NATIVE LAW

VOLUME NO. 2a

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Montréal
—
1924
—
Patton
et vir
et autres
v.
Héritiers
de feu M.
Allen
et
Giasson.

Attendu que la demanderesse revendique un immeuble situé dans la réserve de Caughnawaga, district de Montréal, faisant partie du lot No. 1 sur les plan et livre de renvoi officiels du Domaine de la Seigneurie du Sault St-Louis et allègue que: par acte sous seing privé en date du 23 mai 1890, le père de la demanderesse, dont elle est la légataire universelle, a vendu ce terrain au mis en cause, et allègue de plus que cette vente est nulle pour le principal motif que ce terrain a été vendu sans l'approbation du surintendant général des affaires des sauvages;

Attendu que les défendeurs ont plaidé que cette affaire avait été portée devant le Département des Affaires Indiennes, lequel a jugé en faveur des défendeurs, et que cette Cour est en conséquence incompétente;

Considérant que par l'article 30, de la loi des Sauvages, chap. 81 S. R. C., 1906, une personne ne peut être considérée comme propriétaire à titre d'héritier ou de légataire d'une terre située dans une réserve avant d'avoir obtenu un titre du Surintendant Général des affaires des Sauvages; que la demanderesse a fait une réclamation pour se faire connaître comme héritière de ce terrain, laquelle réclamation a été rejetée par le surintendant; que conséquemment la demanderesse n'a pas le droit de demander à cette Cour de la déclarer héritière ou légataire de cette terre dans la réserve.

Considérant que le père de la demanderesse pouvait vendre à Giasson; que cette vente était sujette à l'approbation du Surintendant Général, disposition qui a pour but évident d'empêcher que la propriété d'une partie de la réserve passe à un acheteur qui n'a pas le droit d'acquérir; que le Surintendant Général est encore à temps pour donner son approbation; que la nullité résultat de l'article 23 est une nullité relative que le vendeur ne peut invoquer pas plus que la nullité de la vente de la chose d'autrui, article 1487 C. C.

Considérant que d'après le droit commun la demanderesse garante comme son auteur, ne peut évincer l'acheteur;

Pour ces motifs, déboute la demanderesse de son action avec dépens.

Montréal
—
1924
—
23 juin.

SAURIOL demandeur *v.* CHARBONNEAU, défendeur.

Vente dans le commerce — Défaut de livrer — Inexécution — C. C., 1070.

Le défaut d'expédier et livrer au commerçant qui l'a achetée, la marchandise (le bois) promise à ce dernier constitue une inexécution d'obligation qui ouvre à l'acheteur le recours de l'action en dommages pour le préjudice subi, la preuve testimoniale du contrat verbal intervenu étant dans ce cas permise[1].

JUGEMENT. La Cour, après avoir entendu les parties, par leurs avocats, sur le mérite de la présente cause, avoir examiné la procédure. les pièces produites, entendu la preuve et avoir délibéré

Statuant au mérite:—

Considérant qu'il ressort du dossier que le demandeur réclame du défendeur des dommages-intérêts à raison de la violation d'un contrat intervenu entre le demandeur et le défendeur, au cours du mois d'octobre 1922, les dits dommages-intérêts représentés en sa déclaration par deux items, dont l'un 1o. de $210.00 représentant le surplus par lui payé sur 70 cordes de

M. le juge Mercier.—Cour supérieure.—No 4811.—Guérin, Renaud & Cousineau, avocats du demandeur.—J.-E.Lafontaine, avocat du défendeur.

1. Autorités du défendeur.—*Guernon & Lacombe*, 4 R. L., 335; *Taillon & Taillon*, 13 R. L., n. s., p. 90; *Goldberg* v. *Dom. Woollen Co.*, 1 Com. L. R., p. 45.

Autorités du demandeur:—6 Mignault, p. 64; *Gagné & vir* v. *Gagné & Mongeau*, 23 R. J., p. 384; *Odell* v. *Larigueur*, 32 C. S., p. 99; *Fuller & Moreau*, M. L. R., 5 C. S., 121.

ST. ANN'S ISLAND SHOOTING AND FISHING CLUB LIMITED.. } APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1949
*Nov. 7
1950
*Feb. 21

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Indian Lands, Lease of—Direction of Governor in Council mandatory—Failing authorization by Order in Council lease void—The Indian Act, R.S.C. 1906, c. 81, ss. 51, 64.

Section 51 of the *Indian Act*, R.S.C. 1906, c. 81, provides that all Indian lands which are reserves or portions of reserves surrendered to His Majesty, shall be deemed to be held for the same purposes 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 Part I of the Act.

Held: That the language of s. 51 is mandatory, and in the absence of direction by the Governor in Council, a lease of Indian lands is invalid.

In the case at bar the original lease, having been approved by Order in Council, was a valid one but such approval terminated with the said lease. As to the subsequent leases, they lacked authorization by Order in Council and consequently were void.

APPEAL from a decision of the Exchequer Court, Cameron J. (1), whereby an action brought by the appellant for a declaration of right to a renewal of a lease of surrendered Indian lands, was refused.

The appellant in 1880 secured from the Council of the Chippewa and Pottawatomie Indians of Walpole Island a lease of part of their reserve, St. Ann's Island, for shooting and fishing for a term of five years and renewable for a like term but reserving to the said Indians their right to shoot and fish the leased area. The appellant having raised the question as to whether the lease was a valid one under the *Indian Act*, a formal surrender of the leased lands was made by the Indians to the Crown and an Order in Council was passed approving the surrender and confirming a lease from the Superintendent General of Indian Affairs to the appellant for a term of five years renewable for a like term. From 1884 to 1925 several further leases were entered into between the same

*PRESENT:—Kerwin, Taschereau, Rand, Estey and Locke JJ.

(1) [1949] 2 D.L.R. 17.

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parties. Some contained no provision for renewal, some varied the terms of the original lease as to the amount of land, and the terms of payment. The 1925 lease excluded the Indians from shooting or fishing on the leased property and reserved that right to the appellant alone. It also provided for a term of 20 years with the right of renewal for further successive terms of ten years at rentals to be fixed by arbitration. In 1944 the appellant gave notice to the Superintendent General of Indian Affairs of its intention to renew the lease but he refused to grant such renewal or to admit that the lessee was entitled thereto. The matter was subsequently under the provisions of s. 37 of the *Exchequer Court Act*, referred to that Court for adjudication.

A. S. Pattillo and *J. A. Macintosh, K.C.*, for the appellant.

Lee A. Kelley, K.C., and *W. R. Jackett, K.C.*, for the respondent.

KERWIN J.:—I would dismiss this appeal. It is unnecessary to consider that part of the reasons for judgment of the trial judge (1) dealing with the argument that the Crown was estopped from denying the validity of the tenancy of the appellant since counsel for the appellant stated that he did not now advance any such claim. As to the other points, I agree with the trial judge.

During the argument a question was asked as to whether a contention could be advanced that the surrender "to the end that said described territory may be leased to the applicants for the purpose of shooting and fishing for such term and on such conditions as the Superintendent of Indian Affairs may consider best for our advantage", was really a surrender upon condition, and that if the condition were not fulfilled the land would revert. It was suggested in answer thereto that this would not assist the appellant and this was made quite clear by Mr. Jacket when he pointed to ss. 2 (*i*) and (*k*), 19, 48 and 49 of the *Indian Act*, c. 81, R.S.C. 1906. If by some means the lands again became part of the reserve, then s. 49 would apply and, except as in Part I otherwise provided, no

(1) [1949] 2 D.L.R. 17.

release or surrender of a reserve or a portion thereof shall be valid or binding unless the release or surrender complies with the specified conditions.

The determination of the case really depends upon s. 51 of the Act. These lands were Indian lands which had been surrendered and, therefore, in the wording of the section "shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this part." Mr. Jacket pointed out that counsel for the appellant wanted s. 51 to be read as if the words "subject to the conditions of surrender and the provisions of this part" preceded "all Indian lands, etc. * * * ", thus inserting those words, which now appear at the end, at the very commencement, and without taking into consideration the fact that the two parts of the section are separated by a semi-colon. Reference was also made to s. 64 but the collocation of the word "deed" with "lease or agreement" shows that a surrender could not be included under the word "deed".

The trial judge answered the question in the negative and dismissed the claim with no costs to either the claimant or the respondent but there is no reason why costs in this Court should not go against the unsuccessful appellant.

The judgment of Taschereau and Locke JJ. was delivered by:—

TASCHEREAU J.:—By Petition of Right filed in December, 1945, the suppliant-appellant claimed that it was entitled to a renewal of a lease of certain premises, from the Superintendent General of Indian Affairs, dated May 19, 1925. The first document to which we have been referred is a resolution dated March 18, 1880, adopted by the Council of the Chippewa and Pottawatomie Indians of Walpole Island, purporting to authorize an original lease to the St. Ann's Shooting and Fishing Club, of St. Ann's Island. Pursuant to this resolution, the Superintendent General of Indian Affairs executed the lease on May 30, 1881, "for the purpose of shooting over the

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Taschereau J.

same and angling and trawling in the waters thereof" for a period of five years, renewable on its expiration for a like term.

Following the execution of this lease, the officers of the Club raised certain questions as to the validity of the lease, and more particularly as to whether there had been a surrender of the lands as required by the *Indian Act* of 1880, an acceptance thereof by the Governor General in Council, and finally, an Order in Council authorizing the lease. A further meeting of the Indians was therefore held in February, 1882, and a formal surrender was executed in due form, and on the 24th of February of the same year, the Indian Superintendent at Sarnia wrote to the Club that for the purpose of the lease, a formal surrender had been given, and that the defect in the preliminary proceedings had been remedied. In April, 1882, Order in Council No. 529 was passed purporting to accept the surrender, and on the 18th of April, the Department again advised the Club that the surrender had been accepted, and that the lease had been confirmed by the said Order in Council.

In 1884, 1892, 1894, 1906 and 1915, new leases were entered into between the same parties, but only those of 1894, 1906 and 1915 contained provisions for renewal. In all these leases, except the first one, trustees signed the agreements with the Superintendent General, on behalf of the St. Ann's Island Shooting and Fishing Club.

In May, 1925, the Superintendent General of Indian Affairs signed a new lease with Geoffrey T. Clarkson and Walter Gow, acting as trustees for the St. Ann's Island Shooting and Fishing Club Limited, and it provided that the lessees should be entitled on the expiration of the term granted, to renewals for further successive periods of ten years at rentals to be fixed by arbitration.

The lessees have been in possession of the lands in question since 1881, and have expended substantial amounts for the permanent improvement of their facilities as a hunting and fishing club, including the erection of a club house and other buildings and the opening up of ditches and canals. On September 4, 1945, Geoffrey T. Clarkson and Walter Gow assigned their interest in the lease to the appellant.

