line of the 960 acres is the rear line of the lots fronting on Gold River, and there is evidently more than one grant made between the river and the road which could not have happened or would not have been likely to happen if the land was part of the Indian Reserve. It is true that as to one of these grants the grantee took it at his own risk but I cannot imagine that any Commissioner of Crown Lands or that

the Governor in Council would make such a grant at all if the land had been within the reserve.

There has been a mistake made somewhere, in locating the grant by some of the later surveyors, but I do not think I can offer any safe conjecture as to its origin. It may have arisen from the fact that there is a plan dated apparently 1818 in which the Indian lands on both sides of the river are continuous with no such break between the river and the road as the plan in the Record Book shews. This 1818 plan, however, is evidently not the plan of the present Indian Reserve. It does not correspond in acreage, containing only 200 acres. It would seem from the surveyor's memo. on the plan that the Indians were asking for more land and it is possible that this request resulted in the subsequent location of the land as indicated in the plan contained in the book referred to.

The plaintiff's claim will be dismissed.

PRINCE EDWARD ISLAND.

SUPREME COURT. NOVEMBER 4TH, 1913.

HANDRAHAN v. BUNTAIN.

Trover—Fixtures—Fairbanks Coal Scales—Sleepers—Rails and Trollies—Issue as Between Purchaser from Mortgagee and Purchaser Under Execution.

A set of Fairbanks scales for weighing coal was set in a pit, prepared for the scales, and fastened at the corners with screw-bolts to the timbers of the frame of the pit; over a portion of this frame was erected a scale-house, and this was so fastened to the frame that part of the scale-house would have to be taken apart before the scales could be removed. The scales in question were part of a wharf plant for the storage and sale of coal, and in addition to the scales the plant comprised certain sleepers, rails and trolleys in respect of which no ground of action was disclosed.

Held, that the scales should be treated as a trade fixture as between the purchase of the wharf from the mortgagee in possession, with the consent of the mortgagor, and a purchaser under execution issued against the mortgagor.

D. A. McKinnon, for plaintiffs.

G. Gaudet, for defendant.

FITZGERALD, V.C.:—This action was tried before me without a jury. It is in trover for the conversion of a set of Fairbanks coal scales and of certain sleepers, rails and trollies

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EDWARDS v. BLACKMORE.

Meredith, C.J.C.P.

Burk's aid, was formed, Burk being paid for all that was done by him by a gift of stock in the new company.

Nothing turns upon the onus of proof: that which is proved is all that is material now: but I may ask upon whom else than the plaintiff could the onus be, in such a case as this, upon a promissory note merely stamped with the name of the company and signed "per A. W. Burk, Mgr.?" Mr. Robertson could do nothing but take that onus upon himself, as he did, at the trial. The action is upon the promissory note only; and the defences are substantially a denial of the making of the note, and that, if made, there was no power to make it: see Bills of Exchange Act, sec. 51.

I am in favour of allowing the appeal, and of dismissing the action, on this ground also.

Appeal dismissed; MEREDITH, C.J.C.P., *dissenting.*

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EX. C.

Re INDIAN RESERVE, CITY OF SYDNEY, N.S.

Exchequer Court of Canada, Audette, J. March 16, 1916.

INDIANS (§ II—36)—REMOVAL TO NEW RESERVE—EXPEDIENCY—COMPENSATION.

The Exchequer Court, pursuant to the provisions of s. 49a of the Indian Act, will recommend the removal of Indians from their Reserve to a new site, if, in the interest of the public and the welfare of the Indians, such removal seems expedient. Under s. 2 (4) of the Act, they are to be compensated for the special loss or damage in respect of their buildings or improvements upon the Reserve.

Statement.

REFERENCE to the Exchequer Court of Canada under the authority of an order-in-council passed on April 24, 1915, pursuant to the provisions of s. 49*a* of the Indian Act, as amended by 1 & 2 Geo. V., c. 14, s. 2, for enquiry and report as to whether it was expedient, having regard to the interest of the public and of the band of Indians then resident on the Sydney (N.S.) Indian Reserve to another place outside the limits of the city of Sydney.

J. A. Gillies, K.C., appeared on behalf of the party interested in the removal of the Indians; *G. A. R. Rowlings* was appointed by the judge to represent the Indians on the hearing of the reference.

Audette, J.

AUDETTE, J., made his report to the Governor-General-in-council as follows:—

To His Royal Highness, the Governor-in-council:

The question as to whether or not it is expedient—having regard to the interest of the public and of the Indians, that the

latter should be removed from the Reserve at Sydney, and for further action under the provisions of the Act—having been referred to the Exchequer Court of Canada for inquiry and report, under both the provisions of the order-in-council of April 30, 1915, and of 1-2 George V., c. 14—the undersigned has the honour to report as follows:—

The notice, provided by s. 2 (2) of the Act, fixing the time and place for the taking of evidence and the hearing of the investigation respecting the above matter, having been published in the "Canada Gazette" and in a local newspaper at Sydney, I assigned counsel to represent and act for the Indians, who might be opposed to the proposed removal, they having previously declared their unwillingness to surrender.

The hearing of the matter was proceeded with at Sydney, on the 20th, 21st, 22nd, 23rd and 24th days of September, 1915, and upon hearing read the pleadings, and upon hearing the evidence adduced, both on behalf of the party seeking such removal, and on behalf of the Indians—and upon hearing J. A. Gillies, K.C., of counsel on behalf of the party seeking the removal, and Mr. Rowlings, on behalf of the Indians, the undersigned humbly submits the following finding:—

The Reserve in question, which is numbered 28 in the Official Schedule of Indian Reserves, is located on the eastern shore of Sydney Harbour, and was acquired by the Dominion government on April 28, 1882, under a grant from the Province of Nova Scotia, for the use of the Micmac Tribe.

It had been surveyed under direction of the federal government in 1877, and at that time contained 2 acres, 2 roods and 37 perches—the area mentioned in the provincial grant above mentioned.

When the Cape Breton Railway was built in 1887 or 1888, sixty-six hundredths of an acre of the Reserve was expropriated for the purposes of that public work, severing the land in two parcels, leaving the Reserve, already of irregular shape, with the contents of 2 acres and 12 perches, and a small piece of land on the water side of the track. This small piece of the Reserve, severed by the railway from its main part, is of no value and cannot be utilized for settlement purposes—and in the result leaves the Reserve, for practical purposes, still smaller than its apparent and real size.

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Joe Christmas, the present chief, or captain, of the band on the Reserve, has lived on the Reserve back and forth since 1875. In 1887, two more Indian families arrived upon the Reserve. In 1899 there were 85 Indians on the Reserve, and on February 15, 1915, there were 23 houses and 115 Indians. At present there are between 120 and 122 Indians and 27 houses, without counting the school-house and the brick building with sanitary closets.

The present Reserve is really an adjunct of the Eskasoni Reserve, composed of 2,800 acres, and which is about 24 to 25 miles from Sydney. The Grand Chief of the Micmacs resides at Eskasoni, and there is only a sub-chief, or captain, at the Sydney Reserve. There are in the vicinity of 155 Indians at Eskasoni, who do some agricultural work. When these Eskasoni Indians come to Sydney to sell their handicrafts and products, they reside on the Sydney Reserve. There is also the Cariboo Marsh Reserve, of about 5,385 acres. The land on that Reserve is so poor that no Indians reside upon it, but as there is considerable timber upon it they use it to cut their supply for fuel and for making ties, which they sell to the Steel & Coal Co. There are also Indians residing at North Sydney and Little Bras d'Or who, like the others when they come to Sydney, put up at the Indian Reserve.

Now, this Reserve abuts on King's Road, which is one of the principal arteries of the city, a highway very much travelled and used by the public, and upon which a large number of fine residences are built. No one cares to live in the immediate vicinity of the Indians. The overwhelming weight of the evidence is to the effect that the Reserve retards and is a clog in the development of that part of the city. On this branch of the case I may say I would have come to a final decision with more satisfaction, had I heard the present mayor of the city, some representatives from the Board of Trade, and some prominent public-spirited citizens.

It is worth passing notice to mention that the two medical doctors who respectively held the position of Indian agent for this Reserve since 1899 favour the removal of the Indians, provided larger and better quarters are given them. Dr. McIntyre says, he thought the Reserve congested with 20 houses and 100 Indians, and there are now 27 houses and 122 Indians. The removal would make the property in that neighbourhood more valuable for assess-

ment purposes—and it is no doubt an anomaly to have the Indian Reserve in almost the centre of the city, or on one of its principal thoroughfares.

The racial inequalities of the Indians, as compared with the white man, check to a great extent any move towards social development, a state of affairs which, under the system now obtaining, can only grow worse every day, as the number of Indians is increasing.

I do, therefore, without hesitation, come to the conclusion, on this branch of the case, that the removal of the Indians from the Reserve is obviously in the interest of the public.

Coming to the second branch of the case, as to whether it is in the interest of the Indians to be removed to a larger place, I may say that during the trial or investigation, I had occasion, accompanied by counsel on both sides, to view and examine the Reserve in question. It was on that day quite clean and in good sanitary condition; but it is established that this condition did not always obtain.

The majority of the Indians is opposed to the removal. They find their present Reserve well located, close to the place where t' cy earn their livelihood, and it suits their methods of life. They want to stay where they are, and do not wish to accept any place offered to them. However, if a better, larger and more suitable place is found it will be acceptable to some of them. This state of things carries us thus far and no further. But the Reserve is getting too small, too congested and too limited, to accommodate its increasing population, besides the fact that the sanitary conditions are unsatisfactory and can only grow worse with an increase in population in the settlement.

The brick sanitary closet in the Reserve has been closed as a result of misuse, and the several draught-houses, now in use to replace it, have proved to be very objectionable to the neighbourhood. Although provided with a number of such draught-houses, the Indians have not been always considerate and mindful of their neighbours in respect of cleanliness. They are also charged with disturbance, but that part of the evidence is meagre and not very reliable, and in that respect they may not be any worse than white men of certain classes. And while it can be said in one sense they may be undesirable neighbours in that locality, they

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could be considered as reasonably well-behaved Indians. They are healthy Indians and the Reserve is free from tuberculosis.

These Indians have abandoned the nomadic life of their ancestors, and are now employed as labourers all over the city at different works, while the women do some charring and washing.

This Reserve has become too small for the present requirements. There are too many buildings upon it, and the band of Indians has become too numerous to be located under the present conditions for sanitation on such a small area. An undesirable and objectionable congestion is the necessary result. Moreover, the band is growing, the young men are marrying and desire to settle there. And while the Reserve is too small for the Indians actually in occupation, we must not overlook that all the Indians of Cape Breton who come to Sydney reside on the Reserve during the time of their visit. And, looking to the future, made wise by looking on the past of this Reserve, it appears that the desirability of a larger Reserve, a matter of expediency now, will become imperative in the near future.

The Indians, in their own interest, should be removed to a larger place where they would be given a small plot of land to cultivate. But this removal, while it should be to a place outside of the city, to avoid a further removal in the future, must be consistent with and considerate of the interest of the Indians. They should remain as close as possible to the city, although outside its limits, to allow them to pursue the same manner of earning their livelihood by doing work in the city, where, indeed, they have become quite a factor in the labour market. They must also be kept close to their Church, because it is insisted upon, in the evidence, that their priest has a very salutary influence over them, and when the Indian loses the influence of his Church, he goes on the down grade. These Indians are labourers of all classes: bricklayers, masons, plasterers, carpenters, pick and shovel men, and some of them work on the Cape Breton Electric Tramway. They are much employed during the winter, for the removal of snow from the tramway. They also make pick handles, tubs and baskets.

The evidence establishes in the result that the removal would be in the interest of the Indians, provided they are given a better and larger Reserve in some place convenient to their church and

their work. And in doing so, to place them in the neighbourhood of the Coke Ovens district must be avoided—that locality is undesirable in many respects—and occasion for intemperance is sure to arise there.

Both the unsatisfactory condition of the present Reserve with respect to sanitation, and the advantage to be derived by the Indians from larger grounds, make it expedient to recommend their removal to a better and larger place, consistent with the relatively close proximity to their work and church.

What the Indian, on the one hand, may lose from the convenience of close neighbourhood to his place of labour, in the future perhaps made costly by the expense of a ferry or car-fare—which with that class must be reckoned—will be offset by the advantage of a larger territory for his Reserve, where he can have his little plot of ground under cultivation, giving him a vegetable garden, helping materially in support of his family.

The removal of this band of Indians from the Reserve will open to improvement at once that part of the city of Sydney, while the Indian, in the result, will not suffer anything serious, save perhaps a disadvantage in the degree of convenience in going to and from his work, and his morals can be looked after just as well upon the new Reserve. He will be able to attend his church just the same, and he will, moreover, be perhaps further away from the temptation in the way of intemperance and kept busy and interested in his Reserve by attending to his vegetable garden. Having each a small plot of land would also be an incentive to keep it in proper condition.

Having found the removal of the Indians from this Reserve expedient and advisable, it becomes my duty now, under the provisions of s. 2 (4) of the Act:

> To ascertain the amounts of compensation, if any, which should be paid respectively to individual Indians of the band for the special loss or damages which they will sustain in respect of the buildings or improvements to which they are entitled upon the lands of the Reserve.

On that branch of the case, ex. "E," testified to by 3 witnesses, establishes the value of each building upon the Reserve, with the name of the proprietor opposite the figures. This valuation, however, has been arrived at on a basis of re-instatement value. That is, it does not shew the actual market value of the buildings, taking into consideration the depreciation for wear and tear. That

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document shows what it would cost to build these, however, anew to-day.

While the Indian, the ward of the nation, should be treated as well as possible, it is quite conceivable that a great part of the old buildings could be used in the erection of the buildings on the new Reserve. The total value of the buildings, owned by the Indians on the Reserve, is placed by these three witnesses at $8,850, subject to what has just been said. This is exclusive of the value of the brick sanitary closet and the school-house.

Passing now to the question of the selection of the site for a new Reserve, it may be said that a deal of evidence has been adduced in that respect. Indeed, the selection of a site is a question not free from difficulty, and upon which a deal of evidence has been adduced. A large plan of the city has been filed, and upon it has been shewn as prospective or available sites, the places marked respectively "A," "B," "C," "D," "E," "F," "G," and "H." On that plan is also shewn the site of the present Reserve.

Besides these sites so indicated on the plan, there is also across the harbour at Westmount, almost opposite the present Reserve, a place recommended by some of the witnesses. It is entirely outside of the limits of the city, and quite accessible to the city for the most part of the year. However, in the autumn and in the spring the ice makes the crossing quite impossible at times for a period varying from one week to three weeks and perhaps more. Were it not for that last difficulty, the place would be ideal. The Murphy farm of 50 acres is there available—and there is also a large quantity of land in that neighbourhood which could easily be secured at a reasonable price. The soil is very good, the site beautiful and abutting on the harbour. If the Indians were established at Westmount on a really good farm, would it not be possible for them to keep a few horses, and when the ice on the river prevents them from coming across, they could drive to town, a distance of only 5 or 6 miles? They would be there away from the liquor shops and the undesirable foreigners settled at the Coke Ovens, where they often get liquor—always a source of trouble to them.

Of all the other sites above mentioned and referred to by the letters "A" to "H," I would only recommend in the alternative, either "A" or "E."

The "A" site lies outside of the eastern part of the city between the Grand Lake Road and the Sydney and Glace Bay R. Co.'s line; and "E," which is also outside the eastern part of the city, at the top of the Cow Bay Road.

Jos. Christmas, one of the Indians, although objecting to the removal, says if they must be removed, he would prefer the Westmount site to any other. Ben Christmas, another Indian, speaking for himself, says "E," at the top of the Cow Bay Road, would meet with his approval if they are given a little assistance in building and larger grounds. The soil there, however, seems to be of doubtful character for farming purposes.

Under all the circumstances, I would humbly recommend, as prospective alternative sites, "A" at the top of the Grand Lake Road, or "E" at the top of the Cow Bay Road, or Westmount. The prospective sites within the limits of the city should be discarded, because the same question of removal would arise again at some future date.

The price at which these prospective properties could be acquired has been estimated by some of the witnesses.

It may be said that while the present site can only be sold at public auction, Mr. Gillies, K.C., has offered to purchase it at $5,000. If the sale is made this amount may be used as an upset price. Agent Parker valued the land at $4,800—witnesses Ross and Midgley at $5,000—Rev. Father Cameron at $150 an acre—and Rev. Father McDonald, in his letter of January 8, 1914, at $12,000. The valuation of $5,000 would appear to be about fair and right.

Therefore, the undersigned has the honour to report he finds it expedient, having regard to the interest of the public and of the Indians located on the small Sydney Reserve, that the said Indians should be removed from such Reserve.

Furthermore, it is found that the compensation above set forth should be paid respectively to the individual Indians of the band for the special loss or damages sustained by them in respect of their buildings or improvements upon the Reserve, or an adjustment be made for their claims in respect thereto, and a suitable new Reserve be obtained for them before they be removed from or disturbed in the possession of the present Reserve.

The undersigned would further recommend that the Indians

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should, on their removal, be treated with great consideration and kindness, and that such removal should be made quietly without undue haste, trouble or inconvenience, to the Indians. The site to be first selected and the compensation for their buildings or improvements adjusted on the basis above mentioned.

In witness whereof I have set my hand this 15th day of March, A.D. 1916. (Sgd.) L. A. AUDETTE, J.E.C.

SASK.

C. A.

HEFFER v. KOKATT.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. July 15, 1918.

COURTS (§ II A—151)—CONTRACT TO PAY MARKET PRICE—MEANS OF ASCERTAINING—DEBT—JURISDICTION OF DISTRICT COURT.

A contract to pay whatever price is being paid at a certain place or to pay the market price for goods sold furnishes the means of ascertaining the amount due and an action for that price is an action for debt.

If the amount does not exceed $100, the action may be tried in the District Court under r. 4 of the District Court Rules (Sask.).

Statement.

APPEAL by defendant from a District Court judgment in an action for the price of goods sold. Affirmed.

P. H. Gordon, for appellant; no one for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with LAMONT, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—The plaintiff sues for $84.25, being the balance owed by defendant to plaintiff on an account for hay sold by plaintiff to defendant.

The plaintiff's version of the transaction is that: "I told him he could have the hay for price in livery barn less $1.50 a ton for hauling. I charged him for 8½ tons. He said he only got 6¾."

Defendant says: "We agreed he was to have ¼. I was not to stack it. Afterwards I agreed to stack and haul it, and pay $5 a ton. I afterwards paid in $7 so as to be sure and have enough. Afterwards found there was 6 tons and two-thirds of plaintiff's share."

The trial judge gave judgment for plaintiff for $21.30. Two objections were taken to this judgment.

1. That, as both parties swore to a contract at a certain specified price, the judge had to either find that the hay was sold at one of those prices or dismiss the action, because, under these circumstances, he could not find on a *quantum meruit*.

I cannot agree to this proposition. It being admitted the hay was sold, the judge could then find the amount and price. As the parties disagreed on both, he could decide on a *quantum meruit*.

objection is precluded by the forty seventh section of the statute 4 Wm. IV. ch. 1.

SHERWOOD, J. and MACAULAY, J. of the same opinion.

Per Cur.—Rule discharged.

DOE EX DEM. JACKSON v. WILKES.

A grant from the Crown must be by matter of record under the Great Seal, and an exemplification under the Great Seal of a grand invalid in its inception, will not have the effect of making such grant valid by relation, from its commencement.

Ejectment brought to recover possession of a small tract of land, one-fifth of an acre, in the village of Brampton. The lessor of the plaintiff proved his title by producing letters patent from the crown, granting him the premises in fee simple. The date of the patent was 5th March 1834, and upon the face of it, it appeared to be made in confirmation of a previous sale of the land to the grantor, through the Commissioner of Crown Lands, for the sum of 10*l.* 5*s.* To rebut this title the defendant produced an instrument, exemplified under the great seal of this province, of which the following is a transcript :—

[GREAT SEAL.] UPPER CANADA.

" WILLIAM THE FOURTH, *by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, &c.*

" To all to whom these presents shall come, Greeting :—

" Know ye, that amongst the rolls and records in the Secretary and Registrar's Office, in the province of Upper Canada, Lib, A. fol 8, it is thus contained:—Frederick Haldimand, Captain General and Governor-in-Chief of the province of Quebec and territories depending thereon, &c. &c. &c., General and Commander-in-Chief of His Majesty's Forces in said province, and the territories thereof, &c. &c. &c. Whereas his Majesty having been pleased to direct that in consideration of the early attachment to his cause manifested by the Mohawk Indians, and of the loss of their settlement which they thereby sustained, a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them and others of the Six Nations who have either lost their settlements within the territory of the American States, or wish to retire from them to the British; I have, at the earnest desire of many of these his faithful allies, purchased a tract of land from the Indians situated between the lakes Ontario, Erie and Huron ; and I do hereby, in his Majesty's name, authorise and permit the said Mohawk Nation

and such others of the Six Nation Indians as wish to settle in that quarter, to take possession of and settle upon the banks of the river commonly called Ouse or Grand River, running into Lake Erie, allotting to them for that purpose six miles deep from each side of the river, beginning at Lake Erie and extending in that proportion to the head of the said river—which they and their posterity are to enjoy for ever.

Given under my hand and seal at arms, at the Castle of St. Lewis, at Quebec, this 25th day of October 1784, and in the 25th year of the reign of our sovereign lord George the Third, by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith, and so forth.

[Signed,] FREDERICK HALDIMAND."

Registered, 26th March, 1795.

(Signed) WM. JARVIS.

By His Excellency's command.

(Signed) R. MATTHEWS.

"All which we have caused to be exemplified.

"In testimony whereof we have caused these our letters to be made patent, and the great seal of our said province to be hereunto affixed. Witness our trusty and well-beloved Sir John Colborne, K.C.B., lieutenant-governor of our said province, and major-general commanding our forces therein, this 28th June, 1834, and fifth year of our reign. (Signed) J. C."

It was then proved that the Six Nations Indians had enjoyed the lands described in this instrument for more than forty years; that the premises in question composed part of the tract; and that individual Indians had leased portions of the tract to different persons. There was also produced a letter, admitted to be under the signature of Mr. Goulburn, under-secretary of state for the colonies in 1816, addressed to Captain Norton, an Indian agent, in which it is stated that "there is no difficulty on the part of his Majesty's government, to admit that the grant on the Grand River, which was after the peace of 1783 made to the Five Nations and their posterity forever, is a grant as full and as binding upon the government as any other made to individual settlers."

A verdict was directed to be taken for the plaintiff, with leave for the defendant to move to enter a nonsuit if the court should be of opinion that by reason of the instrument under the hand and seal-at-arms of General Haldimand,

and the possession of the Indians under it, the King was disabled from making the grant under which the lessor of the plaintiff claims.

Draper accordingly obtained a rule nisi in Michaelmas Term last, which was argued in Hiliary Term by the *Attorney-General* for the plaintiff, and *Baldwin* for the defendant.

ROBINSON, C. J.—Nothing is reported to have been given in evidence at the trial, from which it could be inferred whether the defendant was or was not in possession by privity with the Six Nations Indians, or whether they countenanced the defence and objected to this action upon the idea that the Crown had done or was attempting anything in opposition to their rights, and inconsistent with the former act of the governor of the province of Quebec, under which the Indians had originally taken possession. From what passed at the trial, there was no ground for assuming this; and upon the argument of this case last term, I considered the legal questions which have been agitated to have been raised by objections purely technical, taken by the defendant to the title of Johnson, the lessor of the plaintiff, and urged for the purpose of maintaining himself in possession without its being attempted to be shewn, and indeed without its being pretended that the Crown, in what they have latterly done, have been acting adversely to the Indians, or with a view to deprive them of any advantage they could claim under the instrument of Governor Haldimand.

The defendant showing no privity between himself and the Six Nations Indians, and being, for all that appears, a stranger to any title that could be set up under the act of Governor Haldimand, does what any defendant in ejectment may do, generally speaking—that is, he takes whatever legal exceptions he can to the title set up for the plaintiff; and he maintains that by the instrument made by General Haldimand as governor of the province of Quebec, the King was divested of the title of the premises in question, and was disabled to make the grant which he assumed to make to the lessor of the plaintiff in 1834.

To this it is answered, that the instrument produced can have no legal operation to pass an estate from the Crown—first, because it is not under the great seal, and not matter of record; secondly, if it were indeed a patent under the great seal, it woul be void for uncertainty as to the parties who are to take under it, the grant not being made to any corporate body, nor to any person by name in their natural capacity; thirdly, that no estate is conveyed by the words of the instrument, which amounts merely to a license to the Six Nations of Indians to enjoy the land at the pleasure of the Crown.

The defendant, on the other side, maintains, that the instrument is in fact matter of record, being made so by its being recently exemplified under the great seal; that the grantor can make title under the enrolment, and cites 3 & 4 Edw. VI. ch. 4, as it seems from the note on the instrument, as well as from the certificate exemplifying it, that it has become matter of record; that it is not indispensable, with respect to all grants from the Crown, that they should be under the great seal, for that leases may be made in England under the exchequer seal)cites Com. Dig. Patent); that in the colonies, grants from the Crown may be good, though not under the great seal, if they are sanctioned by usage in the particular colony (Chalmers' Opinions on Cases from the Colonies, vol. 1, p. 241); that it does not appear to the court that there was a great seal in use in Canada when this instrument was made (1784); and that whether a great seal was necessary to grants of land, and whether the king could only grant by record in the province of Quebec, must be decided by the laws of Canada at the time the instrument was executed—that is, by the French law in force then—and not by the law of England, which, in civil matters, was suspended by the introduction of the law of Canada under statute 14 Geo. III. c. 83.

As to the objection, that the grant is bad for uncertainty in respect to the grantor: that it is at least certain as to the Indians, who went into actual possession and lived upon it, and that it would be good as regards their interests, though there might be uncertainty as to other persons who might

claim; that the Indians were by this grant made a corporate body and enabled to take (1 Roll. 513) and hold in a corporate capacity, although no corporate name was expressly given to them. That if the grant did but give a right to hold generally, without strict legal words of inheritance, the grantor had a life interest, during the continuance of which the King could not make a grant to others; and that if the Indians or any Indians have under Governor Haldimand's grant a right to hold possession, that right must prevent any other person from recovering in ejectment, which implies a right to the immediate possession.—1 Inst. 86.

In my opinion, the case is clearly in favour of the King's right to make the patent in 1834. Upon the first objection to the instrument of Governor Haldimand—for it is impossible to adjudge, upon any legal principle or upon any authority, that such an instrument could divest the crown of an estate—it is true, that by the law of England leases may be made of lands of the crown under the seal of the Court of Exchequer, either for years or for life, because such, it is said, has been the common usage of the Court of Exchequer, "and the customs and usages of every of the King's Courts are as a law, and it would lead to great difficulty and confusion if the multitude of leases which have been so made were to be held void."—2 Co. 16; Cro. Car. 99, 513, 528; Cro Jac. 109; Plow. 320, b.

But it is impossible to bring this case within the reason or authority of Exchequer leases of crown lands, for here neither is the great seal used nor any seal answering to that which, upon the authority cited, can be admitted as equivalent. The seal at arms of Governor Haldimand is no seal of the King, and it is not shewn that in point of fact it was ever pretended in any other case to dispose of crown lands by an instrument under the seal at arms of the Governor of Quebec. Again, this instrument does not profess in its terms to be a lease for years or for life; but if it be meant to convey any legal estate, it clearly was not intended to limit such estate to the life of the grantee. The general principle is clear, that no grant of the King is avail-

able or pleadable unless under the great seal, and it is equally clear that this case cannot be brought within the principle relied upon. Com. Dig. Patent C. 2; 2 Roll. 182, l. 5. The laws of Canada were spoken of in the argument. It was not shewn, that according to those laws the Governor of a colony, acting in the name of the King, could under his own seal at arms grant away the lands of the crown; but it is not important to discuss this point, for the question must be resolved by the laws of England, and not by the French law as it prevailed in Canada upon the division of the Province of Quebec. King George the Third, in the royal proclamation of 1763, introduced the law of England into the newly conquered country, and the same proclamation, in speaking of grants of land to be made in the Province of Quebec, uses the term *patent;* and no doubt, according to the law of England, it could only be by patent that lands could be granted. It is true that before 1784, when this instrument was made, the statute 14 Geo. III. c. 83, intervened, which enacted that thereafter, "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada, as the rule of decision of the same." But if it were otherwise clear, that under this form of words the laws of Canada could be considered as introduced in such a manner as to apply to the exercise of the King's prerogative in granting lands, binding his Majesty by whatever laws the French King had been bound, which I do not at present assent to, yet the ninth clause of the statute prevents such an application of the previous words, for it expressly declares "that nothing in this Act contained shall extend, or be construed to extend, to any lands that have been granted by his Majesty or shall thereafter be granted by his Majesty, his heirs and successors, to be holden in free and common soccage.' If without this clause the application of the laws of Canada would be extended to make valid this instrument of Governor Haldimand, which otherwise would convey no interest, it is clear that the ninth clause would prevent the laws of Canada from being so extended as to defeat the subsequent grant in free and common soccage, which has been made to Jackson, the lessor of the plaintiff.

We are thrown upon the law of England for the decision of this question, and by that law (and I imagine, not less by the laws of Canada), it is plain no estate has been created in crown lands by this grant, if it can be so called, which Governor Haldimand has assumed to make of them under his seal at arms. The want of the great seal is in my opinion fatal. It has been argued that the recent exemplification of this instrument, under the great seal of the province, has made it matter of record, but the question is, whether, when the patent was issued to Jackson in March, 1834, the King was or was not seized of the land? That he was so seized is plain, unless the instrument under Governor Haldimand's seal at arms had divested his Majesty of the estate. If that instrument could only derive validity from its being exemplified under the great seal, then the exemplification came too late, for clearly the principle upon which the enrolment of a bargain and sale may have an effect retrospectively, cannot apply in such a case, for no estate passed under that instrument at the time of its execution.—Com. Dig. Confirmation D. 5. But there can be nothing in this argument, in any view of it. The principle is—that the King can neither grant nor take an estate, but by matter of record. In respect to titles made to the King, the question of the necessity of the great seal does not occur, and it is sufficient to shew that the conveyance is by matter of record; but with respect to grants made by the King, the question is not merely whether the instrument of conveyance can or cannot be made out to be matter of record; the grant must be shewn to have been made under the great seal, and the exemplification under the great seal of an instrument in itself insufficient for the purpurpose, cannot change the nature of the instrument.

The 3 & 4 Edw. VI. ch. 4, was referred to—but nothing can be clearer than that that statute and the 13 Eliz. ch. 6, explaining it, can have no such effect as to make the exemplification of an instrument, which is not a patent, supply the place of a patent. It proves the very contrary, for it shews that no patent existed. Those statutes do nothing more than enable persons claiming by force of any patents

made to them, to make title by the enrolment of such patent. Enrolling an instrument such as that produced, I take to be merely a nugatory act. Whatever may have been the intention of the Colonial Government of Quebec at the time the instrument was made, which, as far as has been shewn to us, is without precedent; it is impossible to give it effect, as divesting the King of his estate, without admitting that Governor Haldimand, under his hand and seal of arms, could have alienated all the Crown lands in the province without the intervention of those forms which are necessary to the perfecting of a patent, and which are designed to afford protection both to the crown and the subject.

It is not necessary to enter into a particular consideration of what might be the legal operation of this instrument, supposing it to have been made in such a manner as to be binding on the crown; I must say, however, that the letter which was produced, under the signature of Mr. Goulburn, can have no effect on the judgment of this court upon the legal construction or effect of this act of Governor Haldimand. It states very openly and candidly what effect the Government are willing to concede to it, so far as their rights and the rights of the Indians are concerned, and would be a very strong document in support of the Indians if anything had been since done by the Government inconsistent with the frank avowal contained in that letter. But it is not pretended that anything has been done at all at variance with the sentiments then expressed by the under secretary of state, or repugnant to the wishes or rights of the Six Nations. The defendant, I repeat, has shewn no priority between himself and the Six Nations, and, for all that appears, the necessity for this ejectment against the defendant may as probably have arisen in consequence of measures taken by the crown in concert with the Indians, and for their interest and protection, as from an opposite cause.

Though my opinion is given upon the insufficient nature of the instrument produced, separate from its contents, I have not failed to consider the question raised with respect to the uncertainty of the grantees that are to take, and the

nature of the interests intended to be passed. At present I consider that the instrument cannot be held to convey any legal estate, for the want of a certain designation of any person or persons to take as grantees.—1 Co. 50; Dyer, p. 170; Co. Lit. 3, a.; 10 Co. 26, b. I do not think that a patent in the form of this instrument would have created a corporation consisting of "the Mohawk Nation and such other of the Six Nation Indians as wish to settle on the tract of land described;" and unless it can have that effect, as there are no persons particularly named, there cannot be said to be properly any grantees; and it is, at any rate, out of the question to contend that an instrument under the seal at arms of a colonial governor can constitute a legal charter erecting a corporation. The most that can be made of the instrument issued by Governor Haldimand is this, in my opinion—it may be considered as a declaration by the King's Governor, and in the King's name, that certain lands of the crown were held by the King for the exclusive use and enjoyment of the Six Nations. As it conveyed no legal title, not being under the great seal, and not being made to any persons in their natural capacity, or to a body corporate, and contains no legal words of inheritance, it is impossible to say the King did not continue fully seized in fee of the premises, or that in a court of law any greater effect could be ascribed to such an instrument than that of a license to possess during the King's pleasure, which pleasure would be determined by the King's death, or by the patent subsequently issued; and so long as the right of possession continued unaffected by any determination of the King's will, the King, as the possessor of the legal title, could of course assert that title against a stranger, for it might very well be that the ejectment might be necessary for the very purpose of protecting the Indians in the exclusive possession which had been promised to them; so that the grant made to the lessor of the plaintiff may be no infringement of ano equity between the crown and the Six Nations, and to allow of an ejectment against the defendant, who appears in no other light than a stranger, involves no opposition to legal principles, since if the crown had

made no recent grant, and had continued seized as trustee for the use of the Indians, (admitting that to be possible in law) the King could have asserted that legal title even against the *cestui qui trust*, and much more against a stranger.—Com. Dig. Grant G. 3; Hard. 443; 8 T. R. 118.

I am of opinion, on these grounds, that the verdict for the plaintiff should stand; and if this question which has been raised here were to be decided according to the laws of Canada, and not by the law of England, it has not been shewn that the result would be otherwise. We have ascertained that there was a great seal in use in the Province of Quebec in 1784, when the instrument of General Haldimand bears date; that grants of land, of which few were made by the British Government before the year 1795, were made by letters patent under the great seal, and that it has been uniformly held in the courts of Lower Canada that grants of the waste lands of the Crown could not be made in any other manner. Before the conquest, it appears that no seal was held to be necessary in grants from the French Crown. The Governor and Intendant were enabled to grant jointly, but their grant was not effectual until it was ratified by the King of France; and it may reasonably therefore be inferred that such an instrument as this before us could not have availed under the French-Canadian law to possess any interest beyond that of a mere license of occupation.

I repeat, however, that such a question as this, arising here or in Lower Canada, is not to be decided by the laws in force at the time of the conquest, but upon the principles of the common law of England, which, in respect to the prerogative of the King in granting the lands of the crown, continued to be in force after the passing of the 14 Geo. III. ch. 83, as well as before.

SHERWOOD and MACAULAY, J. J., of the same opinion.

Per Cur.—Postea to the plaintiff.

to me on every ground unreasonable and wholly foreign to what in my opinion the parties could have intended.

The appeal should be allowed with costs and the action dismissed with costs.

OSLER and MACLAREN, JJ.A., concurred, giving reasons in writing.

MOSS, C.J.O., also concurred.

MACLENNAN, J.A., dissented, giving reasons in writing.

APRIL 12TH, 1905.

C.A.

JONES v. GRAND TRUNK R. W. CO.

Railway—Expulsion of Passenger—Indian—Passenger Rates—Special Contract—Custom—Withdrawal of Privilege—Absence of Notice—Accommodation—Jury—Damages.

Appeal by defendants from judgment of BRITTON, J., 3 O. W. R. 705, in favour of plaintiff for $10 damages (assessed by jury) and costs on the High Court scale, in an action for damages for expulsion from a train of defendants.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

W. R. Riddell, K.C., for defendants.

A. G. Chisholm, London, for plaintiff.

MOSS, C.J.O.:—. . . Plaintiff had frequently travelled upon defendants' train between Hagersville and Hamilton, and vice versa, as the holder of an Indian ticket, occupying a seat in the first class carriage, even when the train was composed, as it was on the occasion in question, of two carriages, one a first class carriage, and the other the carriage in respect of which the dispute has now arisen. Until the occasion in question she had always occupied a seat in the first class carriage, and had never been denied the accommodation. Upon the weight of evidence, the other carriage was, to all outward appearance, nothing more than a smoking car. There was nothing to indicate that it was a car for the accommodation of second class passengers. The conductor testified that the words "second class" were painted on the outside, but in this he is contradicted by the brakesman and plaintiff's husband, who made a careful examination of the carriage.

Inside, the word "smoking" is painted on one end, if not both ends; but there is a small square of paper pasted over the door of the smaller compartment with the words "no smoking" printed with a pen and ink. The testimony shews that every part of the carriage was on occasions occupied and used by smokers of tobacco. The conductor says he only checked smoking in the smaller compartment when women were there, and admits that at times it was an offensive carriage by reason of tobacco smoke. Plaintiff says that on the occasion in question, when she alighted on the platform at Rymal, she saw a number of persons at the windows smoking with their pipes in their mouths.

The jury found that the carriage was in a fact a smoking car, and it was open to them to so find upon the evidence.

Upon the findings and the evidence, it should, I think, be taken to be established: (1) that the carriage into which the conductor told plaintiff to go bore, to all outward appearance, the semblance of a smoking car, and nothing else; (2) that plaintiff believed, in good faith, that it was a smoking car, and nothing else; (3) that there was no other carriage provided as part of the train for the accommodation of second class passengers; (4) that plaintiff was told by the conductor that she must pay the full first class passenger fare or go into "the next car," meaning the carriage in question, or get off; (5) that the conductor was aware that plaintiff believed the carriage to be a smoking car, and nothing else, but he did not inform her to the contrary, or gilve her any reason to think otherwise; (6) that a smoking car used as such is not sufficient accommodation for the transportation of second class passengers.

Upon these conclusions it follows that upon the occasion in question defendants did not furnish sufficient accommodation for plaintiff as a second class passenger. I see nothing improper, or fraught with the dire consequences suggested by counsel for defendants, in the finding of the jury that as a smoking car the carriage in question was not sufficient accommodation for second class passengers.

The opinion of Parliament as to the character to be ascribed to smoking tobacco is found in sec. 214. sub-sec. (e), of the Railway Act, which authorizes railway companies to make by-laws, rules, or regulations for "prohibiting the smoking of tobacco and the commission of any other nuisance in or upon such carriages." Even in the absence of rules or

regulations, no person travelling in a first class carriage would be permitted to smoke in the midst of the other passengers. He would be obliged to conform to the ordinary usages and decencies. And surely there can be no license to such a person to enter a car filled perhaps with women and children, and because they are travelling on second class instead of first class tickets, and in a second class carriage, subject them to the nuisance caused by tobacco smoke, which would not be tolerated in the car he came from. There is no evidence in this case that it is the usage to allow smoking among the passengers in a second class carriage.