Some correspondence was then exchanged between the Department of Indian Affairs and the Club, as to the renewal of the lease, but as the parties could not agree, it was therefore decided that the question should be referred to the Exchequer Court of Canada for adjudication. Pursuant to the dispositions of the general rules and orders of the Court, the appellant filed a statement of claim on December 17, 1945, and asked for a declaration that the Club was entitled to a renewal of the lease dated May 19, 1925, for a further term of ten years, and subject to the stipulations and provisions contained in the lease of May 19, 1925, save as to rental. The claimant also asked that the annual rent to be paid during the term of the renewal of the lease, from October 1, 1944, to September 30, 1955, be determined by the judgment, instead of by arbitration.

Mr. Justice Cameron, before whom the matter came, reached the conclusion that as the lease of 1925 was never authorized by Order in Council, it was, as well as the provisions for renewal, wholly void.

These lands in question were formerly part of a "Reserve" for the use or benefit of the Chippewa and Pottawatomie Indians of Walpole Island, and there is no doubt that they could not be originally leased in May, 1881, to the predecessors of the appellant, unless they had been *surrendered* to the Crown. The effect of a surrender is to make a reserve or part of a reserve, "Indian Lands", defined in section 2 of the *Indian Act*, para. (*k*) as "any reserve or portion of a reserve which has been surrendered to the Crown".

The necessary surrender was made as a result of the meeting held by the Indians in February, 1882, and which was accepted by Order in Council No. 529 in April of the same year. This Order in Council reads as follows:—

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 3rd April, 1882.

On a Memorandum, dated 7th March 1882, from the Superintendent General of Indian Affairs, submitting for acceptance by Your Excellency in accordance with the provisions of the *Indian Act* 1880, Section 37, Subsection 2, a Surrender, dated 9th February 1882, made to the Crown by the Chippewa and Pottawatomie Indians of Walpole Island, of that portion of their Reserve known as "St. Ann's Island" and the marshes adjacent thereto, for the purpose of the same being leased for the

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benefit of said Indians to the "St. Ann's Island Shooting and Fishing Club" for shooting and fishing purposes, and in confirmation of a lease covering said premises issued by this Department on the 30th of May, 1881, to the aforesaid "St. Ann's Island Shooting and Fishing Club".

The Committee advise that the surrender be accepted and submit the same for Your Excellency's approval.

It followed that St. Ann's Island became "Indian Land", and in view of s. 51 of the *Indian Act*, could be leased or sold only with the approval of the Governor General in Council. This s. 51 reads as follows:—

> All Indian lands which are reserved 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.

It is argued on behalf of the appellant that the effect of P.C. 529 is not only to accept the surrender of the lands to the Crown, and to confirm the original lease of May 1881, but also to authorize the Superintendent General of Indian Affairs, to enter into further agreements with the appellant, as he did.

I am unable to agree with this contention. When the Indians surrendered the lands to the end that said described territory may be leased to the applicants, * * * "for such terms and conditions as the Superintendent General of Indian Affairs may consider best for our advantage * * *", the lease with the appellant had then been signed, and the terms of the surrender indicate that its contents were known to all. The object of the surrender was to legalize what was rightly thought to be illegal, and to ratify what had been done. The same may be said of the Order in Council. But neither the authorization to the Superintendent in the surrender, nor P.C. 529 can be construed in my opinion as authorizing the Superintendent at the expiration of the lease, to enter into fresh agreements with the appellant nearly fifty years later, and in which can be found different conditions. When this lease came to an end, P.C. 529 which had authorized it, had served its particular purpose and a new one was therefore needed, in view of the imperative terms of s. 51, to vest in the Superintendent the necessary authority to lease these lands anew.

In view of the declaration of counsel for the appellant that he does not rely on the point raised in the court

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below, that the respondent is estopped from denying the validity of the tenancy of the claimant, it is unnecessary to deal with it.

The appeal should be dismissed with costs.

The judgment of Rand and Estey JJ. was delivered by

RAND J.:—The question in this appeal is whether what purports to be a lease executed by the Superintendent General of Indian Affairs to the predecessor trustees of the appellant became binding on the Dominion Government. It was made in 1925 for the term of twenty years with an option for "renewal leases * * * for successive periods of ten years" and was the last of a succession between the same parties dating from 1881. It covers certain lands and waters within an Indain reservation, and was given primarily for fishing and hunting purposes, although not so expressly restricted.

The matter originated in a resolution passed on March 18, 1880, by the Indian Band Council authorizing the letting of what was known as St. Ann's Island to trustees for the St. Ann's Island Shooting and Fishing Club on terms approved by the Council, which was followed by a document signed by the Superintendent General dated May 30, 1881. The term was for five years from May 1, 1881, renewable for a like period; and it was provided that the lands and any buildings erected on them would at the "end, expiration, or other determination" of the lease or renewal be yielded up without any allowance being made for improvements.

Under the *Indian Act* of 1880, a surrender of the Indian interest was required before an effective lease could be made. On February 6, 1882, as a result of enquiries made by the lessees, at a meeting of the Band, an instrument was signed on its behalf which, after referring to the resolution of March 18, 1880, formally surrendered the lands to Her Majesty "to the end that said described territory may be leased to the applicants for the purpose of shooting and fishing for such term and on such conditions as the Superintendent General of Indian Affairs may consider best for our advantage." Then following a

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recital that an executed lease had been read and explained, it declared approval of its terms and the confirmation of its execution by the Superintendent General.

The surrender was accepted by a minute of the Privy Council approved by the Governor General on April 3, 1882 (P.C. 529) as follows:—

> On a Memorandum, dated 7th March 1882, from the Superintendent General of Indian Affairs, submitting for acceptance by Your Excellency in accordance with the provisions of the *Indian Act*, 1880, Section 37, Subsection 2, a Surrender, dated 9th February 1882, made to the Crown by the Chippewa and Pottawatomie Indians of Walpole Island, of that portion of their Reserve known as "St. Ann's Island" and the marshes adjacent thereto, for the purpose of the same being leased for the benefit of said Indians to the "St. Ann's Island Shooting and Fishing Club" for shooting and fishing purposes, and in confirmation of a lease covering said premises issued by this Department on the 30th of May, 1881, to the aforesaid "St. Ann's Island Shooting and Fishing Club".
>
> The Committee advise that the surrender be accepted and submit the same for Your Excellency's approval.

The first lease was superseded by another executed in 1884, which in turn was followed by others in 1892, 1894, 1906, 1915 and finally by that now in question. In those of 1884 and 1892 there was no provision for renewal, but an option to renew for ten years was contained in the instruments of 1894, 1906 and 1915.

Section 51, R.S.C. 1906, c. 81 (the *Indian Act*) provided:—

> All Indian lands which are reserved 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.

Cameron J., before whom the Reference made by the Minister under s. 37 of the *Exchequer Court Act*, came, construed the surrender to be absolute but held that s. 51 required for the validity of the lease of 1925 that it should have been directed by the Governor in Council, and, as admittedly no other Order in Council than No. P.C. 529 of April 3, 1882 had been made, found it void.

The contention of the appellant is that the surrender was on the condition that the lands should thereafter be subject to a right of leasing by the trustees, on terms satisfactory to the Superintendent General, which, if not perpetual, would continue so long as the Superintendent General determined; that by acceptance of the surrender

the condition became fixed and without more or by virtue of s. 64 of the Act, the Superintendent General became competent thereafter to deal with the lands in relation to the Club as he might consider for the benefit of the Band.

I find myself unable to agree that there was a total and definitive surrender. What was intended was a surrender sufficient to enable a valid letting to be made to the trustees "for such term and on such conditions" as the Superintendent General might approve. It was at most a surrender to permit such leasing to them as might be made and continued, even though subject to the approval of the Superintendent General, by those having authority to do so. It was not a final and irrevocable commitment of the land to leasing for the benefit of the Indians, and much less to a leasing in perpetuity, or in the judgment of the Superintendent General, to the Club. To the Council, the Superintendent General stood for the government of which he was the representative. Upon the expiration of the holding by the Club, the reversion of the original privileges of the Indians fell into possession.

That there can be a partial surrender of the "personal and usufructuary rights" which the Indians enjoy is confirmed by the *St. Catherine's Milling Company Limited* v. *The Queen* (1), in which there was retained the privilege of hunting and fishing; and I see no distinction in principle, certainly in view of the nature of the interest held by the Indians and the object of the legislation, between a surrender of a portion of rights for all time and a surrender of all rights for a limited time.

But I agree that s. 51 requires a direction by the Governor in Council to a valid lease of Indian lands. The language of the statute embodies the accepted view that these aborigenes 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.

But the circumstances here negative any delegation of authority. The Order in Council approved a lease for a

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

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definite period on certain stipulations; by its terms, it would come to an end, even with renewal, within ten years; and the efficacy of the Order was exhausted by that instrument.

It was argued that the Crown is estopped from challenging the lease, but there can be no estoppel in the face of an express provision of a statute; *Gooderham & Worts Limited* v. *C.B.C.* (1), and *a fortiori* where the legislation is designed to protect the interests of persons who are the special concern of Parliament. What must appear —and the original trustees were well aware of it—is that the lease was made under the direction of the Governor in Council, and the facts before us show that there was no such direction.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Blake, Anglin, Osler & Cassels.*

Solicitor for the respondent: *F. P. Varcoe.*

1949

*Oct. 4, 5, 6, 7, 11, 12

1950

*Feb. 21

SUN LIFE ASSURANCE CO. OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Assessment—Municipal—Office building partly owner and partly tenant occupied—Actual value—Exchangeable value—Prudent investor—Replacement cost—Commercial value—Non-productive features.

In the municipal assessment of a very large office building in Montreal, which is approximately 50 per cent owner-occupied and the remainder rented, and whose size, design and particular architectural features make it impossible to be compared with any other building in that city,

* PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

(1) [1947] A.C. 66; [1947] 1 D.L.R. 417.

BETWEEN:

ST. ANN'S ISLAND SHOOTING AND FISHING CLUB LIMITED..... } CLAIMANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1948
Nov. 29, 30
1949
Jan. 26

Crown—Indian Act R.S.C. 1906, c. 81, ss. 51 and 64—Non-compliance with requirements of Act—Authorizing Order in Council as required by Act not passed—Lease invalid without authorizing Order in Council—Superintendent General of Indian Affairs not authorized to enter into a lease—No estoppel against the Crown herein.

Claimant asks for a declaration that it is entitled to a renewal of a lease of Indian lands made between the Superintendent General of Indian Affairs and certain trustees pursuant to a renewal clause therein.

Held: That s. 64 of the Indian Act R.S.C. 1906, c. 81, did not confer on the Superintendent General of Indian Affairs original authority to enter into a lease of surrendered Indian lands as he was only the official named to complete those matters, such as execution of a lease, for which a valid authority existed; that s. 51 of the Act requires an Order in Council as the necessary preliminary to the validity of the lease entered into and no such Order in Council referable to that lease was passed at any time.

2. That the Crown is not estopped by anything that has been said or done by its officers or servants from alleging non-compliance with the Statute.

REFERENCE by the Minister of Mines and Resources of a question of law for the opinion of the Court.

The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

A. S. Pattillo and *J. A. MacIntosh* for claimant.

Lee A. Kelley, K.C. and *W. R. Jackett* for respondent.

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

CAMERON J. now (January 26, 1949) delivered the following judgment:

In these proceedings the claimant asks for a declaration that it is entitled to a renewal of a lease dated May 19, 1925, made between the Superintendent General of Indian Affairs, of the First Part, and G. T. Clarkson and Walter

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Gow, in trust for St. Ann's Island Shooting and Fishing Club, of the Second Part, pursuant to a renewal clause therein and which I will later refer to more particularly. By letters dated the 12th day of April, 1944, and the 1st day of September, 1944, the lessees gave to the Superintendent General notice of their intention to renew the lease of the lands described in the said lease pursuant to the provisions thereof, but he refused to grant such renewal or to admit that the lessees therein were legally entitled to demand the same.

On November 1, 1945, the Minister, under section 37 of the Exchequer Court Act, referred the matter to this Court for adjudication. Pleadings were delivered. At the trial there was filed a statement of facts agreed to by counsel for the purpose only of having the following question of law submitted for the opinion of the Court, namely,

> Is the claimant entitled to a renewal for a further period of ten years from October 1, 1944, of the lease dated 19th May, 1925, on and subject to the like terms, stipulations and provisions as are contained in the said lease subject to the provisions of the supplemental indenture dated 14th April, 1931, save as to rental.

It is to be noted that by indenture dated September 4, 1945, the said trustees mentioned in the lease dated May 19, 1925, duly assigned to the claimant all their right title and interest in the said lease, including the right to renewal thereof, and in a certain further supplemental indenture dated April 14, 1941, between the same parties, in which supplemental indenture the boundaries of the property were settled and agreed upon. It is admitted for the purposes of this reference that all the rights of the lessees in the lease of 1925 are vested in the claimant. The sole question for determination, therefore, is whether the claimant is entitled to a renewal for a further period of ten years from October 1, 1944, when the former lease expired, such renewal to be on the same terms as the lease of May 19, 1925, save as to rental. The respondent alleges that the documents on which the claimant bases its claim are wholly invalid. It is admitted that if the leases from time to time entered into between the parties hereto were or are valid, they have not been forfeited by breach of any of the terms thereof, or otherwise.

The lands in question are Indian lands (that is, portions of Indian reserves which have been surrendered to the

Crown) in the County of Kent, Ontario. No question arises as to the validity of the surrender or the acceptance thereof by the Crown. Under the terms of the various leases executed by or under the authority of the Superintendent General of Indian Affairs, the Club has been in possession of the lands in question since 1881. At various times it has expended very substantial amounts for the permanent improvement of its facilities as a hunting and fishing club, including the erection of a club house and other buildings and the opening up of ditches and channels. Inasmuch as I have reached the conclusion that the surrender was absolute, I do not consider it necessary to refer in detail to the rights and privileges granted to the Club or the limitations placed thereon, some of which varied materially from time to time. The surrender being absolute and no rights having been reserved to the surrendering Indian Bands, the Crown, in my view, had full power in granting a lease to vary the terms and conditions from those previously in effect, as was thought necessary.

Exhibits A to M are certified copies of all the documents (other than letters) which affect the matter in issue. Ex. A is a resolution of a council of the Chippewa and Pottawatomie Indians of Walpole Island, dated March 18, 1880, accepting the offer of the Club to lease St. Ann's Island and included these words:

> The terms of the lease at ten years and privileged to renewal if everything satisfactory for another term.

The claimant does not rely in any way on this resolution, and in any event it would be of no force or effect because of the provisions of the Indian Act, 1880, ch. 28, s. 36. prohibiting the sale, alienation or leasing of any reserve or portion thereof until it had been released or surrendered to the Crown.

The first lease from the Superintendent General (Ex. B) is dated May 30, 1881. It is for a term of five years, renewable for a like term. Following the execution of that lease the officers of the Club raised certain questions as to the validity thereof and more particularly as to the validity of the surrender, the authority of the Superintendent General to execute the lease, and enquired as to whether an Order in Council had been passed accepting the surrender and authorizing the lease. In the result, a further

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meeting of the Indians was held on February 6, 1882, and a formal surrender executed in due form (Ex. C). On February 24, 1882, the Indian Superintendent at Sarnia wrote the Club Secretary (Ex. P) as follows:

> The defect in the preliminary proceedings regarding the lease to the Club has been remedied by taking from the Indians a formal surrender of St. Ann's Island for the purposes of said lease.

That was followed by an Order in Council P.C. 529 of April 3, 1882. Both of these documents are hereinafter set out in full.

On April 18, 1882, the Department wrote the Club Secretary as follows (Ex. Q):

> I have to inform you that the surrender made by the Walpole Island Indians of the shooting grounds covered by the lease to the St. Ann's Island Shooting and Fishing Club has been accepted by an Order of H. E. the Governor General in Council, dated the 3rd instant, and that the lease has been confirmed by said Order.

Both parties apparently considered that all necessary steps had been taken to validate the lease of 1882. Subsequently, new leases were entered into in 1884, 1892, 1894, 1906, 1915 (these being respectively Ex. E, F, I, J and K), and finally, in 1925, the lease containing the renewal clause on which the claimants now rely. The leases of 1884 and 1892 contained no provisions for renewal, but those of 1894, 1906 and 1915 each contained provisions for one renewal of ten years.

It may be noted that while the annual rental was originally $250, it had been increased to $750 in 1904 for the same property. The rental has remained at the latter figure since 1906, but by mutual consent the lease of 1915 excluded very substantial parts of the property originally leased, and that of 1925 excluded an additional area. By the supplemental indenture of April 14, 1931 (Ex. M), the parties mutually agreed that the property intended to be included in the lease of May 19, 1925, was as set out in the plan attached thereto; and in all other respects confirmed that lease.

Inasmuch as counsel for the claimant relies on the terms of the surrender and of P.C. 529, I think it advisable to set these out in full.

The surrender was in the following terms:

> Know all men by these presents, that we the Chiefs and principal men and Warriors of the Chippewa & Pottawatomie Indians of Walpole Island, being this day assembled in our Council House in presence of our visiting Superintendent—and referring to a meeting of Council held at this place

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on the 18th day of March A.D. 1880—at which meeting it was duly resolved by a majority of those present at said meeting—that the assent of these Bands should be given to the issue of a lease by the Indian Department in favour of certain gentlemen who had applied therefor—of certain lands and marshes hereinafter described—And considering that consent thereto was then and there duly given:

We now do surrender & yield up to our Sovereign Lady the Queen and her Successors—All that certain parcel or tract of land and marsh situated in the Province of Ontario and County of Kent, bounded by the Chenail E-carté, Johnston's Channel, and the navigable waters of Lake St. Clair; and which may be described and known as St. Ann's Island, and the marshes adjacent thereto.

To the end that said described territory may be leased to the Applicants for the purpose of shooting & fishing for such term and on such conditions as the Superintendent General of Indian Affairs may consider best for our advantage—

AND having heard read and explained a lease executed by the Deputy Superintendent of Indian Affairs in favor of Christopher Robinson, Esquire, of the City of Toronto, and certain other gentlemen in such lease named —And believing that such lease was executed in good faith and in accordance with our consent duly given in Council as aforesaid—

We hereby accept of said lease and confirm and establish the same.

In testimony whereof we have hereto set our hands and Seals this sixth day of February A.D. 1882.

Done in the name and on behalf of the Chippewas and Pottawatomies of Walpole Island.

P.C. 529 was as follows:

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 3rd April, 1882.

On a Memorandum, dated 7th March 1882, from the Superintendent General of Indian Affairs, submitting for acceptance by Your Excellency in accordance with the provisions of the Indian Act 1880, Section 37, Subsection 2, a Surrender, dated 9th February 1882, made to the Crown by the Chippewa and Pottawatomie Indians of Walpole Island, of that portion of their Reserve known as "St. Ann's Island" and the marshes adjacent thereto, for the purpose of the same being leased for the benefit of said Indians to the "St. Ann's Island Shooting and Fishing Club" for shooting and fishing purposes, and in confirmation of a lease covering said premises issued by this Department on the 30th of May 1881, to the aforesaid "St. Ann's Island Shooting and Fishing Club."

The Committee advise that the surrender be accepted and submit the same for Your Excellency's approval.

(Signed) A. M. Hill,
Asst. Clerk of the Privy Council.

In answering the questions submitted to the Court, I think that consideration must first be given to the law in effect when the lease of 1925 was entered into with the Superintendent General, that lease containing the following provisions for renewal:

And it is further hereby agreed between the parties hereto that the said parties of the second part, their successors in trust or assigns, shall

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on the expiration of the term hereby granted be entitled to renewal leases of the demised premises for further successive periods of ten years each at rentals to be fixed for each renewal (in case the parties cannot agree) by three arbitrators or a majority of them, one to be chosen by each of the parties and the third to be appointed by such two nominees—and in arriving at the rental to be paid the value of any buildings theretofore erected or paid for or improvements made or paid for by the parties of the second part, their successors in trust or assigns, shall not be taken into account, it being intended that such rental shall be the fair rental value of the demised premises had such buildings not been erected or improvements made. And the said party of the first part for himself and his successors in office covenants and agrees that should said parties of the second part, their successors in trust or assigns, desire such renewal leases or any of them, the same will be granted on and subject to the like terms, stipulations and provisions as are herein contained save as to rental which is to be agreed upon or fixed as aforesaid.

By section 51, ch. 81, R.S.C., 1906 (The Indian Act), it was provided that:

> 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.

I am of the opinion that the validity of the 1925 lease and of its provisions for renewal must depend upon compliance with the provisions of that section. Counsel for the claimant referred me to the provisions of ch. 48, Statutes of Canada, 1924, being an Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian reserve lands, and the corresponding Ontario Act of the same year. He pointed out that by the provisions of those Acts and of certain decisions in the Privy Council, the beneficial interest in surrendered Indian lands in Ontario was in the Province rather than in the Dominion, that by the provisions of those Acts the administration of such lands was in the Dominion and that upon their surrender such lands might be sold, leased or otherwise disposed of by Letters Patent under the Great Seal of Canada, or otherwise under the direction of the Government of Canada, the proceeds to be disposed of as therein provided. I shall not stop to consider whether the lands here in question do or do not fall within the provisions of those Acts. It is sufficient to indicate that whether they do or do not, section 51 (*supra*) was still in effect in 1925, and laid down the procedure to be followed.

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It is submitted by counsel for the claimant that the provision which required a direction by the Governor in Council for the management, lease and sale of surrendered Indian lands is not absolute, and, that if, in the conditions of surrender or in the provisions of Part I of the Act, authority is given to the Superintendent General as to the leasing of such lands, then no Order in Council is required. He then refers to the document of surrender of 1882 (*supra*) which he says confers authority on the Superintendent General to determine the term and conditions of any lease as he thinks best, and submits that by reason of that provision no Order in Council was necessary. He also argues that by section 64, ch. 81, R.S.C., 1906 (The Indian Act), the Superintendent General had a power, without an Order in Council, to execute leases binding on the Crown and that, therefore, no Order in Council was necessary to validate such lease, as the provisions of section 64 come within the words "*subject to* the conditions of surrender and *the provisions of this Part.*" That section 64 is as follows:

> When by law or by any deed, lease or agreement relating to Indian lands, any notice is required to be given, or any act to be done by or on behalf of the Crown, such notice may be given and act done by or by the authority of the Superintendent General.