If, as defendants contend, there was a small compartment of the carriage in question not devoted to smoking, plaintiff was not aware of it. As before mentioned, there was nothing on the outside to indicate that it was a second class passenger carriage, and all the indications plaintiff observed pointed to its being a smoking car. I think it was the conductor's duty, seeing, as he must have seen, that plaintiff was under that impression, to have told her of the compartment. The duty is to "furnish" sufficient accommodation, and I cannot think that duty was performed in this instance. To furnish must include to make known or bring to the notice of those for whom the accommodation is provided, some intelligible direction to where it is. Plaintiff was allowed to continue under the belief that the only accommodation offered her was a seat in a smoking car, and, in the view I take of the facts and findings, this was not furnishing her with sufficient accommodation.

Appeal dismissed with costs.

MACLENNAN and MACLAREN, JJ.A., concurred.

GARROW, J.A., dissented, giving reasons in writing, in which OSLER, J.A., concurred.

APRIL 12TH, 1905.

C.A.

GRAHAM v. INTERNATIONAL HARVESTER CO.

Master and Servant—Injury to Servant—Negligence of Master —Common Law Liability — Defective System — Findings of Jury—Workmen's Compensation Act.

Appeal by defendants from judgment of MEREDITH, C.J., in favour of plaintiff, upon the findings of a jury.

FALCONBRIDGE, C.J.—Contrary to the opinion which I formed during the argument of this appeal, I have come to the conclusion that I cannot reverse or vary the carefully considered judgment of the learned Master. Two of the plaintiffs who are represented by Mr. Falconbridge are admittedly recti in curia, and I at first thought that, as they were domini litis, all parties suing should be compelled to come in to or be bound by their action. But I do not see, in view of the very different measure of damages which would have to be applied in the case of these respective claimants, how counsel could present the case or the Judge intelligently or intelligibly charge the jury. It is quite manifest that such a course would be impracticable. The Irish case, Johnston v. Great Northern R. W. Co., 20 L. R. (Ir.) 4, does not assist in solving the problem that is here presented. There the defendants paid a sum of money into Court with their defence. The plaintiff admitted the sufficiency of the amount, and all that remained to be done was to establish the claim of a party interested to part of the money brought in.

I should be pleased to find that any Court is sufficiently ingenious to deliver the defendants from the embarrassing situation in which they seem to be placed, but I must dismiss this appeal with costs in any event to the plaintiffs in each of the actions.

BRITTON, J. JUNE 3RD, 1904.

TRIAL.

JONES v. GRAND TRUNK R. W. CO.

Railway—Expulsion of Passenger—Indian — Agreement between Council of Six Nations and Railway Company—Passenger Rates—Invalid Contract — Custom of Allowing Indians Half Rates—Withdrawal — Absence of Notice—Second Class Car—Sufficient Accommodation—Findings of Jury—Damages.

Action by Charlotte Jones, wife of Dr. Peter E. Jones, an Indian of the Mississauga band, residing at Hagersville, to recover damages for being ejected from a train of defendants. Plaintiff, though not by blood an Indian, was an Indian under R. S. C. ch. 43, sec. 1, as the wife of an Indian, and, by virtue of an arrangement with defendants, had been until shortly before the action was brought entitled as an Indian to be carried by defendants at half price between Hagersville and Hamilton in a first class car. Defendants recently began to issue special tickets called "Indians' tickets," which

were sold to Indians at half of first class fare, but these tickets had "second class" printed upon them.

On 18th May, 1903, plaintiff purchased one of these tickets from Hamilton to Hagersville, but was not aware of the change, and did not observe the words "second class." Accordingly she was requested by the conductor to pay full fare or to go in what he called the second class car. Plaintiff refused to do either, the so-called second class car being, as she said, a smoking car. She was compelled to leave the train at Rymal, and brought this action to recover damages for ejection. She claimed that by virtue of a contract between the Six Nation Indians and the Hamilton and Lake Erie Railway Company (now merged into the defendants) she had the right to travel at half of a first class fare. (The Mississaugas live on the Six Nation Reserve.)

Plaintiff also set up that she should have had notice of the change, and that merely handing her a ticket on which the words "second class" were printed was not sufficient; also that there was no second-class passenger car on the train, and plaintiff could not be compelled to travel in a smoking car. The jury found that the car to which plaintiff was assigned did not furnish sufficient accommodation for the transportation of plaintiff as a passenger, and assessed the damages at $10.

A. G. Chisholm, London, for plaintiff.

W. R. Riddell, K.C., for defendants.

BRITTON, J.—The evidence in support of the alleged contract is that on 16th March, 1875, at a council meeting of the Six Nations, at which there were present 41 chiefs and an interpreter, a deputation on behalf of the Hamilton and Lake Erie Railway Company was present by appointment. The president of the company and the general manager asked for a cession from the reserve of land for a right of way for their company, 37 12-100 acres, free of charge, the company to satisfy individual claims for improvements. . . The members of the deputation offered, on behalf of the company, for the concession of the right of way, to carry the people of the Six Nations at half fare to and from Hamilton. According to the minutes of that council meeting, it was argued that this would be a good bargain for the company, and then this appears: "The president of the company is asked by the council, if the offer to carry Indians half fare on the railway would be binding on the company. The president replied 'yes,' and that it would be made so by

the board of the company. The superintendent intimated that any such arrangement would be subject to the approval of the superintendent-general, who he doubted not would give his sanction."

The next meeting of council was on 2nd April, 1875, when 31 chiefs and an interpreter were present. The minutes of that meeting shew the following: "The superintendent read a resolution of the board of directors of the Hamilton and Lake Erie Railway Company pledging the company to carry members of the Six Nations over that railway at half fare in consideration of the grant of way free of charge."

The decision of the council was, "that the right of way through the township of Oneida, according to the plan of survey produced, be granted to the Hamilton and Lake Erie Railway Company, free of any charge, in consideration of passing members of the Six Nations over said railway at half rates for all time to come."

At a meeting of the council held on 17th August, 1875, at which there were present 45 chiefs and an interpreter, there was read a departmental letter disallowing the arrangement, and stating that the land must be paid for. . . .

It was argued by counsel at the trial that I should, without the aid of a jury, determine the question of the treaty or contract right of plaintiff to travel as alleged, allowing the jury to find amount of damages, if any, and to decide any other disputed questions of fact. . . .

As to the ticket, the plaintiff did not ask for, nor did she in fact know that she received, a ticket marked "second class." She asked for an "Indian's ticket." The price she paid was what she had been accustomed to pay for an Indian's ticket, on which she had been allowed to ride in a first class car. She did not pay the ordinary second class fare.

I did not put questions to the jury as to plaintiff's knowledge of the kind of ticket she received. I was not asked to do so, and had I done so, there could have been only one answer, for there was no evidence on the point except what plaintiff stated. . . . The matter may be dealt with as a question of law: Watkins v. Rymill, 10 Q. B. D. 178.

Upon the undisputed facts, I do not think defendants did what was reasonably sufficient to give plaintiff notice of the withdrawal of the concession. . . .

As to the sufficiency of the car for the transportation of plaintiff as a passenger having a ticket marked "second class," the questions and answers were: "If plaintiff was

only a second class passenger, did the car to which she was assigned furnish sufficient accommodation for the transportation of this plaintiff as a passenger?" The jury answered, "No." "If not, in what respect was it insufficient?" Answer: "On account of its being a smoking car." The jury found $10 damages, and thought the damages would be the same whether the plaintiff had a right to travel first or second class.

As to there being no completed contract with the Six Nations, the defendants' objection must prevail. The assent of the superintendent-general, virtually the assent of the Crown, was required to any such contract. The compensation for lands taken could not be paid to the Indians, whether in money or in reduced rates for travel. No doubt it was a wise thing to get the consent of the Indians in taking lands in their reservation, but for some, no doubt wise, reason, the negotiations did not result in contract.

It is not necessary, in the view I take of this branch of the case, to consider further what the plaintiff's rights would be, as a member of the Mississauga band, to Six Nations contracts upon the Six Nations reserve.

On the other branch of the case, the evidence of plaintiff and of the conductor is that, as plaintiff would not pay an additional 40 cents, or go into what the conductor called the second class car, she was compelled to leave the train. No physical force was used to put plaintiff off. The defendants did not at the trial put in evidence any by-law or rule or regulation shewing what the conductor should do under the circumstances, or as to what a second class car should be or how equipped, or what kind of a car is sufficient for a second class passenger. The defendants relied for their defence upon the section of the Railway Act, sec. 248 of the Act of 1888, which was in the same words re-enacted in the Act of 1903. This is: "Every passenger who refuses to pay his fare may, by the conductor of the train and the train servants of the company, be expelled from and put out of the train. . . ."

Plaintiff had paid her fare—but defendants contend that payment of fare means fare according to class. Without knowing what rules defendants have in regard to that matter, and dealing only with this particular case, without attempting to define the rights of railway companies in such cases, I think sufficient was not shewn in this case to entitle defendants to compel plaintiff to leave the train. And I know of no question upon the evidence on this point that I could have submitted to the jury.

The jury have found that the car did not furnish sufficient accommodation for this plaintiff as a second class passenger.

Section 246 of the Railway Act provides that "all regular trains shall be started and run as near as practicable at regular hours fixed by public notices and shall furnish sufficient accommodation for the transportation of all such passengers. . . ."

The question of sufficient accommodation is one of fact. The word sufficient cannot be limited to space or capacity or strength. It must refer not only to these things, but also to the reasonable comfort, safety, and convenience of the traveller.

Sufficient—"being all that is needful or requisite, adequate:" see Standard Dictionary. "Equal to end proposed, adequate to wants:" Imperial Dictionary.

There is nothing technical or difficult to understand as to what a smoking car is. The jury understood—so do all the parties. The evidence of the brakesman Parker was that he did not think the car to which plaintiff was assigned had the words "second class" on it. There is no evidence that either conductor or brakesman pointed out to plaintiff that she need not be in same compartment with smokers if she rode in that car. Plaintiff stated that the conductor told her she must go into the smoking car or pay 40 cents.

The conductor says he called it a second class car, and plaintiff said she would not go, and that she called it a cattle car, and again a smoking car.

Upon the whole evidence and upon the answers of the jury to questions submitted, I think plaintiff entitled to judgment for $10 damages and to costs on High Court scale.

Plaintiff will not be entitled to include in her costs any subpœnas or copies or services or costs of witnesses for evidence exclusively as to alleged agreement (with the Indians). Defendants will not be entitled to set off any costs. Costs of examination for discovery allowed to plaintiff.

JUNE 3RD, 1904.

DIVISIONAL COURT.

BANK OF HAMILTON v. ANDERSON.

Parties—Joinder of Plaintiffs—Joinder of Causes of Action—Mortgage—Lease — Inconsistent Claims — Assignee for Benefit of Creditors.

Appeal from order of MACMAHON, J., ante 389, dismissing an appeal by plaintiffs from order of Master in Cham-

LAZARE et un AUTRE v. THE ST. LAWRENCE SEAWAY AUTHORITY et PROCUREUR GENERAL DE LA PROVINCE DE QUEBEC, *Mis en cause* *

Expropriation — Injonction interlocutoire — Indiens — Réserve de Caughnawaga — Voie maritime du St-Laurent — Droit d'occupation Droit de propriété — Couronne — Juridiction de la Cour supérieure Ultra vires *— Suffisance de la législation — Loi sur les Indiens (S. R. C. 1952, ch. 149), art. 2, 20, 35 — Loi sur l'administration de la voie maritime du St-Laurent (1951, 15-16 Geo. VI, 2e session, ch. 24), art. 10, 12, 18 — Loi sur la Cour de l'Echiquier (S. R. C. 1952, ch. 98), art. 17, 18 — Loi sur les expropriations (S. R. C. 1952, ch. 106), art. 15.*

Les requérants, la Bande des Indiens de Caughnawaga et l'un de ses membres, demandent l'émission d'une injonction interlocutoire et une déclaration que les terres de la Réserve de ce nom ne sont pas sujettes à l'expropriation que l'intimée entend y faire pour l'établissement d'un canal pour la voie maritime du St-Laurent.

Les droits des Indiens de Caughnawaga, dans leur Réserve, ne sont pas différents de ceux conférés aux autres Indiens en Canada et consistent en un droit d'occupation et de possession, mais non en un droit de propriété, lequel repose sur la Couronne.

Quand il ne s'agit pas d'établir un quantum de dommages-intérêts ou des réclamations que les expropriés pourraient avoir, mais du droit même de la Couronne d'exproprier certaines terres et de la légalité des lois en vertu desquelles on entend procéder, il n'y a pas de dispositions dans la Loi sur la Cour de l'Echiquier qui enlèvent au tribunal de droit commun, la Cour supérieure, son pouvoir de s'enquérir si les lois concernées sont *ultra vires*.

L'article 35 de la Loi sur les Indiens pourvoyant à l'expropriation des terres réservées et les art. 10 et 18 de la Loi sur l'administration de la voie maritime du St-Laurent sont du domaine du gouvernement fédéral. Propriétaire incontestable du fonds, ainsi que le révèlent les titres des requérants, l'Etat a le droit d'en reprendre possession, sauf compensation pour la perte d'occupation.

La législation actuelle est suffisante pour rendre légale l'expropriation en question dans la Réserve et tous les terrains qui y ont été pris, soit d'une façon permanente, soit pendant une période restreinte durant le cours des travaux, sont réellement des terrains pris sous l'autorité de l'art. 10 de la Loi sur l'administration de la voie maritime du St-Laurent.

La requête pour injonction interlocutoire est rejetée.

M. le juge André Demers. — No 400,946. — Montréal, 24 octobre 1956. — Carignan, *Emile Colas* et Provost; *F. R. Scott*, conseil, pour les requérants. — Hyde et Ahern; *John G. Ahern c.r.*, pour l'intimée. — Lucien Tremblay c.r., pour le mis en cause.

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* En appel, Montréal, no 6219.

INJONCTION interlocutoire.

Jugement : Par la présente requête, James Lazare, un indien Mohawk de la tribu des Iroquois, qui fait partie de la Bande de Caughnawaga et demeure dans la Réserve du même nom, et la Bande des Indiens de Caughnawaga demandent et l'émission d'une injonction interlocutoire et un jugement du tribunal déclarant que les terres de ladite Réserve ne sont pas sujettes à l'expropriation que l'intimée entend y faire pour l'établissement d'un canal.

Le procureur général de la Province de Québec a été mis en cause, il a comparu mais n'a pas plaidé.

Les requérants prétendent qu'en vertu des titres qu'ils possèdent sur la Réserve, titres datant d'un octroi de Louis XIV en l'an 1680, ils ont un droit de jouissance de ladite Réserve qui ne saurait leur être enlevé par aucune autorité sans le consentement de la Bande, consentement d'ailleurs que les requérants se refusent énergiquement à donner.

Le deuxième moyen soulevé par les requérants porte que l'intimée n'a pas les pouvoirs nécessaires pour exproprier les terrains en question vu que les droits de propriété reposent sur la Couronne pour la Province de Québec. Comme dernier moyen, ils soumettent que, même si l'intimée avait les pouvoirs qu'elle prétend posséder, elle tente de s'emparer d'une partie de terrain plus considérable que celle pour laquelle elle a été autorisée.

Les requérants concluent en demandant une injonction interlocutoire; ils demandent, en outre, que les art. 35 de la Loi sur les Indiens (1) ainsi que les art. 10 et 18 de la Loi sur l'administration de la voie maritime du Saint-Laurent (2) soient déclarés *ultra vires*, illégaux et nuls en tant qu'ils porteraient sur l'expropriation des terres de la Réserve.

L'intimée, qui a produit une contestation écrite, après avoir nié les différentes prétentions des requérants, soumet, entre autres moyens, que la Cour supérieure n'a pas juridiction pour entendre la présente requête, que la Bande des Indiens de Caughnawaga n'a pas les capacités légales pour poursuivre, que les requérants n'ont aucun droit de propriété sur les terrains en question, mais seulement l'usufruit et, finalement, que le Parlement du Canada a l'autorité pour adopter des lois concernant les terrains réservés aux Indiens.

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(1) S.R.C. 1952, ch. 149.
(2) 1951, 15-16 Geo. VI, 2e session, ch. 24.

Par une admission produite au dossier, l'intimée reconnait que la Bande des Indiens ainsi que le requérant, James Lazare, n'ont jamais abandonné leurs droits dans ladite Réserve, au sens de l'abandon, tel que défini dans la Loi sur les Indiens et qu'ils n'ont jamais consenti officiellement à la présente expropriation.

Avant d'examiner les différents moyens de droit soulevés respectivement par les parties, il est opportun de bien établir quels sont les droits des Indiens sur les terres de la Réserve en question. Cela nous a amené à étudier non seulement les titres que les requérants prétendent avoir sur ces terrains, mais également la question du droit de propriété des Indiens sur les terres de l'Amérique du Nord, sujet qui a fait l'objet de causes célèbres tant aux Etats-Unis qu'en notre pays.

Comme l'établissement des colons sur les terres des Etats-Unis s'est fait en grande partie sous le droit anglais et qu'il est similaire à l'établissement qui s'est fait au Canada tant sous le régime français que sous le régime anglais, ces décisions s'appliquent donc à notre cas.

Un des juges les plus éminents des Etats-Unis, le juge en chef Marshall de la Cour suprême, a étudié le problème à fond et il est intéressant de lire ses notes telles que rapportées dans la cause *Johnson and Graham's Lessee* v. *McIntosh* (3). Dans cette cause, il s'agissait de savoir quel était le propriétaire de certains terrains qui avaient été achetés des Indiens par une des parties, et que l'autre avait obtenus au moyen d'une concession du gouvernement des Etats-Unis et la Cour suprême en est venue à la conclusion que ceux qui avaient acheté des Indiens ne possédaient pas un titre pouvant être reconnu par les Cours.

En passant, nous recommandons la lecture de cet arrêt célèbre à ceux qui aiment l'histoire de leur pays et de l'Amérique.

Qu'il nous suffise de citer ici quelques extraits :

P. 574. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives.

P. 594. The proclamation issued by the King of Great Britain, in 1763, has been considered, and, we think, with reason, as constituting an additional objection to the title of the plaintiffs.

By that proclamation, the Crown reserved under its own dominion and protection, for the use of the Indians, "all the land and territories lying

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(3) (1823) 8 Wheaton's Reports 543.

to the westward of the sources of the rivers which fall into the sea from the west and northwest", and strictly forbade all British subjects from making any purchases or settlements whatever, or taking possession of the reserved lands.

P. 596. So far as respected the authority of the Crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

P. 597. The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our Courts.

Dans la cause *Fletcher* v. *Peck* (4), on traite du titre des Indiens dans les termes suivants :

What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. It is a right not to be transferred but extinguished. It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.

Les plus hauts tribunaux de notre pays ont également été appelés à se prononcer sur cette question.

Dans la cause *St. Catherine's Milling and Lumber Company* v. *The Queen* (5), le Conseil Privé a décidé ce qui suit :

That by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the Province in the same", within the meaning of sect. 109.

Also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein.

Dans cette dernière cause, il a donc été décidé que le droit des Indiens n'était qu'un droit d'usufruitier et que le droit de légiférer sur les terres réservées était du domaine fédéral, mais que, dans le cas où lesdites réserves étaient abandonnées, les terres retournaient aux provinces.

Or, les Indiens de Caughnawaga n'ont établi devant le tribunal aucun traité établissant un titre autre que celui d'usufruitiers et d'occupants de la Réserve et l'examen des documents produits

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(4) (1812) 6 Cranch's Reports 87, à la p. 121.
(5) (1889) 14 A.C. 46.

démontre, sans l'ombre d'un doute, que la concession originaire de la Réserve par le roi Louis XIV avait été faite aux membres de la Compagnie de Jésus et non pas aux Indiens eux-mêmes. Nulle part dans les documents produits on ne trouve un droit absolu de propriété ni un droit perpétuel d'usufruit concédé par un prince ou un gouvernement enlevant ces terres du domaine public, de telle sorte qu'il faudrait un traité pour en prendre possession.

Depuis la conquête, l'administration a toujours été entre les mains d'un *receiver* ou d'un agent spécial qui est maintenant connu dans la Loi sur les Indiens sous le nom de surintendant.

Dans l'Acte de l'Amérique britannique du Nord on voit que le droit autrefois exercé par la Couronne britannique repose maintenant sur le Parlement du Canada, qui a seul le droit de légiférer au sujet des Indiens et des terres qui leur sont réservées.

Dans la Loi sur les Indiens, on lit à l'art. 2 la définition du mot « bande » qui signifie « un groupe d'Indiens, ... à l'usage et au profit commun desquels des terres, dont le titre juridique est attribué à Sa Majesté, ont été mises de côté avant ou après l'entrée en vigueur de la présente loi ».

Et, à l'art. 20 de la même loi, sous-par. premier, il est dit qu'un Indien n'est légalement en possession d'une terre dans une réserve que si, avec l'approbation du ministre, possession de la terre lui a été accordée par le conseil de la Bande. C'est le cas du présent requérant James Lazare.

Et, finalement, à l'art. 35, on traite des terres prises pour cause d'utilité publique et on y trouve que des expropriations, par le Parlement du Canada ou une autorité municipale locale ou une corporation avec le consentement du gouverneur en conseil, peuvent être exercées contre les terres d'une réserve.

Il est bien évident, à la suite de toutes ces citations et de tous ces textes, que les droits des Indiens de Caughnawaga, dans la Réserve du même nom, ne sont pas différents de ceux conférés aux autres Indiens dans ce pays et que ce droit consiste en un droit d'occupation et de possession mais non de propriété, lequel repose sur la Couronne.

Nous avons cru devoir nous attarder sur cette question, vu son importance, pour nous permettre de résoudre la présente cause.

Nous avons vu précédemment que le premier point soulevé par l'intimée est le défaut de juridiction de la Cour supérieure.

L'intimée prétend qu'en vertu des art. 17 et 18 de la Loi sur la Cour de l'Echiquier (6), c'est cette dernière Cour qui a seule juridiction dans les cas d'expropriation de biens pour des fins publiques.

Mais si on examine bien la nature de la procédure devant nous, il ne s'agit pas d'établir ici un quantum de dommages-intérêts ou des réclamations que les requérants pourraient avoir, mais du droit même de la Couronne d'exproprier les terres en question et de la légalité des lois en vertu desquelles on entend procéder.

Nous ne trouvons rien dans la Loi sur la Cour de l'Echiquier enlevant au tribunal de droit commun qu'est la Cour supérieure son pouvoir de s'enquérir si les lois en vertu desquelles on entend procéder sont *ultra vires* et illégales.

Nous en arrivons donc à la question primordiale de savoir si les requérants ont dûment établi un droit tel que le Parlement du Canada n'avait pas le pouvoir d'exproprier leurs terres.

La réponse à cette question, à la suite de l'examen de leurs titres et des droits des Indiens nous semble s'imposer clairement, à savoir que, contrairement à leurs prétentions, les requérants n'ont qu'un droit d'usufruitier, droit qui leur a été accordé par le prince qui s'est toujours réservé la propriété.

Or, si l'Etat est resté le maître incontestable du fonds, s'il a d'ailleurs, et cela sans interruption depuis les débuts de la colonie, exercé ses pouvoirs comme tel et qu'il a même gardé la haute main absolue de ces terres, il est indiscutable qu'il a le droit d'en reprendre possession sauf, bien entendu, compensation pour la perte d'occupation.

Nous en venons donc à la conclusion que le premier motif soulevé par les requérants est mal fondé, que l'art. 35 de la Loi sur les Indiens pourvoyant à l'expropriation des terres réservées ainsi que les art. 10 et 18 de la Loi sur l'administration de la voie maritime du Saint-Laurent sont du domaine du gouvernement fédéral.

Le deuxième point soulevé portant qu'aucun statut n'existe permettant l'expropriation en question de la Réserve est, d'après nous, également mal fondé.

Comme nous l'avons vu précédemment dans la cause *St. Catherine's Milling and Lumber Company* v. *The Queen*, la propriété du fonds,à la suite d'un abandonnement par la Couronne d'une réserve, passe à la Province.

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(6) S.R.C. 1952, ch. 98.

Suivant la prétention des requérants, la Loi sur l'administration de la voie maritime du Saint-Laurent, à l'art 18, pourvoit aux expropriations; il y est mentionné qu'on peut, sans le consentement du propriétaire, prendre des terres et les exproprier, mais nulle part y trouve-t-on mentionnés les mots « Couronne sous l'autorité de la Province ». La seule inférence à l'expropriation d'une terre de la Couronne se trouve dans la Loi sur les expropriations (7), à l'art. 15, où l'on mentionne un terrain de la Couronne sous l'autorité de la Province. Et, soumettent les requérants, les terres de la Réserve des Indiens ne sont pas sous le contrôle du gouvernement de la Province. Il ne s'agirait donc pas de celles mentionnées à l'art. 15 de ladite loi.

Les requérants soumettent qu'on a dû sentir la faiblesse de la position puisque, en vertu d'un amendement en 1955, on a ajouté à l'art. 18 de la Loi sur l'administration de la voie maritime du Saint-Laurent un par. 5 donnant à l'Administration le droit de prendre des terres sur une réserve. Mais, là encore, font remarquer les requérants, il n'est nullement question des droits de la Couronne.

Il nous semble que les requérants plaident le droit d'autrui. D'après nous, seule la Province aurait pu avoir intérêt à soulever ces prétendues irrégularités. Mais la législation, telle que passée, est-elle insuffisante? Nous ne le croyons pas.

De deux choses l'une, ou l'expropriation comporte un abandon des terres de la Réserve au sens de la Loi sur les Indiens et alors la Province en devient la propriétaire, ou l'expropriation ne comporte pas un tel abandonnement. Dans l'un et l'autre cas la législation est suffisante.

En effet, s'il ne s'agit pas d'abandon, l'usage d'une partie de la Réserve pour le canal est du domaine fédéral (8) et si l'expropriation a l'effet d'un abandon, alors l'art. 15 de la Loi sur les expropriations prend son plein effet et, là encore, l'expropriation serait légale.

Il reste un troisième moyen soulevé par les requérants à l'effet qu'on aurait pris des terrains au delà de ce qui était autorisé par les lois en question.

Les requérants disent que les pouvoirs de l'Administration sont décrits à l'art. 10 de la Loi sur l'administration de la voie maritime du Saint-Laurent, qui se lit comme suit :

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(7) S.R.C. 1952, ch. 106.

(8) Acte de l'Amérique britannique du Nord (1867, 30-31 Vict., ch. 3), art. 91, par. 24.

L'Administration est constituée en corporation

a) en vue d'acquérir des terrains pour des ouvrages qui peuvent être indispensables à l'établissement et à l'entretien, soit entièrement au Canada soit conjointement avec des travaux entrepris par une autorité compétente aux Etats-Unis, d'une voie en eau profonde entre le port de Montréal et le lac Erié et aux fins de construire, entretenir et mettre en service lesdits ouvrages; et

b) en vue de construire, entretenir et mettre en service tels ouvrages relatifs à cette voie en eau profonde que le gouverneur en conseil peut juger nécessaires pour remplir toute obligation assumée ou qui doit être assumée par le Canada aux termes d'un accord présent ou futur.

La preuve devant nous et dans les interrogatoires préliminaires est à l'encontre de la prétention des requérants. Il a été établi, dans notre opinion, que tous les terrains qui ont été pris, soit d'une façon permanente, soit pendant une période restreinte durant le cours des travaux, sont réellement des terrains pris en vertu de l'autorité de l'art. 10.

D'ailleurs, l'art. 12 de ladite loi ne permet pas aux requérants de discuter, comme ils ont tenté de le faire, de l'opportunité de faire passer le canal soit sur la rive sud, soit sur la rive nord du St-Laurent et nous ne sommes pas d'avis, en présence de la preuve, que les requérants aient établi leurs prétentions sur ce dernier point.

L'intimée a soulevé que la Bande n'avait pas un statut légal pour intenter la présente procédure.

Etant venu aux conclusions mentionnées ci-dessus, il ne nous semble pas nécessaire de discuter ce moyen important.

Remarquons, toutefois, qu'il paraît y avoir une contradiction entre la position prise par l'intimée et celle du Département des affaires des Indiens où l'on constate dans une lettre que son surintendant a autorisé un montant appréciable pour permettre à la Bande d'intenter les présentes procédures.

Pour toutes ces raisons, nous en venons à la conclusion que les requérants n'ont pas établi les allégations de leur requête et que l'intimée a dûment établi les allégations de sa contestation.

Par ces motifs : le Tribunal rejette la requête pour injonction interlocutoire, avec dépens.

opinion it is unnecessary to embark upon the question of the validity of s. 45.

I would answer Q. 1 by saying that s. 16 is *intra vires;* and Qq. 2 and 3 both in the affirmative, and dismiss the appeal.

Appeal dismissed.

LOGAN v. STYRES et al.

Ontario High Court, King J. September 3, 1959.

Constitutional Law II—Indians—

Statutory provision for surrender of part of Indian Reserve — Whether competent for Dominion to interfere with internal self government of Indian band—Haldimand Deed—Simcoe Deed—The Parliament of Canada has legislative authority under s. 91(24) of the *B.N.A. Act* to provide for the surrender of reserved Indian lands, even though this be done by a method which interferes with the system of internal government of Indian bands by hereditary chiefs. Members of the Six Nations Indians who settled on reserved land conveyed by the Haldimand Deed of October 25, 1784 (sometimes called the Haldimand Treaty), a transfer confirmed by the Simcoe Deed of January 14, 1793, did so under the protection of the Crown, and they and their posterity consequently owed allegiance to the Crown, becoming subjects thereof. It cannot therefore be contended that they are immune from the competent laws of Canada, however unfair or unjust it may be in particular circumstances to interfere with their traditional system of internal government.

ACTION to enjoin an intended surrender of part of an Indian Reserve.

M. Montgomery, R. E. Pringle and *J. H. Gardner,* for plaintiff; *R. F. Wilson,* Q.C., and *C. E. Woollcombe,* for defendants.

KING, J.:—In the statement of claim the plaintiff is described as a member of the Six Nations Indian Band residing upon the Six Nations Indian Reserve near Brantford, Ontario, and the wife of Joseph Logan, Jr., a Mohawk Chief of the Six Nations Indians. The constituent members of the said Six Nations Indians are the Mohawk, the Oneida, the Onondaga, the Cayuga, the Seneca and the Tuscarora.

In the course of her evidence the plaintiff stated that she was nominated to bring the action on behalf of the hereditary Chiefs of the Six Nations Indian Band and although the defendants submitted that the plaintiff, as an individual member of the Six Nations Indian Band, had no status to maintain the action for the relief claimed, I have nevertheless allowed the action to proceed.

The defendant, Clifford E. Styres, is chief councillor of the elected council of the said Six Nations Indian Band and the defend-

ant R. J. Stallwood is superintendent of the Six Nations Indian Agency at Brantford, Ontario.

The Six Nations Indian Reserve at Brantford consists of slightly more than 45,000 acres of land set aside for the use and benefit of the Six Nations Band.

The present action is for an injunction to restrain the defendants from taking any steps to facilitate the surrender of 3.05 acres of land being a part of the said Reserve and for a declaration that Order in Council P.C. 1629 dated September 17, 1924 and Order in Council P.C. 6015 [[1951] S.O.R. 523] dated November 12, 1951 are *ultra vires* the powers of His Excellency the Governor-General of Canada acting for and with the advice and consent of the Queen's Privy Council for Canada.

Briefly, the position taken by the plaintiff is that the Six Nations Indians in the latter part of the eighteenth century and subsequently were the faithful allies of the British Crown and that they continue to the present day to be such faithful allies and that they never were and are not today subjects of the Crown. The plaintiff then takes the further position that the Six Nations Indians, not being subjects of the Crown, it was *ultra vires* the powers of the Parliament of the United Kingdom to enact section 91(24) of the *B.N.A. Act*, whereby the legislative authority of the Parliament of Canada is made to extend to all matters coming within the classification "Indians, and Lands reserved for the Indians", insofar as the said Six Nations Indians are concerned. If this be so the plaintiff then states that it is *ultra vires* the powers of the Parliament of Canada to enact the *Indian Act*, R.S.C. 1952, c. 149, insofar as the said Six Nations Indians are concerned and that likewise the Orders in Council already referred to and made pursuant to the *Indian Act* are likewise *ultra vires* insofar as the Six Nations Indians are concerned.

If the plaintiff is able to establish the above then I am of the opinion that judgment should be given for the relief asked but of course it is a formidable task that the plaintiff has undertaken.

The difficulties would appear to have arisen with the Orders in Council already referred to. Almost from time immemorial the Indian Bands which formed, first the Five Nations Confederacy, and later the Six Nations Confederacy were governed by their hereditary Chiefs. I have used the term "hereditary Chiefs" to describe the system whereby the Clan Mothers designated a Chief from among the male members of certain families within the Clan. The Orders in Council to which objection is taken set up a system whereby elected Councillors would supplant the hereditory Chiefs among other matters in dealing with the surrender of Reserve

lands. It would appear that many of the Six Nations Indians, a great majority in fact, do not recognize the authority of the Parliament of Canada to provide for elected Councillors or to provide for the surrender of Reserve lands by means of a vote. Such members of the Six Nations Indians, it would appear, simply refrain from voting at all and in the proposed surrender of the lands in question when a vote was held on July 27, 1957, only 53 votes were cast out of which 30 voted for surrender and 23 against surrender and this out of about 3,600 eligible voters. It is the elected Councillors who negotiate the terms of surrender and in the present case Cockshutt Farm Equipment Ltd. proposed to purchase the 3.05 acres of land in question for the sum of $25,000 and the elected Councillors accepted this proposed purchase-price and arranged for a vote on the surrender to Her Majesty the Queen of the land in question so that it might be sold to the proposed purchaser. I have given the result of the second vote which was taken on the question of surrender. The first vote which was held in the preceding month was much the same with 54 persons having voted, 37 for the surrender, 16 against the surrender and one rejected ballot, but since the majority of those entitled to vote did not vote on the first occasion, the second vote was called for.

It should be remembered that the *Indian Act* provides in ss. 39 and 40 that the Governor in Council may accept or refuse a surrender of land so that it is still quite possible for the Governor in Council to take the position that the surrender of the land in question in this action should be refused. From the evidence given at the trial it is difficult to see what advantage would accrue to the Six Nations Indians by surrendering the land in question.

Before turning to the evidence in this action I should say that in my opinion all of the witnesses were honest witnesses who were endeavouring to tell the truth. Indeed, there is no dispute about any facts of any consequence. I should say, however, that the plaintiff was given some leeway in presenting the historical background of the plaintiff's claim and in putting forward the merits of the hereditary system of Chiefs as opposed to the elective system of Councillors. The defendants did not consider it necessary to present any evidence with respect to the merits of the hereditary system as opposed to the elective system so that only one side of this matter was before the Court.

A start has to be made at some stage and I believe a satisfactory point at which to begin is with the Haldimand Deed dated October 25, 1784, which followed the conclusion of the American Revolution and which in its recitals sets out a sufficient background. It is as follows:

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"*Frederick Haldimand Captain General* and *Governor in chief* of the province of *Quebec* and *Territories* depending thereon *etc etc etc General* and *Commander in Chief* of His Majesty's Forees in said provinee and the Frontiers thereof — ete — etc — etc —

——— *Whereas His Majesty* having been pleased to direct that in consideration of the early attachment to his cause manifested by the *Mohawk Indians* and of the loss of their settlement which they thereby sustained — that a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them and others of the *Six Nations*, who have either lost their settlements within the *Territory* of the *American States*, or wish to retire from them to the British — I have at the earnest desire of many of these *His Majesty's faithful allies* purchased a tract of land from the *Indians* situated between the *Lakes Ontario, Erie* and *Huron*, and I do hereby in His Majesty's name authorize and permit the said *Mohawk Nation* and such others of the *Six Nation Indians* as wish to settle in that quarter to take possession of and settle upon the Banks of the *River* commonly called *Ouse* or *Grand River*, running into *Lake Erie*, allotting to them for that purpose *six miles deep* from *each side* of the *river* beginning at *Lake Erie* and *extending in that proportion to the head* of *the said river* which them and their posterity are to enjoy for ever. ——

Given under my hand and seal at arms at the *Castle of St. Lewis* at *Quebec* this *twenty-fifth* day of *October* one thousand seven hundred and *eighty-four* and in the *twenty-fifth* year of the reign of our Sovereign *Lord George The Third* by the Grace of *God* of Great Britain, France and Ireland *King* Defender of the *Faith* and *so forth.*

Fred- Haldimand

——— *By His Excellency's Command* ———
R. Mathews"

It should be noted that the foregoing document is a deed and is not in any sense a treaty although in the course of the evidence

it was referred to as the Haldimand Treaty from time to time.

In the surrender of their lands from time to time the Six Nations Indians trace their title to the lands to this Haldimand Deed and in a typical document of surrender there is included the recital

"Whereas His late Majesty did by a certain instrument, bearing date the twenty-fifth day of October, in the year of Our Lord one thousand seven hundred and eighty-four, under the hand and seal of Sir Frederick Haldimand, then Governor of Quebec, allot and grant unto us upon the banks of the said river running into Lake Erie six miles deep from each side of the said river, beginning at Lake Erie and extending in that proportion to the head of the said river."

However, there is another document upon which the Six Nations Indians rely and it is known as the "Simcoe Deed" dated January 14, 1793, and it is as follows:

"J. Graves Simcoe

(Great Seal of Canada)

"George the Third, by the Grace of God, King of Great Britain, France and Ireland, Defender of the Faith, and so forth. To all to whom these presents shall come, Greeting!

"Know ye, that whereas the attachment and fidelity of the Chiefs, Warriors, and people of the Six Nations, to Us and Our Government has been made manifest on divers Occasions by their spirited and zealous Exertions, and by the Bravery of their Conduct, and We being desirous of showing Our Approbation of the same and in recompense of the Losses they may have sustained of providing a convenient Tract of Land under Our protection for a safe and suitable Retreat for them and their Posterity, Have of Our Special Grace, certain Knowledge and mere motion, given and granted and by these Presents Do Give and Grant to the Chiefs, Warriors, Women and People of the said Six Nations and their Heirs forever, All that District or Territory of Land, being Parcel of a certain District lately purchased by Us of the Mississagua Nation, lying and being in the Home District of Our Province of Upper Canada, beginning at the Mouth of a certain River formerly known by the name of the Ouse or Grand River, now called the River Ouse, where it empties itself into Lake Erie, and running along the banks of the same for the space of Six Miles on each side of the said River, or a space co-existensive therewith, conformably to a certain Survey made of the said Tract of Land, and annexed to these Presents, and continuing along the said River to a Place called or known by the Name of the Forks, and from thence along the main Stream of the said River for the

space of Six Miles on each side of the said Stream, or for a space equally extensive therewith, as shall be set out by a Survey to be made of the same to the utmost extent of the said River as far as the same has been purchased by us, and as the same is bounded and limited in a certain Deed made to Us by the Chiefs and People of the said Mississagua Nation, bearing Date the Seventh Day of December, in the year of Our Lord One Thousand Seven Hundred and Thirty-Two; To have and to Hold the said District or Territory of Land so bounded as aforesaid of Us, Our Heirs and Successors, to them the Chiefs, Warriors, Women and People of the Six Nations, and to and for the sole use and Behoof of them and their Heirs for ever, Freely and Clearly of and from, all, and all manner of rents, fines, and services whatever to be rendered by them or any of them to Us or Our Successors for the same, and of and from all conditions, stipulations and agreements whatever, except as hereinafter by Us expressed and declared. Giving and granting, and by these Presents confirming to the said Chiefs, Warriors, Women, and People of the said Six Nations and their Heirs, the full and entire possession, use, benefit and advantage of the said district or territory, to be held and enjoyed by them in the most free and ample manner, and according to the several customs and usages of them the said Chiefs, Warriors, Women, and People of the said Six Nations; Provided always, and be it understood to be the true intent and meaning of these Presents, that, for the purpose of assuring the said lands, as aforesaid to the said Chiefs, Warriors, Women, and People of the Six Nations, and their Heirs, and of securing to them the free and undisturbed possession and enjoyment of the same, it is Our Royal will and pleasure that no transfer, alienation, conveyance, sale, gift, exchange, lease, property or possession, shall at any time be had, made, or given of the said district or territory, or any part or parcel thereof, by any of the said Chiefs, Warriors, Women or People, to any other nation or body of people, person, or persons whatever, other than among themselves the said Chiefs, Warriors, Women and People, but that any such transfer, alienation, conveyance, sale, gift, exchange, lease or possession shall be null and void, and of no effect whatever, and that no person or persons shall possess or occupy the said district or territory or any part or parcel thereof, by or under pretence of any such alienation, title or conveyance as aforesaid, or by or under any pretence whatever, upon pain of Our severe displeasure.