I am unable, however, to agree with that interpretation of section 51. I am of the opinion that that section is imperative in its requirements that only by a direction of the Governor in Council can surrendered Indian lands be validly managed, leased or sold, and that the disposition of surrendered Indian lands is thereby placed directly under the control of the Government. The words "subject to the conditions of surrender" are not to be interpreted as doing away with the necessity of a direction from the Governor in Council in any case, but, in my view, they require the Governor in Council when so dealing with the lands to take into consideration any conditions of the surrender, so that any directions given would be subject to such conditions. The reservation by the Indians of a right of way, or of use of water power in a stream, might be examples of such conditions; and the surrender, when accepted by the Governor in Council with such conditions, would to that extent limit the manner in which the lands could be managed, leased or sold.

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But in the surrender itself, I can find no such or any conditions which would be binding on the Crown. Claimant's counsel himself agrees that the surrender was absolute, the Indian Bands giving up to the Crown all their usufructuary interest in the lands, and that was the only interest they had therein (see *St. Catherines Milling & Lumber Co.* v. *The Queen* (1). A careful examination of the surrender shows that no such conditions were attached and that it was intended to be, and was in fact, an absolute surrender. It is true that the purpose of the surrender was indicated, namely, that the property should be leased to the Club for fishing and shooting; that the Superintendent General was named as the one who should determine the term of the lease and its conditions; and that approval was given to the lease of 1881. But in the view that I have taken of the meaning of section 51 (then s. 40, ch. 28, of the Indian Act of 1880), the surrendering Indian Bands had no power to do any of these things and their efforts to do so were wholly abortive. The statutory authority of the Governor in Council to manage, lease and sell could not be fettered in any such way, nor its authority and duty diverted to anyone named by the surrendering Indians.

The provisions of section 64 (*supra*) in my opinion do not confer on the Superintendent General the power to make leases of surrendered lands without the authority of an Order in Council as a necessary preliminary. To interpret them in that way would be to altogether negative the provisions of section 51. They must be read together and when so read the import of section 64 is clear. It means that when by law, or by any deed, lease or agreement relating to surrendered lands any notice or act is required to be done, such notice may be given or act done by, or by the authority of, the Superintendent General. If, for example, the lease of 1925 and all its terms, including the provisions for renewal, had been authorized by the Governor in Council, then the Superintendent General would be the party designated to execute the original lease and, without a further Order in Council, the renewal of such lease.

(1) (1889) 14 A.C. 46.

The section does not confer on him any original authority but names him as the person to carry out those things for which a valid authority exists.

It is admitted that there was no Order in Council which specifically authorized the Superintendent General to execute the lease of 1925. But it is submitted by the claimant, in the alternative, that if an Order in Council were necessary, P.C. 529 of 1882 was sufficient authorization for all subsequent leases entered into between it and the Superintendent General. With that contention I cannot agree. It might well be argued that the closing words of P.C. 529, "The Committee advises that the surrender be accepted, and submit the same for Your Excellency's approval," did nothing more than accept surrender. But I do not find it necessary to determine that point. Giving the Order in Council the widest possible meaning that could be attributed to it, and taking into consideration that the memorandum submitted for the consideration of the Governor in Council included the words, "in confirmation of a lease covering said premises issued by this Department on the 30th of May, 1881, to the aforesaid St. Ann's Island Shooting and Fishing Club," it is quite clear that if anything was authorized. the Order in Council retroactively authorized the lease of 1881 only, and that lease was for a term of five years with the right of renewal for a further period of five years only. P.C. 529 could not possibly be construed as validating a lease entered into forty-five years later. It may here be noted that in the memorandum submitted to Council, nothing is said as to that part of the surrender which purported to give to the Superintendent General power to determine the term and conditions of any lease. That matter was never before the Governor in Council.

My opinion, therefore, is that section 51 requires an Order in Council as the necessary preliminary to the validity of the lease of 1925, and that no such Order in Council referable to that lease was passed at any time.

Counsel for the claimant, however, submits that by reason of what has occurred, the respondent is estopped from denying the validity of the tenancy of the claimant. He points out that the Superintendent General, a Minister of the Crown, by executing the various leases, including

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that of 1925, and by correspondence between the parties, held himself out as having authority to represent the Crown and to enter into the various leases; that as a result the claimant paid rent which was accepted by the respondent, and expended large sums of money on improving the lands for its purposes in the belief that such representations were well founded. He also refers to certain correspondence after the first lease was executed in 1881, when the trustees raised questions as to the validity of the surrender and the acceptance thereof, and the necessity of having an Order in Council authorizing its lease, at which time they were advised that the necessary steps to validate the lease had been taken. I have considered the cases on which he relies in respect of his argument that estoppel in pais may apply as against the Crown.

I have reached the conclusion on this point, that, in view of the statutory requirement of a direction by the Governor in Council, that the respondent is not estopped by the foregoing. Reference may be made to Phipson on Evidence, 8th ed., 667, where it is stated that:

> Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.

The problem was considered in the case of *Maritime Electric Co. Ltd.* v. *General Dairies Ld.* (1), in which it was

> *Held*, that the appellants were not estopped from recovering the sum claimed. The duty imposed by the Public Utilities Act on the appellants to charge, and on the respondents to pay, at scheduled rates, for all the electric current supplied by the one and used by the other could not be defeated or avoided by a mere mistake in the computation of accounts. The relevant sections of the Act were enacted for the benefit of a section of the public, and in such a case where the statute imposed a duty of a positive kind it was not open to the respondents to set up an estoppel to prevent it.
>
> An estoppel is only a rule of evidence, and could not avail to release the appellants from an obligation to obey the statute, nor could it enable the respondents to escape from the statutory obligation to pay at the scheduled rates. The duty of each party was to obey the law.

The judgment in that case was delivered by Lord Maugham. At p. 620 he said:

> the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision.

(1) (1937) A.C. 610.

And at p. 621:

If we now turn to the authorities it must be admitted that reported cases in which the precise point now under consideration has been raised are rare. It is, however, to be observed that there is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character. The text-books have regarded the case as one closely analogous to the cases of high authority where it has been decided that a corporation could not be estopped from contending that a particular act was ultra vires.

He referred also to *In re a Bankruptcy Notice* (1), in which Atkin, L.J., stated:

Whatever the principle may be (referring to a contention as regards approbation and reprobation) it appears to me that it does not apply to this case, for it seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid.

Reference may also be made to *Ontario Mining Company* v. *Seybold* (2), in which at p. 83 Lord Davey, in delivering the judgment in the House of Lords, said:

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 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.

In my view the respondent cannot be estopped by anything that has been done from alleging that there has not been a compliance with the statutory requirements of section 54.

Having found that the requirements of the statute have not been complied with and that the respondent is not estopped by anything that has been done or said by its officers or servants from alleging non-compliance with the statute, it becomes necessary only to consider the result of such non-compliance.

(1) (1924) 2 Ch. 76. (2) (1903) A.C. 73.

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Reference may be made to the judgment of the Judicial Committee of the Privy Council in *The King* v. *Vancouver Lumber Company* (1). In that case a lease was entered into between the Crown, acting through the Minister of Militia and Defence, and the Company, the demise being for twenty-five years "renewable." The grant of the lease was made under a statutory authority which provided that the Governor in Council might authorize the sale or lease of any lands vested in Her Majesty not required for public purposes, and for the sale or lease of which there was no other provision in the law. An Order in Council was passed giving authority to lease for twenty-five years. Subsequently, the solicitor for the Company opened negotiations with the Minister in regard to variations in the lease. As a result endorsements were made on the former lease and signed by the Minister, varying its terms and giving rights of renewal for successive periods of twenty-five years. No Order in Council was passed approving of these changes, although there was some evidence that the agent of the Company had been assured by the Minister that an Order in Council had been passed authorizing the new terms. In fact, no such Order in Council was passed at any time. It was held that the signature of the Minister was an insufficient compliance with the terms of the statute and that, in the absence of an Order in Council, the new terms were void.

In the case of *British American Fish Company* v. *The King* (2) (affirmed 52 D.L.R. 689), Cassels, J., in this Court held that a lease for fishing privileges, and executed by the Minister of Marine and Fisheries for a term of twenty-one years with an option of renewing for a further period of twenty-one years, was totally invalid as to the option, the same not having been authorized by the Order in Council which had recommended the granting of the lease for twenty-one years only.

In *Gooderham & Worts Ltd.* v. *Canadian Broadcasting Corporation* (3), it was held that a clause in the lease which was unauthorized by the Order in Council was void *ab initio*. In that case Lord MacMillan also pointed out that the alleged estoppel was against pleading of a statute.

(1) 50 D.L.R. 6.
(2) 44 D.L.R. 750.
(3) (1947) A.C. 66.

Reference may also be made to *The Queen* v. *Woodburn* (1), *The King* v. *McMaster* (2), *Easterbrook* v. *The King* (3), and *Booth* v. *The King* (4).

Following these decisions, I have reached the conclusion that as the lease of 1925 was never authorized by an Order in Council, there has been non-compliance with the imperative provisions of section 51 and that the lease and the provisions for renewal therein are wholly void.

Counsel for the respondent also alleged invalidity of the lease of 1925 on the ground that the property therein demised (as amended by the agreement of 1931) included property not contained in the surrender of 1882. The burden of proof thereof is on the respondent, and on the somewhat meagre evidence before me I am quite unable to find as a fact that such is the case. In fact, the only affirmative evidence is to the contrary. I would further point out that even if it were so established, there has been no evidence to indicate that the respondent had not the right to include the additional parts in the lease: such additional parts may have been acquired by the Crown otherwise than by the surrender referred to. On this matter I must find that the respondent fails.

I therefore answer the question submitted in the negative. Under all the circumstances I think each party should bear its own costs.

Having reached the above conclusion on the question submitted for determination, I think I should make a further comment. The respondent has succeeded in securing a declaration of invalidity solely because of the failure to pass the requisite Order in Council, and not because the claimant had failed to do anything which was within its powers to do. The evidence indicates that the buildings erected by the claimant, or the former trustees of the Club, exceeded $25,000 in value and that, in addition, very substantial amounts have been laid out in digging ditches and channels. Some disposition of the property will have to be made by the respondent. Inasmuch as the claim to a perpetual lease has now been disposed of adversely to the claimant, and as the question of fixing a fair rental for the future is now open, it would

(1) (1898) 29 S.C.R. 112.
(2) (1926) Ex.C.R. 68.
(3) (1931) S.C.R. 210.
(4) 51 S.C.R. 20.

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seem but fair and reasonable that the claimant be given an opportunity to protect its investment by a new and valid lease for a limited term.

Judgment accordingly.

The Supreme Court of Canada on February 21, 1950, not yet reported, dismissed an appeal herein.

1950

Feb. 8-10

Feb. 15

BETWEEN:

ALFRED MOREAU ..... PLAINTIFF;

AND

ROLAND ST. VINCENT, carrying on business under the firm name of Loisir Favori Enregistré..... DEFENDANT.