"And that in case any person or persons other than them, the said Chiefs, Warriors, Women and People of the said Six Nations, shall under pretence of any such title as aforesaid presume to possess or occupy the said district or territory or any part or

212 parcel thereof, that it shall and may be lawful for Us, Our heirs and successors, at any time hereafter, to enter upon the lands so occupied and possessed by any person or persons other than the people of the said Six Nations, and them the said intruders thereof and therefrom, wholly to dispossess and evict, and to resume the part or parcel so occupied to Ourselves, Our heirs and successors; Provided, always, that if at any time the said Chiefs, Warriors, Women and People of the said Six Nations should be inclined to dispose of and surrender their use and interest in the said district or territory or any part thereof, the same shall be purchased for Us, Our heirs and successors, at some public meeting or assembly of the Chiefs, Warriors, and People of the said Six Nations, to be holden for that purpose by the Governor, Lieutenant-Governor, or person administering Our Government in Our Province of Upper Canada.

In Testimony Whereof, We have caused these Our Letters to be made Patent, and the Great Seal of our said Province to be hereunto affixed, Witness. His Excellency John Graves Simcoe, Esquire, Lieutenant-Governor and Colonel Commanding Our Forces in Our said Province. Given at Our Government House, at Navy Hall, this fourteenth day of January, in the year of Our Lord one thousand seven hundred and ninety-three, in the thirty-third year of Our Reign.

"(Signed) Wm. Jarvis, Secretary.
Recorded February 20th, 1837.
Lib. F., Folio 106.

"(Signed) D. Cameron, Sy. and Regr.

(Initialled) J.G.S."

The purpose of the Simcoe Deed would seem to be to confirm the grant already made by the Haldimand Deed. In each of these deeds it is made clear that those of the Six Nations Indians settling on the lands therein described do so under the protection of the Crown. In my opinion, those of the Six Nations Indians so settling on such lands, together with their posterity, by accepting the protection of the Crown then owed allegiance to the Crown and thus became subjects of the Crown. Thus, the said Six Nations Indians from having been the faithful allies of the Crown became, instead, loyal subjects of the Crown.

The position which the Six Nations Indians have taken throughout the years is perhaps best stated in their own words in the submission made by them to the representatives of the United Nations at San Francisco, California, U.S.A., on April 13, 1945 and which was as follows:

"On behalf of the people of the Six Nations Indians settled

upon part of the territory granted to them pursuant to the pledge given by the British Crown and granted under the terms of the Haldimand Treaty of March 1784, we, the representatives of the above named people of the Six Nations Indians, appeal to the conscience of the democratic nations for action to correct the deep injustice under which we are suffering.

"In accord with the terms of the proposal made to us by representatives of the English Crown, we as a sovereign people accepted the terms of the Hildimand Treaty and settled upon the territory thereby granted to us. A few years after our occupation of the territory and before it was fully settled a large part of the territory was alienated from us by methods and on terms which did a deep injustice to our people and all their descendents. One, Joseph Brant, using an alleged power of attorney from the Six Nations Indians dated November 2, 1796, leased large sections of our territory to white people. No revenue whatsoever accrued to the people of the Six Nations Indians for such leases and until now we have been unable to secure either restoration of the property which was granted to us and our deseendents and friends in perpetuity, nor to secure compensation for its alienation.

"Our claim for abrogation of the so-called leases under which this property was alienated from us or, failing such abrogation, compensation for such alienation or revenues from all such lands, is based upon the fact that, according to the terms of the India Act (which deny to Indians the legal status of a person) and the terms under which the land was granted to us, the methods by which the above named Brant disposed of said lands were illegal and cannot be justified either in the eyes of the law or by the conscience of governments.

"We appeal to the representatives of the governments and peoples of the United Nations gathered here in this historic conference at San Francisco to aid the people of the Six Nations Indians in securing these fundamental rights. Our appeal for restoration of the property rights guaranteed to us in 1784 is based first of all upon our duty, as parents, to protect the rights and the futures of our children, but it is based also upon our solemn obligation to protect the rights of our people as a whole. We, the people of the Six Nations Indians, who fought as allies of the British Crown during the American revolutionary war, accepted the grant of lands described in the Haldimand Treaty and came to Canada from the United States to settle on these lands in the spirit and in the understanding that we were doing so as a sovereign people. As a nation we now appeal to the conscience of the nations of the world. We appeal for the restoration of those lands which the

terms of the Haldimand Treaty guaranteed the people of the Six Nations 'and their posterity are to enjoy forever'.

"Verification of all the above statements is to be found in the copy of Sessional Paper No. 151 tabled in the House of Commons Canada on April 5th, 1945, which is attached.

ON BEHALF of the people of the Six Nations Indians on the Grand River at Brantford, Ontario . . .

. . . . . ."

From the evidence before me, however, it would appear the strongest case for the Six Nations Indians should be based upon the submission that Parliament should not make the Order in Council to which objection is taken applicable to the Six Nations Indians rather than that Parliament cannot make such Orders in Council applicable. It seems to me much might be said on that score.

I am of the opinion that the Six Nations Indians are entitled to the protection of the laws of the land duly made by competent authority and at the same time are subject to such laws. While it might be unjust or unfair under the circumstances for the Parliament of Canada to interfere with their system of internal Government by hereditary Chiefs, I am of the opinion that Parliament has the authority to provide for the surrender of Reserve land, as has been done herein, and that Privy Council Order P.C. 6015 is not *ultra vires*. It should be noted that P.C. 1629 has been revoked by P.C. 6015, so it is not necessary to consider P.C. 1629 further.

In my opinion, therefore, the plaintiff is not entitled to an injunction and is not entitled to the declaration asked for.

The plaintiff's action is therefore dismissed but, under the circumstances, without costs.

Action dismissed.

BALAN v. KRETZUL

Alberta Supreme Court, Appeal Division, Clinton J. Ford C.J.A., H. J. Macdonald and Johnson JJ.A. October 7, 1959.

Water & Watercourses II D, II F—

Alleged interference with natural flow of surface water—Conflicting evidence as to course of natural drainage—In an action based on an alleged interference by defendant with the natural drainage of surface water by construction of a dam resulting in flooding of plaintiff's land with consequent loss of crops, the trial Judge found on conflicting evidence (and in the absence of any survey of the area)

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* Mar. 14, 15
* Dec. 5

FRANK MILLER, Chief Councillor of the Six Nations of the Grand River, on behalf of himself and all others, members of the said Six Nations of the Grand River, and the said Six Nations of the Grand River. (SUPPLIANTS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Petition of Right—Whether the Crown in the right of the Dominion of Canada liable for alleged breaches of trust or debts of (a) the government of the Province of Canada, (b) the government of the Province of Upper Canada—s. 111. The British North America Act.

The appellant seeks by Petition of Right to hold the Crown in the right of Canada liable in damages for breaches of trust and contract. The breaches alleged fall under three heads: (1) that in 1824 the Parliament of Upper Canada by statute authorized the flooding by the Welland Canal Co. of some 1800 acres of lands previously granted to the Six Nations Indians, appellant's ancestors, by the Crown and although the statute provided for compensation, the Department of Indian Affairs or its officers as trustees of the said Indians failed to collect it; (2) that in 1836 the Government of Upper Canada authorized a free grant of a further 360 acres of said Indians' lands to the Grand River Navigation Co. and that the said trustees failed to secure compensation therefor; (3) that in 1798 the appellant's ancestors surrendered certain lands to the Crown under an agreement whereby the said lands were to be sold and the purchase moneys held in trust for the said Indians benefit and that in 1836 the said government without the knowledge or consent of the Indians and without authority contracted to purchase stock of the Grand River Navigation Co. for them, and that the said government and, after the Union of 1840, the Government of the Province of Canada, pursuant to such contract paid out $160,000 from the said Indian funds which on the failure of the company was lost. Appellant claims that since by s. 111 of the *British North America Act* the Crown in the right of the Dominion of Canada assumed liability for the debts of the former Province of Canada, the said sum with interest should be restored to the funds held by the present Department of Indian Affairs and the federal government on behalf of the appellants.

* PRESENT:—Kerwin, Taschereau, Rand, Kellock and Locke JJ.

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Held: that as to heads one and two of the Petition, any breach of trust, if it occured, took place before the Act of Union of 1840 and appellant had not shown any basis of obligation upon the Crown in the right of the Dominion of Canada.

As to head three, the appeal was allowed and the matter referred back to the Court of Exchequer.

The question as to whether the claim was barred by the *Exchequer Court Act* or the *Statute of Limitations* was not dealt with by this Court.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J., (1) answering in the negative the first of two questions of law set down for argument, viz: (1) Assuming the allegations of fact contained in the Petition of Right read with the particulars filed by the Suppliants to be true, does a Petition of Right lie against the Respondent for any of the relief sought by the Suppliants in the said Petition? (2) If a Petition of Right would otherwise lie against the Respondent for any of the relief sought by the said Petition, is the said Petition barred by the *Exchequer Court Act* and the *Statute of Limitations* (Ontario)?

Auguste Lemieux, K.C. for the appellants.

W. R. Jackett for the respondent.

The judgment of Kerwin and Rand JJ. was delivered by:—

KERWIN J.:—This is an appeal by the suppliants against a decision of the Exchequer Court (1) answering in the negative a question of law set down for determination prior to the hearing. The question is as follows:—

Assuming the allegations of fact contained in the Petition of Right read with the particulars filed by the Suppliants on October 21, 1943, and September 5, 1944, pursuant to orders made by the President of this Honourable Court on June 3, 1942, and December 21, 1943, respectively, to be true, does a Petition of Right lie against the Respondent for any of the relief sought by the Suppliants in the said Petition?

The claims in the petition of right may be classified under three headings. 1. Certain lands in what is now the Province of Ontario were, on February 5, 1798, surrendered by the Six Nations Indians to the then reigning Sovereign by a document which concluded:— "and do

(1) [1948] Ex. C.R. 372.

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beseech his said Majesty to grant the same in fee to the Persons in the said Schedule mentioned for the several and respective considerations to the said Lands annexed which are to receive from the said Persons, as an Equivalent for the same." The unsatisfactory nature of the petition has been pointed out in the reasons for judgment in the Exchequer Court but, giving it the most favourable construction that can be suggested on behalf of the suppliants, this claim, which is for the value of part of the lands so surrendered destroyed by flooding, arose before the Act of Union of 1840 and there is no way in which the respondent can be held responsible. The respondent is His Majesty in the right or interest of the Dominion of Canada which, of course, came into existence in 1867. The same consideration is sufficient to dispose of claim 2, which is for the value of lands contained in a free grant to the Grand River Navigation Company in 1836.

There is more difficulty as to claim 3 as to which it is alleged that in or about the year 1833 the Government of Upper Canada "and subsequently the Government of Canada after the Union of 1840" paid out of the proceeds of the sale of the lands surrendered in 1798, the sum of $160,000 for the purchase of shares of the Grand River Navigation Company. It will be noticed that the only difference so far as dates are concerned between claims 1 and 2, on the one hand, and claim 3, on the other, is that, in the latter, the claim is made that the Government of Canada after the Union of 1840 paid money for the purchase of the shares. The respondent argues that the petition of right shows, at the most, an obligation of His Majesty in the right of the Imperial Government. The allegations are contradictory in many respects but, in disposing of the question of law, they should not be construed too strictly against the suppliants, and I am therefore disposed to leave the matter as the facts to be presented to the trial judge would warrant. Whether or not a trial ensues will depend upon the outcome of the argument of the second question of law set down for determination, viz., as to whether the claims advanced are barred by the *Exchequer Court Act* and the Ontario *Statute of Limitations*. The disposition of the present appeal will

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be without prejudice to such question of law being considered and dealt with so far as the third claim is concerned.

The appeal should be allowed and the answer to the question of law should be "No" as to claims 1 and 2, and "Yes" as to claim 3. While the Exchequer Court simply answered the question in the negative, the costs of and incidental to the hearing were made costs in the cause. That direction might well stand. The costs of the appeal should be to the appellants in the cause, subject to this, that, in any event, they should not receive any costs of or in connection with their factum.

The judgment of Taschereau and Kellock JJ. was delivered by:

KELLOCK J.:—In his petition, appellant claims with respect to three separate matters; first, the flooding of approximately 1,800 acres of land on the Six Nations Indian Reserve near Brantford, Ontario, by reason of the execution of works pursuant to the Statute of 1824, 4 Geo. IV, c. 17, and amending Acts, relating to the Welland Canal; second, the taking by Order-in-Council of October 20, 1836, without compensation, of some 368 acres for the purposes of the Grand River Navigation Company; and third, the use made by or at the instance of the Crown, before and after 1840, of certain trust moneys belonging to the said Six Nations Indians in the sum of $160,000.

By his petition and particulars appellant alleges that the lands in claims one and two, and other lands, were the subject of a patent dated the 14th of January, 1793, in favour of "the chiefs, women and people of the said Six Nations and their heirs forever". It is further alleged that on or about the 5th of February, 1798, certain of the said lands were surrendered to the Crown by the Indians for the purpose of being re-granted to certain purchasers, which surrender was accepted by the Crown for the said purpose, the conveyances to the purchasers to be delivered by the Crown upon the production of a certificate from certain trustees authorized by the Indians to receive the mortgages to be given back, certifying that the purchasers

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had done everything necessary to secure to the Indians and their posterity the "stipulated annuities and considerations which they agree to give for the same".

The petition then alleges the passing of the Act of 1824 by the Parliament of Upper Canada and the flooding in the year 1826 of 1826 4/5 acres by the execution of the works without any compensation at any time having been made to the Indians, although provision was made by the statute for that purpose. Section 9 of the statute provided that if the canal should pass through any land in possession of any tribe or tribes of Indians, or if any act occasioning damage to their property or possessions should be done under the authority of the Act, compensation should be made to them in the same manner as provided by the statute with respect to the property, possession or rights of other individuals. "The Chief Officer of the Indian Department within this province" was required to name an arbitrator on behalf of the Indians and any amount awarded was to be paid to the said Chief Officer "to the use of the said Indians". It was subsequently provided in 1826 by 7 Geo. IV, c. 19, s. 5, that all matters to be determined by arbitration under section 7 of the earlier statute should be referred as therein provided "so that the award or awards of such arbitrators may be made public and declared on or before the first day of September next (1826) and that all and every sum of money by such an award or awards directed to be paid by the said company shall be paid to the party or parties entitled to receive the same on or before the first day of October next".

The petition further alleges in paragraph 4 that since the year 1784 the Department of Indian Affairs, through its Superintendent-General or other officer or officers charged with its control and management, was an express trustee for the Indians with respect to the control and management of their lands and property, including moneys received on their behalf. Appellant claims that it was the duty of the officer named in the Act of 1824, namely, "the Chief Officer of the Indian Department" to collect the amount to which the Indians were entitled in respect of the flooding of their lands and that he failed to take any steps to that end, whereby they have suffered loss.

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The petition also alleges that on the 20th of October, 1836, an Order-in-Council was passed in Upper Canada declaring 368 7/10 acres of the Indian lands to be a free grant to the Grand River Navigation Company which had been incorporated in 1832 by 2 Wm. IV, c. 13. It is alleged that a patent of the said lands was issued to the company pursuant to this Order-in-Council and that the Indians at no time received any compensation for the lands so taken and that the Crown as their express trustee committed a breach of trust in failing to see that such compensation moneys were paid.

With respect to these first two heads of claim the appellant is in the difficulty that any breach of trust, if it occurred, took place before the Act of Union of 1840, and the appellant has not shown any basis of obligation resting upon His Majesty in the Right of the Dominion of Canada in respect of such a liability, although with respect to liabilities arising after that date section 111 of the *British North America Act* is relevant. I think therefore that the appeal cannot succeed with respect to these two heads of claim.

Coming to the third head of claim, it is alleged by the petition that as a result of the surrender and its acceptance a definite contractual agreement arose under which the Government of Upper Canada undertook to take charge of and sell the surrendered lands, receive the purchase moneys and hold the same intact "for the benefit of the suppliants' ancestors separate and distinct from the public money of the province, for the purpose of providing a certain sure revenue for the support of the suppliants or their ancestors". It is further alleged that in or about the year 1833 the Government of Upper Canada, depository and in control of the funds arising from the sale of the Six Nations lands, of which a very considerable amount was then in the custody and control of the Receiver General of the said province, contracted to purchase in the name of the Six Nations, but without their knowledge or consent, 6,121 shares of the par value of $25 each of the Grand River Navigation Company, and that the Government of Upper Canada, through the said Receiver-General, and subsequently the Government of Canada after the Union of 1840, paid, without further authority, out of collections

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made and arising from sales of lands, the sum of $160,000. It is alleged that these payments were in breach of the contractual agreement referred to. The suppliants claim that the said sum of $160,000 with interest should be restored to the funds held by the Department of Indian Affairs and the present government, on behalf of the Indians, the whole of this money having been illegally paid away for the said purpose and lost.

It is further alleged that by an Act of the Parliament of Canada of the 30th of August, 1851, c. 151, the Navigation Company was empowered to raise 40,000 pounds on debentures of the then town of Brantford by reason of which there was created in favour of the said town a mortgage upon all the assets of the said company as a result of which the said assets were ultimately foreclosed by the said town and lost to the Indians.

As already pointed out, it is also alleged by the petition that the Department of Indian Affairs from its formation in 1784 to the present time is an express trustee of the lands and property of the Indians, including all Indian money paid to it. It is also alleged that, in addition to the relief claimed on the basis of the "Statutes, Ordinances and Orders-in-Council" particularized above, the suppliants are "entitled to succeed on equitable grounds" and the specific claim with respect to the $160,000 is for "repayment of cash paid on stock of the Grand River Navigation Company from *trust* funds of suppliants".

On behalf of the respondent it is first contended that the allegations of fact in the petition and particulars do not show any agreement by His Majesty or anything held by His Majesty in trust. It is said that reference to the Crown (presumably in documents or statutes) as trustee for the Indians and to the Indians as wards of His Majesty is not a technical use of such terms but such references are merely descriptive of the general political relationship between His Majesty and the Indians. It is also contended that the only fact relied upon to show a trust or agreement is the acceptance by the Governor-in-Council in 1798 of the surrender of the Indian lands. In addition to the particular allegation of trust arising out of the surrender and acceptance in 1798 there is, however, the further allegation in the petition that the Crown, through the Indian

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Department and its officers, was always a trustee for the Indians with respect to lands or moneys of the Indians.

In *Civilian War Claimants Association* v. *The King* (1), Lord Atkin said:

> There is nothing so far as I know, to prevent the Crown acting as agent or trustee if it chooses deliberately to do so.

In *Kinloch* v. *Secretary of State for India* (2), Lord Selborne, L.C., at 623 said:

> Still it would not be altogether satisfactory to proceed on that ground alone * * * if it really appeared that the intention of the Crown, in the Order in Council and the Warrant which passed from the Crown upon this subject, was to constitute the person who for the time being might fill that office of state a trustee in the ordinary sense of the word, liable to account in a Court of Equity to private persons.

At page 625 the Lord Chancellor further said:

> Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust—a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not. What their sense is here, is the question to be determined, looking at the whole instrument and at its nature and effect.

I think the law is correctly stated in *Lewin on Trusts*, 14th Ed. p. 25:

> The Sovereign may sustain the character of a trustee, so far as regards the capacity to take the estate, and to execute the trust.

The authors go on to state that doubts have been entertained whether, the subject can by any legal process, enforce the performance of the trust. They add at p. 26:

> The subject may, undoubtedly, appeal to the Sovereign by presenting a petition of right, and it cannot be supposed that the fountain of justice would not do justice.

In *Pawlett* v. *Attorney-General* (3), the plaintiff had executed a mortgage in favour of a mortgagee who had died and his heir being attainted of high treason the King had seized the lands. The plaintiff thereupon exhibited a bill against the King and the executor, seeking redemption of the mortgage, and the question that arose was whether he could have any remedy against the King for

(1) [1932] A.C. 14 at 27.
(2) (1882) 7 A.C. 619.
(3) (1668) Hardres, 465.

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redemption. It was decided by Lord Hale and Baron Atkyns that the proceedings would lie. In *Esquimalt and Nanaimo Rly.* v. *Wilson* (1), the Judicial Committee in referring to the judgment of Baron Atkyns, said:

> It was stated in the report that he was strongly of opinion that the party ought in this case to be relieved against the King, because the King was the fountain and head of justice and equity, and it was not to be presumed that he would be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him.

It is provided by section 18 of the *Exchequer Court Act*, R.S.C. 1927, c. 34:

> The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown * * *

The effect of this section is to clothe the Exchequer Court with jurisdiction with respect to claims maintainable against the Crown whether under the former practice they were maintainable only by petition of right or otherwise.

With respect to a contention that there was no jurisdiction in the ordinary courts as to claims against the Crown where a petition of right would not lie, their Lordships in the *Esquimalt* case said at page 365:

> But there are many cases in which petition of right is not applicable in which the Crown was brought before the Court of Chancery, and the Attorney-General, as representing the interests of the Crown, made defendant to an action in which the interests of the Crown were concerned * * *

At page 367 their Lordships referred to what was said by Lord Lyndhurst in *Deare* v. *Attorney-General* (2), namely:

> I apprehend that the Crown always appears by the Attorney-General in a Court of Justice, especially in a Court of Equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned.

Their Lordships proceeded:

> This statement, though made on the equity side of the Court of Exchequer, is certainly not limited to the Chancery proceedings that were instituted in that Court; it is of wide and general application. It is in entire agreement with the principles enunciated by Baron Atkyns in the earlier authority, and it is recognized as being the existing practice in the Courts today.

(1) [1920] A.C. 358.

(2) (1835) 1 Y. & C. 197, 208.

With respect to the procedure by petition of right their Lordships said at 364:

> That procedure is adopted for the recovery from the Crown of property to which the applicant has a legal or *equitable* right, as, for example, by proceedings equivalent to an action of ejectment or the payment of money.

Section 7, subsection 1, of the *Petition of Right Act*, R.S.C. 1927, c. 158, is as follows:

> If the petition is presented for the recovery of any real or personal property, or any right in or to the same, which has been granted away or disposed of by or on behalf of His Majesty, *or his predecessors*, a copy of the petition and fiat, endorsed with a notice to the effect of the Form C in the schedule to this Act, shall be served upon or left at the last or usual or last known place of abode of the person in possession or occupation of such property or right.

Their Lordships in the *Esquimalt* case at page 364 said in relation to the very similar section of the British Columbia legislation:

> Sect. 7 shows that where a petition of right is presented to recover real or personal estate or any right granted away or disposed of on behalf of His Majesty, a copy is to be left at the house of the person last in possession, *showing that the main claim is against the Crown*, that the person last in possession is not necessarily a proper party to the suit, but that, in order that he may be affected with knowledge, provision is made that he should be served in the manner indicated.

In *Hodge* v. *Attorney-General* (1), the title-deeds of a leasehold estate had been deposited with bankers, by way of equitable mortgage. The depositor was subsequently convicted of felony and a bill was filed by the mortgagees against the Attorney-General for a sale of the property. Alderson B., sitting in equity, held that the court could declare that the plaintiffs were equitable mortgagees and directed the Master to take an account of what was due to the plaintiffs and decreed that the plaintiffs should hold possession of the property until their lien was satisfied. He held that he did not have any jurisdiction to order a sale or to order the Crown to reconvey.

I see no more difficulty in the present instance, should the facts warrant, in making a declaration that the moneys in the hands of the Crown are trust moneys and that the appellant and those upon whose behalf he sues are cestuis que trust, even although the court could not direct the Crown to pay. In this latter event it is inconceivable that at this date, any more than in the time of Baron Atkyns,

(1) (1838) 3 Y. & C. 342.

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the Crown, as the fountain of Justice, would not do justice. I think, however, no such difficulty lies in the way of an order for payment.

In *Feather* v. *The Queen* (1), at 294, Coburn C.J., delivering the judgment of the court said:

> We concur with that court in thinking that the only cases in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money * * *

If this is so with respect to moneys of the subject as to which no trust exists, it cannot be any the less so because the moneys coming to the hands of the Crown are impressed with a trust in favour of the suppliant and there can be no objection, as urged by Mr. Jackett, that the Crown has paid away the moneys. This situation is expressly recognized in section 7 of the *Petition of Right Act*, already cited, and in *In re Gosman* (2) it was held that moneys transferred to the Crown by the trustees and executors of the will of a deceased person where no next-of-kin had been discovered were recoverable by the next-of-kin, although in the meantime the moneys had been paid away by the Crown.

As to the moneys received in respect of the sale of the lands, O'Connor J. construed the petition to allege that they had been received by the trustees for the Six Nations. In this he has, I think, been misled by a seeming ambiguity. In a letter of February 20, 1798, to the Duke of Portland, it is stated that the trustees were "to receive for *their* use mortgages and other securities for the payment to *them* of the several and respective considerations stipulated". This, in my opinion, means that the trustees were merely to hold the securities, not collect them; the words "for the payment to them" describe the obligations for which the securities were given; "their" and "them" signify the Indians. This is confirmed by the minute of council of February 5, 1798, "to secure to the Five Nations and their posterity the stipulated annuities and considerations which they agree to give for the same". The same minute speaks of the trustees as "authorized to receive" mortgages of the said lands. Paragraphs 14 and 15 of the

(1) (1865) 6 B. & S. 257.

(2) (1880) 15 Ch. D. 67; 17 Ch. D. 771.

petition distinctly allege that the Crown was to and did receive the money. The reason for putting the mortgages into trustees would seem to be the obvious one of enabling suit or action to be taken without the difficulty or inconvenience that would attend them in the name of the Crown.

I take the allegations, therefore, to be: that in consideration of the surrender, the Crown, whether acting with Imperial or Colonial advisers, undertook to convey the property to the purchasers named and to others thereafter to be named, to receive the purchase moneys and to maintain them as a converted form of the lands sold for the purposes of a tribal enjoyment equivalent to that to which the Six Nations were entitled under the grant; and that by transmission this obligation has become assumed by the Crown in right of the Dominion. Although the matters present relations of the nature of a trust, they contain likewise the ordinary elements of a contract.

Under the arrangements of 1798 the persons nominated by the Six Nations to receive the securities were the Acting Surveyor General, the Superintendent of Indian Affairs, both officers of the Crown, and one, Alexander Stewart, a barrister. The petition does not show how long these persons acted or how it came about that the Department of Indian Affairs became substituted. Some further light may be obtained from subsequent legislation.

After Union by the Act of 1841, 4 and 5 Victoria, c. 74, it is recited that:

> Whereas three-quarters of the stock of the Grand River Navigation Company is held *in trust* and for the benefit of the Six Nations Indians; and whereas by the provision of the Act incorporating the said Company, *the persons in whose name such Stock is so subscribed and held for the said Six Nations Indians*, have no adequate influence in the appointment of the Directors by whom the affairs of the said Company are regulated and managed * * *

The statute proceeds to enact that it should be lawful for the Governor of the province by and with the advice and consent of the Executive Council to nominate and appoint two directors at every election so long as the proportion of three-quarters of the capital stock should continue to be held for the use and benefit of the said Six Nations Indians. The reason for this enactment was that

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it had been provided by section 22 of the Act incorporating the company that no one person should have more than fifteen votes regardless of the number of shares held.

A further development with respect to the holding of these shares is evidenced by the Act of 1853, 16 Victoria, c. 256. By section 1 the holding of a special meeting of stockholders of the company was authorized and by section 2 it was provided that the question to be put at the meeting was whether the company and all works connected therewith should or should not be placed under the control and management of the government of the province. The proviso to the section reads:

> Provided always that inasmuch as three-fourths of the Stock of the Company is held *in trust* for the benefit of the Six Nation Indians, the decision so come to by the said shareholders, if in the affirmative, shall not be valid or binding until ratified and confirmed by the *Governor as Trustee for the said Six Nation Indians.*

In 1860 by 23 Victoria, c. 151, section 3, it was provided:

> All moneys or securities of any kind applicable to the support or benefit of the Indians or any tribe or band of Indians and all moneys accrued, or hereafter to accrue, from the sale of any lands reserved or held in trust as aforesaid, shall, subject to the provisions of this Act, be applicable to the same purposes and be dealt with in the same manner as they might have been applied to or dealt with before the passing of this Act.

And by section 8 it is provided:

> The Governor-in-Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom, the moneys arising from sales of Indian lands and from the property held or to be held in trust for the Indians, shall be invested from time to time, and how the payments to which the Indians may be entitled shall be made, and shall provide for the general management of such lands, moneys, and property * * *

It does not appear who in 1841 were "the persons in whose name such stock is so subscribed and held for the said Six Nation Indians." When the history of the dealings from time to time with the Indian moneys subsequent to their receipt is disclosed from the official records, the court will be in a position to say what was and is the position and obligations in law of the Crown with respect to the moneys in question. For that purpose the matter must go to trial.

It is also contended on behalf of the respondent that if the allegations in the petition show any legal obligation on the part of His Majesty, it is an obligation of His

Majesty in right of the Imperial Government. It is said that until 1855, or later, the Imperial Government retained control of the administration of Indian Affairs in Canada and reference is made to *Rex* v. *Hill* (1); *St. Catherine's Milling and Lumber* v. *The Queen* (2); and *Easterbrook* v. *The King* (3). The statements in these judgments are all, of course, statements of fact and their applicability to the case at bar will depend upon the evidence to be adduced. It would at present appear however, from the Act of 1841 and the Act of 1853, already referred to, that, whatever may have been the general situation, nevertheless, with respect at least to the moneys here in question, the local government was purporting to exercise some measure of control. It is sufficient for the present purposes to say that the Crown's contention cannot be given effect to at this stage and will depend ulimately for whatever force it may have upon the evidence.

It is next contended on behalf of the Crown that any legal claim which might be shown by the allegations of fact in the petition arose prior to 1840, and therefore, the appellants cannot rely upon the provisions of section 111 of the *British North America Act*. I do not read the petition as thus restricted but as alleging payments out of the moneys in question after the Union of 1840. It may be that these payments were all made in pursuance of one contract to buy the shares alleged to have been made in 1833, in which event it may be contended on the part of the appellant that payments made after the Union of 1840 cannot be justified on that ground if the contract was illegal when made. It may be however, that the payments after Union were independent transactions. That again is a matter for the evidence.

The respondent in its factum, although the point was not mentioned in argument, contends that the appellant and those on whose behalf he sues, have not shown that they, as distinct from the original members of the Six Nations living in 1798, are entitled to any interest in the subject matter of the petition. No difficulty was felt on this score in *Henry* v. *The King* (4). Without approving or disapproving of anything decided in that case I do not think this is an objection which can or should be dealt with at

(1) (1907) 15 O.L.R. 406 at 411.
(2) (1888) 14 A.C. 46 at 54.
(3) [1931] S.C.R. 210 at 214.
(4) (1905) 9 Ex. C.R. 417.

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this stage. When the evidence is fully developed the point may or may not be of importance. I would leave it to be dealt with at the trial.

I would allow the appeal with respect to the claim for $160,000 and refer the same back to the Exchequer Court. The learned trial judge below did not, by reason of the conclusion to which he came on the first question, deal with the *Statute of Limitations* which was the subject of the second question, and the reference back will be subject to the determination of that question. This will raise the interesting question as to whether persons with the limited civil rights of the Indians can be barred by the statute. The matter was not argued before us and I do not deal with it.

As to costs, I agree with the order proposed by my brother Kerwin.

LOCKE J.:—The question set down for argument by an order made under the provisions of Rule 149 of the Exchequer Court states the matter to be determined as being whether, assuming the allegations of fact contained in the Petition of Right and the particulars delivered by the suppliant to be true, a petition of right lies against the respondent for any of the relief sought. This has been treated properly, in my opinion, as raising also the question as to whether the Petition of Right discloses any cause of action, and the matter has been disposed of by the learned trial judge upon this footing.

In so far as the claim of the suppliants is to recover damages in respect of the lands flooded by the works of the Welland Canal in the year 1826 and for payment of the value of the lands said to have been granted to the Grand River Navigation Company in 1832 are concerned, I agree that the appeal fails. Apart from the unfortunate amendment to the petition made on April 9, 1943 which, if taken literally, would be fatal to the claim in respect of the lands submerged, it is disclosed upon the face of the petition that the acts complained of took place when the administration of Indian Affairs was in the hands of the Province of Upper Canada. While by section 111 of the *British North America Act* the Dominion of Canada assumed liability for the debts of the Province of Canada, it is neither suggested in the pleadings nor contended in argument before

us that by the Act of Union of 1840 the Province of Canada became liable for liabilities of the Province of Upper Canada of the nature suggested.

As to the claim advanced in respect of the amount of $160,000 or part of it, said to have been expended out of the funds of the Six Nations Indians by the Province of Canada for the purchase of Grand River Navigation Company stock, and the claim for interest, I think there is error in the judgment appealed from.

By paragraph 13 of the Petition of Right, it is alleged that on February 5, 1798, Captain Joseph Brant, acting under a Power of Attorney from certain chiefs of what were then the Five Nations Indians, in pursuance of arrangements made with the Government of Upper Canada, executed a formal surrender to the Crown of "the lands to be sold." When asked for particulars as to the nature of the deed of surrender, the suppliants delivered a copy of the grant which disclosed that the request advanced on behalf of the Five Nations Indians was that the surrender of 352,707 acres of land be accepted for the sole purpose of enabling His Majesty to grant the lands to certain named purchasers for the consideration stated in a schedule to the document. The consideration for the purchase which aggregated an amount in excess of £42,000 was not to be paid to the Crown but to the Acting Surveyor-General, the Superintendent of Indian Affairs for the District, and Alexander Stewart, Esq., described in a letter from the Honourable Peter Russell, President of the Executive Council of Upper Canada to the Duke of Portland, Secretary for the Colonies dated February 20, 1798, as the persons named by the Five Nations as "their trustees to receive for their use mortgages and other securities for the payment to them of the several and respective considerations stipulated." By paragraph 14 the suppliants alleged that as a result of the negotiations between Brant and the Provincial Government of Upper Canada an agreement was entered into whereby the Government was to take charge of and sell the lands and receive the purchase money and hold the same intact for the benefit of the suppliants' ancestors separate and distinct from the public money of the Province for the purpose of providing revenue for the support of the Five Nations.

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By paragraph 15 it is alleged that:—

In or about the year 1833 the Government of Upper Canada, depositary and in control of the funds arising from the sale of Six Nation lands, of which a very considerable amount was then in the custody and control of the Receiver-General in said Government charged with the duty of selling lands belonging to Suppliants, and receiving the funds arising from such sales and disbursing the same under the contractual agreement made between Joseph Brant aforesaid and the Government of the Province of Upper Canada under which said Government was to hold the proceeds of such lands for the purpose of assuring to your Suppliants and their posterity an annuity for their future support, in despite of the terms of said contractual agreement aforesaid, contracted to purchase in the name of your Suppliants, but without their knowledge or consent, 6,121 shares of $25 each of the stock of the Grand River Navigation Company, and said Government of Upper Canada, through the said Receiver General of its Government and subsequently the Government of Canada after the Union of 1841, paid without further authority out of collections made and arising from said sales of lands authorized and directed to be made by the terms of said contractual agreement with said Brant, the sum of $160,000 from the proceeds of such sales so illegally contracted for without authority to be purchased by him in the name of your Suppliants to complete the payment for such shares, and Suppliants charge that said payment was made in breach of the contractual agreement to hold the whole of said proceeds of sales for the support of your Suppliants or their ancestors as occasion might arise.

and by paragraph 16 the suppliants asked that the said sum should be restored with interest to the funds held by the Department of Indian Affairs and the present Government of Canada "on which is binding and effective the contract founded (sic) by said Brant in 1798." When asked for particulars as to the identity of the person or persons who made the various payments out of the various funds upon the purchase of the stock, the suppliants replied that the information was in the possession of the Indian Affairs Branch of the Department of Mines and Natural Resources.

As pleading, the language of these paragraphs leaves much to be desired. Paragraph 15 speaks of the Government of Upper Canada being "charged with the duty of selling lands belonging to suppliants" and refers to the funds paid for the Grand River Navigation Company stock as being paid "out of collections made and arising from said sales of lands" but without further explanation I think this must be taken to refer to the lands conveyed to the nominees of the Five Nations Indians under the directions given by Brant in 1798, and not to the proceeds of the sale of other lands. While the reference to the

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Power of Attorney given to Brant by the Five Nations Indians referred to in paragraph 13 shows that the lands in question were surrendered simply for the purpose of permitting grants to be made to the persons to whom the Indians desired the lands to be sold and the particulars of the deed of surrender show that the consideration for the purchase was to be paid over to the individuals named by the Indians as trustees and these persons are referred to in the communication from Peter Russell to the Secretary for the Colonies as the "trustees to receive for their use mortgages and other securities for the payment to them of the several and respective considerations stipulated" and the pleading does not allege that these trustees thereafter paid over the consideration to the Crown to be held on behalf of the Indians, I think when these paragraphs are read together it is made sufficiently clear that the suppliants claim that the funds realized from the sale came into the possession of the Crown and were held on behalf of the Indians. The identity of the trustees, named, two of whom were the Honourable David William Smith, His Majesty's Acting Surveyor General, and Captain William Claus, His Majesty's Deputy Superintendent of Indian Affairs. and the fact that by c. 74 of the Statutes of the First Parliament of the Province of Canada (4 & 5 Vict.) it was recited that three-quarters of the stock of the Grand River Navigation Company were held in trust for the benefit of the Six Nations Indians (presumably by the Crown) and it was provided that the Governor of the Province, by and with the advice and consent of the Executive Council, might nominate two of the directors of the company, would at least indicate either that possession of the funds by the trustees had been treated from the outset as possession by the Crown or that possession of the funds had thereafter been taken. These are facts which undoubtedly should have been more clearly pleaded but that this is what the suppliants really contend is, in my opinion, evident. It is alleged in paragraph 15 that the Government of Upper Canada contracted to purchase the shares in the Grand River Navigation Company and that the said Government prior to 1841 and the Government of the Province of Canada thereafter paid in the aggregate $160,000 out of the moneys held in trust for the Indians

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upon the purchase of the stock, without saying what amounts were paid by the respective Governments. It is further in the same paragraph alleged that the Government of Upper Canada was to hold the proceeds of the sale of the lands for the purpose of assuring to the suppliants and their posterity an annuity for their future support and that the moneys paid out for the Grand River Navigation Company stock were so paid without authority from the Indians in breach of the agreement between them and the Crown, and in so far as this relates to the moneys disbursed by the Government of the Province of Canada I am of the opinion that a cause of action against that Province is disclosed. While again the pleading is defective, I think the statement in paragraph 22 (*g*) that the suppliants rely upon the *British North America Act* should here be construed as meaning that it is claimed that by virtue of section 111 of that Act His Majesty in right of the Dominion of Canada is liable for the claim as being a debt of the former Province of Canada, liability for which was imposed upon the Dominion by the Statute, and that a cause of action in respect of this part of the claim as against the respondents is shown. Section 111 reads that "Canada shall be liable for the debts and liabilities of each province existing at the Union." The question as to whether this gave a right of action directly against the Dominion in respect of the liability of the province was not raised before us and is not, in my opinion, one of the questions set down for argument and I accordingly express no opinion upon the point.