Copyright—Infringement—Copyright Act, R.S.C. 1927, c. 32—No copyright in ideas—Copyright in a literary work not dependent on registration—No copyright in arrangement, system, scheme or method—Plaintiff in infringement of copyright action must show copying of his literary work.

The plaintiff, a partner and manager of a firm carrying on business in Montreal under the firm name of L'Information Sportive, its business being the publication and sale of a weekly sports paper called "L'Informative Sportive", conducted a weekly competition called "Concours: Recrutement d'Abonnés", the details of which were published in the paper, and claimed to be the owner of copyright therein. The defendant, a former distributor of "L'Information Sportive", began to carry on business under the firm name of Loisir Favori, his business being the publication of a leaflet called "Mots Croisés", and conducted a weekly competition called "Quizz général de la publication Loisir Favori Enrg.", the details of which were published in the leaflet. The plaintiff claimed that the defendant's "Quizz général de la publication Loisir Favori Enrg." was a plagiarism of his "Concours: Recrutement d'Abonnés" and an infringement of his copyright and sought an injunction and damages.

Held: That an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own. Every one may freely adopt and use the ideas but no one may copy his literary work without his consent.

had pleaded payment of both the notes, if he did not prove the whole, the verdict must be against him. I think the plea good.

Per Cur.—Judgment for the defendant.

DOE DEM SHELDON V. RAMSAY ET AL.

Grant of Governor under his seal-at-arms—Power of Chief of an Indian tribe to act as agent for the tribe—Power of Commissioners of forfeited estates—59 Geo. III. ch. 12—Inquisition void for want of certainty—Description in conveyance—Meaning of phrase "more or less."

A grant of lands, in 1784, by the then Governor of the Province of Quebec, &c., under his *seal-at-arms*, to the Mohawk Indians and others, conveyed no legal estate; first, as not being by letters patent under the great seal; secondly, for want of a grantee or grantees capable of holding.

Held also, that the mere fact of a chief of an Indian tribe assuming to act as a duly authorized agent, in the name and on behalf of the tribe, shewed no power in him so to act; and therefore, that a lease, signed by him as agent, &c., conveyed nothing.

And consequently, that such lessee had no estate which, on his being subsequently attainted of high treason, could be forfeited to the Crown, and vest in the commissioners of forfeited estates, under 59 Geo. III. ch. 12.

Though by the 33 Hen. VIII. ch. 20, the Crown, in case of attainder for high treason, would be deemed in actual possession without any inquisition of office, yet such lands only would vest in the commissioners under 59 Geo. III. ch. 12, as should be found by an inquisition to be vested in the Crown, and therefore no more land could possibly pass by a deed from the commissioners than the inquisition had found the traitor seized of.

And *held*, that the inquisition could not support the conveyance which the commissioners made; for it referred to nothing which could supply proof of identity, and the commissioners were not warranted in going beyond the inquisition and *semble*, that the inquisition was void for want of certainty.

The defendants—James Ramsay, Hector Dickie, Mary Kerr, and John Cleator—defended for a tract of land on the south side of the Grand River, giving a description of it by metes and bounds, not expressing in what township it is, nor what quantity of lands the lines embrace.

The plaintiff in his declaration sued for land in the township of Brantford, in the county of Wentworth, and described it as "being composed of all that certain tract of Indian lands on the south-west branch of the Grand River, in the township of Brantford, beginning at the white oak tree standing on the bank of the said river, on the south side of said river, above the Indian Mill, near a hut formerly known by the name of Culver's Hut, on the bank of said river, a few rods below said hut, said white oak tree charred on four sides, and four sides hacked, said tree standing two rods from said river, or thereabouts; and running

south 10 degrees west 16 chains, to a stake marked B. M.; thence north 80 degrees west 38 chains 80 links; thence north 10 degrees east, to the bank of said river; thence along the bank of said river to the first-mentioned boundary, including all privileges of the waters of the said river in front of the said lot."

At the trial of this ejectment, at Hamilton, before Robinson, C. J., at the last assizes, the lessor of the plaintiff claimed title under a sale made to him on the 9th July, 1832, by the commissioner of forfeited estates, under the statute of Upper Canada, 59 Geo. III. ch. 12. It was shewn that one Mallory had been, upon indictment and outlawry thereon, attainted of high treason, committed by him in the year 1813, in giving aid to the enemy during the war then carried on between Great Britain and the United States of America. And upon an inquest of office, which followed his attainder, it was found and returned by the jury, that at the time of his committing the high treason, he was seized of certain estates mentioned in the inquisition, among which were two tracts thus described: "Also a lease of a certain tract of the Indian lands, containing about 1400 acres, joining the township of Brantford, leased to him for the term of 999 years; *and another lease for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres, more or less;*" and that he had no other lands to their knowledge.

It was about the last of these two tracts, described as containing "about sixty acres, more or less," that the dispute in this action has arisen.

The inquisition bore date 14th January, 58 Geo. III.

A verdict was given for the plaintiff.

Connor, Q.C., and *Galt* with him, in support of a rule *nisi* to enter a non-suit; or for a new trial without costs, on the evidence and for admission of evidence after the plaintiff's case closed—objected to the inquisition having been admitted after the plaintiff's case was closed. The evidence was clear as to the quantity of land it was intended should pass —1 Sug. V. & P. ch. 7, sec. 3; Day v. Finn (*a*). The

(*a*) Owen 133.

inquisition is void for uncertainty; and should have set out metes and bounds—Pullen v. Birkbeak (*a*). The commissioners could only make a deed such as the titles on which they were acting would warrant; they had therefore no right to incorporate this description in their deed. A deed cannot convey 420 acres under an inquisition which only forfeited 60.

Such a grant from the crown would have been void—2 Bl. Com. 347; Doddington's case (*b*); Dowtie's case (*c*). There is no provision in the statute 59 Geo. III. ch. 12, for assigning a chattel interest in law.

Freeman, contra—The commissioners must be presumed to have exercised their authority properly—Taylor on Ev. 113, 119; Doe Hopley v. Young (*d*). He contended that Brant's lease to Mallory, coupled with the inquisition, made that certain which before was doubtful—"*Id certum est quod certum reddi potest*," and therefore the inquisition not void for uncertainty: and as to not producing the inquisition, he said he did not consider it necessary, as the commissioner's deed recites it, and shews how the inquisition described the land.

The statutes and facts bearing on the points in dispute are fully set out in the judgment of the Chief Justice.

ROBINSON, C. J.—By the statute 59 Geo. III. ch 12, the Government was authorized to appoint commissioners, "in whom all the real estates which then were or thereafter might become vested in his Majesty by the attainder of persons convicted of high treason, committed during the said late war, should be vested for the purposes mentioned in the act."

And in order that all such estates might be "the better known, described, and ascertained, and the rents, issues, and profits thereof recovered for the use of his Majesty, and that due examination might be taken and satisfactorily made of all just and lawful claims to or upon such estates, the act provides that the Clerk of the Crown shall deliver to the commissioners an extract, certified under the seal of

(*a*) Carthew 453. (*b*) 2 Rep. 33. (*c*) 3 Rep. 10. (*d*) 8 Q. B. 63

the Court of King's Bench, of all inquisitions, whereby any real or personal estate of any kind whatever shall have been returned as forfeited to his Majesty by the attainder of any person of any high treason, as aforesaid; in which extracts shall be stated the names, additions, and late places of abode of the person attainted; the species of treason of which, and the respective times, places, and courts, when and where they were so attainted; *and also the real estates, chattels, real or personal, debts, &c., which in the said inquisitions are found to be forfeited by such attainder;* and that the commissioners shall enter these extracts in a book or register to be kept by them; an extract from which book, signed by any two of the commissioners, shall be sufficient evidence, in any court, of the matter therein certified."

And, to the end that all the estates and interest vested in the commissioners under the act may be duly published, so as all persons having interest therein may have notice thereof, in such manner as they may enter their claims upon the same, as provided by the act, it was enacted, "that the commissioners shall cause this register to be open to public inspection without fee, and transmit to the special receiver, to be appointed under the act, an authentic copy of the register."

It is also provided that the commissioners shall send to the clerk of the peace of the district in which any of the lands forfeited shall be a duplicate of every such entry to be affixed on the door of the court-house, and to be inserted in a book to be kept by the clerk of the peace.

Provision is then made for receiving, hearing, or determining the claims of any persons having or claiming any estate, right, title, or interest into or out of any of the said estates vested or to be vested in the commissioners. And it is enacted, "that all and every the estate and interests which shall be entered in the register to be kept by the commissioners according to the directions of the act, to or upon which no claim shall be entered within the time and in the manner prescribed, shall be deemed or taken against all persons, and to all intents and purposes to be vested in the commissioners in virtue of the act."

Then by the 13th clause of the statute, the commissioners are directed to sell all and singular the real estate and chattels vested or to be vested in them by the act, by public auction, according to the best of their judgment; to give ninety days' public notice of the time and place of sale, and of the several particulars then and there to be sold; and to cause an entry to be made in their book of all and every the real and personal estate so sold, and of the buyers' names and prices paid, &c.; and, upon payment of the purchase-money to the commissioners, to execute deeds of bargain and sale for such real estates as shall be in such manner sold to the respective purchasers thereof; which deeds are required to be registered as other conveyances of lands in Upper Canada.

It was proved on the trial that the extract of the inquisition entered in the commissioners' book, and of which a copy was delivered out by their clerk as the act directs, corresponded literally with the inquisition as regarded the tract of land respecting which this question arises. The date of entry in their books is first March, 1819, and the land is no otherwise described than thus: "And another lease, for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres more or less." No township, county, or district is named as being that in which these sixty acres are situated.

It was then proved that on the 9th July, 1823, the commissioners of forfeited estates executed an indenture between themselves of the one part, and the present lessor of the plaintiff William B. Sheldon of the other part, in which they recite the statute and their own appointment as commissioners, that Mallory had been attainted of high treason, &c., and that amongst other things "the residue of the demised term of 999 years unexpired and yet to come, of and in all and singular the lands, tenements and hereditaments thereinafter described, had by inquest of office been found to be forfeited to his late Majesty, as having been in the seizin of the said Mallory at the time of the committing of the said high treason; that is to say, a certain tract of the Indian lands on the south-west branch of the Grand

River, containing about sixty acres," referring to the record of the conviction and judgment, and to the inquisition. And they recite further, that the said residue of the said demised term of and in the premises aforesaid, in the said county of Haldimand (which county of Haldimand had been nowhere before mentioned, either in the inquisition or extract, or in this deed), having by virtue of the statute become duly vested in the said commissioners, they did, on the 31st day of August, 1820, having given due notice and complied with all the other requisitions of the statute, sell the said residue of the said term of and in the said premises, with the appurtenances, by public auction, to the said William B. Sheldon, he being the highest bidder for the same, according to the provisions of said act, at and for the price or sum of 17*l.* 10*s.* And then their deed witnesses that in consideration of the said sum of 17*l.* 10*s.*, and under and by virtue of the powers and authorities in the said statute contained, they thereby assigned, transferred, and set over to the said William B. Sheldon, the present lessor of the plaintiff, his executors, &c., "all and singular the said residue of the said demised term of 999 years unexpired and yet to come, of and in all and singular the said parcel or tract of land situate on the south-west branch of the Grand River as aforesaid, and described in the original lease for the same from Jacob Brant [should be Joseph Brant], agent of the Six Nation Indians, to the said Bonajah Mallory, hereunto annexed, as follows—that is to say, beginning at a white oak tree standing on the bank of said river, on the south side of said river, above the Indian Mill, near a hut formerly known by the name of Culver's Hut, on the bank of said river, a few rods below said hut, said white oak tree charred [should be "blazed"] on four sides, and on four sides hacked, said tree standing about two rods from said river or thereabouts; and running south 10 degrees west 16 chains to a stake marked B. M.; thence north 80 degrees west 38 chains 80 links; thence north 10 degrees east to the bank of said river; thence along the banks of said river to the first-mentioned boundary, including all privileges of the waters of said river on the front of

said lot, containing fifty-four acres, be the same more or less."