As to the second branch of the question, I am of opinion that a petition of right lies for the above mentioned part of the relief claimed and that there is jurisdiction in the Exchequer Court for the reasons stated by my brother Kellock.

The question as to whether the claim is barred by the *Exchequer Court Act* and the *Statute of Limitations* was not dealt with by the learned trial judge and was not argued before us and I do not deal with it.

The appeal should be allowed as to the claim advanced in regard to moneys said to have been paid out by the Province of Canada after the date of the Union and as

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to the interest upon these moneys, but as to the remainder of the claims should be dismissed. I agree with the order as to costs proposed by my brother Kerwin.

Appeal allowed as to the claim advanced in respect of moneys alleged to have been paid by the old Province of Canada for the purchase of shares of the Grand River Navigation Co. out of the proceeds of the sale of lands surrendered in 1798. The costs of an incidental to the hearing before the Exchequer Court of the question of law shall be costs in the cause. The costs of this appeal shall be to the appellants in the cause except in any event they shall not receive any costs of or in connection with their factums.

Solicitor for the appellants, *Auguste Lemieux.*

Solicitor for the respondent, *F. P. Varcoe.*

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THE SHERWIN-WILLIAMS COMPANY OF CANADA LIMITED (PLAINTIFF) ..... APPELLANT;

*May 13, 16, 17, 18

*Dec. 22

AND

BOILER INSPECTION AND INSURANCE COMPANY OF CANADA (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Insurance—Against damage caused by accident—Policy excludes loss from fire and from accident caused by fire—Accident followed by fire and explosion—Whether loss covered—Cause of—Assignment of insured's rights—No signification—Whether insured can still claim—Arts. 1570, 1571 C.C.

An insurance policy insured appellant against loss on property directly damaged by accident and excluded losses from fire and from accident caused by fire. A tank, which was the object of the insurance, burst permitting the escape of fumes which ignited and exploded causing considerable damage to appellant's factory. The Superior Court maintained the action on the policy and the Court of Appeal dismissed it on the ground that the damages were caused by fire and were not the direct result of the tearing asunder of the tank.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

[COMMON PLEAS DIVISION.]

RE JOHN MILLOY AND THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF ONONDAGA.

By-law—Animals running at large—Unreasonableness—Mode of enforcing penalty—Indians and Indian lands—Quashing amending by-law after lapse of year from original by-law.

By-law No. 84, passed by the township of Onondaga on 29th May, 1882, prohibited certain animals therein named running at large; and provided that, *except between the 10th May and the 1st December in any year*, it should not be be lawful for the owners of any other animals, not theretofore mentioned or indicated, to allow or permit the same to run at large. A fine or penalty not exceeding $5.00 was imposed for every offence, but the animals were not thereby to be relieved from the operation of any by-law relating to pounds or pound keepers, or for any trespass or damage committed or done by them through their being permitted to run at large. The recovery of fines and penalties, (not adding the words "and costs,") was directed to be under sec. 421, *et seq.*, of the Summary Convictions Act, with imprisonment, in the event of no distress, unless the fine or penalty and costs, including costs of committal, be sooner paid. By-law No. 97, passed on 9th July, 1883, after reciting that the object was to prevent all animals of any age or description running at large at all seasons of the year, amended by-law No. 84, by striking out the words in the words in italics. A motion to quash by-law 97 was made within a year after its passing, but after the lapse of a year from the passing of by-law 84.

Held, that the by-law was not oppresive or unreasonable as extending to all seasons of the year, in that it was no wider than the statute under which it was passed, Municipal Act, 1883, sec. 492, sub-sec. 2.

It was objected that the provisions in by-law 84, as to the levying fines was *ultra vires*, because that section of the Act provided a mode of recovery, *i. e.*, by sale of the animals impounded, and hence that sec. 421 *et seq.*, did not apply; but *Held*, that the objection was taken under a misconception of fact, in that the by-law was not and did not profess to be a pound by-law; and it was by no means clear that these sections would not apply to a pound by-law.

Quære, as to the effect of the omission of the words "and costs" in the clause providing for the penalty; but as this was not taken in the rule, it was not considered.

It was also objected that the by-law should have been limited in its provisions so as not to extend to Indian lands within the township, but the learned Judge refused to quash on this ground (1) because the quashing a by-law is not imperative but discretionary; (2) and if it were quashed the original by-law would remain; (3) it could only be quashed as to Indians and Indian lands; (4) the applicant was not prejudiced, and this was not a substantial objection; and (5) the Indians who were alone affected were not complaining.

The cases in which an amending by-law may be moved against after the expiry of a year from the passing of the original by-law considered.

On June 20th, 1884, *H. T. Beck* obtained an order *nisi* to shew cause why by-law No. 97, of the township of

Onondaga, should not be quashed with costs, upon the grounds—

1. That the amendment made by said last mentioned by-law is unreasonable and *ultra vires*, in that it prohibits the running at large in the township of Onondaga of all animals of any age or description at all seasons of the year.

2. That by-law No. 84, as amended by by-law No. 97, is unreasonable and *ultra vires*, in that section 5, as amended, imposes an absolute and unconditional duty on the owners of all animals to prevent the same from running at large.

3. That said by-law as amended is *ultra vires* and unreasonable, in that section 6 imposes a penalty upon all persons having the charge, care or control of any animals, whether as owners or otherwise, who shall permit or suffer the same to run at large.

4. That subsection 2 of section 492 of the Consolidated Municipal Act, 1883, makes special provision for levying all damages, fines, and expenses from a sale of the animals in question in case of a breach of any by-law passed under the provisions of the said subsection, and the municipality have no power to collect fines under the provisions of section 421 and following sections of said Act.

5. The Municipal Act gives a remedy *in rem* merely, and not *in personam*.

6. That by-law No. 84, as amended by by-law No. 97, is ambiguous, and the first five sections are inconsistent with section 5 as amended.

7. That the said municipality had no jurisdiction over the Indian lands situate in the said township, and the said amended by-law should limit its provisions so as as not to extend to said lands, or in any way affect anything done or permitted thereon.

On June 27, 1884, *V. Mackenzie*, Q. C., supported the order.

Wilson, Q.C., contra.

July 16, 1884. ROSE, J.—This is a motion to quash by-law 97 of the township of Onondaga.

This by-law amends section 5 of by-law 84. By-law 84, by section 1, repeals previous by-laws; and, by sections 2, 3 and 4, prohibits the running at large of certain animals therein named, and, by section 5, provides "*That except between the 10th day of May and the 1st day of December in any year* it shall not be lawful for the owners of any other animals, not hereinbefore mentioned or indicated, to allow or permit the same to run at large."

Section 6 enacts, "That all persons having the charge, care or control, whether as owners or otherwise, of any animals hereby prohibited from running at large, who shall permit the same to run at large contrary to the provisions hereof, shall be liable to a fine or penalty for every such offence of not exceeding $5: and the imposition of any such fine or penalty shall not relieve such animals themselves from the operation of any by-law of the said township relating to pounds or pound keepers, for or on account of any trespass or damage committed or done by them by reason of their being so permitted and suffered to run at large."

The 7th section provides for the recovery of fines or penalties (not adding the word "costs," as in the statute), under the Summary Convictions Act; and, in the event of no distress, for imprisonment not exceeding twenty-one days, "unless such fine or penalty and costs, including costs of committal, are sooner paid.

It will be observed that neither in sections 6 or 7 are costs provided for, so that the word "such" has nothing to which it refers as to the costs. I will refer to this hereafter.

Section 8 provides for the informer giving evidence, and is a copy in part of sec. 404, R. S. O. ch. 174, omitting the clause as to wife or husband giving evidence.

This by-law was passed on the 29th of May, 1882.

By-law 97, passed on the 9th of July, 1883, amends by-law 84 by striking out from section 5 the words which I

have italicised. It recites that the object is "to prevent all animals, of any age or description, from running at large at all seasons of the year."

The grounds of the motion may be said to be three. The main one is: 1. That it is oppressive and unreasonable, as extending to all animals at all seasons of the year.

2. That the provision as to levying of fines is *ultra vires*, as subsection 2, section 492, provides a mode of recovery, *i. e.*, by sale of the animals impounded; and hence the provisions of section 421 do not apply.

3. That the by-law should have been limited in its provisions so as not to extend to the Indian lands within the township.

As to the first ground. The words of the statute are (sec. 492, subsec. 2, Municipal Act, 1883), "For restraining and regulating the running at large or trespassing of *any animals*;" also, "providing for impounding them:" and then follows, "and for causing them to be sold in case they are not *claimed* within a reasonable time, or in case the damages, fines and expenses are not paid according to law.'

It will thus appear that the section provides for two things: restraining and regulating, and impounding.

The by-law we are considering does not provide for impounding, but for restraining and regulating.

The amending by-law is not a new enactment of all the provisions of the amended by-law. They remain as at first enacted, save in so far as amended. Clause 5 is alone affected. It is clear by-law 84 cannot be moved against, more than one year having elapsed since it was passed. If I am bound to quash by-law 97, by-law 84 will remain unaffected, save that clause 5 will be restored to its original condition.

It seems to me an amending by-law may be moved against after the expiry of a year from the passage of the original by-law:

1. When the original by-law is *intra vires*, but by the amendment is made *ultra vires*, or so objectionable as to demand the interference of the Court.

2. When the original by-law is objectionable, and the amending by-law extends its objectionable provisions to new objects, new territory, or over a further period of time.

Where, however, the original by-law is objectionable, and the amending by-law limits its application or makes some immaterial verbal alteration, it seems to me the Court should not interfere, as the party moving has lost his right to take the objection as against the old by-law.

To illustrate: If by-law 84 had restrained the running at large of oxen, and had contained clauses which were *ultra vires*, and the amending by-law had extended these provisions to all animals, the amending by-law should be quashed. If, however, by-law 84 restrained all animals, and the amending by-law limited it to oxen only, then the year having elapsed, in my opinion, the amending by-law should not be quashed.

There are, no doubt, other considerations, which from time to time will arise; but the above are sufficient for the present motion.

The amending by-law here extends the period of time during which all animals are restrained from running at large, so as to cover the whole year instead of about five months.

No evidence has been offered that this is unreasonable, and no authority cited. I do not see that it is necessarily so. I think it may be reasonable. The statute is unlimited in its language, both as to time and animals—"any animals."

It was urged that this would apply to the smallest animals and the youngest. The enacting words of the by-law are not wider than the statute, and I must not allow a lively imagination to place a limitation on the power of the municipality that the Legislature has not seen fit to impose. If the municipality should attempt to enforce the provisions in an unreasonable manner, the Court could interfere.

I think this ground fails.

As to what is a domestic animal, see *Budge* v. *Pa*

3 B. & S. 382.

As to the second objection, so far as this is open on this motion, I think it is taken under a misconception of the effect of subsection 2. I have endeavoured to point this out by the mode of division above. This is not a pound by-law, nor does it profess to be; and while I am clear that the provisions of sections 421 to 428 apply to the provisions of this by-law, I by no means say they would not apply to a by-law respecting pounds. It will be time enough to examine this question when it arises.

I think this ground also fails.

I hardly see why clauses 6, 7 and 8 were enacted. Sections 421 *et seq.* cover the ground taken; and in drafting clause 7 of the by-law, as I have above pointed out, the provisions as to recovering and enforcing the fines and penalties "with costs" has been omitted.

It will be observed that section 421 only applies, "unless where other provision is specially made" therefor.

This objection is not taken in the order *nisi*, and I do nothing more as to it than to call the attention of the corporation to the possible difficulty of enforcing the payment of the costs, under the language of the by-law. The question would be a more serious one on a motion to quash a conviction.

The third objection has given me some little anxious thought.

Under the British North America Act, "Indians and lands reserved for Indians," are among the subjects over which the authority of the Dominion Parliament extends.

The Indian Act, 1880, sec. 74, provides that, "The chief or chiefs of any band in council may frame, subject to confirmation by the Governor-in-council, rules and regulations for the following subjects:

5. The prevention of trespass by cattle; also for the protection of sheep, horses, mules, and cattle.

8. The establishment of pounds, and the appointment of pound keepers.

The Indian reserve pointed at in the third objection is said to be within the township of Onondaga. The lan-

guage of the by-law is general, and in terms applies to all persons within the township. This is a defect. See *Lumley* on By-laws (1877) p. 70; especially *Mayor, &c., of Guildford* v. *Clark*, 2 Vent. 247.

Referring to the report in that case, we find as follows: "The by-law is said to have been: That if any inhabitant should be chosen; whereas they cannot make by-laws to bind all the inhabitants of the town, but only the freemen or members of the corporation." There was a second ground taken, and the report proceeds: "And the Court held these matters incurable." See also *Lumley* on By-laws, p. 86: "The law must not be made in respect of a matter not within the authority of the body enacting it, nor to operate upon persons or in a district not subject to their control. In technical terms, it must not be *ultra vires*." Also pp. 148 to 156 inclusive.

I think, however, I need not determine this question, for the following reasons:

The quashing of a by-law is not imperative, but discretionary. Among other cases collected in Rob. & Jos. Digest, pp. 2469-2471, see *re Platt and Corporation of Toronto*, 33 U. C. R. 53, 58; *McKinnon and Corporation of Caledonia*, 33 U. C. R. 502, at p. 507.

2. If I should quash this by-law, the original by-law remains.

3. If I gave effect to it at all, I should quash it only as to the Indians and Indian lands: see *re Morell* v. *City of Toronto*, 22 C. P. 323.

4. The applicant cannot be affected, as it cannot in any way prejudice him; and this is not the substantial objection to the by-law.

5. The Indians, who alone could be affected, are not complaining, nor is it stated that any annoyance is or has been experienced from its existence.

While I do not quash it, I would suggest that the corporation consider whether the objection is not one which it might very easily remove. It may affect other by-laws, and cannot be ignored on a motion to quash a conviction.

It was said on the argument that this amending by-law was passed in opposition to the petition of a majority of the ratepayers. This is no ground for quashing it. If the ratepayers are not satisfied with their councillors, the remedy is in their own hands. The Courts cannot interfere.

The order must be discharged, with costs.

I have derived much assistance in considering the questions as to the effect of amending by-laws or statutes from Mr. *Sedgwick's* work on the Construction of Statutory and Constitutional Law, 2nd ed., p. 68, and note to p. 162, as to the relation back to the time of original Act; notes to pp. 95; and 96, as to how far an amendment acts as a repeal notes to pp. 110 and 111, as to effect of repealing prior statutes.

I make reference to this work, as he was the only author I found who had given special attention to the subject of amending or amendatory statutes.

Order discharged.

et cela sur la simple production du certificat du surintendant médical. La sollicitude et la confiance du législateur s'arrêtent là cependant et ne sauraient donner à ces savants aliénistes plus de latitude que celle définie par le texte de cet article 330*a* du code civil ainsi que par les dispositions de la Loi des asiles d'aliénés et de la curatelle publique.

Par ces motifs: Accueille la présente requête; déclare nul, inexistant et rescindé le jugement rendu par un député-protonotaire de la Cour supérieure le 20 décembre 1943, et prononçant l'interdiction pour démence de l'intimée; annule la nomination du mis en cause, le Dr L.-Alphonse Dion, chirurgien-dentiste, comme curateur de l'intimée; ordonne que le nom de l'intimée soit rayé du tableau des interdits; rejette l'intervention de l'intervenant, le Dr Lucien Larue, de Québec, en sa qualité de surintendant de l'Hôpital St-Michel Archange, à Mastaï; réserve à l'intimée tous autres recours que de droit, le tout avec dépens contre l'intervenant.

Myiow et autres, requérants et l'honorable juge Hector Perrier intimé et le Procureur-Général du Canada, mis en cause

Bref de prohibition — Expropriation par l'administration de la Voie Maritime du St-Laurent — De terrains dans la réserve de Caughnawaga — Mandat d'un juge de la Cour supérieure agissant comme « persona designata *» — Décision du juge ayant été portée en appel — Décision confirmée — Pouvoirs du juge — Loi de l'expropriation* [1952 *R.C.S. ch.* 106] *art.* 22 *— Loi de l'Administration de la Voie Maritime du St-Laurent* [1952 *R.C.S. ch.* 242] *— Loi des Indiens* [1932 *R.C.S. ch.* 149] *art.* 35.

1. Sur l'appel «*de plano*» des requérants, la Cour du banc de la Reine s'est trouvée satisfaite de la juridiction de l'intimé et de sa façon de l'exercer puisqu'elle a décidé de ne pas intervenir.

2. La demande d'un bref de prohibition par les requérants basée sur les mêmes raisons que celles exposées à la Cour d'appel est en fait une demande de revision du jugement de la Cour d'appel qui ne peut être reçue par cette Cour.

3. D'ailleurs, il n'y a pas eu dans la cause qui nous occupe excès ou abus de juridiction.

M. le juge Ignace Deslauriers — Montréal, le 4 mars 1957 — Cour supérieure, no 413,364 — P. Cutler, pour les requérants.

Les six requérants sont des Indiens Mohawks de la tribu iroquoise, habitant la réserve indienne de Caughnawaga, dans la Province de Québec. Ils occupent sur cette réserve des emplacements requis pour l'aménagement de la voie maritime du St-Laurent. « L'Administration » chargée de l'exécution des travaux de canalisation peut, à cette fin, prendre ou acquérir des terrains, sans le consentement des propriétaire (ch. 242, S.R.C. 1952, amendé par le ch. 58 des Statuts du Canada 1955.) — La Loi sur les expropriations (ch. 106, S.R.C. 1952) s'applique à ces prises de possession ou achats, *mutatis mutandis* (section 18). La Loi des Indiens (ch. 149 S.R.C. 1952, section 35,) donne à l'administration de la Voie Maritime du St-Laurent, le pouvoir d'exproprier à ses fins des terrains situés dans une réserve indienne, moyennant certaines conditions, qui dans le cas des requérants ont été remplies.

Ceux-ci, cependant, ne reconnaissant nullement la légalité des lois ci-dessus, nient la juridiction du Parlement Canadien sur eux, en matière d'expropriation. Ils basent leurs prétentions sur un octroi que le roi de France aurait fait à la bande indienne de Caughnawaga en 1680, et qui aurait été garanti à perpétuité par des traités subséquents, souscrits par la Couronne impériale. Ils estiment que la bande de Caughnawaga, en vertu de ces traités, est absolument maître de son territoire, que le gouvernement ne peut rien y prétendre, qu'il est impuissant à légiférer dans leur cas, qu'ils ne cèderont leurs terrains que s'ils le veulent bien. « La bande de Caughnawaga » affirment-ils (allégations 25 et 26 de l'opposition auxquelles il est référé dans l'allégation 21 de la présente requête), « est, en vertu de ces traités, comme un pays étranger pour le Canada, au sens de l'article 132, de l'acte de l'Amérique britannique du Nord ». S'appuyant sur ces prétentions, les six requérants, se sont opposés à toutes prises de possession par l'autorité de la voie maritime des terrains qu'ils occupent. Ils ont refusé de déménager. Ils auraient évincé de ces terrains des gens qui s'y sont présentés agissant pour le ministre du transport, l'Administration de la voie maritime du St-Laurent ou pour un entrepreneur, désireux d'exécuter les travaux dont il était chargé pour l'aménagement de ladite voie maritime du St-Laurent.

Devant cette résistance et cette opposition, l'application de l'article 22 de la Loi sur les expropriations fut demandée. En con-

séquence, le 10 janvier 1957, l'honorable juge Hector Perrier, l'intimé, un juge de la Cour supérieure, émit un mandat adressé au shérif du district de Montréal, lui enjoignant de faire cesser la résistance ou opposition et de mettre l'Administration de la Voie Maritime du St-Laurent ou ses agents en possession des terrains en question.

Appel fut interjeté de l'ordre ou jugement de l'honorable juge Hector Perrier à la Cour du banc de la Reine, le 14 janvier 1957, prétendant que ce jugement était un jugement de la Cour supérieure et non pas celui d'une *persona designata.* L'honorable juge Casey, de la Cour d'appel, participant au jugement de cette Cour déclare dans ses notes:

> *"With respect, I cannot accept these arguments nor can I attach any importance to the other considerations advanced by the appellants. The economy of the Expropriation Act is such that the right of the Crown to expropriate is absolute. It is only the amount of compensation that can be discussed. So far as section 22 is concerned, the warrant therein provided for is only a means of giving effect to the Crown's right to take and the language of the statute makes it quite plain that when a Judge of the Superior Court is called upon, he acts as a* persona designata *and not as the Court to which he is attached".*

L'appel fut rejeté le 19 janvier 1957, la cour déclinant sa juridiction et déclarant le jugement *a quo* sans appel.

Les requérants ayant échoué en appel, demandent maintenant l'émission d'un bref de prohibition contre l'honorable juge Perrier, intimé, agissant comme *persona designata,* pour faire annuler son jugement, se faire déclarer propriétaires de leurs lots et faire discontinuer toutes procédures contre eux par l'intimé ou le mis en cause.

Il n'apparaît pas que les allégués de la requête des requérants sont en conformité avec les faits révélés par le dossier 3595 *ex parte* des dossiers de cette Cour.

L'article 1003 du code de procédure civile, déclare:

> « Il y a lieu à un bref de prohibition lorsqu'un tribunal inférieur excède sa juridiction ».

Il semble que la Cour du banc de la reine a tranché la question lorsqu'elle a décidé de rejeter l'appel « *de plano* » des requérants. Il est reconnu en effet qu'elle intervient même dans le cas de jugement sans appel, lorsqu'un excès de juridiction est constaté. C'est ainsi qu'elle a agi dans les causes:

> *La Cité de Montréal* c. *Hénault* (1); *Dostaler* c. *Lalonde* (2); *Hamelin* c. *Leduc* (3); *James McShane* c. *Auguste T. Brisson* (4).

Sur l'appel « *de plano* » des requérants, la Cour du banc du Roi s'est trouvée satisfaite de la juridiction de l'intimé et de sa façon de l'exercer puisqu'elle a décidé de ne pas intervenir. La demande d'un bref de prohibition par les requérants basée sur les mêmes raisons que celles exposées à la Cour d'appel, est en fait une demande de revision du jugement de la Cour du banc du Roi, qui ne peut être reçue par cette Cour.

D'ailleurs, il n'y a pas eu dans la cause qui nous occupe excès ou abus de juridiction. Toutes les prescriptions de l'article 22 (S.R.C. 1952, ch. 106) de la Loi des expropriations ont été suivies.

En premier lieu, une demande a été faite pour un mandat, à un juge de la Cour supérieure, chargé à la date de sa présentation vers la fin de novembre 1956, de connaître semblables matières, comme à l'ordinaire. Avis a été signifié aux requérants sur l'ordre de ce juge, de faire connaître au moins douze heures avant l'audition de la cause les raisons de leur résistance ou opposition.

Les requérants n'ont nullement protesté ni contre la forme ni contre la teneurs de la procédure. Ils se sont eux-mêmes présentés devant le juge de la Cour supérieure, entendant les affaires de pratique le 1er décembre 1956 pour obtenir la permission de contester la demande faite par écrit, ce qui fut accordée. La cause fut continuée au 5 décembre 1956. Le 4 décembre, les requérants ont produit une « opposition à la requête » comprenant 10 pages et 42 articles où ils exposaient en détails toutes les raisons de leur résistance et opposition. Ils est à noter, qu'eux-mêmes, s'adressant à

(1) 26 R.L. n.s. 270.
(2) 29 B.R. 195.
(3) 67 B.R. 366 à 370.
(4) 6 Montreal Law Reports, 1.

la Cour et non au juge dans leur opposition, ont payé des timbres judiciaires.

Le 5 décembre 1956, ils se sont rendus devant l'honorable juge Perrier alors chargé, à son tour, d'entendre semblables matières. Ils n'ont nullement décliné sa juridiction. Ils ne se sont élevés contre aucun vice de procédure. Ils n'ont invoqué nul manquement à la loi. Ils ont procédé à faire entendre tous les témoins qu'ils ont voulu faire entendre. Ils ont plaidé tous leurs moyens. A ce moment, ils étaient entendus, tel que le veut la loi, par un juge de la Cour supérieure. Toutes les exigences de l'article 22 de la Loi des expropriations ont été remplies sous la surveillance d'un juge de la Cour supérieure. Le nom de ce juge importe peu lorsque la juridiction est dévolue à la fonction Cf la Loi de l'interprétation, chapitre 158, article 31, sous paragraphes *a*, *b* et *f*, qui se lisent comme suit:

> *a)* s'il est prescrit qu'une chose doit se faire par ou devant un magistrat, un juge de paix, un autre fonctionnaire ou employé public, elle est faite par ou devant un d'entre eux dont la juridiction ou les pouvoirs s'étendent au lieu où la chose doit être faite;
>
> *b)* chaque fois que pouvoir est accordé à une personne, à un employé ou fonctionnaire de faire ou de faire faire une chose ou un acte, tous les pouvoirs nécessaires pour mettre cette personne, cet employé ou ce fonctionnaire en état de faire ou de faire faire cette chose ou cet acte sont aussi censés lui être conférés;
>
> *f)* s'il est conféré un pouvoir ou s'il est imposé un devoir au titulaire d'une charge en cette qualité, le pouvoir peut être exercé et le devoir doit être accompli par celui qui alors remplit cette charge;

Si l'accomplissement des formalités de la loi n'était pas à la satisfaction des requérants lorsqu'ils se sont présentés à la Cour, ils devaient s'en plaindre en temps utile. Les irrégularités de procédure sont couvertes par la comparution du défendeur et son défaut de les invoquer. Aucun préjudice n'a été souffert par les requérants qui ont eu toutes les chances de s'expliquer, tel que le veut la loi. L'honorable juge Perrier n'a rien fait de plus que ce que lui permettait la loi. C'est une différence avec le cas de l'honorable

juge Forest, dans la cause citée par les requérants: *Plante* c. *Cormier* (5), qui avait ordonné une enquête et l'assignation de témoins dans un décompte judiciaire, s'arrogeant ainsi les pouvoirs de trois juges comme s'il s'agissait d'une contestation d'élection. Il existe aussi une différence entre le cas qui nous occupe et celui de *L'Alliance des professeurs catholiques* c. *La Commission des relations ouvrières* (6). Dans cette cause, un bref de prohibition a été émis parce que la certification de l'alliance avait été révoquée sans avis. Dans notre cas le principe réaffirmé par la Cour suprême de « *audi alteram partem* » a bien été observé.

Quant aux arguments que l'intimé a rendu un jugement de la Cour supérieure, plutôt que d'émettre un mandat de « *persona designata* », basant cette prétention sur les faits que le juge, se serait désigné dans son jugement comme « La Cour » et que des timbres judiciaires auraient été apposés sur les procédures comme s'il s'agissait d'une procédure de la Cour supérieure plutôt que relevant d'un juge de la Cour supérieure, etc., les prôner c'est vouloir revenir à un formalisme tombé depuis des siècles en désuétude. Les termes sacramentels n'existent pas pour les procédures légales. L'excessif attachement aux formes extérieures n'est pas de mise et ne peut servir aucune fin pratique. Que le juge se soit désigné à la première personne ou à la troisième personne, « singulier », ou à la première personne « pluriel », ou qu'il ait employé une formule traditionnelle pour la rédaction de son mandat ou ordre, cela n'importe guère, pourvu qu'il ait eu à ce moment la qualité d'un juge de la Cour supérieure, agissant comme tel, suivant la loi. Arrêt, décision, ordre, ordonnance, règle, décret, mandat, condamnation, sont autant de termes tenus pour synonymes. Pourtant on peut y voir des nuances. Ces nuances doivent servir de base à des recours semblables à celui réclamé par les requérants? Je ne le crois pas.

La Cour d'appel confirmant un jugement de l'honorable juge Marier dans la cause: *Langlois et autres* c. *Lévesque et autres* (7), où il était question d'un juge de la Cour supérieure *persona designata* ayant supposément excédé sa juridiction a décidé un point semblable. Prononçant l'arrêt de la Cour l'honorable juge Bernard Bissonnette s'exprime ainsi:

(5) 61 B.R. 8.
(6) 1953 S.C.R. 140.
(7) 1951 B.R. 669.

« Considérant que les moyens invoqués par les appelants, même s'ils étaient prouvés, n'affectent aucunement la juridiction qu'avait le juge tant *ratione materiae* que *ratione personae*, ne le dépouillent pas de la compétence qui lui est attribuée par la loi en général et par cette loi particulière et qu'également toutes ces allégations, fussent-elles établies, ne constituent pas de leur nature un excès de juridiction;

Considérant en effet que la juridiction du juge n'apprécie selon la nature, l'objet et l'effet de l'ordre ou de l'ordonnance ou du jugement qu'il rend, sans égard aux intentions ni aux sentiments qui peuvent animer celui qui les signe; que si ce juge est compétent quant à la matière et quant à la personne, il demeure investi, en dépit de toutes autres contingences, de l'autorité judiciaire que la loi attribue à ses fonctions;

Considérant que les allégations de la requête pour l'émission du bref de prohibition, même si elles sont tenues pour vraies, sont insuffisantes en droit pour établir que le juge a agi sans juridiction ou qu'il a excédé celle qu'il avait mission d'exercer;

Quant à l'allégué que le juge a condamné les requérants aux frais et qu'il a ainsi excédé sa juridiction, cela n'est pas exact, car l'ordre du juge est en réalité sans frais pourvu que les requérants obéissent à cet ordre qui leur enjoint de cesser leur résistance ou opposition. S'ils transgressent cet ordre péremptoire et sans appel, il va de soi que les conséquences de la rébellion des requérants peuvent être dispendieuses;

Quant à l'opinion exprimée par l'honorable juge intimé sur les droits des requérants, faisant siennes les conclusions du jugement de l'honorable juge André Demers dans: *Lazare et un autre c. L'Administration de la voie maritime et Procureur Général de la Province de Québec* (8), comment pouvait-il s'abstenir de l'émettre, puisque les prétentions des requérants à ces droits étaient les raisons mêmes qu'ils donnaient pour leur résistance ou leur opposition à évacuer les terrains expropriés qu'ils occupent? Il n'a pas en exprimant ainsi son opinion excédé sa juridiction;

(8) 1957 C.S. 5.

Considérant tout ce que ci-dessus rapporté; Considérant que la requête des requérants pour l'émission d'un bref de prohibition contre l'intimé, est mal fondée, ladite requête est rejetée, avec dépens.

Lafrenais c. de Varennes

Opposition à jugement — Jugement ex-parte *— Discussions de règlement — Ne suspendent pas les règles et les délais de procédure — Sauf convention expresse — Art.* 1163 *c.p.c.*

1. N'est pas susffisante la raison: « Le défendeur fût empêché de produire sa défense et de contester l'action dans les délais légaux parce qu'il croyait qu'un règlement était sur le point d'intervenir dans la présente cause ».

2. Les règles et les délais de procédure ne sont pas suspendus par les discussions de règlement à moins qu'il y ait une promesse de ne pas procéder et que la preuve en soit faite par des documents ou l'admission de la partie ou de son procureur.

3. Ce qui fait que la seule raison invoquée par le défendeur-opposant, ne peut justifier le bien-fondé du rescindant, en vertu de l'art. 1163 c.p.c.

Le Tribunal, après avoir entendu les parties par leurs avocats sur le mérite de la présente opposition à jugement, entendu la preuve examiné le dossier de la procédure, les pièces produites et délibéré:

Il s'agit d'une opposition à jugement et le Tribunal n'a qu'à se prononcer sur le rescindant qu'elle a pris en délibéré, sans entendre le rescisoire.

La seule raison invoquée par le défendeur-opposant se trouve à l'art. 2 de son opposition et se lit comme suit:

> 2. Le défendeur fût empêché de produire sa défense et de contester l'action dans les délais légaux, parce qu'il croyait qu'un règlement était sur le point d'intervenir dans la présente cause.

La jurisprudence semble établie aujourd'hui que cette seule raison n'est pas suffisante, et c'est l'opinion du Tribunal, que les

M. le juge Léon Lajoie — Trois-Rivières, le 3 avril 1958 Cour supérieure, no 81,514 — Gravel, Thomson et Gravel, pour le demandeur — Jean-Paul Morin, pour le défendeur-opposant.

1868. Judges who have considered it. I think the decree of the late Vice-Chancellor was right, and should be affirmed.

Macbeth v. Smart.

Per curiam.—Appeal allowed, and the bill in the Court below dismissed with costs.—[VANKOUGHNET, C., and SPRAGGE and MOWAT, V.CC., dissenting.]

NOTE.—MORRISON, J., was not present at the argument of this case. His name was erroneously inserted as being one of the Judges before whom the appeal was argued.

[*Before the Hon. the Chief Justice, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice Hagarty, the Hon. Mr. Justice Morrison, the Hon. Mr. Justice A. Wilson, and the Hon. Vice-Chancellor Mowat.*]

MUTCHMORE v. DAVIS.

Crown patents, repeal of—Pleading—Demurrer.

A bill by a private individual impeaching a patent for fraud or error must shew that the plaintiff's interest arose before the impeached patent was issued.

This rule applies whether the plaintiff's interest is under another patent for the same land, or under a contract of purchase.

Where a bill was not maintainable in respect of its principal object, and its statements were confused and verbose, the Court of Appeal declined to consider a minor relief to which the plaintiff claimed to be entitled, and allowed a demurrer to the bill, leaving the plaintiff to file a new trial for the latter relief, if he should be so advised.

Statement. The bill impeached a patent granted by the Crown to *George Sylvester Tiffany*, in 1838, so far as it affected a lot of land purchased by the plaintiff from the Crown Lands Agent in 1845, and another parcel purchased by

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the plaintiff from a patentee of a subsequent date to *Tiffany's* patent. The land in question was what is called "Indian Land." The land granted to *Tiffany* consisted of 845 acres, which are described in the patent, with this addition "together with all the lands west of this description which are or may be overflowed by the waters of [a certain creek therein described] above the mill-dam now erected on the said creek and lot of land." The substance of the bill (the great and unnecessary length of which was remarked upon by the Court of Appeal) appeared to be as follows:—The bill alleged that these general words, according to their legal import, comprised far more land than the Crown was aware of when the patent was granted; that amongst the lands which it wrongly embraced was a parcel of land subsequently patented to another person and which had theretofore become vested in the plaintiff, and another parcel which, on the 22nd March, 1845, the Crown agreed to sell to the plaintiff, and in respect of which he held the receipt of the Crown Lands Agent for part of the purchase money. The bill further alleged that the patent for the lands west of the 845 acres particularly described therein had been obtained by false representations; that the Crown was at the time without any knowledge of the true situation, extent, value, or description of the overflowable lands west of the described parcel above the mill-dam; that it was falsely represented to Her Majesty, her officers, and agents, verbally and by written communications, and by production of an erroneous map, that, according to the situation and nature of the land, the overflowable land was but a small, compact, and not valuable parcel of drowned land, and did not comprise the lands now claimed by the plaintiff; that the dam which is mentioned in the letters patent had been removed before the issuing of the patent, and was not then in existence; that after the issuing of the patent, Her Majesty had the land which was overflowable by the dam, including the parcels now claimed by

Statement.

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the defendants, surveyed and offered for sale: that the same were sold to the plaintiff and others; that *Tiffany* his heirs and assigns had full knowledge and notice of this, and did not object to the same or attempt to enforce their pretended right thereto under the patent to *Tiffany;* that the patent, with respect to the overflowable land, was as far as possible, and with the acquiescence of *Tiffany* his heirs and assigns, repudiated by Her Majesty. The bill also alleged that the lands claimed by the plaintiff were Indian lands, and that not only was the Crown deceived into introducing into the patent a description which includes them, but that the grant of such lands, if intended, would have been void under the Statutes in force at the time in relation to Indian lands.

Statement.

It was further alleged that the mill-dam was not rebuilt for many years after the issuing of the patent to *Tiffany* nor until after the sales under which the plaintiff claimed; that during all this time the stream flowed in its natural course and purity through such lands, leaving the same for cultivation and very valuable for farming purposes; that on the faith of his purchase the plaintiff went into and was admitted by the Crown into the actual possession and occupation of the parcel he purchased from the Crown, and, in ignorance that it was comprised in the grant to *Tiffany*, made large and costly improvements thereon, and at great expense cleared, fenced and rendered fit for cultivation thirty acres, and built a dwelling house, barns, stables, and other buildings of great value on the land.

The bill further alleged that the defendants were the assignors of *Tiffany* and claimed to be entitled under his patent to all the land the defendants can overflow, by rebuilding the dam and enlarging it to the utmost, but not for the purpose of acquiring the fee simple of the lands they can thereby overflow. The bill shewed that this overflowing injured the land, destroyed the

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timber and improvements, and injuriously affected the health of the inhabitants: and after setting out the threats and intentions of the defendants, the bill prayed amongst other things relief against the patent: that the plaintiff might be decreed entitled to pay to the proper officers of the Crown or department of the Government, the balance of his purchase money and to receive a patent for the land he had bought; for an injunction against the threatened nuisance, and other relief.

To this bill the defendants, other than the *Attorney General* filed a general demurrer for want of equity.

The *Attorney General* demurred to so much of the bill as sought that the plaintiff might be decreed to pay the residue of his purchase money to the proper officers of the Crown, or the proper department of the Government, and to thereupon receive a patent from the Crown of the land referred to; and for cause of demurrer shewed that the Court had no jurisdiction to grant a decree as against the Crown, any relief to the plaintiff in respect of these matters. To the rest of the bill the *Attorney General* answered, alleging that he was a stranger to the matters alleged and claimed, such rights and interest therein on behalf of Her Majesty as the Court should be of opinion that Her Majesty was entitled to; and he submitted such rights and interest to the care and protection of the Court.

Statement.

The demurrer of the other defendants came on to be argued before Vice-Chancellor *Spragge*, who, at the close of the argument (after briefly stating the facts of the case) made the following observations:—

SPRAGGE, V. C.—The bill admits in so many words that at the date of the patent, very large portions of the lands purchased by the plaintiff in 1845, were, and still

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are, lands west of the lands described in *Tiffany's* patent, capable of being overflowed by the waters of the said creek above the said mill-dam, and it alleged that, while such portion of the patent as grants the lands west of the description is valid and conclusive at Common Law, yet that it is invalid and will be relieved against in Equity, upon the ground stated in the bill, such grounds being in substance that the patent was, as to such lands, issued improvidently, and under mistake, and induced by certain misrepresentations which are set out in the bill; (whether sufficiently alleged is another question). The bill alleges that the Crown is hindered and prevented by the patent to *Tiffany*, from receiving from the plaintiff the residue of his purchase money, and that the plaintiff had made frequent applications for such purpose, but always without effect. The bill makes no case in respect of any equity vesting in himself in respect of the land he purchased or in his assignors in

Statement.

respect of the land purchased by him, at the date of the patent to *Tiffany*. The bill does not state the date of the patent to his assignor. It is no part of the plaintiff's case that the patent to *Tiffany*, at all affected him (and it could not be so for he was a stranger) at the time. His case must be that as to the land in question he purchased from the Crown a right to impeach the Crown patent, so far as it granted those lands. I do not mean by this that the Crown, by its agent, knowingly sold to the plaintiff land covered by the patent to *Tiffany*. It will be presumed, for the honor of the Crown, that the sales to the plaintiff and to his assignee, were in ignorance of the fact that the lands so sold were covered by *Tiffany's* patent, nor do I mean that the plaintiff or his assignor purchased with such knowledge. The plaintiff, indeed, desires such knowledge, though in such terms as to imply that he had notice of the patent itself.

If there had been notice of the patent to *Tiffany*, conveying the land in question, this case would be

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clearly within the case of *Prosser* v. *Edwards*, and I incline to think that notice is not necessary in order to bring a case within its principle. I will quote some passages from the judgment of Lord *Abinger*.—"In a case where a party assigns his whole estate, and afterwards makes an assignment generally of the same estate to another person: and the second assignee claims to set aside the first assignment as fraudulent and void, the assignor himself making no complaint of fraud whatever, it appears to me that the right of the second assignee to make such claim would be a question deserving of great consideration; my present impression is, that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. In such a case a second assignment is merely that of a right to file a bill in equity for a fraud, and I should say that some authority is necessary to shew that a man can assign to another a right to file a bill for a fraud committed upon himself."

Statement.

The above remarks were made at the close of the argument, and, upon mature deliberation, his Lordship remained of the same opinion, and in giving judgment expressed himself thus:

SPRAGGE, V. C.—Where an equitable interest is assigned, it appears to me that in order to give the assignee a *locus standi* in a Court of Equity, the party assigning the right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. In the present case it is impossible that the assignee can obtain any benefit from his security except through the medium of the Court. He purchases nothing but a hostile right to bring parties into a Court of Equity, as defendants to a bill for the purpose of obtaining the fruits of his purchase, and more to the same purpose. In *Prosser* v. *Edwards*, as in this

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case the purchase was, not only of that which had been previously conveyed to another, but of something besides, and at the argument Lord *Abinger* felt pressed by that consideration, but eventually allowed the demurrer, notwithstanding. The principle, being one of public policy, would apply, I apprehend, where the second sale or assignment is by the Crown, through its agent, as well as where it is strictly by one subject to another. I see no good reason why it should not.

But there is this further reason, why, as it appears to me, the plaintiff cannot have a *locus standi* in this Court. It is to be assumed, as I have said, that the sale of lands, covered by the previous patent to *Tiffany*, was in ignorance of the fact of their being covered by that patent, for I must assume that the Crown would not, and that its agent would not knowingly do that which was against public policy. The Crown, supposing the allegations of this bill to be true, might by *scire facias*, or by information, it may be assumed, have impeached *Tiffany's* patent, in so far as it granted the lands in question. If it knowingly sold these lands to another, it sold a mere right to file a bill in Equity, which I must take it to be out of the question. It follows that the sales of these lands to the plaintiff and his assignor respectively, were sales made improvidently and under mistake, and can confer upon the plaintiff no right to come into this Court.

Statement.

In coming to this conclusion, I do not go counter to what was decided in *Martin* v. *Kennedy*, and in other cases which have followed it, that the party aggrieved might file a bill without making the *Attorney General* a party; for in none of those cases did the Crown, after granting to one, assume to sell to another, and in all of them, as I believe, the claims of the plaintiff existed before the issue of the patent. In such a case as the one before me, the *Attorney General* is, in my opinion, the only proper person to come into this Court to com-

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plain that the Crown has been imposed upon or mistaken. Being of opinion that the plaintiff has no *locus standi* in this Court, I do not go into the question raised by the demurrer. The demurrer is allowed with costs.

The demurrer of the *Attorney General* afterwards came on before Vice-Chancellor *Mowat*, *pro forma*, when it being stated that this demurrer depended on that of the other defendants, it was allowed without argument.

The plaintiff appealed from the orders allowing the demurrers.

The reasons of the respondent, Her Majesty's *Attorney General*, which are referred to in the Chancellor's judgment were as follows :—

Statement.

1. Her Majesty's *Attorney General* says that the order on his demurrer and answer made in the Court below should not be reversed or set aside, because, as he contends, the said Court has no jurisdiction as against the Crown to grant the relief asked for by the appellant and that his demurrer on that ground was properly allowed.

2. Because under the circumstances stated in the appellant's bill of complaint he is not entitled to the relief asked by him, or to any relief, particularly after the lapse of time since the various interests in question arose.

It is not thought necessary to set out the reasons of the appellant or of the other respondents.

Mr. *Blake*, Q. C., and Mr. *R. Martin*, for the plaintiff.

Mr. *Crooks*, Q. C., for *The Attorney General.*

Mr. *Strong*, Q. C., for the other defendants.

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VanKoughnet, C.—Upon the main question in this case, I am of opinion that the plaintiff cannot call upon the Court of Chancery to declare void the patent granted to *Tiffany*. When that patent issued in September, 1838, the plaintiff and those under whom he claims had no interest whatever in the land. The Crown, representing the Indians, as alleged by the bill, dealt with *Tiffany* alone. Years afterwards, and in 1845, the plaintiff made a contract with the authorized agent of the Indian Department for the purchase of a portion of the land which he alleges is covered by the patent to *Tiffany*. No patent or deed for this portion has ever yet issued to him: it never may, for he may never complete his purchase. He also tells us, in paragraph five of this bill, that he is the purchaser, derivatively from the patentee of the Crown, of another portion of the land also covered by *Tiffany's* patent. When this patent, under which he claims, issued, does not appear, except that it was subsequent to the issue of the patent to *Tiffany*. Unless indirectly or constructively by means of this subsequent sale and patent, the grant to *Tiffany* has never been impeached by the Crown. Paragraph seventeen of the bill does say that Her Majesty disregarded the patent to *Tiffany*, and notwithstanding it dealt with and sold the disputed portion of the land covered by it, as still being the land of the Crown. The bill, however, informs us that this patent nevertheless does cover and convey the lands in question and will prevail at law, and that the plaintiff cannot contend against it there, and hence he claims to have it set aside in equity. The only meaning or effect of the seventeenth paragraph would, under this state of facts, be that the Crown, bound by its own patent so long as it stands, has attempted to dispose of lands covered by it: and that, without ever having taken any steps to impugn the patent or have it declared void. Were an individual so to deal, he would, I apprehend, be treated as having conveyed a mere right of action to set aside a deed, which, valid at law, could be only successfully

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impeached in equity, on some doctrine peculiar to that jurisdiction. Admitting that the rule of public policy, against champerty and maintenance, does not bind the Crown, and that it may grant a chose or right of action where a subject could not, I think we should be clear that such an unusual thing as a grant of this nature was made by the Crown, before we gave effect to it. There is no pretence here that such a right has been conveyed, unless by the issue of a patent, or by a sale inconsistent with the prior patent. That any such grant of a right of action can be inferred from this Act of the Crown is asking us to assume too much. The Crown frequently makes inconsistent grants, and the Legislature has provided for such cases by giving the Crown authority to make compensation, as in this case, to the plaintiff. The very most, I think, we can take the plaintiff's statement as amounting to is this, that the Crown treating its own patent to *Tiffany* as void, when, according to the bill, it is valid and binding, and can only be set aside in equity, chose to sell and grant portions of the land covered by it, leaving these vendees and grantees to enjoy their purchases and grants as best they could. But this is very different from the assumption that the Crown, at the same time, and by the same means of a simple sale or grant imparted or conveyed a right to impeach its own former patent, on the allegation of fraud, which the Crown itself had never made, or set up, or used as a means or cause for getting rid of that patent. The plaintiff, nor any one else, having any right to complain of the alleged wrong practised upon the Crown, in the procuring the grant to *Tiffany*; and the Crown itself not choosing to complain of it, and at all events not having in my judgment authorized any one else to make that complaint, either on behalf of the Crown, or as assignee of the complaint, how is the plaintiff to get on should the Crown appear, as it does here, by the *Attorney General* and say "I am ignorant of any of the frauds alleged to have been practised upon me, and I object to

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your invoking the jurisdiction of the Court upon any such grounds against the original patent." And I think this is a fair way of testing the right of a private individual to make such a complaint. When there are two parties claimants of the land at the time the patent issues, and the Crown overlooking facts, or deceived by false testimony as to the right of the one, issues a patent to the other, this Court has held that the party thus aggrieved may without the intervention of the *Attorney General*, pray the jurisdiction of the Court to have the matter investigated, and the patent avoided, and the whole question of the disputed right or claim referred back to the Crown. But, I am not aware of any decision going beyond this, and giving to an individual a right to insist here on the avoidance of a patent which, when it issued in no way affected him or any one else, than the Crown and the patentee, and I so expressed myself in judgment in *Stevens* v. *Cook* (*a*), saying at the same time that when the Crown with full knowledge of the rights of adverse claimants and of all the circumstances, issued a patent to one of them, the other could not insist here that the Crown had come to a wrong decision and that its patent must be avoided, whatever right he may have against the patentee under any agreement that had subsisted between them. Were the Court, at the instance of a second patentee, except as relator upon the complaint of the *Attorney General*, or at the very least as assignee of the right of the Crown to complain of such prior patent, to declare the latter void, the result would be that though the Crown might all the while desire the first patent to stand, even after the discovery by it of the alleged fraud, it would be powerless to uphold it, because in a contest between two private individuals the patent might be declared void; in which case the second patent would take effect. I do not think that such mischief as might arise from this

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(*a*) Vide Ham v. Lasher.

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cause was ever contemplated or intended by the Legislature; or that we should assume that the Crown by such an indirect, I would almost say, underhand means, as that of a second grant meant to convey to the grantees under it, a right to do that which the Crown itself had refrained from doing, namely, to impeach its own prior grant (*a*). The bill is entirely silent as to the Crown desiring that the second grant in this case should have any such effect, or that the Crown ever desired or desires now that the first grant should be declared void. I quite agree with my brother *Spragge* that such a presumption as we are asked to make here would not be consistent with the honour of the Crown.

The plaintiff, however, contends that the grant to *Tiffany* in question here is a free grant, and that it is therefore void as having been made subsequent to the Statute of Upper Canada relating to the management of the public lands, passed in 1838, and which prohibits such grants. It might be sufficient as to this to say that if the objection be a good one, it is as available at law as here; and that there is no instance to be found, of which at least I am aware, where a bill has been filed to set aside a Crown patent as a cloud upon the title. This relief is granted against individuals who by improper dealings with property have caused or may cause confusion or doubt as to a title; but I never heard of the jurisdiction being exercised because of such alleged dealings by the Crown. There is, however, no foundation for the objection disclosed by the bill. According to its statements, the lands in question were unsurrendered Crown Lands held by Her Majesty in trust for the Six Nations Indians. The Statutes relating to the public lands were never made or held to apply to such Indian lands until the Land Act of 1853, which gave the Government power by order in Council, from time to time, to apply such

Judgment.

(*a*) 6 Mod. 229.

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provisions of that Act as it thought proper to "Indian lands under the management of the Chief Superintendent of Indian affairs." Until 1861, this last named officer, acting directly for the Imperial, and not for the Local or Provincial Government, controlled the management of the Indian lands, which, up to the last named period, had never been interfered with by the Commissioner of Crown lands unless in concert with the Chief Superintendent. These lands were dealt with by the Crown in the way it considered most for the benefit of the Indians, for and towards whom it assumed the duty of trustee and guardian. For aught that appears it may have been a wise and a most reasonable discharge of this duty: it may have been at the instance, or with the consent of, the Chiefs of the Six Nations Indians, that this grant was made to *Tiffany* in consideration of his erecting mills, the want of which may have been a serious inconvenience to the Indians; or the erection of

Judgment.

which may have added largely to the value of their adjacent lands.

The only other alleged ground of equity in the bill is a very minor one, viz: that the defendants threaten and intend to overflow much more land than their patent reasonably covers by raising and thus spreading the waters of the stream. This was not insisted on or urged in the Court below; and no relief was asked there in respect of it. The parties discussed there only the questions which I have been hitherto considering, inviting upon them alone, the judgment of the Court. The reasons of appeal do not complain or set forth specifically that in respect of this alleged threat of nuisance, judgment should have been given in the Court below for the plaintiff. As an independent head of equity it would doubtless, if properly put, form a ground of relief by the preventive process of the Court; but it is so mixed up with the main contention of the plaintiff, so injected into a mass of confused and verbose statements, which

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no Court ought to have been called upon to read, and which any Judge might properly, I think, have refused to try to understand—statements, setting at defiance all the rules of pleading, which require brief, concise and intelligible language, and arrangement of language, and was so entirely overlooked by the plaintiffs themselves in the Court below, that I am not disposed on this bill and on this appeal from the only question argued below, to give any relief in respect of it. If necessary, there may be reserved to the plaintiff the right to advance it by another bill, differently shaped and presenting it to the Court in an intelligible form. I think the demurrer of the *Attorney General* sufficiently specific to enable the Court to see at once, and with as little difficulty as the involved statements of the bill permit, what he objects to; and I am sure that his quotation of those statements would in no way have lightened this part of the labor of the Court.

Judgment.

A. WILSON, J.—The plaintiff alleges that until after the grant to *Tiffany* and before the purchase by the plaintiff, the Township of Oneida was Indian land, and was then surrendered by the Six Nations Indians to the Crown for sale and settlement.

That *George S. Tiffany* got his patent on the 3rd of September, 1838, for 845$\frac{6}{100}$ acres of land, "together with all the lands west of this description which are or may be overflowed by the waters of Anderson's Creek, above the mill dam now erected on the said creek and tract of land," that this grant was obtained by various misrepresentations, and by means of a false map or plan shewing that only a small parcel of land would be overflowed; that the mill dam was not standing when *Tiffany* got his patent, and it was permitted to remain down till after the purchase by the plaintiff; that the Township of Oneida, after *Tiffany's* grant, was surrendered to the Crown and surveyed, and the lands since bought by

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plaintiff were laid out and surveyed for sale and sold; that the plaintiff's lands were, by reason of the dam being down, capable of being cultivated—and plaintiff went into possession and made large improvements on the land.

In 1857 the saw-mill was burned, and it is not intended to erect it.

The defendants have, at different times, lately erected the mill-dam, but it has always been carried away.

The plaintiff contends that many hundreds of acres beyond what would be overflowed by the dam in the patent to *Tiffany* mentioned, the defendants can cause to be overflowed by wantonly enlarging the dam to the utmost extent, although not necessary for working the mill, but for the mere purpose of acquiring the fee simple of the lands so overflowed, and defacing what should be the true boundaries of his grant.

Judgment.

And that they threaten to erect the dam for such purpose, which will irreparably ruin the plaintiff's lands and improvements.

That the defendants, in execution of these threats, erected in the summer of 1865, a dam of the kind mentioned, and for the purpose mentioned, and injured the plaintiff's lands as before stated, and by the stagnant water created sickness and diseases dangerous to human life. This dam has since been carried away, but the defendants threaten to rebuild it.

The plaintiff is thus ejected from his land.

In *Brewster* v. *Weld* (*a*), it is said, If a patent be to the prejudice of another, he may have a *sci. fa.* on the

(*a*) 6 Mod. 229.

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enrolment thereof in Chancery, to have it repealed as well as the Queen may (*a*)

It is said to lie by the first patentee to repeal the subsequent patent (*b*).

It is said *scire facias* will not lie at the suit of the last patentee to repeal the first patent though the last patentee have the right with him (*c*). *Scire facias* is in the nature of a bill in Chancery (*d*). But *scire facias* may nevertheless be demurred to for want of certainty. *Nunn* v. *Claxton* (*e*), *Ness* v. *Fenwick* (*f*), *Rex* v. Sir *Oliver Butler* (*g*), *Ness* v. *Bertram* (*h*). The Crown ought to permit subjects aggrieved to sue in the name of the Queen (*i*).

A bill in equity lies to set aside letters patent obtained by fraud, *Attorney General* v. *Vernon* (*j*.) This case was of a grant of land, and the fraud alleged was like this bill in many respects; but it was at the suit of the *Attorney General*, whereas this bill is against the *Attorney General*.

Judgment.

A subsequent grantee of the property, and not merely buying the right to sue can file a bill to set aside a previous conveyance by the same grantor, though the grantor do not concur in the suit. *Dickinson* v. *Burrell* (*k*), this seems like a right which the plaintiff has to be secured in the possession of his land bought from the Crown against the wanton acts of the defendants, who by colour of exercising rights under

(*a*) Bac. Abr. *sci. fa.* ch. 3.
(*b*) Bac. Abr. *sci. fa.* ch. 3.
(*c*) Com. Dig. patent, F. 4, 5; Dyer. 276*a*, 276*b*; 2 Rol. 191, ch. 52.
(*d*) Latch. 112; Bac. Abr. *sci. fa.* D. (*e*) 3 Exch. 712.
(*f*) 2 Exch. 598. (*g*) 3 Lev. 221; 2 Ventr. 344.
(*h*) 4 Exch. 195.
(*i*) 10 Mod. 354; 1 P. Wm. 217; Vin. Abr. Prerog. M. b. 9, pl. 10, U. C. pl. 8, and authorities cited.
(*j*) Vern. 277–370. (*k*) 1 L. R. Equity, 337.

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such vague words as "together with," &c., are wantonly overflowing and ruining his lands so bought for the mere purpose of enlarging the limits of their supposed grant, by attempting to overflow as much as the waters can by any kind of erection, be made to overflow. And who never, apparently, had more than the right to overflow according to the mill dam as it was in 1838, but who are claiming and exercising much beyond what was then claimed.

If this bill be true, and it apparently is so, it does not seem a proceeding which it is for the honor of the Crown that any merely technical difficulty should be permitted to remain in the way of the plaintiff as a bar, or even an impediment, to his obtaining his full rights.

The Crown, or rather its officers, cannot capriciously refuse to do right to any subject: *Ryves* v. *The Duke of Wellington* (*a*).

Judgment.

"We are not to presume that any promise made by the King even to the meanest and most criminal of his subjects will not be sacredly observed." Per Lord *Denman*, C. J., in *The King* v. *Garsiah* (*b*), If the free grant be unauthorised and be prejudicial in fact to the Crown purchaser, it must be capable of being impeached in some form or other.

The plaintiff must have the right even in the present suit, to determine what his own rights are by determining the limits to which the defendants may lawfully overflow, that which they claim to be their own land, although their patent be not disputed, and to confine them within these limits when established, and to restrain them from overflowing, unless for the purposes in the patent expressed.

MOWAT, V. C.—The bill in this case is certainly expressed with considerable verboseness, its sentences are

(*a*) 9 Beav. 579. (*b*) 3 A. & E. 275.

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long and involved, its statements are not artistically arranged, and an unusual degree of attention is consequently required to master its full scope; but I have never known a general demurrer to be allowed on these grounds. The General Order (*a*) requires a plaintiff's case to be stated "in clear and concise language." I think that, on most points, the language of this bill is clear, and the case it makes free from ambiguity; it does not state the case concisely, and this should be considered in disposing of the costs; but to hold that a general demurrer lies where a bill is not concisely expressed, would be laying down a rule which would be very hard of application. Conciseness is a thing of degree, and it is very seldom that a bill is expressed with all the conciseness that is practicable. Indeed, no bill on the files of the Court would stand such a test, if strictly applied; and where is the line to be drawn? What degree of diffuseness is to expose the pleader to a demurrer? If any practicable rule could be laid down, I would be very glad to adopt it by a General Order; but I know no way of expressing such a rule. Amongst pleaders, and amongst all men who write or speak, there is the greatest difference in the degree of terseness on the one hand, or copiousness on the other, with which they express what they wish to state; and I am afraid that, in regard to conciseness in bills, it will be vain to attempt more than take the want of it into account, as hitherto, in disposing of the question of costs,—as to which the Court exercises a large discretion. I have, therefore, considered it my duty to consider the case presented by the bill, on its merits.

Judgment.

It is the rule of the Court of Chancery, that if any relief whatever can be given on a bill, a general demurrer must be overruled (*b*). It is quite immaterial, there-

(*a*) No. 9, sec. 3 (3 June, 1853).

(*b*) Hartley v. Russell, 2 S. & S. 253.

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fore, in disposing of this case, to consider whether some of the grounds for relief which the bill sets up can, or cannot, be maintained by a private individual, or whether all the relief prayed can be granted; but, after giving the case my best consideration, it seems to me clear, that the plaintiff is entitled to some relief, though various questions have to be decided before determining the full extent of the relief which, if the bill is true, the plaintiff has a right to demand.

The bill relates to land in the Township of Oneida, in the County of Haldimand. On the 3rd September, 1838, letters patent of that date issued, purporting to grant to *George Sylvester Tiffany* and his heirs, a certain tract or parcel of land, comprising $845\frac{66}{100}$ acres therein described (and as to which no question arises), "together with all the lands west of this description which are or may be overflowed by the waters of" a certain creek, formerly known as Anderson's Creek, above the mill dam then erected upon the said creek and parcel of land. The bill alleges (sec. 9), that the defendants claim under this patent, not only the land which would be overflowed by means of the dam referred to in the patent, but all other lands "which they can further cause to be overflowed * * * by wantonly enlarging to the utmost the said mill dam, as well as by constructing such further and other dams and contrivances to raise the waters of such creek as they may see fit, * * and although such overflowing may be caused, not for any purpose of using or working * * any * * mill or machinery, but for the mere purpose of acquiring the fee simple of the lands so overflowable, and defining the boundaries thereof;" * * that (sec 11) the dam referred to in the patent had been removed before the issuing of the patent, and was not replaced for many years; that lately the defendants, who claim under *Tiffany*, have more than once "rebuilt said dam, sometimes to the same extent, and sometimes to a greater

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extent and size;" but that the new dams have at short intervals been removed; that there has been no mill or machinery on the premises since 1851; and that none is intended to be put up; but that during last summer the defendants constructed a new dam upon the site of the old one, though "much higher and more extensive, * * and thereby, after many years' abandonment and disuse * * of their alleged right, * * caused the waters of the said creek to again overflow all and much more than had been previously overflowed of the plaintiff's land, * * comprising very valuable timbered and wooded and arable meadow and pasture, portions of the plaintiff's said lands; * * all of which were, during all that time, thereby greatly injured, as well as the atmosphere of that part of the country made thereby, during all that time, sickly and dangerous to human life by reason of the noxious vapors and malarias which were thereby caused to arise and extend to the plaintiff's said lands, from the waters of the said creek so caused to overflow as aforesaid, and to become stagnant and emit such noxious vapors and malarias;" that the defendants threaten to renew the works (sec. 11) and thereby "raise the waters * * to the utmost possible extent, and thereby cause and force such waters to overflow almost all" the plaintiff's lands, "and greatly and unreasonably beyond what any purpose of (the grant), even if valid, would require, and will thereby irreparably ruin and destroy large quantities of valuable timber and trees now growing upon the said lands, * * as well as a large amount of the fences and costly improvements and buildings now thereupon, and produce great and lasting injury to the soil thereof, not for any purpose to which the said pretended Crown grant thereof to said *Tiffany*, his heirs and assigns, even if it were valid, would extend, but for the mere purpose of acquiring the fee simple of all the lands so overflowable as aforesaid;" and that, unless restrained by injunction, the defendants "will re-erect, make and continue the same" nuisances as

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Now, having reference to these statements,—which are not concisely expressed, but are sufficiently clear and distinct,—and remembering the rule that a mere occupier can maintain a bill to restrain a nuisance (*a*), I do not see how it can be doubted that a general demurrer to the bill does not lie. If the claims of the parties had arisen from grants by a subject, or from transactions with a subject, of precisely the same character otherwise as those alleged, it was not disputed, and is, I apprehend, indisputable, that a bill by the plaintiff would lie to restrain the nuisance; and I cannot imagine a ground on which this right is to be withheld because the dealings of the parties were with the Crown. If there are supposed to be technical difficulties in the way of repealing the patent to *Tiffany* at the suit of the plaintiff, I perceive no such difficulty in the way of the limited relief asked on the foundation of nuisance. This part of the bill is not remarked upon in the judgment in the Court below, and my brother *Spragge* informs me it was not presented to his attention at the bar; but it was discussed on the appeal, and, so far as I recollect, or as my notes indicate, without objection on the part of the respondents.

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I do not say that an injunction is the only relief to which the plaintiff shews an equity; and I do not think that the other relief prayed, so far as it concerns the defendants other than the Crown, is such as can only be granted at the suit of the *Attorney General*. I say nothing at present as to relief against the Crown; but as regards any relief against a fellow subject, where it does not militate against the interest of the Crown, I do not perceive how a Court of Equity can refuse relief on the mere ground

(*a*) See Kerr on Injunctions, 336, and 351, and cases cited.

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that the validity of a patent comes in question. On the contrary, if the case is one in which, had both parties derived, or claimed to derive, title through a third person, the plaintiff would be entitled to a decree,—I think he must be entitled to it though both claim immediately under the Crown.

Part of the property which the plaintiff claims, he holds under a patent subsequent to *Tiffany's*, and part under a contract of purchase with the Crown. As to the former—the right of a subsequent grantee of a private individual to set aside a prior grant voidable in equity, though good at law, is clear (*a*). This right is, in such a case, "incidental to the conveyance of the property, and passes with it" (*b*). *Prosser* v. *Edmonds*, decided by Lord *Abinger* in 1835 (*c*), has been referred to as opposed to this view. I am not aware that the doctrine of that case has ever hitherto been thought applicable to an assignment by the Crown. Assignments by the Crown of a chose in action are valid even at law, and the assignee can sue at law in his own name (*d*). But viewing the case as between subjects, *Prosser* v. *Edmonds* is not an authority against the bill, for, as the Master of the Rolls pointed out in *Dickenson* v. *Burrell*, "The distinction is this: if *James Dickenson* [the party under whose deed the plaintiff claimed] had sold or conveyed the right to sue to set aside the [prior instrument] without conveying the property or his interest in the property, * * that would not have enabled the grantee *A. B.* to maintain this bill; but if *A. B.* had bought the whole of the interest of *James Dickenson* in the property, then it would. The right of suit is a right incidental to the property conveyed; nor is it, in my opinion, a right

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(*a*) Dickinson v. Burrell, Law Rep. 1 Eq. 337.
(*b*) *Ib.* 342. (*c*) 1 Y. & C. Ex. 481.
(*d*) Miles v. Williams, 1 Wils. 252; Earl of Stafford v. Buckley, 2 Ves. Senr. at p. 181; Lambert v. Taylor, 4 B. & C. 138.

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which is only incidental to the property when conveyed as a whole, but it is incidental to each interest carved out of it" (*a*). A jurisdiction having been conferred on the Court of Chancery to set aside, at the instance of parties interested, "patents issued through fraud, or in error or improvidence" (*b*), it seems to follow inevitably that the right to sue, which the plaintiff claims in respect of the land he holds under patent, is incidental to the property thereby conveyed, and that we cannot decline giving effect to it.

But, in point of form, the bill is objectionable as to this part of the case, not because it is not concisely expressed, but because it is wanting in some allegations that are material. It is in fact too concise on this point, for it alleges that "the plaintiff is, by title derived through a purchaser for value and patentee thereof from the Crown, by a patent deed of conveyance issued

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subsequently to the issuing of the said patent to the said *George Sylvester Tiffany*, the owner of" &c.; and there is no allegation as to how he derived title from the purchaser and patentee referred to, whether by descent, conveyance, &c. The cases collected in *Lewis* on Equity Drafting (*c*) shew how this part of the plaintiff's case should have been stated.

The plaintiff's claim to relief against *Tiffany's* patent, in respect of the land which the plaintiff has occupied and improved on the faith of a contract of purchase, and for which he has not yet obtained a patent,—stands on a different footing. The rule of the Court is, that a purchaser is not entitled to relief against a prior grantee of

(*a*) *Ib.* See also per *Esten*, V. C., in Martin v. Kennedy, 4 Grant. 92, 93; Baby *q. t.* v. Watson, 11 U. C. Q. B. 521; Mason v. Jones, 11 Gr. 460.

(*b*) Consol. Stat. ch. 22, sec. 25; 23 Vic. ch. 2, sec. 25, U. C. Consol. 12, sec, 26, sub-sec. 9.

(*c*) Page 26, *et seq.*

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his vendor, until such purchaser has completed his purchase, and taken a conveyance. But it having been decided in *Martin* v. *Kennedy* (*a*) and other cases, and being now the law of the Court, that the right to impeach a patent as plaintiff may exist without such an equity as would have given a right to impeach a grant by a private person, I think the suggested restriction of this right to cases in which the interest of the plaintiff arose before the issuing of the impeached patent, is arbitrary, and not to be adopted. Such a restriction receives no support from the language of the Statutes which conferred on the Court jurisdiction to interfere with patents. Nor is any such support claimed for it. No such limitation was suggested in the leading case of *Martin* v. *Kennedy* where, however, it was contended, that the suit must be by the *Attorney General*. That contention was negatived by the Court in the following language: "The arguments against this view appear to be, that the analogy on which it rests does not seem to support it in its full extent, inasmuch as authority exists to shew that a *scire facias* to repeal a patent may issue at the Common Law in the name and at the instance of a subject; and, no doubt, if this Act permits a proceeding in the name and at the suit of a subject, it must be by bill; that for the purpose of permitting an information at the suit or in the name of the Crown, the Act does not seem to have been required, the Crown, it seems, not being confined to a *scire facias* to repeal a patent, but, as it is entitled by its prerogative to sue in whatever Court it pleases, and may require a discovery in order to enforce its rights, might without this Act, in any of the cases specified in it, have proceeded itself, or have permitted a subject to proceed in its name, by information in this Court (*b*); that the words of the 29th clause, in describing the form

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(*a*) 4 Grant, 96. See Tasker v. Small, 3 M. & C. 70.

(*b*) Vide Attorney-General v. Vernon, 1 Vern. 277, 370.

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of proceeding, are 'action, bill, or plaint,' excluding 'information,' perhaps because not required; while it cannot be supposed, that, if this clause was introduced into the Act merely to enable the Crown to proceed, or permit a proceeding, in its own name in this Court, any other form of proceeding than an information would have been contemplated, an information being altogether as short and convenient as a bill, and much more suitable to the dignity of the Crown; and that the relief is to be administered 'upon hearing the parties interested,' a form of expression which would indeed, if necessary, include the Crown, but is not likely to have been employed on the hypothesis suggested. For these reasons, I consider that in a case within the Act, a bill in Equity may be exhibited at the suit of the party aggrieved." This view has been acquiesced in by the Crown and otherwise ever since; many bills have been brought by individuals impeaching patents on similar grounds during the fifteen years which have elapsed since that decision was pronounced; and it seems impossible to doubt, and I believe nobody does doubt, that suits by private individuals were contemplated by the Legislature, and are within the words and the meaning of the Act.

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Now, in regard to the interest which is to entitle a private individual to bring such a suit, to draw a line between interests accruing before, and interests accruing after, the issuing of the impeached patent, and to disregard all equities which a case of the latter kind may present, seems to me to be entirely unwarranted, and to be against all analogy and sound reason. No equity could be stronger than that which this plaintiff sets up. His story is, that, at the time of his purchase from the Crown, the Crown was, with the knowledge of the holder of the prior and impeached patent, dealing with the property as ungranted land; that the plaintiff entered in good faith into the contract to purchase; that

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on the faith of the purchase being valid, he paid to the Crown an instalment of the purchase money; that the Crown accepted his money; that the usual receipt was given to him by the Crown Lands' Agent; that he holds this receipt still; that he went into possession of the land he thus bought, and made valuable improvements upon it, before having any notice of the adverse claim which he seeks now to impeach. Some of the grounds on which he impeaches this adverse claim are, that the grant to *Tiffany*, as respects the land intended to be included in the general description of lands "which are or may be overflowed by the waters of the said creek," was a free grant; that this general description was not supposed by the Crown to comprise the land now claimed by the plaintiff; that the Crown did not intend to grant this land to *Tiffany*; that the patent, so far as relates to the land covered by this general description, was obtained by falsely representing the situation and nature of the land around to be such that the overflowable land was a small piece of drowned land not extending to the lands now claimed by the plaintiff; that, so far as relates to these lands, Her Majesty, as far as possible, repudiated the patent to *Tiffany*, and did so with the acquiescence of *Tiffany*, his heirs and assigns; that *Tiffany*, his heirs and assigns, had full notice and knowledge that Her Majesty was, through her agents and officers, offering for sale and making sales of these lands to the plaintiff and others, and did not object thereto, or in any way attempt to enforce their pretended rights in respect thereof. No equity could be higher than that which these allegations make out in favor of the plaintiff, or could afford stronger reason for allowing a party to make good his own title by getting out of the way a prior patent which, according to the bill, was at once a fraud on the Crown, and a fraud on all who, in ignorance of the claim made under it, should afterwards purchase the land which its description was wrongfully contrived to cover. These

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statements of the bill may be all false, but on this demurrer they must be taken to be all true, and we must adjudge accordingly.

The learned counsel for the defendants contended that the statements having reference to this part of the case were too vague to sustain the bill; but, rejecting all which are open to criticism on this ground, I think enough remains for the plaintiff's purpose.

The bill sets up some other objections to *Tiffany's* patent, which, in the view I take of the case, it has not been necessary for me to consider, and some of which appear to be such as a private individual ought not to be permitted to raise.

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It is not to be supposed that the Crown desires to uphold a fraudulently obtained patent against a *bona fide* purchaser without notice of such patent, whose money the Crown has accepted, and who has expended his means in improvements on the faith of his purchase. The case, according to the bill, is not one of inconsistent patents issued through mistake by the officers of the Crown, without any fraud on the part of anybody. One can understand why, on the whole, in such a case of mere mistake, especially if the first patentee or his representatives had improved the property, and the second purchaser or patentee and his representatives had not done so, the Crown might justly prefer to leave the erroneous patent in force, giving compensation to the second grantee. But a case of a fraudulently obtained patent, in circumstances like those alleged by the plaintiff here, is in an entirely different position; and if, even here, the Crown, for some reason which the allegations of the bill do not suggest, wishes to leave the impeached patent untouched, the Crown will say so in its answer; and such effect as that desire is entitled to will be given to it at the hearing of the cause; but for the Court to

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refuse, at the outset, in all cases indiscriminately, to give relief to a subsequent and *bona fide* purchaser, because in some cases such relief may be inequitable, and against the policy of the day,—instead of leaving such special cases to be dealt with specially,—is surely as little to be defended by reason, as by the language of the Statute.

In England the Crown gives, almost as of course, to any *bona fide* applicant who considers himself aggrieved, leave to use the name of the *Attorney General* in an information to try the question. Indeed, so nearly a matter of course had this become, that the contention was raised, though unsuccessfully, that leave could not constitutionally be refused in any case. The signature of the *Attorney General* to the information being obtained, the aggrieved party is left to employ his own solicitor and counsel to conduct the suit, and he carries it on at his own risk and expense. The Crown re- Judgment.
quires him, also, to name a relator, who is responsible to the opposite party for the costs of the defence, in case he should shew himself entitled to them; and the *Attorney General*, after signing the information and giving his official sanction to the suit, may appear as counsel for the defendant. But in this country, there has often been great difficulty in the way of an applicant for leave to file an information, and the leave has sometimes been withheld when in England it probably would have been granted. A Government in sanctioning an information seems to prejudge the case—to assume the story of the applicant to be true on all points, though it may be controverted on some points that are material, and which the machinery of a Court is necessary to determine satisfactorily; and the opposite party thinks it hard that the whole weight of the authority of the Crown should be given, in advance, in favor of the complaints that are made against him. To permit parties to litigate questions between them in their own

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names, relieves the *Attorney General* from a responsibility that it is sometimes inconvenient to assume; and the just rights of parties ought, in a free country, to depend, as little as possible, on the mere will of any public officer. I think, therefore, that we ought not to create disqualifications in the way of litigants which the books do not compel us to lay down. So far as to the demurrer of the defendants other than the *Attorney General*.

The demurrer of the *Attorney General* was not argued in the Court below, it having been stated at the bar that it raised the same questions as the demurrer of the other defendants. But this, I perceive, was a mistake. The demurrer of the *Attorney General* is to part only of the bill, viz., to so much of it as prays relief against the Crown. Now the demurrer of the other defendants was allowed on the ground that the

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plaintiff had no right to sue. By demurring to part only of the relief prayed, the *Attorney General* admitted that the plaintiff had a right to sue, and to some relief, and could not set up an objection of this kind. This was expressly held in *Gilbert* v. *Lewis* (*a*). As to the objection, that the Court has no jurisdiction to direct the plaintiff "to pay the residue of his purchase money," and "to thereupon receive a patent or deed of conveyance from the Crown of the lands" comprised in his contract,—which is the part of the prayer to which the *Attorney General's* demurrer is confined,—I believe no such relief has hitherto been granted in any case; but the Statute establishing this Court gave the Court express jurisdiction "to decree the issue of Letters Patent from the Crown to rightful claimants" (*b*); and I do not know in what cases this jurisdiction is to be exercised,

(*a*) 1 DeG. J. & Smith, at 49.

(*b*) Consol Stat. U. C. ch. 12. sec. 26. No. 8. Page, 51. Vide Latour v. The Attorney General, 11 Jur. N. S. 7; 23 & 24 Vic. ch. 34 (Impl).

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if it cannot be invoked by a purchaser in whose way, and that of the Crown, fraud in obtaining a prior patent has placed a difficulty, which the intervention of this Court is needed to remove.

I think both demurrers should have been overruled; but, in consequence of the inartificial structure and great prolixity of the bill, without costs.

Per Curiam.—Appeal dismissed with costs.

[A. WILSON, J., and MOWAT, V.C., dissenting.]

ONTARIO & MINNESOTA POWER Co. Ltd. v. THE KING.

Imp. P.C. 1924.

Judicial Committee of the Privy Council. Viscount Cave. Lord Dunedin. Lord Carson and Lord Blanesburgh. October 23, 1924.

Estoppel III E — Taking benefit of Order in Council — Recitals — Subsequent denial of truth.

Where a person has taken the benefit of an Order in Council which contains certain recitals, he cannot afterwards deny the truth of such recitals.

[*Smith* v. *Ontario & Minnesota Power Co.* (1918), 45 D.L.R. 266, 44 O.L.R. 43, approved.]

APPEAL by the defendants from the judgment of the Supreme Court of Canada, reversing the judgment of Audette, J. (1920), 20 Can. Ex. 279. Varied.

Tilley, K.C., and *C. F. H. Carson*, for appellants.

E. L. Newcombe, K.C., and *Bristol*, for respondent.

The judgment of the Board was delivered by

VISCOUNT CAVE:—This is an appeal by the Ontario & Minnesota Power Co. Ltd. from a judgment of the Supreme Court of Canada by which the appellants were held liable for all damages sustained by His Majesty or by the Indians concerned as a result of the flooding or erosion of certain Indian Reserves bordering on the Rainy Lake by reason of a dam erected by the appellants in the Rainy River. The appellants do not deny that some damage was caused by their dam, but they justify under a grant made by the Government of the Province of Ontario in the year 1905; and the question is whether that grant absolves them from liability.

Before considering the terms of the grant it is necessary to state shortly the history of the reserves in question. By the North West Angle Treaty No. 3 dated October 3, 1873, the Salteaux Tribe of the Ojibbeway Indians surrendered to the Crown the extensive reserves to which they were then entitled under the Proclamation of 1763, subject to a stipulation that particular reserves should be selected and set aside for them as soon as practicable and should be administered and dealt with for them by the Government of the Dominion of Canada. Power was reserved to the Government of Canada to appropriate such sections of the reserves so set aside as might be required for public works or buildings, due compensation being made for the value of any improvements thereon. Pursuant to this treaty officers were deputed by the Government of Canada to confer with the Indians and select reserves, and on their report the Governor-General by Order in Council dated February 27, 1875, purported to approve the setting aside of certain

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reserves including the reserves now in question. These reserves have since been occupied by the Indians, being administered for them by the Government of the Dominion under the provisions of the Treaty, of s. 91 (24) of the B.N.A. Act 1867, and of the Indian Act, R.S.C. 1906, c. 81.