It will be observed that this description, which found its way into the commissioners' deed, is something quite independent of, and wholly in addition to, anything that appears in the inquisition, or in the commissioners' registered extract; and for all that appears, the sale made by the commissioners, and the public notice that preceded it, contained nothing of this particular description, but were in the same general terms as the inquisition. They ought to have corresponded with that, according to the act, and it is to be presumed therefore that they did.

This particular description by metes and bounds, it will be seen, agrees exactly with the description of the premises described in the declaration, except that it calls the land 54 acres more or less, whereas in the inquisition the tract is called 60 acres more or less. The plaintiff claims in this action all the land which, he says, this particular description, by metes and bounds, contained in the commissioners' deed will embrace. How such a description came to be imported into the deed given by the commissioners was thus explained at the trial: Mallory, upon whose attainder the land had been forfeited, had fled from the country during the war, and it was known in what part of the United States he was residing. Sheldon, some time after he had made his purchase (the time for any persons making claim to any of the land returned as forfeited by the inquisition having necessarily elapsed before the sale), went to Mallory, and obtained from him, or from his agent, the lease, or a lease under which he represented himself to have held the tract in question; thus taking an assignment of it to himself, which is indorsed on the back of it, and which is signed by one William Mallory, as agent of Bonajah Mallory.

This is dated 21st May, 1822, and he must have produced this lease to the commissioners of forfeited estates, for they have framed their deed according to it in point of description, and it is referred to in their deed as being annexed.

The commissioners no doubt did this from a desire to give to their conveyance greater certainty; and assuming

that this must have been the lease which is referred to in such general and vague terms in the inquisition, although there is a discrepancy between the two in the only thing which looks like certainty in the description given in the inquisition, the latter calling the contents of the tract "about 60 acres," and this lease "about 54 acres."

At the trial this lease was produced by the lessor of the plaintiff, and he claims to hold according to it.

It is an indenture, made the 25th January, 1805, between the Six Nations Indians, residing on the Grand River, in the province of Upper Canada, by Joseph Brant, principal chief and agent for the said Six Nations, duly authorized in their name and on their behalf to execute leases of such parts and parcels of their lands as by the said Joseph Brant shall be thought fit to be leased, of the one part, and Bonajah Mallory, of, &c., of the other part; and it recites that on the 25th day of October, 1784, at the city of Quebec, upon the representation of the said Joseph Brant, in behalf of the Six Nations of Indians, to the late General Haldimand, then governor and commander-in-chief of the province of Quebec, &c., he, the said commander-in-chief, in consideration of the early attachment to the king's cause manifested by the Mohawk Indians, and of the loss of their settlements which they thereby sustained, by an instrument in writing by him subscribed, with his seal-at-arms annexed, and since registered in the Secretary's office of the province of Upper Canada, was pleased to grant, appropriate, and assign to them and such others of the Six Nations as wished to settle in that quarter, six miles deep from each side of the Grand River, at the mouth thereof, and extending in that proportion to the head of the said river, to be enjoyed by them and their posterity forever. And this indenture witnesses, that the said Six Nations of Indians, by Joseph Brant, their agent, in consideration of a peppercorn rent, demised to Mallory, his executors, administrators, and assigns, all that certain parcel or tract of land, being part of the above-described territory, granted by the said commander-in-chief to the said Six Nations, beginning, &c., describing the land precisely as in the declaration in this

ejectment, and in the commissioners' deed afterwards made, and stating the tract to contain fifty-four acres, more or less; to hold for 999 years, with covenant of the Six Nations Indians, by their agent, for quiet enjoyment. This instrument is signed by "Joseph Brant, agent," and by Mallory, and they both sealed it.

The commissioners' deed and this lease being produced, the chief contest at the trial was about the extent of the tract conveyed by the commissioners. Their deed, adopting the description contained in Brant's lease, professed to convey about fifty-four or sixty acres; but the plaintiff, by the effect which he desires to give to the description, would make it embrace about four hundred and twenty acres.

420 ACRES.
N. 10° E. 140 chains, 85 links.
N. 10° E.
S. 10° W. 16 ch.
60 ACRES.
N. 80° W. 38 chains, 80 links.
S. 10° W. 16 ch.
N. 80° W. 38 chains, 80 links.

All turns on the point of departure, and that depends on what was the position of the white oak tree spoken of in the description by metes and bounds. The tree itself is no longer standing, and all traces of Culver's hut, which was a mere shanty, has long ago perished. Upon the point where that hut stood, there was a great conflict of evidence; the plaintiffs' witnesses affirming that it had stood about thirty chains higher up the Grand River than the defendants' witnesses declare it to have stood. The great difference this would make in the description arises from the circumstance of there being a great bend in the Grand River at that point. Beginning where the defendants' witnesses swore Culver's hut stood, the three lines mentioned in the description would inclose a tract of about sixty acres, lying evenly along the south bank of the Grand River, and parallel with it, in that part of its course having the east and west ends of the tract of about the same depth. It may have been commonly called sixty acres, upon a computation made of the figure as a parallelogram, supposing the points on the water's edge to be connected by a straight line; but probably the area is more correctly stated in Brant's lease at fifty-four acres, upon a computation, which throws out the curve of the river and the land covered with water. If, according to what the plaintiff contends for, the point of departure is taken on that part of the bank of the river where his witnesses described Culver's hut as standing, which is about thirty chains further to the west, then, measuring from thence south 10 degrees west 16 chains, and from thence north 80 degrees west 38 chains 80 links, as we are directed by the description, would carry us so much further to the west that a line drawn from that point on the course given in the description north 10 degrees east, instead of taking us back to the river, as it was evidently supposed it would do, by a line of about the same length as that measured back from the river at the starting point—viz., 16 chains—would, on account of the great bend of the river, not touch its bank, except by a line produced 140 chains and 85 links.

The large tract of land embraced by the bend of the river, which would be thus included, is claimed, part of it by

Indians whose cleared fields were under cultivation at the time Brant made his lease to Mallory, which clearly could never have been intended to interfere with their possessions, and the remainder by other persons to whom the government has granted the land upon sales made by them for the benefit of the Indians, with their concurrence.

The plaintiff, to shew what the description in Brant's lease would cover, called Lewis Burwell, a provincial surveyor, and relied upon a plan or survey made by Mr. Burwell, in which he had delineated the ground as surveyed by him according to the lines and courses in Brant's lease. He swore that he had commenced this survey, in May 1827, at the request of the plaintiff Sheldon, who employed him for that purpose; that knowing nothing of the former position of Culver's hut, referred to in the lease, and not having before made any survey on the Grand River, he started from a tree, which Sheldon pointed out to him as the one referred to in the lease as standing near where Culver's hut had stood; and as he proceeded in his survey from that point, the Indians, finding he was running his line through their fields, remonstrated, alleging that these were lands which they had always had in their possession, and which Brant could have made no lease of; and he found it necessary to desist. Afterwards, in 1833, he continued his survey at Sheldon's request, and made the plan produced on the trial.

Not long after he had done this, he was requested by some of those with whose possessions the description as contended for by Sheldon would interfere, to survey their property; and the government, before they made grants on behalf of the Indians, as they contemplated doing about that time, also employed him to survey that part of the country, and he then did not adopt the tree as the starting point, which be had before taken as pointed out to him by Sheldon, but he took depositions of persons whom he examined as to the true position of Culver's hut, and among them a son of Culver then living, and was perfectly satisfied, as he swore, from the evidence he received, that he had not been misled as to the starting point when he made

the survey for Mr. Sheldon; and laying down a tract by the lines and courses in the lease, taking as his point of departure what he ascertained from the old inhabitants to whom he referred to have been the true position of Culver's hut and the tree referred to as being near it, he found the tract to embrace about the quantity of land mentioned in the lease; and that it would be such a tract as it must have been intending to lay out, though, taking the survey either way, it would interfere with a reservation of land which seems at an early period to have been assigned to, or intended by the Indians for a family by the name of Kerr.

It seems that Brant had agreed with Mallory to construct a wooden bridge over a small stream running into the Grand River near this tract, and was to give him sixty acres of land for the job. He may possibly have had the consent of the Kerr family to interfere with their tract to the limited extent which his lease was meant to cover.

However this may be, the evidence was such as, I must say, left no doubt on my mind that a survey, such as the plaintiff contends for, never could have been such a survey as formed the basis of Brant's lease. The contents of the area which the respective surveys would embrace, do not, to my conviction, shew this more plainly than the courses and distances set down in Brant's lease; for these shew plainly that an actual survey had been made, in order to obtain the proper terms of that description, and that the intention was to lay down a tract along the river, of moderate depth, to embrace about 60 acres, and to present a parallelogram which should lie along, and correspond with the river in that part. It was evidently found that to lay down such a tract, the rear line would require to be on a course north 80 degrees west, and so laying down a rear line on that course which would range with the general bearing of the river at that part of it, the two ends of the tract might be on the same course, and would be about the same length, and the three lines would embrace an even and convenient figure. A compass must have been used on the occasion—an actual survey must have been made, for a post is referred to in Brant's lease, as planted at the

end of the 16 chains, of which no trace can be expected to be found now. But any surveyor, or any person using a compass, if he had started from the point the plaintiff contends for, as the tree mentioned in Brant's lease, and first run south 10 degrees west 16 chains, then north 80 degrees west 38 chains 80 links, must have seen that the course was carrying away from the river, and would not be the proper course at that point, (30 chains higher up the river,) for embracing a tract of moderate dimensions lying along the river, and bounded by the river in front. He must have seen that to run the rear line on such a course at that part of the bend of the river, and for such a distance, would take him to a point from whence he could not return to the river by the same course as the line bounding the other end of his tract, without going 140 chains instead of 16, and making one end of his tract about nine times as long as the other, and without containing seven times as much land as was meant to be demised; and giving Mallory the exclusive control over one bank of the Grand River for about three miles, instead of 38 chains.

If any such line had been, it would have been made plain at once that it could not answer the purpose intended, and would have crossed fields that Indians were in the actual occupation of.