In the year 1888 this Board decided in *St. Catherine's Milling & Lbr. Co.* v. *The Queen* (1888), 14 App. Cas. 46, that by force of the surrender of 1873 the beneficial interest in the lands in Ontario comprised in that surrender was transmitted to that Province subject only to the Dominion powers of legislation over lands reserved for the Indians; and it was no doubt in consequence of that decision that in the year 1894 the Governments of the Dominion and of the Province of Ontario, having been empowered by statutes of Canada and Ontario so to do, came to an agreement as to such of the reserves which had been set aside as above mentioned as were found to be situate in that Province. By this agreement, which was dated April 16, 1894, it was agreed between the 2 Governments (among other things) as follows:—

"2. That to avoid dissatisfaction or discontent among the Indians, full enquiry will be made by the Government of Ontario, as to the Reserves before the passing of the said Statutes laid out in the Territory, with a view of acquiescing in the location and extent thereof unless some good reason presents itself for a different course.

"3. That in case the Government of Ontario after such enquiry is dissatisfied with the reserves or any of them already selected, or in case other Reserves in the said territory are to be selected, a joint commission or joint commissions, shall be appointed by the Governments of Canada and Ontario to settle and determine any question or all questions relating to such reserves or proposed Reserves."

No action appears to have been taken under these clauses until the passing of the Act of 1915 (Act to confirm the title of the Government of Canada to certain lands and Indian Lands, 1915 (Ont.), c. 12) hereafter referred to, and the Indians continued to enjoy the selected reserves.

Matters were in this position when in the year 1905 the Government of Ontario made the grant which is in question in these proceedings. By the deed of grant, which was dated January 9, 1905, and was made between the Commissioner of Crown Lands for the Province of Ontario (thereinafter called the Government) of the one part and E. W. Backus and others (thereinafter called the purchasers) of the other part, after

recitals showing that the Rainy River formed the international boundary between the Province of Ontario and the State of Minnesota and formed in the neighbourhood of the Town of Fort Frances a valuable water power, and that the purchasers were the owners of the lands and water power on the Minnesota side opposite to Fort Frances, the Government agreed to sell to the purchasers certain land at Fort Frances including a part of the bed of the river at that point, and the purchasers agreed to construct a dam across the river and to develop and supply power to the full capacity of the river in manner therein provided. It is desirable to quote in full the following clauses of the deed.

"2. The purchasers covenant and agree to construct a dam, conduit or such other works on or near the said River at Fort Frances, in accordance with the plans hereto attached, sufficient to develop power to the full capacity of said River (including any increased capacity of said River by reason of the construction of storage dams or works) according to the plans hereto attached, approved of by the Lieutenant-Governor in Council, and which are hereby made a part of this Contract, such dam to be built of solid masonry or concrete and to be of such character and of such dimensions as will make the same amply strong and safe for the purposes intended, and such works will be of such design as will fully provide for sufficient waste weirs to obviate danger in time of floods or freshets. The dams, head gates, waste weirs and works in connection therewith or incidental thereto shall not be proceeded with unless and until the plans, drawings and specifications for the same shall have been submitted to and approved of by the Lieutenant-Governor in Council, which said plans, drawings and specifications shall show the precise site and location of the said work: Provided, however that notwithstanding anything hereinbefore contained, and notwithstanding the approval of the plan hereto attached, the waters of the Rainy Lake shall not at any time be raised to a higher level than may be authorized by the Government, and the height of water to be maintained in the said Lake and the use or non-use of the Flash Boards as shown on said plans shall at all times be subject to such control and direction by the Government as in the opinion of the Government may be necessary to ensure safety and protection of property."

"17. It is distinctly understood and agreed that the lands, rights and privileges mentioned in this Agreement are confined solely to lands, rights and privileges the property of the Crown in Ontario under the control and administration of the Govern-

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ment of Ontario, and that no permission is given hereby to the purchasers to overflow or cause to be overflowed any lands not the property of the Crown in Ontario and not under the control and administration of the said Government, and if damage is done by the erection of any dam or the construction of any works under this Agreement no recourse shall be had against the Government in respect thereof."

The plan attached to this grant showed a dam across the river of which the crest was to reach the bench mark 497, an arbitrary datum which indicated approximately the high water mark reached by the river in ordinary seasons. The above grant was duly confirmed and the detailed plans, drawings and specifications approved by the Lieutenant-Governor of Ontario in Council.

The above grant obviously concerned, not only the Province of Ontario, but also the Government of the Dominion as custodian of the Indian Reserves which were the subject of the agreement of 1894 and of the navigation of the lake and river. Accordingly by a Statute of Canada passed in 1905 (1905 (Can.), c. 139) it was enacted that the appellant company might develop and operate the water power on the Rainy River at or near Fort Frances and construct, operate and maintain dams and other works in connection with the said power, but it was provided that no work so authorized should be commenced until the plans thereof should first have been submitted to and approved by the Governor-General in Council. In pursuance of this Act plans showing the nature of the proposed works were submitted to the Minister of Public Works of the Dominion and on his recommendation were approved by an Order of the Governor-General in Council dated September 19, 1905, "subject to the conditions inserted in the agreement between the Government of the Province of Ontario and the applicants, and also subject to all the conditions and reservations expressed in the Act of Parliament passed at its last Session respecting the Ontario and Minnesota Power Company, Limited". Some changes were afterwards made in the plans, but having regard to their Lordships' opinion on the other questions raised in the appeal these need not be further referred to. The dam was completed about the year 1909.

In the year 1915 the Legislature of Ontario passed a statute (1915 (Ont.), c. 12) by which, after reciting that in pursuance of the terms of the agreement dated April 16, 1894, the Government of Ontario had made full enquiry as to the reserves laid out as therein mentioned and it had been decided

to acquiesce in the location and extent thereof (with an exception not now material) subject to the modifications and additional stipulations set forth in the Act, it was enacted as follows:—

"1. The said reserves as shown on said plans, with the exception of Indian Reserve 24C, in the Quetico Forest Reserve, are hereby transferred to the Government of Canada, whose title thereto is hereby confirmed, and subject to all trusts, conditions and qualifications now existing respecting lands held in trust by the Government of Canada for Indians, and subject to the provisions of the following sections.

"2. All water powers which in their natural condition at the average low stage of water have a greater capacity than 500 horsepower, and such area of land, including roads in connection therewith, as may be necessary for the development and utilization thereof, and the land covered with water lying between the projecting headlands of any lake or sheets of water not wholly surrounded by an Indian reserve or reserves and islands wholly within such headlands shall not be deemed to form part of such reserve, but shall continue to be the property of the Province, and *The Bed of Navigable Waters Act* [R.S.O. 1914, c. 31] shall apply, notwithstanding anything contained in the fourth paragraph of the agreement hereinbefore mentioned."

Passing now to the facts which gave rise to this litigation, it appears that in several years after the erection of the appellants' dam the Indian Reserves bordering on Rainy Lake and on the Rainy River where it issues from the lake about 2 miles above the dam, known as Reserves No. 1, No. 18B and No. 16D. were injured by floods which were wholly or partly attributable to the action of the dam. In some of these years the water rose above the 497 bench mark, and in the year 1916 when there was an extraordinary flood it is said to have risen above the 500 mark. The result of this flooding was that crops and other property belonging to the Indians were injured or destroyed and the land itself was washed away or eroded and a number of trees were killed. The Dominion Government claimed from the appellants compensation for these injuries, and after some correspondence the Attorney-General of Canada filed this information against the company claiming on behalf of the Indians (on whose behalf he was authorized to sue by the Indian Act, as amended) $3,153 to compensate them for damage done to their property on the 3 reserves and also claiming on

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behalf of His Majesty $19,360 for damage caused to Reserve No. 1 known as Pither's Point.

This suit was heard by Audette, J., (1920), 20 Can. Ex. 279, who held that on the selection of the reserves in question in 1875 a road-space 2 chains in depth along the shore of Rainy Lake had been excepted out of the reserves; that the raising of the water of the lake up to the bench mark 497 was authorized by the grant of 1905; that the title acquired by the Dominion in 1915 was subject to an exception of the road-space and to the terms of the grant of 1905; and accordingly that the Attorney-General was only entitled to compensation in respect of damage caused to property lying beyond the road-space 2 chains in depth by raising the water above the level of bench mark 497. Upon this footing he estimated the damages caused by such flooding at $500 and directed that if this figure was not accepted there should be an enquiry as to damages.

Both parties having appealed against this judgment to the Supreme Court of Canada, that Court (by a majority) held that neither the reservation of the road-space nor the right to flood the reserves by raising the level of the water up to bench mark 497 was established; and they accordingly set aside the judgment of Audette, J., and ordered and adjudged as follows:—

"That His Majesty the King in the right of Canada do recover from the defendant all damages sustained by His Majesty or by the Indians concerned as a result of the flooding or erosion of the lands comprised in the Indian Reserves, whose boundaries extend in all cases to the water's edge as shown on the plan marked Exhibit 70 at the trial of this action, where such flooding or erosion was occasioned by the level of the waters bordering the said lands being raised or maintained from time to time since the construction of the defendant's dam and works to or at higher levels than the said waters would have attained or maintained had the said dam and works not been constructed."

And the Court ordered that the cause be referred back to the Judge of the Exchequer Court to ascertain the amount of the said damages if any. It is against this judgment that the appellants have appealed to this Board.

It was argued on behalf of the appellants that the title of the Dominion to the reserves in question is held subject to the grant made by the Province to the appellants in 1905, and their Lordships are of opinion that this contention is justified. It may well be that, having regard to the terms of the agreement made between the 2 Governments in the year 1894 (which was

the agreement referred to in the case of *Ont. Mining Co.* v. *Seybold*, [1903] A.C. 73), the Government of the Province had no authority to make a grant affecting the reserves referred to in that agreement without the assent of the Government of the Dominion. But the Dominion by its Act of 1905 and the Order in Council made under that Act adopted and confirmed the grant to the appellants subject only to the additional conditions contained in those instruments; and accordingly the grant is now binding (subject to those conditions) on the Dominion, and the only question to be determined is the construction of the grant.

Then did the grant authorize the appellants to raise the water of the Rainy Lake above the ordinary level and so to flood the reserves? In their Lordships' opinion this question should be answered in the negative. The grant does indeed authorize the appellant company to construct a dam having its crest at bench mark 497 and to "develop the water power to the full capacity of the stream from side to side at high water mark"; and it may be that the raising of the level of the upper part of the river by means of the dam would to some extent affect the level of the lake. But under the terms of the grant the dam was to be provided with weirs sluices and other apparatus sufficient to regulate the head of water above it; and it was expressly provided by clause 2 of the deed that notwithstanding anything therein contained and notwithstanding the approval of the plan thereto attached the waters of the Rainy Lake should not at any time be raised to a higher level than might be authorized by the Government. This proviso appears to their Lordships to have been intended to override the powers given by the deed to the appellant company and to compel them, in the absence of express authority by the Government to the contrary (which was not obtained), so to operate their works that they should not have the effect of raising the waters of the lake beyond their ordinary level to the detriment of the adjoining property. Further it was provided by clause 17 of the deed that the lands, rights and privileges therein mentioned were "confined solely to lands rights and privileges the property of the Crown in Ontario under the control and administration of the Government of Ontario" and that no permission was given thereby to the purchasers to overflow or cause to be overflowed any other lands; and these stipulations appear to have been intended to protect from flooding the Indian Reserves, which were under the control and administration not of the Province but of the Dominion. If so it follows that the appellants had no authority

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to cause the waters of the lake to flood the reserves and are liable in damages for so doing.

The above conclusion is supported by the terms of a recital contained in the Order made by the Governor-General in Council on September 19, 1905, to which reference has not yet been made. That Order contained a recital that the Chief Engineer of the Department of Public Works had reported "that the only objection that could be raised to the proposed elevation of the dam is provided for by a proposed revetment wall to be constructed by the company and also by a clause in the Act of Incorporation of the company which makes all damages to lands caused by their works a charge to be borne by them". The report so made by the chief engineer was incorrect, for the Act of Incorporation of the company contains no such clause as is here mentioned. The chief engineer appears to have obtained the information on which his report was based from a report made to him by Gray, the engineer in charge; and there is nothing to show from what source Gray derived the information, or to connect the appellant company with the misstatement contained in these documents. But what is certain is that the appellant company took the benefit of the Order in Council, the terms of which must have been known to them, and it does not appear that they took any steps to inform the Government of the Dominion that the recital was incorrect. This being so, their Lordships agree with the decision of Riddell, J., in *Smith* v. *Ontario & Minnesota Power Co.* (1918), 45 D.L.R. 266, 44 O.L.R. 43, that the appellants must be taken to have accepted the recital as correct, and accordingly must be held liable for compensation for damages caused by their works. A correspondence which took place between the Department of Indian Affairs and the appellants in the years 1906-9 proceeded upon the footing that the appellants were liable for damages caused by flooding, and they did not then dispute their liability.

For the above reasons their Lordships agree in the main with the decision of the Supreme Court of Canada, but they are of opinion that the judgment pronounced by that Court requires to be varied in two respects.

In the first place their Lordships are unable to agree with the Supreme Court in holding that the 3 reserves in question extend to the water's edge. The evidence as to the setting aside of the reserves in 1875 is incomplete; but it appears from a report of a Committee of the Privy Council appointed to deal with the matter that the persons appointed to select the reserves had recommended "two chains in depth along the shore of

Rainy Lake and the bank of Rainy River to be reserved for roads, right of way to lumber-men, booms, wharves and other public purposes"; and this recommendation appears to have been accepted by the Committee and approved by the Governor-General in Council. Further, a map (ex. "Q") dated in July 1876, and produced by the Indian Department, shows this road as having been excepted out of all the reserves abutting on the lake. It is true that in the year 1889 the Department of Indian Affairs, in answer to a request of the Commissioner of Crown Lands for Ontario for a tracing of the reserves, forwarded a plan (ex. 70) not showing the roadway; and this appears to have been the plan which was referred to in the Act of 1915. But the reserves transferred by that Act were the reserves as laid out in 1875; and if on the laying out of the reserves the road was excepted, as appears to have been the case, the Act of 1915 would not have the effect of adding it to the reserves. The plan, ex. 70, must therefore be rejected to as *falsa demonstratio*. On the whole their Lordships are satisfied that the 2 chains in depth were not included in the reserves and accordingly did not pass to the Dominion by the Act of 1915.

In the second place it appears that on May 18, 1910, His Majesty by the Superintendent-General of Indian Affairs, leased a part of Reserve No. 1 (known as Pither's Point) to the corporation of the Town of Fort Frances for a term of 99 years, such part to be used for park purposes subject to the right of the Indians to camp and sell wares upon it. This lease was apparently invalid at the time, as the title to the land was in the Province; but it appears to be now effective, the land having been acquired by the Government of Canada in 1915. On August 19, 1918, just before the commencement of this suit, the Municipality of Fort Frances released to the Crown that portion of the land lying along the shore of Rainy Lake which would be covered by water when the latter was raised to the 497 bench mark and all trees killed at high water during 1916, and also purported to assign to the Crown all claims that they might have against the appellant company or other persons for damages to the said lands caused by raising the waters adjacent thereto; but this deed was not effective to pass a right of action for damages for wrongs already committed. It follows that as regards the land comprised in this lease, and apart from the right of the Indians to compensation, the Government of Canada can only recover for injury to its reversion.

For the above reasons their Lordships are of opinion that the judgment of the Supreme Court of Canada should be varied

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by striking out the words "whose boundaries extend in all cases to the water's edge as shown on the plan marked Exhibit 70 at the trial of this action" and substituting a statement that the boundaries of the reserves extend to a line 2 chains distant from the water's edge as shown on ex. "Q," and also by adding a declaration that as to so much of Reserve No. 1 as is comprised in the lease of 1910 the damages recoverable by His Majesty are limited to the damage sustained by the Indians together with the injury (if any) caused to the reversion of His Majesty expectant upon the determination of that lease, but that in all other respects the judgment should be confirmed. As the appellants have only partly succeeded, there will be no costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Judgment accordingly.

REX v. LONG BRANCH RACING ASS'N.

Ontario Supreme Court, Appellate Division, Magee, Hodgins, Masten, Orde and Smith, JJ.A. December 12, 1924.

Gaming—Racing association—Betting—Incorporation—Exception—Powers.

The provisions of Cr. Code s. 235 (2) excepting from the general prohibition of betting certain associations incorporated before March 20, 1912, only applies to associations having before that date the right to operate a race track.

APPEAL by the defendant from 2 convictions by a Magistrate, for keeping a common betting house, and using premises for recording and registering bets. Affirmed.

R. H. Greer, K.C., for appellants.

E. Bayly, K.C., and *F. P. Brennan*, for the Crown.

The judgment of the Court was delivered by

HODGINS, J.A.:—Appeal from Brunton, Police Magistrate, who convicted the defendants under s. 228 of the Cr. Code, R.S.C. 1906, c. 146, as amended 1909 (Can.), c. 9, s. 2; 1913 (Can.), c. 13, ss. 10, 11; 1923 (Can.), c. 41, s. 2, in one case, and under s. 235, as amended 1910 (Can.), c. 10, s. 3; 1922 (Can.), c. 16, s. 13; 1923 (Can.), c. 41, s. 3, in the other. The charges were keeping a common betting house and using premises for recording and registering bets, etc.

The facts were admitted and the sole defence in both cases was that by s. 235 (2) the defendants were protected.

The defendants are a company originally named the National

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HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA.....PLAINTIFF;

AND

THE ONTARIO & MINNESOTA POWER COMPANY, LIMITED, DEFENDANTS.

Indian Lands, surrender of to Dominion—Powers thereof to accept—Indian Reserves—Transfer by Province to Dominion—Provincial Lands—B.N.A. Act 1867—*5 Geo. V, ch. 12—6 Ed. VII, ch.* 132 *(Ont.)*

Held: That upon a proper construction of the Nort West Angle Treaty (1873), the Dominion Government had full power under such treaty to accept the surrender on behalf of the Crown from the Indians, and as the result of such surrender the title to or beneficial interest in the lands so surrendered, within the Ontario boundaries, passed to the province under the provisions of section 109 of the B.N.A. Act, 1867, and that the entire beneficial interest therein was in the province until the conveyance of a part for Indian Reserves, by the province to the Dominion by the Act of the legislature of the province in 1915 (1).

2. That when the province assented to the "Reserves" being made and transferred them to the Dominion (5 Geo. V, ch. 12), the Dominion acquired them subject to the statutory rights, (2), and that the lands and privileges so granted were specifically eliminated from what was transferred to the Dominion, including among other things, the right granted to defendants to flood the land up to bench mark 497.

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(1) *St. Catharines' Milling and Lumber Co.* vs. *the Queen*, 14 A.C. 46; and *Attorney-General P.Q.* vs. *Attorney-General Dominion*, 37 T.L.R. 125; *Ontario Mining Co.* vs. *Province of Ontario* (1910) A.C. 637; *the King* vs. *Bonhomme*, 16 Ex. C.R. 437, confirmed on appeal to the Supreme Court of Canada.

(2) See 6 Ed. VII, ch. 132 (Ont.

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3. That, by reason of a reserve for roads, etc., along the shores of Rainy Lake and River being contained in the description of the Indian Reserves so surendered by the province to the Dominion as aforesaid, the land so reserved, did not form part of the Indian Reserves, and the beneficial interest therein remained in the province.

4. That, therefore, in view of all the facts, plaintiff could not recover for injury due to the flooding of any of said lands previous to the Act of 1915 aforesaid; but that, in 1916 (after the conveyance of the Indian Reserves to the Dominion) in view of the defendants having accumulated large quantities of water in the upper lakes and reservoirs, plaintiff could recover damages occasioned by the flooding of the land between bench mark 499 (in the state of nature) and bench mark 500.

INFORMATION exhibited by the Attorney General for the Dominion of Canada claiming damages for injuries to an Indian Reserve in the Rainy Lake District in the province of Ontario, by reason of flooding due to a dam constructed on the banks of the river and other works of the defendant.

October 5th, 6th and 7th, 1920.

Case was heard before the Honourable Mr. Justice Audette at Fort Frances.

November 12th, 1920, trial and argument continued at Ottawa.

Peter White, K.C., and B. *H. L. Symmes* for plaintiff.

W. N. Tilly, K.C., for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now (December 22nd, 1920) delivered judgment.

This is an information exhibited by the Attorney General whereby the sum of $23,413.50 is claimed from the defendants as damages, for the flooding of lands alleged to belong to the plaintiff.

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I have had the advantage, accompanied by counsel for both parties, of viewing the premises in question the day preceding the trial.

By the North West Angle Treaty, No. 3, made and concluded on the 3rd October, 1873, between Her late Majesty Queen Victoria and the Saulteaux tribe of the Ojibbeway Indians, a certain tract of land,—containing about 55,000 square miles, covering in general terms, the area from the watershed of Lake Superior to the North West Angle of the Lake of the Woods, and from the boundary of the United States of America to the height of land from which the streams flow towards Hudson Bay—was duly ceded, released, surrendered and yielded up to the Government of the Dominion of Canada for Her Majesty The Queen, subject to certain conditions mentioned in the treaty, and among others to lay aside reserves for Indians, etc. See Exhibit No. 11.

By an act of the Parliament of Canada, 54-55 Vic., Ch. 5 (1891) and an act of the Legislature of Ontario, 54 Vic. ch. 3 (1891) the government of the Dominion of Canada and that of the province of Ontario were given authority to enter into an agreement for the settlement of these reserves, and certain questions respecting the lands so surrendered by this Treaty No. 3, with such modifications or additional stipulations to the draft recited in such statutes, as may be agreed upon by the two governments.

On the 16th April, 1894, the agreement above referred to was entered into by both governments, and it is therein, among other things, recited that whereas, out of the lands so surrendered by the Indians, reserves were to be selected and laid aside; and whereas the *true boundaries of Ontario had since* been ascertained and declared to include part of the territory

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surrendered: and whereas *before* the true boundaries had been declared as aforesaid, the Government of Canada *had selected and set aside* certain reserves for the Indians in intended pursuance of the treaty, although the Government of Ontario *was no party to the selection*, and *at that time had not concurred therein*—with the view of coming to a friendly and just understanding—the two governments had agreed between themselves as follows:

"1. With respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract *have been decided to belong to the Province of Ontario* or to Her Majesty in right of the said province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering, or other purposes by the Government of Ontario or persons duly authorized by the said government of Ontario: and that the concurrence of the province of Ontario is required in the selection of the said reserves.

"2. That to avoid dissatisfaction or discontent among the Indians, full enquiry will be made by the government of Ontario, as to the reserves before the passing of the said statutes laid out in the territory, with a view of acquiescing in the location and extent thereof unless some good reason presents itself for a different course.

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"3. That in case the Government of Ontario after such enquiry is dissatisfied with the reserves or any of them already selected, or in case other reserves in the said territory are to be selected, a joint commission or joint commissions, shall be appointed by the Government of Canada and Ontario to settle and determine any question or all questions relating to such reserves or proposed reserves.

"4. That in case of all Indian reserves so to be confirmed or hereafter selected, the waters within the lands laid out or to be laid out as Indian reserves in the said territory, including the land covered with water lying between the projecting headlands of any lake or sheets of water, not wholly surrounded by an Indian reserve or reserves, shall be deemed to form part of such reserve including islands wholly within such headlands, and shall not be subject to the public common right of fishery by others than Indians of the band to which the reserve belongs.

"5. That this agreement is made without prejudice to the jurisdiction of the parliament of Canada, with respect to inland fisheries under the British North America Act, one thousand eight hundred and sixty-seven, in case the same shall be decided to apply to the said fisheries herein mentioned.

"6. That any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the *concurrence of the government of Ontario.*"

Under the provisions of an order in council of the 8th July, 1874, Messrs. S. J. Dawson and Robert Pithers, had already been appointed to secure and select these reserves, and by a further order in council of

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the 27th February, 1875, the report upon the selection of such reserves was provisionally approved, after the maps accompanying the report of the commissioners had also been submitted *with a full description of the reserve.*

Now it has been established by Mr. Bray, the chief surveyor of the Indian Department at Ottawa, who has been in the employ of the Department for a long period of time, and who has knowledge of the matters concerning treaty No. 3, and who was called as a witness on behalf of the plaintiff, that the reserves provided for by the treaty were duly selected by federal officers, and surveyed and accepted by all concerned. Mr. Bray filed as Exhibit No. 21 and as Exhibit "Q" (also marked "V") plans of the Indian reserve at Rainy Lake, together with the description of that reserve, which description forms part of the records of his department—the language (p. 33 of the evidence) used in setting apart the same and which is to be found, at page 1 of Exhibit "R-a" reads as follows:

"Treaty No. 3. Description of reserves to be set aside for certain bands of the Saulteaux tribe of the Ojibbeway Indians, under treaty No. 3.

"Rainy River. At the foot of Rainy Lake, to be laid off as nearly as may be, in the manner indicated on the plan, *two chains in depth along the shore of Rainy Lake* and bank of Rainy river, to be reserved for roads, right of way to lumbermen, booms, wharves and other public purposes.

"This Indian reserve not to be for any particular chief or band, but for the Saulteaux tribe, generally and for the purpose of maintaining thereon an Indian agency with the necessary grounds and buildings."

This description appears to have been in existence and accepted by the department ever since 1875, when it was provisionally approved by an order in council of the 27th February, 1875 (Exhibit R-A).

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Reading this description together with the two plans filed by Mr. Bray, it will be found that they conjointly agree. That is to say, that the "two chains in depth along the shore of Rainy Lake and bank of Rainy river, to be reserved for roads, right of way to lumbermen, booms, wharves and other public purposes" appear on the one plan in the *shaded space*, and on the other in the road allowance plainly shown and marked thereon. All of this information is supplied by the Department of Indian Affairs, at Ottawa. The only conclusion to arrive at is that the 132 feet do not form part of the reserve, and that the fee or beneficial interest in these two chains is in the province, for the reasons hereinafter mentioned.

On behalf of the plaintiff it is contended that the plan (No. 70) of the reserve which is in the hands of the Ontario Government, and which forms part of the departmental records, does not show the reservation, and the witness who produced it testified that it had been filed with their department in January, 1890, and that no such reservation of 132 feet appear upon the plan. However, by the letter (Exhibit "W") of Mr. Hardy, the then Commissioner of Crown Lands for Ontario, written to the Deputy Minister of Indian Affairs on the 22nd May, 1889, it appears that while asking for tracings of the plans of the Indian reserves in the district of Rainy river, he stated: "it will be sufficient for our purpose if only the outside measurements and courses are put on." And there are some notes and writing on Exhibit No. 70, which do not appear on either exhibits "V" and "21," and vice versa.

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This does not in any manner conflict with the records at Ottawa, in the Department of Indian Affairs. The plan, as requested, was sent to the Ontario government, but it was not as complete as the plan of record at Ottawa, where in addition thereto was also to be found, as would be expected, a description of the reserve. At the trial, I asked for the production, if available, of the field notes of surveyor Caddy, who prepared these plans in 1876; they have not been forthcoming, but after all they are not needed for adjudicating upon the case.

Then, briefly stated, freed from a welter of details and facts which when properly analysed resolve themselves into a small compass, we have the agreement between E. W. Backus and the Ontario government, bearing date the 9th January, 1905, and the assignment of his rights thereby secured to the defendant company, coupled with the act of the Ontario legislature (1906) Ch. 132, 6 Ed. VII, together with the act of the parliament of Canada, 4-5 Ed. VII, ch. 139, whereby the defendants acquired their franchises, the right to erect a dam, to flood the Ontario lands, to interfere with a navigable river, etc.—all of which is so well known to all parties, that I will dispense with mentioning more than the source of such rights.

The defendants in 1906 acquired from the province of Ontario certain land together with leave to construct their dam, and also the right to flood any land that was the property of Ontario to the bench mark of 497.

The defendants further acquired from the Dominion the right under 4-5 Ed. VII, ch. 139, to develop the water power in question, provided that no work authorized by that act, be *commenced* until the plans thereof

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be first submitted and approved by the Governor in Council. The plans were duly submitted and approved before commencing the works, but subsequently thereto some alterations and changes were made, which, under the evidence were approved verbally by the Minister as provided, I would think, by the order in council of the 19th September, 1905 (Exhibit No. 13). However, the matter is here mentioned, because great stress was laid upon the point by the plaintiff to the effect that the works as constructed were not properly authorized, and that the defendants were therefore trespassers. I dismiss this contention, and it would appear also to be *de minimus* in a case like the present one. In the result it means that these changes and alterations were of an essential benefit to the works and had been approved of by the Minister,—and the plans of these works as a whole had been authorized and approved by order in council before being commenced. The sluices as built were constructed with a capacity to discharge more than in the state of nature. See *Montreal St. Railway* vs. *Normandin*. (1)

Now, the Dominion Government had full power to accept the surrender on behalf of the Crown from the Indians by the North West Angle Treaty, and as a result of such surrender the title to the lands, coming within the Ontario boundaries, passed to that province under the provisions of sec. 109, of the British North America Act, 1867 (2).

(1) 33 T.L.R. 174.

(2) *St. Catherine's Milling and Lumber Co.* vs. *the Queen*, 14 A.C. 46; and *Attorney General P.Q.* vs. *Attorney General, Dominion*, 37 T. L.R. 125; *Ontario Mining Co.* vs. *Province of Ontario*, (1910) A.C. 637; *the King* vs. *Bonhomme*, 16 Ex. C.R. 437, confirmed on appeal to the Supreme Court of Canada.

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Having found so much, it results that no part of such lands ever passed to the Dominion before 1915, and that from the day of the surrender to 1915, when the Act 5 Geo. V, ch. 12, was passed by the legislature, the entire beneficial interest in these lands was in the province. Therefore, it follows that when by the Act of 1915 (5 Geo. V, ch. 12) the province assented to the reserves and transferred them to the Dominion, by what may be termed a statutory deed, the Dominion acquired them subject to the statutory rights, conveyance, etc., that had been previously granted to the defendants, as set forth in the Ontario statute of 1906 (6 Ed. VII, ch. 132) which adopted the agreement between the province and the defendants, or their predecessors in title, giving them the right to build their works and dam, to flood the Ontario lands to the bench mark of 497, the height of the crest of the dam, etc. Moreover, under the provisions of sections 2 and 4 of this Act, 5 Geo. V, ch. 12, the lands and privileges granted the defendants would appear to be specifically eliminated from what is transferred to the Dominion by that Act. It may also be observed that by this 1915 Act, modifications have been made to the agreement of 1894. The Dominion, however, has no interest outside the reserve proper, and the reserve is 132 feet from the water's edge.

Having found that the Dominion had no beneficial interest in these lands up to the passing of the Act of 1915, and that the lands for the reserves were by that Act transferred to the Dominion subject to the rights, powers and privileges acquired by the defendants prior to that date; having further found, that "the two chains in depth along the shore of Rainy Lake and bank of Rainy river" did not pass to the Domin-

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ion, but that the beneficial interest in the same is in the province, it remains to be ascertained if the plaintiff suffered any damage, and to what extent.

The scope of the action has been at trial entirely changed from what appears under the written pleadings. The plaintiff is not entitled to any damage resulting from the maintenance of the water to the bench mark 497, and it is impossible under the evidence adduced to assess, at this stage, with any satisfaction, the damages which might have been suffered in 1916 when this bench mark of 497 had been exceeded. In the extraordinary flood of 1916, qualified by Crown witness Smallian as a flood not likely to happen again, the waters rose to 509.06, although the waters had risen very high in 1896, as shown by Exhibit No. 30. Whereas it has been established that under the state of nature they would have risen to 499.65. This rise, however, should be decreased by six inches as it was increased by these six inches through the booms and the jam at the bridge between the 14th and the 27th May, 1916.

For the damages occasioned in 1916 (which were maintained for the best part of the year) between the actual flooding and the flooding that would have obtained in a state of nature, and above the 132 feet along the water front, the plaintiff is entitled to recover. I am unable to charge the defendants with negligence in taking care of this enormous volume of water in 1916, including the accumulation in the upper lakes used partly as reservoirs, when 95 per cent thereof was successfully handled before the state of nature was exceeded. It is easy to be wise after the event and say if this or that means had been resorted to, the flood would or might have been decreased.

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However, under the evidence it is impossible to find negligence. A man of ordinary prudence could not have foreseen the extent of the flood of 1916, as testified to by Crown witness Smallian.

The case has been especially well argued, and with the argument and the information already spread upon the record, it is perhaps possible to form a fair idea of the damages of 1916, although not with any great precision.

What is the damage? The damage to the trees has been caused by the raising of the water to 497. It must be found that the flood of 1916 did not of itself affect the trees that were then cut or otherwise. As I have already stated it is impossible, at this stage, under the new state of facts which arose only at the time of the argument and when the evidence was on the record, to arrive at any satisfactory conclusion with respect to the assessment of the damages; but I have come to the conclusion on this subject of damages, to adopt the following course, assuming that the Indians claiming herein are beyond the 132 feet and the 499 bench mark. From the general evidence, the perusal of plans "G" and "H" and other plans dealing with the same matter, and bearing in mind the evidence of witness Walker, who testified respecting the revenue derived from the Park, it clearly appears what territory would suffer at the two respective bench marks above mentioned—and considering that the flood of 1916 lasted somewhat longer on account of the dam, than it would in a state of nature, which could not be called *damnum fatale* (1). I am willing to name as compensation and in satisfaction of these damages, which are not of a permanent nature, the sum of five hundred dollars. The parties herein to signify

(1) *Corp. of Greenock* vs. *Caledonian Ry. Co.* (1917) A.C. 556.

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by a written document to be filed of record, within fifteen days from the date hereof, if they accept this figure in satisfaction of the said damages. Failing the parties to accept this assessment, there will be a reference to the registrar of this court, for enquiry and report upon the question.

Subject to the right of the parties to elect to accept either a reference or the lump sum above mentioned, I wish to offer the following observations. The reference would be expensive, and the amount recoverable thereunder would very likely be less than its costs, so I embark upon the assumption that the parties would suffer less from an assessment under the present impossibility of accurate ascertainment than from having recourse to a reference. Indeed, according to the testimony of the Indian agent, Mr. Wright, and another witness who spoke upon the question of damages in 1916, it would seem that Pither's Point would not have suffered any appreciable damage from flooding under the circumstances—although the plaintiff might be entitled to recover damage for the deprivation of the use of flooded lands used as a park or otherwise, and even to nominal damages in respect of the same for flooding the plaintiff's land between the two bench marks above mentioned, being an invasion of the plaintiff's right to full and undisturbed possession. The material damage, if any, suffered would be with respect to the Indians; but if the Indians squatted within the 132 feet from the water's edge, they squatted upon provincial lands and not upon the reserve, and if the damages suffered by them is beyond the 499 bench mark, they cannot recover. They cannot recover as such squatters, under the decision of *Smith* vs. *Ontario & Minnesota Water Power Co.* (1).

(1) 44 O.L.R. 43.

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Upon the question of costs, as the success of the parties upon the result of the case is practically divided, I find that there should be no costs allowed as between the respective parties as well upon the trial, as upon the adjournment and the reopening of the case.

Solicitor for plaintiff: *J. W. Bain.*

Solicitor for defendants: *Arthur* D. *George.*

[PRIVY COUNCIL.]

ONTARIO MINING COMPANY, LIMITED PLAINTIFFS.
AND ATTORNEY-GENERAL FOR CANADA
(INTERVENING)

AND

SEYBOLD AND OTHERS . . . . . DEFENDANTS.
AND ATTORNEY-GENERAL FOR ONTARIO
(INTERVENING).

J. C.*
1902
July 7, 8;
Nov. 12

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *s.* 91—*Lands in Ontario surrendered by the Indians—Proprietary Right—Power of Disposition.*

Lands in Ontario surrendered by the Indians by the treaty of 1873 belong in full beneficial interest to the Crown as representing the province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof on the advice of the Ministers of the province and under the seal of the province.

St. Catherine's Milling Co. v. *Reg.*, (1888) 14 App. Cas. 46, followed.

The Dominion Government having purported, without the consent of the province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the said treaty:—

Held, that this was ultra vires the Dominion, which had by s. 91 of the British North America Act of 1867 exclusive legislative authority over the lands in question, but had no proprietary rights therein.

The consent of the province having been subsequently provided for by a statutory agreement between the two Governments, the special leave to appeal granted upon the representation of the general public importance of the question involved would probably have been rescinded if a petition to that effect had been made.

APPEAL by special leave from a judgment of the Supreme Court (June 5, 1901) affirming a judgment of the Divisional Court of Ontario which had affirmed a judgment of the Chancellor of Ontario, who had dismissed the appellants' suit with costs.

The appellants, on February 15, 1899, brought their action in the High Court of Justice for Ontario to have it declared

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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that, by virtue of certain letters patent issued by the Crown, as represented by the Government of the Dominion of Canada, to the plaintiffs' predecessors in title, the plaintiffs were the owners in fee simple of certain lands situate on Sturgeon Island, in the Lake of the Woods, in the province of Ontario, containing 110¾ acres, more or less, including the minerals, precious and base, therein; and that certain other letters patent subsequently issued by the Crown, as represented by the Government of the province of Ontario, comprising, inter alia, the same lands, were void, and were clouds upon the title of the plaintiffs, and should be ordered to be set aside and cancelled.

The respondent Johnston counter-claimed for a declaration that the appellants' patents were void.

The Chancellor of Ontario, under the circumstances, which were not disputed and are stated in their Lordships' judgment, dismissed the action and gave judgment on the counter-claim, declaring the appellants' patents to be void. His judgment, which was substantially affirmed by both the Appellate Courts, proceeded on the grounds that whilst over the Reserve 38 B (which included the lands in suit) the Dominion had legislative and administrative jurisdiction, the territorial and proprietary rights to the soil were vested in the Crown for the benefit of and subject to the legislative control of the province of Ontario; that by the surrender of 1886 the Indian title was extinguished for the benefit of the province, and that no estate could pass to the fee simple of the lands except from the Crown, as represented by the Ontario Government.

The Chief Justice (Sir Henry Strong), besides agreeing with the Chancellor, based his decision more particularly on the reasons given by the Judicial Committee in *St. Catherine's Milling Co.* v. *Reg.* (1)

The judgment of Gwynne J., which was in favour of the appellants, was based upon the following grounds:—

"(*a*) That the British North America Act excluded all idea of any right of interference, direct or indirect, being possessed by or vested in the legislatures or governments of any of the provinces of the Dominion in relation to the Indians or their

(1) 14 App. Cas. 46.

title to lands reserved for their benefit in any part of the Dominion;

"(*b*) That the British North America Act maintains the distinction between 'lands belonging to the several provinces' and 'Indian lands,' and preserved and maintained the Indians in the enjoyment of the benefit and conditions of all treaties entered into between them and the Sovereign;

"(*c*) That the reserves in this case must be regarded as lands vested in the Crown in trust for the sole use and benefit of the Indians upon the terms and conditions agreed upon as those upon which the trust was accepted by Her late Majesty;

"(*d*) That the provisions of the Indian Acts clearly shew the title of the Indians to lands reserved and the precious metals thereunder to be real and substantial and not illusory;

"(*e*) That unless the Proclamation of 1763 and the treaties made thereunder are a dead letter, and the provisions of the British North America Act relating to Indian lands are illusory and devoid of all significance, the sale by the Crown of their reserves, or such parts thereof as should be surrendered to the Crown upon trust to be sold for their benefit, are within the exclusive legislative authority of the Dominion Parliament;

"(*f*) That the lands in question are in a totally different position from the lands under consideration in the *St. Catherine's Milling Co.'s Case* (1);

"(*g*) That the letters patent to the appellants are therefore valid, and the letters patent under which the respondents claim are null and void in so far as they purport to affect the appellants' title to the land and minerals claimed by them."

Bicknell, K.C., and *Greer*, for the appellants, contended that judgment should be entered for them in terms of their claim. They relied upon the grounds taken by Gwynne J. By the British North America Act, 1867, in order to ensure uniformity of administration, the British Parliament placed all lands held in trust for Indians and Indian affairs under the legislative control of the Dominion: see s. 91, sub-s. 24. It would be

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subversive of the policy of that Act to allow any interference by the provincial governments with Indian lands or Indian affairs. Sect. 109, which vests in the several provinces the lands situated therein, does so subject (1.) to any trust in respect thereof; (2.) to any interest other than that of the province. It was contended that the trusts then existing in respect of Indian reserves, theretofore set apart by treaty, were continued. *St. Catherine's Milling Co.* v. *Reg.* (1) decides that the title in unsurrendered lands held by the Indians under the Proclamation of 1763 is "an interest other than that of the province" under this section. The consideration for the extinction of that interest in a very large tract of territory was the setting apart thereout of Indian reserves of 365,225 acres, which accordingly are to be dealt with by the Crown in the same way as the reserves held in trust in 1867. This case is not governed by *St. Catherine's Milling Co.* v. *Reg.* (1), for the lands in that case were of an entirely different nature. In them the Indian title had been extinguished for the public uses of the province. The lands now in suit are lands held by the Crown in trust to sell and dispose of them for the benefit of the Indians; and consequently there is no beneficial interest in them in the province of Ontario. What is called the surrender of these lands to the Crown is in reality a consent by the Indians, as required by the treaty, to the sale thereof by the Crown. It did not, and was not intended to, extinguish their title, but to consent to its conversion into money for their benefit. The reserves selected under the treaty never were lands belonging to the province within the meaning of s. 109. They belonged to the Crown, and neither to the Dominion nor to the province. They can only be disposed of by such statutory authority as is applicable to them. That statutory authority is vested in the Dominion, and the appellants have acquired title by virtue of Dominion legislation: see Consolidated Statutes of Canada, 1859, c. 9, ss. 10 to 18; and after 1867, 31 Vict. c. 42, 32 & 33 Vict. c. 6, 39 Vict. c. 18, and 43 Vict. c. 28; Revised Statutes of Canada, 1886, c. 43. Besides, the province of Ontario must be deemed to have acquiesced in

(1) 14 App. Cas. 46.

the selection of reserves by the officers of the Dominion Government, and did not before the dealing with Reserve 38 B express any dissatisfaction therewith.

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Newcombe, K.C., and *Loehnis*, for the Attorney-General of the Dominion, contended that the letters patent under which the appellants claimed were issued by the Dominion pursuant to British North America Act, 1867, s. 91, sub-s. 24, and Revised Statutes of Canada, c. 43, s. 41. The title to the reserve in this case is vested in the Crown as representing the Dominion; if not, it has in its own right the power of sale and disposition over them, under a trust arising from the surrender in 1886. That surrender did not confer a like power on the province. Ontario has the benefit of the surrender, and cannot object to the execution of the stipulations made in favour of the Indians. Nor is her authority or consent necessary to the conversion of an Indian reserve into money for the benefit of the Indians.

Blake, K.C., for the Attorney-General of Ontario, contended that there was no question of general public importance affecting Ontario warranting the application for leave to appeal, and that accordingly the appeal should be dismissed on that ground alone. After the decision in *St. Catherine's Milling Co.* v. *Reg.* (1) Canada was advised that she had no right to create a reserve of the land in question, and that patents issued by her were void. She thereupon entered into negotiations with Ontario, which resulted in a statutory agreement under 54 & 55 Vict. (Canada) c. 5 and 54 Vict. (Ontario) c. 3, which is in force, though delays have occurred in its execution. The intention is to fulfil it, and it had before suit finally disposed of the question now raised.

J. M. Clark, K.C., for the respondents.

Newcombe, K.C., replied.

The judgment of their Lordships was delivered by—

1902 Nov. 12.

LORD DAVEY. In this case leave was given by His Majesty in Council, on the advice of this Board, to appeal against a judgment of the Supreme Court of Canada dated June 5, 1901. In their petition for leave to appeal the appellants, the Ontario

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Mining Company, alleged that the title to 365,225 acres of land, purporting to have been set aside by the Dominion Government as reserves for the Indians, was affected by the judgment, and represented that the question involved was one of great constitutional and general importance, affecting not only the Dominion and Provincial Governments, but also all the Indians in the province of Ontario. By the Order in Council giving the appellants leave to appeal it was ordered that the Government of the Dominion of Canada and the Government of the province of Ontario should be at liberty to intervene in the appeal, or to argue the same upon a special case raising the legal question or questions in dispute. The two Governments have availed themselves of this liberty, and were represented by counsel on the hearing of the appeal. A preliminary objection was taken to the appeal being heard on its merits by counsel for the respondents, and also by counsel for the Ontario Government, on the ground that the petition for leave to appeal did not disclose an agreement made between the Governments of the Dominion and of Ontario and confirmed by their two Legislatures respectively, which, it was said, if disclosed, would have shewn that the question between the parties to the litigation did not, as alleged, affect the title to the large tract of land mentioned, and that in existing circumstances there was not any question of constitutional or general importance involved affecting either the Governments or the Indians. Their Lordships will postpone for the present their consideration of this objection.

The dispute is between rival claimants under grants from the Governments of the Dominion and of Ontario respectively. The appellants claim to be entitled to certain lands situate on Sultana Island, in the Lake of the Woods, within the province of Ontario, and the minerals thereunder, under letters patent dated March 29, 1889, April 30, 1889, September 2, 1889, and July 23, 1890, issued by the Government of the Dominion to their predecessors in title. The respondents claim an undivided two-thirds interest in the same lands and minerals under letters patent issued to them by the Government of Ontario, and dated January 16, 1899, and January 24, 1899. The action

was brought by the appellants against the respondents in the High Court of Justice of Ontario, and their claim was to have the letters patent of Ontario, under which the respondents claimed, declared void and set aside and cancelled, and for consequential relief. One of the respondents, on the other hand, counter-claimed for similar relief respecting the letters patent of the Dominion under which the appellants claimed title.

The lands in question are comprised in the territory within the province of Ontario, which was surrendered by the Indians by the treaty of October 3, 1873, known as the North-West Angle Treaty. It was decided by this Board in the *St. Catherine's Milling Co.'s Case* (1) that prior to that surrender the province of Ontario had a proprietary interest in the land, under the provisions of s. 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty. In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the British North America Act, 1867, "it must always be kept in view that wherever public lands with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown." Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

After the making of the treaty of 1873, the Dominion Government, in intended pursuance of its terms, purported to

(1) 14 App. Cas. 46.

set out and appropriate portions of the lands surrendered as reserves for the use of the Indians, and among such reserves was one known as Reserve 38 B, of which the lands now in question form a part. The Rat Portage band of the Salteaux tribe of Indians resided on this reserve.

On October 8, 1886, the Rat Portage band surrendered a portion of Reserve 38 B, comprising the land in question, to the Crown, in trust to sell the same and invest the proceeds and pay the interest from such investment to the Indians and their descendants for ever. This surrender was made in accordance with the provisions of a Dominion Act known as the Indian Act, 1880. But it was not suggested that this Act purports, either expressly or by implication, to authorize the Dominion Government to dispose of the public lands of Ontario without the consent of the Provincial Government. No question as to its being within the legislative jurisdiction of the Dominion therefore arises.

The action was tried before the Chancellor of Ontario, and by his judgment of December 2, 1899, it was dismissed with costs. By a second judgment of December 22, 1899, on the counter-claim it was declared that the several patents under the Great Seal of Canada, under which the appellants claimed, were ultra vires of the Dominion and null and void as against the respondents. On appeal to the Divisional Court these judgments were affirmed.

The reasons of the learned Chancellor for his decision are thus summarized in his judgment.

"Over the Reserve 38 B the Dominion had and might exercise legislative and administrative jurisdiction, while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the province of Ontario. The treaty land was, in this case, set apart out of the surrendered territory by the Dominion—that is to say, the Indian title being extinguished for the benefit of the province, the Dominion assumed to take of the provincial land to establish a treaty reserve for the Indians. Granted that this might be done, yet when the subsequent surrender of part of this treaty reserve was made

in 1885 the effect was again to free the part in litigation from the special treaty privileges of the band, and to leave the sole proprietary and present ownership in the Crown as representing the province of Ontario. That is the situation so far as the title to the land is concerned."

The learned judge expressed his opinion that it was not proved that the Provincial Government had concurred in the choice or appropriation of the reserves, though in the view which he took of the case he considered it immaterial.

In the Divisional Court Street J. expressed himself as follows:—

"The surrender was undoubtedly burdened with the obligation imposed by the treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it; but it is equally plain that its ownership of the tract of land covered by the treaty was so complete as to exclude the Government of the Dominion from exercising any power or authority over it. The act of the Dominion officers, therefore, in purporting to select and set aside out of it certain parts as special reserves for Indians entitled under the treaty, and the act of the Dominion Government afterwards in founding a right to sell these so-called reserves upon the previous acts of their officers, both appear to stand upon no legal foundation whatever. The Dominion Government, in fact, in selling the land in question, was not selling 'lands reserved for Indians,' but was selling lands belonging to the province of Ontario."

The Chief Justice adopted the reasons of the learned Chancellor.

There was a second appeal to the Supreme Court. The majority of the learned judges in that Court held that the case was governed by the decision of this Board in *St. Catherine's Milling Co.* v. *Reg.* (1), and the appeal was dismissed. Gwynne J. dissented, but the reasons for his opinion given by

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that learned and lamented judge seem to be directed rather to shew that the decision of this Board in the previous case was erroneous.

Their Lordships agree with the Courts below that the decision of this case is a corollary from that of the *St. Catherine's Milling Co.* v. *Reg.* (1) The argument of the learned counsel for the appellants at their Lordships' bar was that at the date of the letters patent issued by the Dominion officers to their predecessors in title the land in question was held in trust for sale for the exclusive benefit of the Indians, and therefore there was no beneficial interest in the lands left in the province of Ontario. This argument assumes that the Reserve 38 B was rightly set out and appropriated by the Dominion officers as against the Government of Ontario, and ignores the effect of the surrender of 1873 as declared in the previous decision of this Board. By s. 91 of the British North America Act, 1867, the Parliament of Canada has exclusive legislative authority over "Indians and lands reserved for the Indians." But this did not vest in the Government of the Dominion any proprietary rights in such lands, or any power by legislation to appropriate lands which by the surrender of the Indian title had become the free public lands of the province as an Indian reserve, in infringement of the proprietary rights of the province. Their Lordships repeat for the purposes of the present argument what was said by Lord Herschell in delivering the judgment of this Board in the *Fisheries Case* (2) as to the broad distinction between proprietary rights and legislative jurisdiction. Let it be assumed that the Government of the province, taking advantage of the surrender of 1873, came at least under an honourable engagement to fulfil the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and location of the lands to be so appropriated could

(1) 14 App. Cas. 46.

(2) *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, &c.*, [1898] A. C. 700.

only be effectively made by the joint action of the two Governments.

It is unnecessary to say more on this point, for as between the two Governments the question has been set at rest by an agreement incorporated in two identical Acts of the Parliament of Canada (54 & 55 Vict. c. 5) and the Legislature of Ontario (54 Vict. c. 3), and subsequently signed (April 16, 1894) by the proper officers of the two Governments. In this statutory agreement it is recited that since the treaty of 1873 the true boundaries of Ontario had been ascertained and declared to include part of the territory surrendered by the treaty, and that, before the true boundaries had been ascertained, the Government of Canada had selected and set aside certain reserves for the Indians in intended pursuance of the treaty, and that the Government of Ontario was no party to the selection, and had not yet concurred therein; and it is agreed by art. 1 (amongst other things) that the concurrence of the province of Ontario is required in the selection. By subsequent articles provision is made, "in order to avoid dissatisfaction or discontent among the Indians," for full inquiry being made by the Government of Ontario as to the reserves, and in case of dissatisfaction by the last-named Government with any of the reserves already selected, or in case of the selection of other reserves, for the appointment of a joint Commission to settle and determine all questions relating thereto.

The learned counsel of the appellants, however, says truly that his clients' titles are prior in date to this agreement, and that they are not bound by the admissions made therein by the Dominion Government. Assuming this to be so, their Lordships have already expressed their opinion that the view of their relative situation in this matter taken by the two Governments was the correct view. But it was contended in the Courts below, and at their Lordships' bar was suggested rather than seriously argued, that the Ontario Government, by the acts and conduct of their officers, had in fact assented to and concurred in the selection of, at any rate, Reserve 38 B, notwithstanding the recital to the contrary in the agreement. The evidence of the circumstances relied on for this purpose

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was read to their Lordships; but on this point they adopt the opinion expressed by the learned Chancellor Boyd that the province cannot be bound by alleged acts of acquiescence on the part of various officers of the departments which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government, and are not manifested by any Order in Council or other authentic testimony. They, therefore, agree with the concurrent finding in the Courts below that no such assent as alleged had been proved.

It is unnecessary for their Lordships, taking the view of the rights of the two Governments which has been expressed, to discuss the effect of the second surrender of 1836. Their Lordships do not, however, dissent from the opinion expressed by the Chancellor of Ontario on that question.

To revert now to the preliminary objection, their Lordships do not desire to impute any want of good faith to the advisers of the appellants. They may have thought that their clients were not bound by the statutory agreement, and that it was not, therefore, necessary to mention it in their petition for leave to appeal. But the omission to do so was a grave and reprehensible error of judgment, for the existence of the agreement supplies an answer to the allegation of the general public importance of the questions involved, upon which the petition for leave to appeal was founded, as regards both the two Governments and the Indians. If the objection had been taken in a petition to rescind the leave granted, it would probably have succeeded, and their Lordships would now be amply justified in refusing to hear the appeal on its merits. But it was necessary to hear the argument in order to appreciate the objection; and the appeal has had this advantage, that it has enabled Mr. Blake, as counsel for Ontario, to state that he and the learned counsel for the Dominion, acting under authority from their respective Governments, have arranged terms for their adoption which will, it is hoped, have the effect of finally settling in a statesmanlike manner all questions between the Governments relating to the reserves.

Their Lordships will humbly advise his Majesty that the

appeal should be dismissed. The appellants will pay the respondents' costs of it; but the interveners will neither pay nor receive costs.

J. C. 1902 ONTARIO MINING COMPANY v. SEYB LD.

Solicitors for appellants: *Harrison & Powell.*
Solicitor for respondents: *S. V. Blake.*
Solicitors for Dominion of Canada: *Charles Russell & Co.*
Solicitor for province of Ontario: *S. V. Blake.*

[PRIVY COUNCIL.]

KIEFFER . . . . . PLAINTIFF;

AND

LE SÉMINAIRE DE QUÉBEC. . . . DEFENDANTS.

J. C.* 1902 July 21, 23; Nov. 12

ON APPEAL FROM THE COURT OF KING'S BENCH FOR QUEBEC.

CONSOLIDATED APPEAL AND CROSS-APPEAL.

Law of Lower Canada—Action négatoire against Proprietor—Liability of Lessee to adjoining Proprietor in respect of Works on his Land—Damages.

Where a lessee of defendants' land, being in possession thereof and having a contract for future purchase contained in his lease, raised for the purpose of building operations for his own benefit, and not as mandatory of the defendants, the lower part of the leased land with the effect of diverting to the plaintiff's adjoining land, and thereby causing him damage, the water which would otherwise have been discharged over the defendants' land:—

Held, that the plaintiff's remedy was against the lessee, and that an action négatoire against the defendants, who claimed no servitude over the plaintiff's land, was unnecessary.

CONSOLIDATED APPEAL from the above Court (May 29, 1901).

The appellant, by suit commenced on September 21, 1894, complained that the Seminary of Quebec during the three

* *Present*: LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS,

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES AND THE TERRITORIAL COURT OF THE YUKON TERRITORY.

THE ONTARIO MINING COMPANY (PLAINTIFF)..... APPELLANT;

AND

EDWARD SEYBOLD, EDMUND B. OSLER, JOHN W. MOYES, ELIZABETH JOHNSTON, EDWARD H. AMBROSE, JOHN W. BROWN AND JOHN S. EWART (DEFENDANTS) ..... RESPONDENTS.

1901

*April 1.

*June 5.

ON APPEAL FROM A DIVISIONAL COURT OF THE HIGH COURT OF JUSTICE FOR ONTARIO.

Indian lands—Treaties with Indians—Surrender of Indian rights—Mines and minerals—Crown grant—Constitutional law.

The Supreme Court of Canada, Gwynne J. dissenting, dismissed an appeal from the judgment of a Divisional Court of the High Court of Justice for Ontario (32 O. R. 301) which had affirmed the judgment of the Chancellor (31 O. R. 386).

APPEAL by special leave (1), from the judgment of a Divisional Court of the High Court of Justice for

* PRESENT:—Sir Henry Strong C J. and Taschereau, Gwynne, King and Girouard JJ.

NOTE.—This case is published by order of the Department of Justice.

(1) 31 Can. S. C. R. 125.

1901

THE ONTARIO MINING COMPANY v. SEYBOLD.

Ontario (1) dismissing the plaintiff's appeal from the judgment of the Honourable, the Chancellor of Ontario (2), dimissing the plaintiff's action with costs.

The action was for a declaration that, under the circumstances stated in the report of the judgment at the trial (2), and by virtue of the letters patent of grant from the Government of the Dominion of Canada to the predecessors in title of the plaintiff, the latter was intitled to the lands in question in the case, forming part of Sultana Island, in the Rainy River District of the Province of Ontario, and also to set aside the letters patent from the Government of the Province of Ontario granting the lands to the defendants and for an injunction and other incidental relief.

At the trial the learned Chancellor dismissed the action (2) and on appeal to the Divisional Court his decision was affirmed by the judgment now under appeal (1).

Laidlaw K.C. and *Bicknell* for the appellant.

Biggs K.C. for the respondent, Johnston.

A. M. Stewart for the respondent, Osler.

R. U. McPherson for the respondent, Seybold.

J. M. Clark K.C. for the other respondents.

The judgment of the majority of the court was pronounced by:

THE CHIEF JUSTICE (Oral.)—For the reasons given by the learned Chancellor in this case, and more particularly for the reasons given by the Judicial Committee of the Privy Council in *St. Catherines Milling Co.* v. *The Queen* (3), by which we are bound, and which governs the decision in this case, the appeal must be dismissed with costs.

(1) 32 O. R. 301. (2) 31 O. R. 3.
(3) 14 App. Cas. 46.

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GWYNNE J. (dissenting.)—The terms "Indian lands" and "the title" of the Indians to lands in the late Province of Upper Canada and in the late Province of Canada have always from the earliest period been well understood without any doubt or fluctuation of opinion whatever, to consist in this that by the pledge of the Sovereign no sale of lands should be, or ever has been, made by the Crown unless nor until the Indian title has been surrendered by a treaty entered into between the Sovereign and the Indian nations claiming title to the lands and upon surrender the Indian title consists in the honour of the Sovereign being pledged to a faithful observance of the conditions upon the faith of which the Sovereign procured such surrender to be made. This foundation of the Indian title to lands in British North America was originally designed perhaps as a reward for faithful services rendered in the early wars upon this continent by the Indian allies of the British Crown as certainly the tract of country known as the Grand River reservation was set apart for the Six Nations; but whether the concession be regarded as a reward for services rendered, or as proceeding *ex gratiâ et mero motu* of the Sovereign apart from any claim for services rendered all treaties entered into between the Sovereign and the North American Indians have always been regarded by the British Sovereigns and observed by them as inviolable as treaties entered into with foreign civilized nations, and the Indians themselves have always been regarded and treated as wards of the Crown and the management of their affairs was retained by the Imperial Government and was conducted through the Lieutenant Governor of the Province acting under instructions from the Sovereign and through an officer called the Chief Superintendent of Indian Affairs, appointed by the Lieutenant Governor,

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approved by the Imperial Government, to whom through the Lieutenant Governor the Chief Superintendent reported from time to time. In the case of lands surrendered by the Indians upon condition that they should be sold and the purchase monies invested for their benefit the sale of those lands has invariably been made by the Chief Superintendent of Indian Affairs and not by the Commissioner of Crown Lands, and the purchase moneys accruing from those sales were always received and invested by the Chief Superintendent and accounted for by him to the Lords Commissioners of the Treasury in England.

The distinction between the terms "public lands" and "Indian lands" has always been well understood and recognised in Acts of the Legislature. On the 17th of May, 1838, the royal assent pronounced by proclamation was given to an Act numbered chapter 118, of 7, Wm. 4th, intituled "An Act to provide for the disposal of the *public lands* in this province and for other purposes therein mentioned" which had been reserved by Sir Francis Bond Head, the then Lieutenant Governor of the late Province of Upper Canada for the royal assent. A reference to the several clauses of that Act clearly shews that the term "*public lands*" was applied solely to lands placed under the control of the Commissioner of Crown Lands for sale for the public purposes of the province consisting of Crown Lands, Clergy Reserves and School Lands, in all of which the province had an interest, but nothing in the Act had any relation to lands surrendered by the Indians *upon condition that they should be sold and the proceeds invested for their benefit*, the sale of which as already observed was maintained under the control of the Chief Superintendent of Indian Affairs, who as also already shewn was under the control of the Imperial Government exercised through the Governor as repre-

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sentative of the Sovereign. The like distinction is maintained in the statutes 2 Vict. c. 14 and 15, passed in 1839, so also in the following statutes of the late Province of Canada, 4 & 5 Vict. ch. 100. intituled "An Act for the disposal of *public lands*," 12 Vict. ch. 200. intituled "An Act to raise an income of one hundred thousand pounds *out of the public lands* of Canada for Common School education," by which it was enacted that all moneys that should arise from the sale *of any of the public lands of the Province* should be set apart for the purpose of creating a capital which should be sufficient to produce a clear sum of one hundred thousand pounds per annum which said capital and the income to be derived therefrom should form a *public fund* to be called the Common School fund. It is clear that Indian lands came not under this Act, 13 & 14 Vict. c. 42 and 74, the former of which is intituled "An Act for the better protection of the *lands and property* of the Indians in Lower Canada", and the latter is intituled "An Act for the protection of the Indians of Upper Canada from imposition and the property occupied and enjoyed by them from trespass and injury;" 14 & 15 Vict. c. 59 and 106, 16 Vict. c. 159 intituled "An Act to amend the law for the sale and settlement of the *public lands*."

The distinction between "the public lands" of the provice and "Indian lands." the former of which were under the management of the Commissioner of Crown Lands, and the latter under the management of the Chief Superintendent of Indian Affairs is conspicuously apparent in this Act and also in 22 Vict. ch. 22 of the Consolidated Statutes of Canada, A.D. 1859.

Then in 1860 were passed two statutes which maintain the distinction in a most unequivocal manner. The first was passed on the 23rd of April, intituled

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"An Act respecting the sale and management of the *public lands*," and the second intituled "An Act respecting the management of *the Indian lands and property*" having passed both houses of the legislature were reserved by the Governor General, Sir Edmund Head, for the signification of Her Majesty's pleasure. The royal assent thereto was published by proclamation in the *Canada Gazette* of the 13th of October, 1860.

This Act was the outcome of negotiations which had been carried on for some years between the Imperial Government and the Governor General with the view of devising a measure whereby the Imperial Government should be relieved from the expense of maintaining the department for the management of Indian affairs, as it was thought that the Indian property had then reached such a value as to warrant its having imposed upon it the whole cost of the maintenance of the department having charge of its management. Accordingly a bill was prepared under the direction of Sir Edmund Head, and was submitted to, and passed by, both houses of the legislature and reserved for the signification of Her Magesty's pleasure and the royal assent was given thereto as above said.

This Act maintained the office of Chief Superintendent of Indian Affairs as formerly, but instead of the private secretary of the Governor General who had for some years filled that office it declared in its first section that in future the Commissioner of Crown Lands should be "Chief Superintendent of Indian Affairs." By the second section it was enacted that *all lands reserved for the Indians*, or for any tribe or band of Indians *or held in trust* for their benefit, should be deemed to be *reserved and held* for the same purposes as before the passage of the Act By section 3, that all moneys or securities of any kind,

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applicable to the support and benefit of the Indians or of any tribe or band of Indians, and all moneys accruing or to accrue from the sale of any lands reserved or held in trust as aforesaid should (subject to the provisions of the Act) be applicable to the same purposes, and be dealt with in the same manner as they might have been applied to, or dealt with before the passing of the Act. Then by section 7 it was enacted that

> the Governor in Council might from time to time declare the provisions of the Act respecting the sale and management of the *public lands* passed in the present session, or of the twenty-third chapter of the Consolidated Statutes of Canada intituled "*An Act respecting the sale and management of timber and public lands,*" or any of such provisions to apply to *Indian lands* or to the timber on Indian lands, and the same shall thereupon apply and have effect as if they were expressly recited and embodied in this Act.

Now this Act declares the terms upon which Her Majesty the Queen assented to the transfer of the management of Indian affairs from under the direct supervision of the Imperial Government, and it is thus in plain terms declared upon the authority of an Act of the Legislature, that all lands reserved for the Indians, (and the ordinary mode of making such reservations was by treaty with the Indians) should after the passing of the Act be still held as reserved for the benefit of the Indians, as before the passing of the Act they had been by the pledged word of the Sovereign and that lands surrendered upon condition that they should be sold and the proceeds invested for the benefit of the Indians should after the passing of the Act be still held, as they always had been by the Crown, in trust for the benefit of the Indians. The title of the Indians which had been always rested upon the pledge of the Crown while the Imperial Government maintained control of the Indian Department was upon the transfer of that department to the provincial authorities

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made to rest upon an Act of the legislature which without the assent of the Crown could not be repealed. This Act clearly shews that Indian Reserves, or lands held by the Crown in trust for the Indians were never deemed to be "*public lands*" of the province, or land "belonging to the province," or lands in which the province had any beneficial interest or any power of interference, save as regards the legislative authority over the property of the purchaser of any of such lands.

This was the condition of things as existing between the Crown and the Indians in relation to Indian affairs and the Indian title to lands in Canada when the British North American Provinces of Canada, Nova Scotia and New Brunswick had conferred upon them by our Most Gracious Sovereign our late beloved Queen the previously unknown privilege of devising and framing their own constitution which after a thorough consideration and approval of its terms by the legislatures of the respective provinces and after a final agreement upon those terms concluded between delegates appointed by the Provincial Governments and Her late Most Gracious Majesty's Imperial Government was without alteration adopted by the Imperial Parliament and reduced into legislative form in the British North America Act.

In judicially construing a constitution so framed I feel myself bound, upon any question arising, to endeavour to arrive at a construction conformable to my conviction of what, having regard to the previous status and condition of the particular subject under consideration was the intention of the founders and framers of our constitution as expressed in the constitutional charter so framed by them, and with the greatest deference due to those from whom it is my misfortune to differ in the present case, I must say that

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cannot entertain a doubt that when the framers of our constitution provided, among other things, that the subject of "Indians and lands reserved for the Indians" should be within *the exclusive* jurisdiction of the Parliament of the Dominion they meant, and that the legislatures of the provinces, when deliberating upon and taking part in framing the constitutional charter of the Dominion, meant, that the word "exclusive" as there used, should have its precise ordinary meaning and should exclude all ideas of any right of interference direct or indirect being possessed by or vested in the legislatures or governments of any of the provinces of the Dominion in relation to the Indians or to their title to lands reserved for their benefit in any part of the Dominion; and that when in section 91 they provided that the legislative authority of the Parliament of Canada should be exclusive over "Indians and lands reserved for the Indians," and in section 109 that

> all lands, mines, minerals," &c., &c., belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union should belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate

their intention was thereby to maintain the distinction between "lands belonging to the several provinces" and "Indian lands," which in the Acts already referred to had always been maintained between the "Public lands" of the province and "Indian lands," and to preserve and maintain the Indian titles as secured, by parliamentary sanction first, in 23 Vict. ch. 151, so as to secure and maintain inviolate in all parts of the Dominion with perfect uniformity the rights of the Indians as had always been conceded in practice by the grace and pledge of the Sovereign and as had been secured by parliamentary sanctions to the Indians in the Province of

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Canada by 23 Vict. c. 151; thus maintaining the Indians in the enjoyment of the benefit and conditions of all treaties already entered into between them and the Sovereign or which should thereafter be entered into between them through the Governor General as representing the Sovereign.

That such was beyond all doubt the understanding of all parties concerned appears from an Act of the Parliament of Canada which has never been called in question passed in its first session, 31 Vict. ch. 42, intituled "An Act providing for the organization of the Department of the Secretary of State of Canada and for the management of Indian and Ordnance lands." In the fifth section of this Act it is enacted that:

> The Secretary of State shall be the Superintendent General of Indian Affairs and shall as such have the control and management of the *lands and property of the Indians in Canada*.

The sixth and seventh sections are identical with sections 2 and 3 of 23 Vict. ch. 151, as applied to this Act of 31 Vict. ch. 42.

Sections. 8, 9, 10 & 11 introduce into 31 Vict. ch. 42 the provisions of sections. 4, 5, 6, 7 and 8 of 23 Vict. ch. 151. In 1869, was passed by the Parliament of Canada 32 & 33 Vict. ch. 6, by the thirteen section of which the Governor General in council is authorised, on the report of the Superintendent General of Indian Affairs, to order the issue of letters patent granting life estates to Indians in certain cases in land allotted to them within a reserve.

On the 3rd May, 1873, was passed by the Parliament of Canada an Act intituled "An Act to provide for the establishment of the Department of the Interior." By the third section of that Act, 36 Vict. ch. 4, it was enacted that the Minister of the Interior shall be the Superintendent General of Indian Affairs, and, by sec-

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that eight, that the several clauses of 31 Vict. ch. 42 relating to the management of Indian affairs and lands, shall govern the Minister of the Interior in the matters to which they relate, and that wherever the words "Secretary of State," or "Department of the Secretary of State" occur in those clauses the words "Minister of the Interior," and "Department of the Interior" shall be deemed to be substituted therefor.

Now in October, 1873, a treaty, called the North-west Angle Treaty, was entered into between the Saulteaux Tribe of the Ojibbeway Indians and all other Indians inhabiting the country therein described, and Her Majesty the late Queen acting through the intervention of three gentlemen (of whom the Lieutenant Governor of the province of Manitoba and the North-west Territories was one) who were specially appointed as commissioners for that purpose by the Governor General in accordance with the practice which had always prevailed in making upon behalf of Her Majesty a treaty with the Indians; and, by that treaty, the Indians surrendered to Her Majesty a vast tract of country comprising about fifty-five thousand (55,000) square miles more or less. The treaty contains the following undertaking upon behalf of Her Majesty:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians: *and also* to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians, by the officers of the said Government appointed for that purpose, and such selection shall be made after conference with the Indians: Provided, however, that such reserve whether for farming or other purposes shall in no wise exceed in all one square mile for each family of five, or in that proportion for larger or smaller families; and such selection shall be made if possible dur-

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ing the course of next summer or as soon thereafter as may be found practicable, it being understood, however, that if at the time of any such selection of any reserves as aforesaid there are any settlers within the bounds of the land reserved by any band, Her Majesty reserves the right to deal with such settlers as she shall deem just so as not to diminish the extent of land allotted to the Indians; and provided also that the aforesaid reserves of lands or any interest or right therein or appurtenant thereto may be sold, leased or otherwise disposed of by the said Government *for the use and benefit of the said Indians* with *the consent of the Indians* entitled thereto first had and obtained.

The lands designated in the treaty as reserves have been marked out and set apart for the use and benefit of the Indians as provided in the treaty.

By a despatch from the Chief Commissioner the then Lt. Governor of the Province of Manitoba and the North-west Territories addressed to the Governor General accompanying the treaty, it appears that it was made a special condition upon the faith of the fulfilment of which the treaty was agreed to by the Indians that the Indians should enjoy the benefit of all minerals, if any should be found upon any portion of the tract reserved for their benefit.

It was, as appears by the despatch and papers containing a report of the proceedings at the negotiations with the Indians for the treaty, that it was upon the Indians' undoubting faith in the fulfilment of this pledge, promise or condition, whichever it may be called, that about thirty-four millions of acres of land were surrendered *unaffected by any trust or condition in favour of the Indians*. The Indians have, it is true, in the treaty the pledge of the Crown for the payment of certain annuities and other benefits annually to the Indians, but the pledge for the payment of these annuities and other benefits stands upon precisely the same foundation as the pledge as to the Indians retaining the benefit to accrue from all minerals, if any should be found in the lands reserved for them by the treaty.

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As to those lands surrendered to the Crown unaffected by any trust or condition in favour of the Indians, it has been held by the Privy Council in the *St. Catharines Milling & Lumber Company* v. *The Queen* (1) that the Province of Ontario is bound to indemnify the Crown and the Dominion from all obligations assumed by Her Majesty in the treaty containing the surrender. That these lands so surrendered to the Crown unaffected by any trust or condition in favour of the Indians became vested in the Crown in trust for the public purposes of the Province of Ontario in so far as such lands were within the Province of Ontario is not a matter in dispute in the present action.

In view of the never violated pledge of the Crown that no lands should be sold until a surrender of the Indian title should be made by the Indians to the Crown, the Province of Ontario cannot be said to have acquired any usufructuary interest in these lands until the surrender, and a beneficial interest so acquired must more properly be said, I think, to rest upon the treaty of surrender than upon anything in the British North America Act, and for the benefit so obtained by the province by the treaty of surrender the province alone should in justice bear the burthen of the obligations assumed by Her Majesty and the Dominion to obtain the surrender of those lands as was held in the *St. Catharines Milling & Lumber Co.* v. *The Queen* (1) but as to the lands reserved for the Indians, the retaining of which, together with all the minerals therein, by Her Majesty forthe use and benefit of the Indians, having been a condition upon the faith of the fulfillment of which the thirty-four million acres of land, unaffected by any trust or benefit in favour of the Indians, were surrendered, those lands, and it is with a

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portion of them we are now dealing (unless the entering into a treaty with the Indians by Her Majesty through Her representative the Governor General in the serious, grave and earnest manner appearing in the report of the Lieutenant-Governor of Manitoba to the Governor General accompanying the treaty, is a delusive mockery), should be regarded, as all lands in like circumstances have always been regarded ever since the proclamation of 1763, namely as lands vested in Her Majesty in trust for the sole use and benefit of the Indians upon the terms and conditions agreed upon as those upon which the trust was accepted by Her Majesty; and, as I have already said it was, in my opinion, for the purpose of maintaining unimpaired a continuance of that condition of things that the subject "Indians and lands reserved for the Indians" was placed under the exclusive legislative authority of the Dominion Parliament.

In 1880 that parliament, in exercise of the authority thus vested in it, passed the Act 43 Vict. ch. 28, intituled "An Act to amend and consolidate the laws respecting the Indians," and in 1882, the Act 45 Vict. ch. 30, intituled "An Act to further amend the Indian Act, 1880," and in 1884 an Act 47 Vict. ch. 27, intituled "An Act further to amend the Indian Act of of 1880," and on the 2nd of June, 1886, an Act intituled "An Act to expedite the issue of Letters Patent for Indian Lands," all of which Acts are consolidated in ch. 43 of the Revised Statutes of Canada of 1886 intituled "An Act respecting Indians."

Now by these Acts so consolidated it was among other things enacted, that there should be a Department of the Civil Service of Canada called the Department of Indian Affairs, which should have the management, charge and direction of Indian affairs, presided over by a Chief Superintendent of Indian Affairs who

should be the Minister of the Interior or the head of any other department appointed for that purpose by the Governor in Council — that the expression "reserves" in the Act means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of, or granted to, a particular band of Indians, of which the title is in the Crown and which remains a portion of the said reserve *and includes all the trees, woods, timber, soil, stone, minerals, metals and other valuables thereon* or therein—that the Governor General might appoint a Deputy Governor who should have the power in the absence of or under instructions of the Governor General to sign Letters Patent for Indian Lands, and that the signature of such Deputy Governor should have the same force and virtue as if such Letters Patent were signed by the Governor General; sec. 8, s.s. 4 That all reserves for Indians or for any band of Indians or held in trust for their benefit should be deemed to be reserved and held as before the passing of the Act 43 Vict. ch. 28, but should be subject to the provisions of the Act; sec. 14

That if any railway, road, or public work should pass through or cause injury to any reserve belonging to, or in possession of any band of Indians or of any act occasioning damage to any reserve should be done under the authority of an Act of Parliament or of the legislature of any province compensation should be made to them therefor in the same manner as is provided with respect *to the lands or rights of other persons* and that the Superintendent General should, in any case in which an arbitration should be had, name the arbitrator on behalf of the Indians and should act for them in any matter relating to the settlement of such compensation, and that the amount awarded in any case should be paid to the Minister of Finance and Receiver General *for the use of the band of Indians for*

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whose benefit the reserve is held and for the benefit of any Indian who has improvements thereon; (sec. 35).

That no *reserve* or *portion of a reserve* should be sold, alienated or leased until released or *surrendered to the Crown for the purposes of the Act* (sec. 38), and no release or surrender of a reserve held for the use of the Indians of any band should be valid or binding except on condition;

1st. That it should be assented to by a majority of the male members of the band at a meeting or council of the band summoned for that purpose according to the rules of the band and held in the presence of the Superintendent General, or of an officer authorised to attend such council by the Governor General in Council or by the Superintendent General.

2ndly. That such release or surrender should be submitted to the Governor in Council for acceptance or refusal, (sec. 39).

That all Indian lands which are reserves or portions of reserves surrendered or to be surrendered to Her Majesty shall be deemed to be held for the same purposes as before the passing of the Act and should be managed, leased and *sold* as the Governor in Council should direct *subject to the conditions of the surrender and the provisions of the Act* (sec. 41).

That every patent for Indian lands should be prepared in the Department for Indian Affairs and should be signed by the Governor General or the Deputy Governor appointed under the Act for that purpose and should have the great seal of Canada thereto affixed as provided in sec. 45.

That the proceeds arising from the sale or lease of any Indian lands or from the timber, hay, stone, *minerals or other valuables thereon* or on a reserve shall be paid to the Minister of Finance and Receiver General to the credit of the Indian fund, (sec. 71).

There are many other sections of the Act which, clearly I think, show the title of the Indians to lands reserved for their use by treaty or otherwise, or surrendered by them to the Crown for the purpose of being sold for their benefit, to be real and substantial and not purely illusory, but the above sections seem to me to be sufficient for the purpose of the present appeal.

Now in the month of October, 1886, a band of the Indians who had signed the above north-west angle treaty in 1873 called the "Rat Portage Band of Indians" who were in possession of a portion of the reserves in the treaty mentioned as their allotment being desirous of surrendering the same to the Crown for sale for their use and benefit in accordance with the terms of the treaty in that behalf and with the special condition as above mentioned as to any minerals therein, and with the promise made in that behalf upon the faith of the fulfilment of which the treaty was made, by a deed duly executed in accordance with the above provisions of the statute in that behalf surrendered their said portion of said reserves to Her Majesty the then Queen, her heirs and successors

in trust to sell the same to such person or persons and upon such terms as the Government of the Dominion of Canada may deem *most conducive to the welfare of our people*, and upon the further condition that all moneys received from the sale thereof shall, after deducting the usual proportion for expenses of management be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually *to us and our descendants forever.*

This surrender was duly accepted by the Governor General upon the terms thereof in accordance with the above statutory provisions in that behalf.