Independently of the legal questions as to what the commissioners' deed could convey, considering the inquisition on which it was founded, and the quantity of land which it expressed—which latter question indeed would apply as well to Brant's lease as to the inquisition—I found the considerations I have mentioned so convincing, that I cannot say I had the slightest doubt on my mind that those witnesses must be in the right who described Culver's hut to have stood at such a point as Mr. Burwell assumed on the evidence to be correct when he made his last survey; and not those witnesses who assigned to it a position so utterly inconsistent with what must have been the actual starting point in the survey on which Brant's lease is founded.

I explained my views very fully to the jury, and in such

a manner as could have left them under no doubt that I considered what the plaintiff contended for as altogether unreasonable and inadmissible. They were out a long time, and at length came in with a verdict for the plaintiff which seemed to me a very unsound conclusion, from the evidence.

The verdict seems to me so impossible to be reconciled with reason and probability, and so contrary to the weight of evidence, that if no other question arose in the case, we should have no difficulty in granting a new trial, that the case might receive the consideration of another jury upon the merits. There is no ground whatever afforded by the evidence for assuming any intermediate point between that which the plaintiff contends for as the point of departure, and that which the defendant maintains is the true point. It would be acting arbitrarily, and without any regard to evidence, if we were to adopt any point between. The question therefore, is nothing else then whether we are to adopt as correct the description which embraces 420 acres, or that which agrees with the inquisition and the deed, by which 60 acres at the most were understood and intended to be conveyed. There was, no doubt, evidence that, if believed, may be said to support the opinion formed by the jury that Culver's hut stood in the position which the plaintiff contended for; but the positive and direct evidence to the contrary appears to me much the stronger; and the most material thing is, that when we come to apply to the ground a description framed upon the supposition that the plaintiff's witnesses are right in the position they assign to the hut—we find the conclusion irresistible that either the memory of those witnesses must have deceived them, or they must be stating what they do not know.

It is plain an actual survey with a compass was made on the ground, in order to lay out and obtain a proper description of the 60 acres intended by Captain Brant to be leased to Mallory, or 54 acres, excluding the river; the lines also I think, it is equally clear, were surveyed, because a post is referred to as having been planted at the end of a line sixteen chains from the river.

No person with compass and chain could possibly have laid out such a tract of 60 acres, starting from where the plaintiff's witnesses say Culver's hut stood, running the courses mentioned in the description contained in Brant's lease, without finding that instead of striking the river at the east end of the tract by a line of about the same length as at the other end, he would have to go nine times as far, and instead of laying out for Mallory 60 acres of land that would interfere with none of the fields and improvements of the Indians, he would be embracing in his description 420 acres, and many fields which they were actually cultivating, and houses in which they lived, which Brant, it is quite certain, never intended to lease, and which Mallory, it is equally certain, would never have been permitted to occupy, and never could have imagined were intended to be leased to him. There was not the slightest evidence that, from 1805, when Mallory received this lease, till 1812 or 1813, when he fled the country, he ever asserted a claim to any such tract of land as such a description would cover. Nor was it proved upon the trial that the lessor of the plaintiff, for very many years after the year 1820, when he bought this lease forfeited by Mallory, or supposed he was buying some interest in a lease, ever set up a claim to cover by his purchase such a tract as he now claims to, or attempted to molest those who were cultivating it, and living upon it, as they had been for years before his purchase. If he had believed when he paid the 17*l.* 10*s.* that he was bargaining for 420 acres of land, under a deed which expressed the quantity conveyed to be only 60 acres, or if he had soon afterwards any such idea, he should have lost no time in advancing such a pretension, if he ever meant to advance it; for the probability is, that there would have been no difficulty then in ascertaining the position of Culver's hut by such evidence as would have proved the matter beyond all doubt. Perhaps some remains of it were still then in existence, or the tree might have been then standing which was referred to as near it. As it is, the evidence leaves no doubt that neither Mallory himself nor the witnesses, who seem to have perplexed themselves and

the jury about the position of Culver's hut, ever had an idea that Brant had leased to Mallory more than 60 acres.

It would be strange that neither Brant, nor Mallory, nor any of the Indians, seem to have had the slightest notion that Mallory's lines took in 420 acres, and nearly three miles of the winding course of the river, although Culver's hut was there, and could be seen, and there could be no room for doubt at that time from what point the lines were to run.

How it happened, that when there was a conflict of evidence in regard to a matter which depended upon memory, and which depended on the position of an object which had perished, the jury should have disbelieved that evidence, which on the face of it was probable and attended with no difficulty, and was consistent with the deed, and with the known bargain between Captain Brant and Mallory, and should have adopted that account which it is impossible to reconcile with the intention of the parties, as expressed in the deed, and with their conduct, it is not easy to understand. And one is the more surprised when it is considered how extremely unreasonable the claim set up is, and what confusion and injustice it would create, if it could be established.

But the question upon the description is not the only question in the case. Various legal objections were taken at the trial, and insisted upon; and the lessor of the plaintiff, by setting up a claim which is in its appearance very repugnant to reason, has thrown upon the court the necessity of deciding some legal questions of no small importance, though perhaps they are not such as can be called difficult.

The lessor of the plaintiff claims the land in question under an inquisition, which gives no other description of the estate than by calling it a lease for 999 years of certain other Indian lands on the south-west bank of the Grand River, containing about 60 acres more or less; and under that lease, which is the foundation of his title, he claims 420 acres, because, he contends, the tract which is so obscurely described in the inquisition was no other than

that which Mallory had held under a lease from Brant; and he claims to have the benefit of the description of that tract as it stands in the lease. He thus identifies his title with that lease; and there is no doubt, that whatever was held by Mallory under that lease, is what the commissioners supposed they were conveying to the lessor of the plaintiff.

The first objection is, that Mallory held nothing under this lease of Brant's which the law can recognize to be a legal estate or interest, and which could be forfeited by his treason; and we have in effect determined that he did not, by the judgment which was given in this court in Easter Term, 5 Wm. IV., in the case of Doe dem. Jackson v. Wilkes.

In the first place, the Six Nations of Indians took no legal estate under the instrument given by General Sir Frederick Haldimand. He did not own the land in question, and could convey no legal interest by any instrument under *his seal at arms*. Being Governor of Canada, he could have made a grant of Crown lands by letters patent under the great seal of the province, which would have been matter of record; but he could no more grant this large tract on the Grand River, by an instrument under his seal at arms, than he could have alienated the whole of Upper Canada, by such an instrument. Such an instrument could pass nothing.

But secondly, if such an instrument had been made under the great seal, in the ordinary and proper manner, it could pass no legal interest for want of a grantee or grantees, properly described and capable of holding. It grants nothing to any person or persons by name, and in their natural capacity. General Haldimand could not have incorporated the Six Nations of Indians, if he had attempted to do it expressly, by an instrument under *his seal at arms*, and still less could he do it in such a manner incidentally and indirectly by implication. A grant "to the Mohawk Indians, and such others of the Six Nations as might wish to settle on the Grand River, of a tract of land, to be enjoyed by them and their posterity forever," could not have the effect upon any principle of the law of England of vesting a

legal estate in anybody. It could amount to nothing more than what it was well understood and intended to be, a declaration by the government that it would abstain from granting those lands to others, and would reserve them to be occupied by the Indians of the Six Nations. It gave no estate in fee, or for life, or for a term of years, which the Indians could individually or collectively transmit.

Thirdly, if it could have done so, then the ordinary consequence must have followed, that the grantees could only have alienated it by a deed of their own, or a deed executed by some one as their attorney, under a due authority given by them under seal; and if there had been an attorney duly authorized by them, he could only have conveyed their lands by a deed executed in their name, not in his own.

Nothing is shewn here to prove any authority delegated to Captain Brant to part with these lands on the Grand River, so that the Indians could be dispossessed by his act of their interest in it, whatever that might be. Nothing whatever is shewn but that Joseph Brant chose to put his name and seal, as "Joseph Brant, agent," to an instrument by which he professed to alien 60 acres of the land of the Indians for 999 years. He was, no doubt, a chief among them; but we cannot say that that gave him any right to alienate to individuals whatever portion he pleased of the lands held by the crown for their use, and upon such terms as he pleased. We cannot recognize any peculiar law of real property applying to the Indians—the common law is not part savage and part civilized. The Indians, like other inhabitants of the country, can only convey such lands as they legally hold, and they must convey by deed executed by themselves, or by some person holding proper authority from them under seal, to convey their estate in their name. If the Six Nations had, in 1805, when Brant's lease was made, held a legal estate in all the lands on the Grand River, we could not hold that Captain Brant could divest them of their right to 60 acres of it, by making a deed to Mallory in his own name, without admitting that he could equally at his pleasure have divested them of their whole territory, by leasing it to Mallory for 999 years, as

he did this, at a pepper-corn rent. There is nothing here but the mere execution of a deed in a manner that could bind no one but himself, under the assertion of an authority from the Indians, which is in no manner proved.

Where the foundation is so defective it is to little purpose to consider how far it could be admitted to be a good execution of the power to lease, if any had been proved, to alienate for 999 years, at a pepper-corn rent, a tract professing to embrace 60 acres, but which, according to what the lessor of the plaintiff contends for, embraces 420 acres.

It is in my opinion quite certain that Mallory was not seized under the deed which is set up here as the foundation of his title of any legal estate whatever, and so that he could forfeit none; in which respect this case stands on the same ground as that of Denn ex dem. Warren v. Fearnside (*a*), in which, as in this case, land had been sold by the commissioners of forfeited estates after the Scotch rebellion of 1715. The statute 1 Geo. I. ch. 50, had vested those estates in commissioners in the same manner as our statute already referred to, and no claim being made, they had been sold to the defendant. The lands had been forfeited as having been in the seizin of one Plessington, an attainted traitor, to whom a lease had been made the year before the rebellion, which lease the court held to be void, because being a lease for three lives, and so a freehold lease, it was made to commence *in futuro*. The lessee nevertheless had entered, and enjoyed under it, and had paid rent. The lease was void also for another reason, that Plessington was a papist, and disabled by statutes 11 & 12 Wm. III. ch. 4, from holding. The case was very fully argued, and the Court of Common Pleas determined that the lease, being of a freehold and made to commence *in futuro*, was therefore void: Secondly, that Plessington, entering and enjoying the premises under that void lease, was a mere tenant at will: Thirdly, that a tenant at will has no estate that he can forfeit to the crown: Fourthly, that the lease was also void on the ground of Plessington being a papist, (though on

(*a*) Wils. 176.

that point the court were not unanimous): Fifthly, that the possession of Plessington (the lease being void) was the possession of Warren: so that, as the estate was never out of the possession of Warren, there was no occasion to make any claim before the commissioners under the statute 1 Geo. I. ch. 50.

The learned Judge Foster differed from the rest of the court only on the point of the legal consequence of Plessington being a papist; thinking that he might nevertheless take for the benefit of the crown, and forfeit for his treason; but in all the other points the court was unanimous, and it consisted of DeGrey, C. J.; Gould, Blackstone, and Nares, JJ.