Now by letters patent issued under the great seal of the Dominion of Canada in accordance with the provisions of the statute in that behalf above cited and bearing date the 29th day of March, 1889, thirty-five

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acres of the portion of reserve so surrendered by the "Rat Portage Band of Indians" to Her Majesty in trust for sale, together with all minerals, precious or base, which should be found therein, were in consideration of the sum $175.75 paid in hand to the Chief Superintendent of Indian Affairs by one Albert C. McMicken, and the reservation of a royalty of four per cent to be paid upon all minerals produced therefrom granted to the said Albert C. McMicken, his heirs and assigns forever; and by like letters patent bearing date the 30th April, 1889, thirty five other acres, other portion of the said reserve so surrendered by the "Rat Portage Band of Indians" to Her Majesty in trust for sale together with all minerals therein were in consideration of $175 paid in hand to the Chief Superintendent of Indian Affairs by one George Heenan, and of a like reservation of a royalty of four per cent to be paid upon all minerals produced therefrom, granted to the said George Heenan, his heirs and assigns forever: and by like letters patent bearing date respectively the 2nd day of September, 1889, and 23rd day of July, 1890, forty other acres, other part of the said portion of reserve so surrendered by the said "Rat Portage Band of Indians" to Her Majesty in trust for sale together with all minerals therein were, in consideration of the sum of $200 paid in cash to the Chief Superintendent of Indian Affairs by one Hamilton G. McMicken, and of the like reservation of a royalty of four per cent on all minerals produced therefrom, granted to the said Hamilton G. McMicken his heirs and assigns forever; and these several parcels of land were subsequently sold and conveyed by the said Albert C. McMicken, George Heenan, and Hamilton G. McMicken, respectively, to the appellants in fee simple.

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The Government of the Province of Ontario on the 9th of January, 1899, assumed to grant by letters patent issued under the great seal of the Province of Ontario the said several parcels together with other lands and the minerals therein to the respondents as tenants in common in fee simple subject however to the condition following:

This grant is made and is accepted by the grantees subject to the rights, if any, of the Government of the Dominion of Canada in respect of the lands or the minerals, ore or metals thereon or therein contained, it being hereby declared that the said grantees, their heirs, executors, administrators and assigns *shall* have no recourse against us or our successors or against the Province of Ontario or the Government thereof *should our title* to the said lands, mines or minerals be found to be defective, or should these presents be found to be ineffectual to pass such title.

The respondents having asserted title under the said letters patent so issued to them, this action was instituted by the appellants in assertion of title under the letters patent so as aforesaid issued by the Dominion Government, which letters patent the courts below have held to be null and void—hence our present appeal.

Now unless the proclamation of 1763 and the pledge of the Crown therein that no lands in any of the colonies or plantations in America should be sold until they should be ceded by the Indians to, or purchased from them by, the Crown, are to be considered now to be a dead letter having no force or effect whatever; and unless the grave and solemn proceedings which ever since the issue of the proclamation until the present time have been pursued in practice upon the Crown entering into treaties with the Indians for the cession or purchase of their lands are to regarded now as a delusive mockery; and unless the provision in the constitutional charter of the Dominion that the Parliament of the Dominion of Canada shall have

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exclusive legislative authority over all matters coming within the subject "Indians and lands reserved for the Indians" is quite illusory and devoid of all significance; it does appear to me to be free from doubt that all the provisions of the statutes of the Dominion Parliament above cited in relation to the Indians and their property, the management of all their affairs, the maintenance of their revenues for their sole use and benefit, and the sale by the Crown of their reserves or of such parts thereof as should be surrendered to the Crown upon trust to be sold for their benefit are within the exclusive legislative authority of the Dominion Parliament.

The Province of Canada at the time of the Union had no property in any "lands reserved for the Indians." Neither the Canadian statute, 9 Vict. ch. 114, to which the royal assent was given in virtue of the Imperial statute, 10 & 11 Vict. ch. 71, nor the Imperial statute 15 & 16 Vict. ch. 39, intituled "An Act to remove doubts as to lands and casual revenues of the Crown in the Colonies and Foreign Possessions of Her Majesty" had the effect of vesting in the Province of Canada any property "in lands reserved for the Indians" so as to constitute them to be within section 109 of the British North America Act "lands belonging to Canada at the time of the Union."

The words in 9 Vict. ch. 114 for transferring the Crown revenues to the province are:

All territorial and other revenues *now at the disposal of the Crown arising in the province.*

The words in the Imperial Act, 15 & 16 Vict. ch. 39, are contained in the first section of that Act as follows:

1. The provisions of the said recited Acts in relation to the hereditary casual revenue of the Crown shall not extend, or be deemed to have extended, *to the moneys arising from the sale or other disposition of the lands of the Crown in* any of Her Majesty's colonies or foreign posses-

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...ions, or in anywise invalidate or affect any sale *or* other disposition already made, *or* hereafter to be made of such lands, *or* any appropriations of the moneys arising from any such sales *or* other dispositions which might have been made if such Acts or either of them had not been passed.

Now as, by force of the proclamation of 1763, no sale could be made of any lands of the Crown in Canada until a cession or surrender of the Indian title therein should be made by the Indians to the Crown, it seems to follow that until such cession or surrender the Crown could have no territorial casual revenue arising out of such lands which, by force of either of the said acts, could have passed to the province so as to have become property belonging to the province at the union. It is for this reason that I have said that the title of the Province of Ontario to the lands surrendered by the North-west Angle Treaty of 1873 which are not subjected to any right or interest reserved and retained in the Crown for and on behalf of the Indians, seems to me to be due rather to the surrender than to any thing in the British North America Act.

But as to the lands in question in the present suit which are lands specially reserved by the treaty and retained by the Crown as lands reserved for the sole use and benefit of the Indians to be dealt with by the pledge of the Crown in accordance with the terms agreed upon, and upon the Indians implicit faith in the fulfilment of which, the thirty-four million acres, or thereabouts, of lands unaffected by the reservation of any charge in favour of the Indians were surrendered, it appears to me to be free from doubt, that in the distribution of legislative jurisdiction between the Dominion Parliament and the Provincial Legislatures there is nothing whatever in the constitutional charter of the Dominion, which is also the charter of its provinces, which qualifies the exclusive legislative authority vested in the Dominion Parliament over "*lands reserved*

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THE ONTARIO MINING COMPANY v. SEYBOLD.

Gwynne J.

for the Indians," which the lands under consideration in the present case undoubtedly are.

It has been contended that the judgment of the Lords of the Privy Council in the *St. Catharines Milling Company* v. *The Queen* (1) is conclusive upon the question now under consideration, but I have shewn, I think, that lands reserved by treaty with the Indians and retained by the Crown as the lands in question here were upon a trust accepted by the Crown for the exclusive benefit of the Indians in accordance with a practice instituted by the Crown from which there never had been any deviation are in a wholly different position from the lands under consideration in the *St. Catherines Milling Company's Case* (1) which were lands forming part of the thirty-four million acres surrendered by the Northwest Angle Treaty unaffected by any trust or interest therein reserved for the Indians.

Under these circumstances I can see no ground whatever for the contention that the judgment in the *St. Catharines Milling Company's Case* (1) governs the present case and I must say that I can see nothing in the judgment of the Privy Council in that case which would justify, much less which calls for, the withholding of the expression of my firm conviction that the maintaining of the judgment now under consideration in this appeal would be subversive of the scheme of Confederation as designed by the founders and framers of the constitution of the Dominion of Canada and of their clear intention, as expressed in sec. 91, item 24 of the British North America Act, the provision of which would thereby, in my opinion, be rendered wholly illusory and absolutely devoid of all significance.

The contention therefore of the appellants should, in my opinion, prevail and the appeal should be allo-

(1) 14 App. Cas. 46.

wed with costs. The letters patent under which the appellants claim should be declared to be valid, and the letters patent under which the respondents claim should be declared to be null and void in so far as they purport to affect the said several lands and the minerals therein which are claimed by the appellants.

Appeal dismissed with costs.

Solicitors for the appellants: *Laidlaw, Kappelle & Bicknell.*

Solicitor for the respondent, Johnston: *S. C. Biggs.*

Solicitors for the respondent, Osler: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for the other respondents: *McPherson, Clark, Campbell & Jarvis.*

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CONRAD G. OLAND AND ETHELRED OLAND (PLAINTIFFS)..... } APPELLANTS;

AND

DANIEL McNEIL AND JAMES P. WALLACE (DEFENDANTS)..... } RESPONDENTS.

*Nov. 21, 22.
*Feb. 20.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of land—Conveyance absolute in form—Mortgage—Resulting trust—Notice to equitable owner—Estoppel—Inquiry.

The transferee of an interest in lands under an instrument absolute on its face, although in fact burthened with a trust to sell and account for the price, may validly convey such interest without notice to the equitable owners.

* PRESENT:—Taschereau, Sedgewick, Girouard and Davies JJ.

[Mr. Justice Gwynne was present at the hearing but died before judgment was delivered.]

Judgment. injunction for whatever time may be necessary to lodge
Falconbridge, J. the appeal which will no doubt follow in due course.

The city is entitled to its costs of the action and of the motion.

And as to the whole case there will be whatever stay of proceedings is reasonable and necessary for purposes of appeal.

E. B. B.

THE ONTARIO MINING COMPANY v. SEYBOLD.

Constitutional Law—Indians and Lands Reserved for Indians—Surrender of Indian Lands—Special Provisions in Treaty of Surrender—Crown Patent—Precious Metals—B. N. A. Act, sec. 91, sub-sec. 24, ib., sec. 109—Acquiescence of Government.

A treaty of surrender of Indian territory to the Dominion of Canada in 1873, provided that certain lesser reserves in the lands surrendered, were to be defined and set apart, and thereafter to be administered and dealt with, and with the consent of the Indians first obtained, sold, leased, or otherwise disposed of by the Dominion for the benefit of the Indians. Part of one of these lesser reserves so set apart, and situate in the Province of Ontario, was in 1886 surrendered to the Queen under the Indian Act of 1880, 43 Vict. ch. 28 (D.), in trust to sell the same upon such terms as the Dominion might deem most conducive to the welfare of the Indians; and of this, the lands in question were patented by the Dominion to the plaintiffs, including the precious metals therein. The defendants asserted title in fee to the same lands by virtue of an Ontario patent of 1899. It appeared that in negotiating the treaty in 1873, the Dominion commissioners represented to the Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the lesser reserves to be thereafter delimited:—

Held, that after the surrender in 1886, title to the land and to the precious metals therein could be obtained only from the Crown as represented by the Province of Ontario. With the royal mines and minerals the Indians had no concern; nor could the Dominion make any valid stipulation with them which could affect the rights of Ontario.

Semble, a Province is not to be held bound by alleged acts of acquiescence of various departmental officers which are not brought home to or authorized by the proper executive or administrative organs of the Provincial government, and are not manifested by any order in council or other authentic testimony.

Statement. THIS was an action brought by the Ontario Mining Company against E. Seybold, E. B. Osler, J. W. Moyes, E. Johnston, J. W. Brown, E. H. Ambrose, and J. S. Ewart, as grantees of the Province of Ontario for a declaration that

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by virtue of letters patent issued by the Dominion of Canada to the predecessors in title of the plaintiffs, the latter were entitled to the lands in question which were part of Sultana island in the Rainy River district, and also to set aside the letters patent issued by the Province to the defendants and for an injunction and other incidental relief.

The locus is situate in what was formerly known as the disputed territory, but is within the boundaries of Ontario as declared by the order of the Imperial Privy Council of August 11th, 1884, and the subsequent Imperial Statute, 52 & 53 Vict. ch. 28, passed on the 12th of August, 1889. The lands in question were included in the territory surrendered by the Indians in 1873, by the North-West Angle Treaty No. 3.

By this treaty the Dominion undertook to lay aside reserves for the Indians, and in 1879, Sultana island was included in Indian reserve 38 B., by the Dominion officials, under the authority of the Minister of the Interior, but the selection of the reserve was not confirmed by order in council. At the time of the selection of the reserve the Dominion claimed that the whole of the territory in dispute was west of the Province of Ontario, and therefore, under the control of the Dominion.

On October 8th, 1886, the Indians surrendered the whole of Sultana island to the Dominion in trust to sell for the benefit of the Indians, and this surrender was, on March 15th, 1887, approved by Dominion order in council. On September 15th, 1888, Dominion regulations for for the sale of Indian lands were passed, and in 1889 and 1890, letters patent were issued by the Dominion to A. C. McMicken, George Heenan, and H. G. McMicken, of three locations on Sultana island.

Quit claim deeds were executed by the Dominion patentees in favour of the Ontario Mining Company which was formed for the purpose of acquiring the whole of the balance of Sultana island except that part occupied by

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Sultana mine,* and the plaintiffs proved that they had acquired quit claim deeds from the applicants to the Dominion for the balance of Sultana island. Owing to the decision of the Privy Council in the *St. Catherine's Milling Company* case, no further patents than these three were issued by the Dominion authorities. Before the Dominion patents were issued a formal protest was made by the Crown Land Department of Ontario against the Dominion dealing with Sultana island.

In 1894, the plaintiffs applied to the Ontario Government to confirm their titles pointing out that under the decision of the *St. Catherine's Milling Company* case, the title was vested in the Province of Ontario, and subsequently on June 9th, 1897, presented a petition to the Commissioner of Crown Lands, to the Minister of Justice at Ottawa, and the Minister of the Interior asking for the confirmation of their titles.

The matter was argued before the Commissioner of Crown Lands, the various applicants to the Ontario Government and the Ontario Mining Company, being represented.

The Commissioner of Crown Lands made his ruling on November 22nd, 1898, granting a two-thirds interest to the defendants, disallowing certain other claims, and granting a one-third interest to the Ontario Mining Company subject to the condition that the said interest should be accepted by the company as its entire interest in the property in question and that there should be a waiver or abandonment of any larger interest under the Dominion patents or under any application which had been made to the Dominion Government.

The plaintiffs refused to accept the condition and brought this action to set aside the Ontario patents and thereupon the Commissioner of Crown Lands cancelled his ruling in their favour.

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* Sultana mine was on a portion of Sultana island patented by the Dominion in 1883, which patent had been declared void by Rose, J., in *Caldwell* v. *Fraser*, unreported, see *post* p. 400.—Rep.

Statement.

It also appeared that pursuant to concurrent legislation by the Dominion and Province in 1891, an agreement dated April 16th, 1894, was entered into between the Province of Ontario and the Dominion as to Indian reserves by which it was recited that the Province of Ontario was no party to the said treaty and had not concurred in the selection of the said reserves.

The action was tried at Toronto before BOYD, C., on October 26th, 27th, and November 10th, 1899.

Robinson, Q.C., *Laidlaw*, Q.C., and *J. Bicknell*, for the plaintiffs (1), contended that since *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46, it had been settled that the Dominion have exclusive jurisdiction over lands reserved for Indians, and that this jurisdiction includes lands however reserved and is not to be restricted to special Indian reserves; that pursuant to this jurisdiction the Dominion had passed the Indian Act which provided for the surrender of Indian reserves and the sale thereof, and that if the Dominion had not the power to deal with these reserves the Dominion legislation would be nugatory; that Indian reserve 38 B., including Sultana island, had been set apart by Dominion authority and the selection had been entirely concurred in by the provincial authorities; that the jurisdiction and control of the reserves and the administration thereof was vested in the Crown in right of the Dominion of Canada; that the Province had adopted the treaty and having accepted the benefit of it must be bound by all its terms including the one that reserves when surrendered must be sold by the Dominion; and that the condition imposed by the Commissioner of Crown Lands was *ultra vires*.

G. F. Shepley, Q.C., for the Minister of Justice, stated that subject to the action of the Dominion Government and their agreement of April 16th, 1894, the Minister of Jus-

(1) The argument has only been reported in respect to the points on which the judgment turns.—REP.

Argument.

tice adopted the arguments of the plaintiffs and claimed further that the Ontario patents should not have been issued in view of the agreement of 1894, and that if the Ontario Government did not acquiesce in the selection of the reserves a commission should be appointed pursuant to the agreement sanctioned by the legislation of 1891.

Osler, Q.C., and *A. M. Stewart*, for the defendant E. B. Osler, said that they did not attack the surrender by the Indians in the treaty of 1873 or the subsequent surrender of 1886, but adopted them as interpreted by Lord Watson in the *St. Catherine's Milling Company* case; and contended that the effect of these surrenders was to free the Ontario title acquired under the British North America Act from the Indian interest and to enable the Province to enjoy the beneficial interest. In any event the precious metals belonged to the Province: *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas. 295.

J. M. Clark, Q.C., and *R. D. McPherson*, for the defendants Moyes, Ambrose, Brown, and Ewart, contended that the plaintiffs had in 1894, and again by their petition in 1897, admitted that the title was vested in the Province, and having submitted their claim to the arbitrament of the Commissioner of Crown Lands were now estopped from disputing the ownership of the Province; that whatever might be said as to the land the title of the Province to the precious metals was complete as the so-called Indian title being a personal usufructuary right never extended to the royal metals; that royalties were granted to the Province by section 109 of the British North America Act: *Attorney-General of Ontario* v. *Mercer* (1883), 8 App. Cas. 767, at p. 778; *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas. 295, at pp. 302 and 305; *The Esquimalt & Nanaimo R. W. Co.* v. *Bainbridge*, [1896] A. C. 561; *Wcolley* v. *Attorney-General of Victoria* (1877), 2 App. Cas. 163, at p. 166; Chitty's Prerogatives of the Crown pp. 145 and 146; that the land in question had been granted to the Province

Argument.

by section 109 of the British North America Act; this had been decided in the *St. Catherine's Milling Company* case, and also that the effect of the North-West Angle Treaty No. 3, was to divest the Indian interest so that after the treaty of 1873, the title of the Province was complete and the Dominion had no power or authority to set apart Indian reserves out of Ontario lands, or in any way to oust the vested rights of the Province; that the grant of legislative power to the Dominion did not give the Dominion any proprietary rights: Lefroy on Legislative Power in Canada, p. 594; Am. & Eng. Encyc. of Law, 2nd ed., vol. 10, p. 90.

A. W. Fraser, Q.C., and *W. D. McPherson*, for the defendant Seybold.

Biggs, Q.C., for the defendant E. Johnston, referred to in McPherson & Clark's Law of Mines in Canada, pp. 15, 26, and 275.

December 2nd, 1899. BOYD, C.:—

Under letters patent from Her Majesty as represented by the superintendent-general of Indian affairs under the great seal of Canada in 1889 and 1890, the plaintiffs claim to be owners in fee simple of lands situate in Sultana island in the Lake of the Woods, being formerly part of the Indian reserve known as "38 B., Lake of the Woods," but now surrendered and at present known as "A. C. McMicken's mining location," containing 35¾ acres, together with all minerals, precious and base, which may be found thereon; also other parts of the Indian reserve, 38 B., now surrendered and consisting at present of other mining locations, containing in all $35 + 40 = 75$ acres of land, with all minerals, precious and base, thereon. The said lands are part of the territory surrendered to Her Majesty by and under the North-West Angle Treaty No. 3, concluded on October 3rd, 1873, between her commissioners and the Saulteaux tribe of Indians then interested therein. Under the provisions of that treaty, certain lesser reserves in the larger territory surrendered, were to be

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defined and set aside and thereafter to be administered and dealt with by the Government of the Dominion for the benefit of these Indians. It was further provided in the treaty that the said particular reserves might be sold, leased, or otherwise disposed of by the Government of the Dominion for the use of the Indians, their consent being first obtained.

Pursuant to the North-West Angle Treaty No. 3, certain officials of the Dominion, after conference with the Indians, proceeded to set apart the smaller reserve, called "38 B.," for the benefit of the Rat Portage band of Indians, members of the Saulteaux tribe. The Rat Portage band about October 8th, 1886, surrendered to Her Majesty in pursuance of the Indian Act of 1880, 43 Vict. ch. 28, some 600 acres, containing the lands now in question and being part of reserve 38 B., in trust to sell the same upon such terms as the Government of Canada might deem most conducive to the welfare of the band, and to hold the proceeds in trust for the said Indians.

This is a short statement of the history of the land in question, which at the date of Confederation formed part of the unsurveyed waste lands of the Crown in north-western Ontario marching upon the present Province of Manitoba over which the Indian occupancy then extended. By the above series of transactions, the land has been patented by the Dominion to the plaintiffs, and is now claimed by them as against the defendants, who assert title in fee simple by virtue of letters patent issued by Her Majesty under the great seal of the Province of Ontario in 1899.

It is further alleged and proved (subject to objection) by the plaintiffs that in negotiating the said treaty of 1873 the commissioners represented to the treaty Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the particular reserves to be after delimited and undertook on behalf of the Crown that such minerals would be administered and sold for their use and benefit. Hence, the Government of

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Canada has dealt not only with the land, but also with the minerals (of which gold forms a conspicuous part) in conveying the property in question to the plaintiffs.

While the field of argument was somewhat comprehensive, it is enough to consider upon the present record the two main questions: (1) Whether the title in fee to the land can be validly conveyed by the letters patent issued by the Dominion; and (2) whether the Government of the Dominion has the right to deal with the minerals, especially the gold in Sultana island.

By way of clearing the ground it may be premised that the Government of the Dominion dealt with the Indians in 1873 under the supposition that all the territory being surrendered was outside of the boundary of Ontario and within the extra-provincial limits of Canada; and that in setting apart the special reserves, such as 38 B., and in accepting surrender of the part of "38 B." now in question, there was no official intervention on the part of the Province of Ontario, so that in substance the entire transaction was between the Indians interested and the representatives of the Dominion Government.

This is perhaps not very material at present, but I think it is the better conclusion not to hold Ontario as a Province bound by alleged acts of acquiescence on the part of various officers of the departments which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government, and are not manifested by any order in council or other authentic testimony. Loose and general evidence of conduct which might bind the individual, who is supposed to be on the alert to protect himself, ought not to be invoked as against a great political corporation that cannot be responsible for the acts or decisions of the many functionaries employed in the civil service: see *per* Strong, C.J., in *Black* v. *Reginam* (1899), 29 S.C.R., at p. 699. Agreeable to this view appears to be the condition of affairs contemplated by the two Governments in 1891, when the draft agreement proposed to be executed declared that the

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Government of Ontario was no party to the selection of the reserves, and had not yet concurred therein: see Dominion Act, 54-55 Vict. ch. 5, p. 80; and Ontario Act, 54 Vict. ch. 3, p. 8. And since 1891 matters have remained in this regard *in statu quo*.

Proceeding now to the legal questions involved, the starting point is from the decision in *St. Catherines Milling and Lumber Co.* v. *Reginam* (1888), 14 App. Cas. 46. The Privy Council there decides as to the Indian hunting grounds of the interior that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* whenever that title was extinguished or otherwise surrendered (p. 55). As to the portion in Ontario, it is decided that section 109 of the British North America Act gives to each Province, subject to the administration and control of its own Legislature the entire beneficial interest of the Crown in all lands within its boundaries (p. 57).

As to the treaty of 1873 with the Indians, it is decided that the substance of that transaction was a surrender, by which the estate of the Crown was disencumbered of the Indian title, and that the benefit of that surrender accrued to Ontario (pp. 59 and 60).

As to the Dominion after the treaty it is said that Ontario, taking the benefit of the surrender, must relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty and then partly fulfilled by the Dominion Government (p. 60).

As to the meaning of the British North America Act when dealing with property in public land it is declared whenever public land with its incidents is described as "belonging to" (section 109) the Dominion or a Province, these expressions merely import that the right to its beneficial use or to its proceeds has been appropriated to the Dominion or the Province as the case may be, and is subject to the control of its Legislature, the land itself being vested in the Crown (p. 56)

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As to the power of the Dominion in the case of Indians and lands reserved for Indians (section 91 (24)), it is decided that this was a bestowment of the exclusive power of legislation in order to ensure uniformity of administration as to all such lands and Indian affairs generally by one central authority, but that this was not inconsistent with the right of the Province to a beneficial interest in these lands available to them as a source of revenue whenever the estate of the Crown is relieved of the Indian title (p. 59).

And as to the scope of "lands reserved for Indians," it is laid down that the phrase is sufficient to include all lands reserved upon any terms or conditions for Indian occupation (p. 59). That is to say, the expression is to be traced back to the Royal Proclamation of 1763, is not to be limited to reserves set apart under the provisions of a treaty, but is of larger scope covering all wild and waste lands in which the Indians continue to enjoy their primitive right of occupancy even in the most fugitive manner. But no doubt the phrase does include a treaty reserve such as "38 B." (See *Spalding* v. *Chandler* (1896), 160 U. S. R. at p. 403.)

Over this reserve, 38 B., the Dominion had a right to exercise legislative and administrative jurisdiction—while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the Province of Ontario. The treaty land was, in this case, set apart out of the surrendered territory by the Dominion: that is to say, the Indian title being extinguished for the benefit of the Province, the Dominion assumed to take of the Provincial land to establish a treaty reserve for the Indians. Granted that this might be done, yet when the subsequent surrender of part of this treaty reserve was made in 1886, the effect was again to free the part in litigation from the special treaty privileges of the land and to leave the sole proprietary and present ownership in the Crown as representing

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the Province of Ontario. That is the situation as far as the title to the lands is concerned.

What then is the effect of the understanding and arrangement as between the Indians and the Dominion Government acting in the surrender of 38 B.? The Indians surrendered for the purpose of sale, and that they might enjoy the proceeds of sale as a band. The method of sale and by whom conducted was of minor moment so long as an adequate price was obtained. Upon this aspect of the case no evidence has been adduced as to any of the property under either letters patent. I assume that no complaint exists as to either sale in this regard.

As a matter of title I think no estate in fee simple could pass to the lands except from the Crown as represented by the Ontario Government. In that Province the proprietary interest was lodged freed from Indian claim by the effect of the surrender, and it does not appear to be competent for the Dominion to act in the sale and conveyance, as if the Crown held in behalf of Canada. The act of the Dominion appears to have arisen from the belief that the exclusive power to legislate as to Indian reserves given by the British North America Act conferred such plenary form of control as to amount virtually to exclusive ownership. But the Privy Council negatives that view and in a case later than the *St. Catherine's* case, the distinction is defined as carefully as seems possible by Lord Herschell in *Attorney-General of Canada* v. *Attorney-General of Provinces* (Fisheries case), [1898] A. C. 700. I make some extracts, "It must be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. * * There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament, proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act of 1867. Whatever proprietory rights were at the time of passing that Act, possessed by the Provinces, remain vested in them except such as are by any of its express enactments transferred to

the Dominion of Canada," pp. 709, 710. And again, "Whatever grants might previously have been lawfully made by the Provinces in virtue of their proprietary rights could lawfully be made after that enactment (section 91) came into force. At the same time it must be remembered that the power to legislate * * does necessarily, to a certain extent, enable the Legislature so empowered to affect proprietary rights. * * The extent, character and scope, of such legislation, is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected. If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordship's opinion is not an exercise of the legislative jurisdiction conferred by section 91. If the contrary was held it would follow that the Dominion might practically transfer to itself property which has by the British North America Act been left to the Provinces and not vested in it:" *ib.*, pp. 712, 713.

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I am not called upon to deal with any legislation of the Dominion relating to Indians and Indian reserves. No particular statute or enactment was pointed to as directing or justifying the issue of letters patent in this case by the Dominion. Such an Act would be a literal confiscation of provincial property and would transcend the power of the Dominion, because the proprietary right of the Province attaching upon these lands cannot be at the same time lodged in the Dominion so as to enable Canada to convey the proprietary ownership of this land to the plaintiffs.

The true method of both governments, however, appears to be not to stand at arm's length, but to engage in a joint or tripartite transaction whereby the rights of the Indians

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will be secured through the intervention of their protector, the central government, and the interests of Ontario guarded in respect to the ultimate enjoyment of the proceeds of the surrendered land in case the band of Indians cease to exist. Such a combination of parties is also desirable in order that the land may be sold to the satisfaction of the Indians and on proper terms. It is the business of the Dominion to protect the interests of the Indians and to see that the best price is obtained for the land, and so far as the price is concerned that is also the concern of Ontario. The price goes to the Dominion to be administered for the benefit of the Indians so long as a man or a successor of the tribe exists. But if any of the fund remains without any Indian claimant properly entitled, then Ontario is entitled to that residue because then the interest of the Indians will have ended and with that the right of supervision and administration on the part of the Dominion.

The question is left open in the *St. Catherine's Milling and Lumber Company* case (1888), 14 A. C. 46, as to "other questions behind," *i.e.*, with respect to the right to determine to what extent and at what periods the territory over which the Indians hunt and fish, is to be taken up for settlement and other purposes. I infer that these rights will be transacted by means of and upon the intervention of both general and local governments, although the central government may choose to deal *ex parte* with the Indians for the extinction of their claims to land. Still it appears preferable, for the sake of the Indians themselves, as well as for present and future peace, that the allocation of particular or treaty reserves as well as the sales of surrendered lands should be upon conference with the band and with the approval and co-operation of the Crown in its dual character as represented by the general and the provincial authorities.

The Indian Act in force at the time the letters patent were granted to the plaintiff, R. S. C. ch. 43, in its enactments as to "reserves and the sale of reserves," is

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appropriate to the case of public lands belonging to the Dominion of Canada, but does not seem to provide for cases like the present, where the territory is the property of Ontario. (See secs. 41 and 45, *et seq.*)

Somewhat different considerations apply to the right to deal with the precious metals (gold and silver) so far as the land in question is concerned. According to the law of England and of Canada, gold and silver mines, until they have been aptly severed from the title of the Crown are not regarded as *partes soli* or as incidents of the land in which they are found. The right of the Crown to waste lands in the colonies and the baser metals therein contained is declared to be distinct from the title which the Crown has to the precious metals which rests upon the royal prerogative. Lord Watson has said in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas., at pp. 302, 303, the seprerogative revenues differ in legal quality from the ordinary territorial rights of the Crown. These prerogative rights, however, were vested in Canada prior to the Confederation by the transaction relating to the civil list which took place between the Province and Her Majesty—the outcome of which is found in 9 Vict. ch. 114, a Canadian statute, which, being reserved for the royal assent, received that sanction in June, 1846. The hereditary revenues of the Crown, territorial and others then at the disposal of the Crown, arising in the United Province of Canada, were thereby surrendered in consideration of provisions being made for defraying the expenses of the civil list. So that while the Crown continued to hold the legal title the beneficial interest in them as royal mines and minerals, producing or capable of producing revenue, passed to Canada. And being so held for the beneficial use of Canada they passed by section 109 of the British North America Act to Ontario by force of site: see *Attorney-General* v. *Mercer* (1883), 8 App. Cas., at p. 773.

Now with these royal mines, the Indians had no concern. Whatever their claim might be to the waste

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lands of the Crown, and hunting and fishing thereon, it was never recognized that they extended to the gold and silver of the country.

Having no interest in the gold and silver they could surrender nothing. The Dominion Government in dealing with these particular Indians in 1873, had no proprietary interest in the gold and silver and could make no valid stipulation on that subject with the Indians which would affect the rights of Ontario. The Indians are not in any way represented in this litigation, and I do not and could not prejudice their claims against any government by what I now decide. The stipulations on the face of the treaty do not deal with the precious metals, but even if it is competent to go behind the treaty, still it remains that the Indians had no interest, and the Dominion had no competence *quoad* these royal mineral rights. It would appear, therefore, to be a proper result from this state of affairs that while the Dominion would be interested in seeing that a proper return was obtained for land and baser minerals—they would have nothing to say as to the terms and price for which the Province should dispose of the precious minerals.

My conclusion in the matter of title is in accord with the opinion of Mr. Justice Rose as expressed in the unreported case of *Caldwell* v. *Fraser*, * and is not at variance with the judgment of the Court of Queen's Bench in Quebec in *Attorney-General of Canada* v. *Attorney-General of Quebec* (1897), Q. O. R. 6 Q. B. 12.

For reasons given in the foregoing pages, I think the plaintiffs' action should be dismissed with costs — the letters patent issued by the Dominion being invalid.

A. H. F. L.

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* See McPherson & Clark's Law of Mines in Canada, at p. 15; Amer. & Eng. Encycl. of Law, 2nd ed., at p. 91.—Rep.

The judgment is also sustainable upon another ground, viz., that the verdict of the jury declaring that there was no ground of action was in effect a finding that the words were not defamatory. Judgment. Boyd, C.

The motion will be dismissed with costs.

FERGUSON, J., concurred.

E. B. B.

[DIVISIONAL COURT.]

ONTARIO MINING CO. V. SEYBOLD ET AL.

Constitutional Law—Indian Lands—Surrender—Treaty—Crown Patent—Precious Metals—Acquiescence.

The judgment of BOYD, C., 31 O.R. 386, affirmed on appeal.

THIS was an appeal by the plaintiffs from the judgment of BOYD, C., 31 O.R. 386, dismissing with costs an action for a declaration that by virtue of letters patent issued by the Government of the Dominion of Canada to the predecessors in title of the plaintiffs, the latter were entitled to the lands in question, which were part of Sultana island in the Rainy River district, and also to set aside the letters patent issued by the Government of the Province of Ontario to the defendants, and for an injunction and other incidental relief. The facts are stated in the report referred to. Statement.

The appeal was heard by a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 7th June, 1900.

Robinson, Q.C., *Laidlaw*, Q.C., and *J. Bicknell*, for the plaintiffs.

Biggs, Q.C., *J. M. Clark*, Q.C., *R. U. Macpherson*, and *A. M Stewart*, for the several defendants.

Statement.

Shortly after the hearing and before judgment was delivered, ARMOUR, C.J., having been appointed Chief Justice of Ontario, and FALCONBRIDGE, J., Chief Justice of the Queen's Bench in his stead, the parties to the action filed a consent that the judgment of FALCONBRIDGE, C.J., and STREET, J., should be accepted as the judgment of the Court.

December 12, 1900. FALCONBRIDGE, C.J.:—

For the reasons given in the judgment of the learned Chancellor, 31 O.R. 386, which I adopt, I am of the opinion that this case was well decided, and I think the appeal must be dismissed with costs.

STREET, J.:—

The judgment of the Judicial Committee of the Privy Council in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46, has plainly decided that under the terms of the British North America Act, sec. 109, the lands in question in the present action became at Confederation the property of the Province of Ontario, subject to the Indian title, as explained and defined in that judgment. It is further explicitly there held that the surrender by the Indians in the Treaty of 1873 had the effect of extinguishing the Indian title, and not of transferring it to the Government of the Dominion.

The plaintiffs in the present action claim title under a patent issued in the year 1888 by the Government of the Dominion of Canada, and the authority of that Government to deal with the land in question is asserted to be derived, under the facts of this case, from the exclusive power reserved to the Dominion Parliament to pass laws relating to "Indians and lands reserved for Indians:" see B. N. A. Act, sec. 91, sub.-sec. 24. The state of facts existing in the present case which did not exist in the *St. Catherine's Milling Company Case* is as follows. In 1879

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it appears that certain officers of the Dominion Government set aside the lands in question herein with other lands (being a part of the tract covered by the Treaty of 1873), as a special reserve for the Rat Portage band of Indians. This was done in pursuance of the promise on the part of Her Majesty the Queen, contained in the Treaty, to select and set aside a limited but unascertained portion of the lands affected by the Treaty as a special reserve for the benefit of the Indians who were parties to it. Then, by the Indian Act of the following year, 43 Viet. ch. 28, passed by the Dominion Legislature, provision was made for the surrender by Indians of lands specially held as reserves for them, and for the sale by the Dominion Government, for the benefit of the Indians so surrendering, of the surrendered Reserves. In 1886 the Rat Portage band of Indians accordingly surrendered the portion of land which had been specially set apart for them as above mentioned, and in the year 1888 the Dominion Government sold and conveyed the land now in question to the predecessors in title of the plaintiffs.

The plaintiffs' argument from these facts, and from clause 91 (24) of the B. N. A. Act, then is, that we have a legislative authority given to the Dominion Government, to deal with "lands reserved for Indians;" we have certain lands reserved for Indians; we have an Act of the Dominion Legislature authorizing their sale; and we have a sale in pursuance of that Act, under which the plaintiffs claim title.

The obvious defect in this argument, of course, is, that we are bound to hold, under the judgment of the Privy Council, that, upon the surrender of the Indian title effected by the Treaty of 1873, these lands became the property of the Government of the Province of Ontario, in which they were situate. The surrender was undoubtedly burdened with the obligation imposed by the Treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The

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Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it; but it is equally plain that its ownership of the tract of land covered by the Treaty was so complete as to exclude the Government of the Dominion from exercising any power or authority over it. The act of the Dominion officers, therefore, in purporting to select and set aside out of it certain parts as special reserves for Indians entitled under the Treaty, and the act of the Dominion Government afterwards in founding a right to sell these so-called reserves upon the previous acts of their officers, both appear to stand upon no legal foundation whatever. The Dominion Government, in fact, in selling the land in question was not selling "lands reserved for Indians," but was selling lands belonging to the Province of Ontario.

The contention that the Provincial Government must be taken to have assented to the setting aside of these reserves does not appear to be borne out by the facts. An Act of the Provincial Legislature passed in 1891, ch. 3, 54 Vict., sets forth a proposed agreement in which it is expressly declared that the Province was no party to the selection of these reserves and has not concurred therein. Again in April, 1894, the proposed agreement, when executed by the two Governments of the Dominion and the Province, contains the same declaration. There is nothing since that date but controversy between all parties interested—nothing indicating an assent on the part of the Provincial Government to be bound by the action of the Dominion officers in selecting these reserves.

With regard to the claim of the plaintiffs to the right to deal with the precious metals contained in the lands in question, the reasons given by the Chancellor in dealing with that part of the case cover the ground so entirely that it seems unnecessary to do more than to express con-

currence in the reasons as well as in the result to which they lead. Judgment. Street, J.

Appeal dismissed with costs.

E. B. B.

PARKER V. TORONTO MUSICAL PROTECTIVE ASSOCIATION.

Trade Union—Expulsion of Member—Articles of Association—By-law in Restraint of Trade—Illegality—Militia Act.

The plaintiff, a musician and a member of the Active Militia of Canada and of the band of a militia regiment, became a member of the defendant association, a body incorporated under the Friendly Societies and Insurance Corporations Act, whose object was "to unite the instrumental portion of the musical profession for the better protection of its interests in general and the establishment of a minimum rate of prices to be charged by members of the said association for their professional services, and the enforcement of good faith and fair dealing between its members, and to assist members in sickness and death." After the plaintiff had become a member, the defendants adopted and added as part of one of their articles of association the following: "No member of this association shall play on any engagement with any person who is playing an instrument, unless such person can shew the card of this association in good standing. This by-law shall not apply to oratorio or symphony concerts, bands doing military duty, or amateurs. . . ." After the passing of this by-law, the plaintiff and the other members of the regimental band to which he belonged played at a concert, in uniform, under the direction of the bandmaster, and with the permission of the commandant and officers of the regiment. For so playing (some of the band not being members of the association) a fine was imposed on the plaintiff by the executive committee of the defendants, and, in consequence of its not being paid within the time prescribed, he was expelled from membership:—

Held, that, at the time the plaintiff joined the association, it was a legal society, its objects being of a friendly and provident nature; but the amendment was unreasonable and in restraint of trade, and for that reason, and also because contrary to the Queen's Army Regulations and the Militia Act of Canada, was illegal, and the plaintiff's expulsion was invalid, and he was entitled to an injunction and damages.

Rigby v. *Connol* (1880), 14 Ch.D. 482, *Mineral Water Bottle, etc., Society* v. *Booth* (1887), 36 Ch.D. 465, *Swaine* v. *Wilson* (1889), 24 Q.B.D. 252, and *Chamberlain's Wharf, Limited* v. *Smith*, [1900] 2 Ch. 605, considered.

THIS was an action for an injunction and damages, tried before MACMAHON, J., without a jury, at Toronto, on the 8th October, 1900. The facts are stated in the judgment. Statement.

F. E. Hodgins, for the plaintiff.

E. F. B. Johnston, Q.C., for the defendants.