The case was several times argued, and it is so far stronger than the present against the right of the owner of the estate, and in favor of the purchaser from the commissioners of forfeited estates, that there the purchaser under the commissioners had entered and enjoyed, and no claim had been made under the statute, and yet he was dispossessed on the ground that the supposed term which had been treated as forfeited, was a void term. Here the beneficial owners of the land sought to be recovered have never been dispossessed, but the purchaser of the supposed forfeited term, which turns out to be no term, is now seeking to dispossess them, and not only so, but under a purchase of a supposed lease of 60 acres, is contending for a right to 420 acres.

That consideration brings up other questions, which have also been raised in this case, but which it is obviously not material to go into—if I am right in my opinion that no legal estate in any land was created by Captain Brant's lease, and that Mallory was seized of no interest even in the 60 acres, which he could have forfeited to the crown by his treason.

I refer now to the exceptions taken by the defendant's counsel, that the inquisition, as regards this lease, was so vague and uncertain in its terms, that nothing could vest under it in the commissioners—that the provisions of the Forfeited Estates Act, could not operate upon anything so loose and imperfect; that the commissioners could not, by

their deed effectually convey any more or other lands than were returned and described in the inquisition itself, which was the foundation of their title; that the assuming to convey 60 acres by a description which will embrace 420 acres, if the fact be so, and which description not being contained in the inquisition or extract, cannot be taken to have received the consideration of the inquest, was therefore an unauthorized act, which can prejudice no one; and that independently of all other objections, 420 acres of land cannot pass under a deed which professes only to convey 60 acres more or less.

I do not at present see that the plaintiff's claim could be sustained against all these objections; on the contrary, my opinion is, that some, if not all of them, are well founded, and would be fatal at any rate to his case.

Great scope, no doubt, is given to the maxim *id certum est quod certum reddi potest;* but where is the reference in the inquisition to anything by which it can be made certain what was intended? "Another lease for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres more or less:" this is all the description given of what is forfeited.

For anything said in the inquisition, the land might have been fifty miles higher up or lower down the river; anywhere, in short, between the mouth and the source. The fact that Mallory did hold a lease of Indian lands which the commissioners, going beyond the inquest, and for all that appears beyond the evidence before the inquest, have annexed to their deed, does not seem to me to authorize them or us to assume that that must have been the lease to which the inquisition refers. If it be true that the description in the lease will embrace 420 acres, instead of 60, that disproves the identity, for the jury returned no such estate as that in the seizin of Mallory. The inquisition makes no mention of any lease by Brant, it speaks only of "*another lease.*"

If the inquisition had returned "sixty acres on the north side of the St. Lawrence," without any further description, would that bind any land, of any quantity, which Mallory

cou'd be shewn to have been seized of, between Kingston and the eastern limit of the province ?

It would seem rather to be a case calling for a writ of *melius inquirendum.*

The Forfeited Estates Act (sec. 12) only vests in the commissioners the estates that had been described in the register which must be, and in this case was, a transcript from the inquisition; and that being all that was vested in them they could sell no more; and it would be inconsistent with the intention of the act to afford protection to all parties who might have claims, either through mortgage or otherwise, if under an inquisition, and published extracts and notices, all speaking of a tract of about sixty acres, they should find themselves shut out because they did not understand 420 acres to be included, and because they did not make a claim which there was nothing in the inquisition, or extract, or notice of sale, to shew there could be any necessity for making—nothing but a description contained in a paper, which was in the pocket of Mallory when he left the province, and which never had been seen by the jury or the commissioners till after the sale.

For the reasons I have stated, I think the plaintiff wholly failed to support his right to a verdict; and the rule must be made absolute for a nonsuit.

A nonsuit was moved for when the plaintiff closed his case, on the ground that no evidence had been given of the inquisition, which it was contended was indispensable. The plaintiff then produced a copy of the registered extract which, it was argued, should be received in the place of the original, which is made evidence of the inquisition by the statute, and this removed that ground of exception; but the defendant's counsel then objected that the inquisition, as shewn by the extract, could not support the conveyance which the commissioners for forfeited estates had assumed to make to the lessor of the plaintiff, for it referred to nothing which could serve to supply proof of identity; and the commissioners were not authorized to go beyond the inquisition. They could not as it was contended, found their deed upon an instrument produced to them for

the first time long after the inquisition had been returned, an instrument which the jury had no evidence of, and could not be supposed to refer to in the inquisition; and by adopting that instrument as their guide, extend the effect of the inquisition from 60 to 420 acres, which the lease would cover according to what the lessor of the plaintiff contends for.

I was under the impression at the trial that the objection was insuperable, but desired to reserve it for future consideration, because both parties had come prepared with witnesses on the point of the locality of Culver's hut, and I thought it desirable, as it might tend to put an end to contention about that fact, to have that point investigated.

If it was clearly understood by the parties, as I believe it was, that it was to be open to the defendant to renew his motion for nonsuit *in banc.* on the ground I have last stated, then our opinion is, that the rule for entering a nonsuit should be made absolute.

The exceptions to Mallory's title, to which I have adverted, do not seem to have been moved as grounds of nonsuit, but in our opinion they are insuperable objections to the plaintiff's recovery.

BURNS, J.—Two questions fairly present themselves in this case for decision, either of which, if against the plaintiff must determine against his right to maintain this action.

First: Supposing that Mallory had such an estate in his lands as could be forfeited, then did the commissioners' deed convey any estate to the lessor of the plaintiff in the lands which he seeks to recover in this action? This question naturally subdivides itself into the following: 1—Does the inquisition support the conveyance: 2—is the conveyance larger in its terms than the inquisition: and 3—if the inquisition does support the conveyance and the conveyance is not wider in terms than the inquisition, then supposing the verdict to be right as to the starting point of the description, will that be sufficient to convey the lands sought to be recovered here, the quantity of land being expressed to be 54 acres more or less, in the deed. The inquisition in this case was taken by virtue of the royal

prerogative, but the title of the crown to the lands does not depend upon office found, for by statute 33 Henry VIII., ch. 20, sec. 2, it is enacted that upon attaint of high treason, whether it be by the course of the common law or by statute, the crown shall be deemed and adjudged in actual and real possession without any office or inquisition found; and if the crown had granted the lands in this case without office found, the grant would have been good.

The statute 59 Geo. III., ch 12, vested the lands of aliens upon inquisition as therein mentioned, and also the estates real and personal of those attainted of high treason, in such commissioners as the government should appoint, and declares that such estate should be vested in the manner and for the ends and purposes in this act mentioned. Now, though Mallory's lands would have been deemed and adjudged in the possession of the crown without office, the question is whether under this act any other lands than such as were returned upon inquisition became vested in the commissioners. Although the words of the first section are wide enough to embrace all estates whatsoever, yet the 2nd section declares that to the end that all the estates of the said traitors may be the better known, described, and ascertained, it is enacted that the clerk of the crown shall deliver to the commissioners a certified extract, under the seal of the court, of all inquisitions whereby any real or personal estate of any kind whatever has been returned as forfeited by the attainder, &c.; and in these extracts shall be stated the names, additions, and late places of abode of the persons attainted, the species of treason of which, and the respective times, places, and courts, when and where they were so attainted, and also the real estates, chattels, real or personal debts, goods and effects whatsoever, which in the inquisition are found to be forfeited by such attainder; and these extracts the commissioners are to enter into a book to be kept for that purpose. The 4th section gave power to the commissioners to inquire into such estates and to sell the said real estates. The 13th section gave the commissioner power to sell the said real and personal estates by auction, &c.; and it was under this authority that

the property was sold in this case. I think the whole scope of the act shews that it was only contemplated to vest in the commissioners such estates as should be found by inquisition to be vested in the crown, because not only the past was spoken of, but the future also; and it is quite clear that in future, after the passing of the act it would only be such estates as should be returned upon inquisition found which would be vested in the commissioners. If this be so, then it appears to me the validity of the inquisition does come in question, because that is absolutely required to sustain the deed. The stat. 2 & 3 Ed. VI. ch. 8, sec. 8, has been held to apply to all inquisitions (*a*). No valid grant could be made upon this inquisition, because it does not state of whom the lands were held, and where nothing was found in that respect, it would be the same as stating that the jury were ignorant, and in such case a writ of *melius inquirendum* would be awarded. Then again the inquisition says the lands were certain other Indian lands which were on the south-west bank of the Grand River, which may be anywhere from the mouth of the river to its source. This certainly gives no information of the locality of the lands; and though it might be sufficient to have awarded a *melius inquirendum*, yet the description itself, if that is to be acted upon, would support any deed for any lands which might be made within a space of perhaps two hundred miles. I must say I think there is a want of certainty in this inquisition which ought to render it insufficient (*b*). If the inquisition can be got over, then comes the question—whether the conveyance is not wider than the inquisition? The inquisition finds as forfeited to the crown a certain tract of land containing about sixty acres more or less, on the south-west bank of the Grand River, and the conveyance upon the face of it tells us that the particular description which is set forth contains 54 acres more or less. but the plaintiff says that in fact the description contains 420 acres. The inquisition contains no boundaries, but

(*a*) Vide Doe v. Redfearn, 12 East, 96; also notes Thomas's Coke, 1 vol. 303, 304, 2 vol. 197.

(*b*) Rayning's case, Dyer, 268.

professes to declare that Mallory at the time of his attainder was entitled to about 60 acres more or less. As I have before endeavoured to prove, the question is not in truth how much or what quantity of land Mallory had, or which he did forfeit; but how much, and what quantity became vested in the commissioners by virtue of the act of Parliament. Without any particular words of description to limit or enlarge the expression *about* 60 *acres more or less*, I can never imagine that 420 acres are to pass; and therefore when the commissioners became vested with the estate, it was with that only which had been forfeited, viz., about 60 acres. They do not profess to convey even that quantity, for they call it only 54 acres more or less. For reasons which will appear in the sequel. I cannot bring my mind to believe that more than 60 acres ever became vested in the commissioners by means of the inquisition, and consequently they could convey no more; and if their conveyance is, by reason of a false description, made to embrace more than that, the defendant is not to be deprived of his land for that reason, even though the plaintiff's deed may be thereby rendered void for what he might otherwise claim and ought to have. But, suppose the description is correct, that is, applying the external proof upon the ground to it, and that it in truth does embrace 420 acres. that in my opinion does not help the plaintiff, because I think no more than the 60 acres were vested in the commissioners. Suppose, however, that all the land which Mallory owned did become vested in the commissioners, and that the inquisition supports the deed, then when the commissioners professed to sell 54 acres more or less, will 420 pass by that deed under a description which would cover 420 acres? If one were selling a lot by its number or name, and misstated the number of acres, or misstated the boundaries of it, that case may be understood without difficulty; but in this case external evidence must be applied before it can be ascertained whether the description embraces only the 54 or the 420 acres. In such latter case I conceive it is very important that we should look at the quantity the parties intended should be conveyed. To understand such

a case, we must rightly comprehend what meaning is to be attached to the expression *more or less*. In a very old case, Day v. Finn (*a*), it was held that ten acres, *sive plus sive minus*, did not pass 30 acres; and Yelverton held that by the expression should be intended a reasonable quantity more or less, by a quarter of an acre, or two or three at most; and if it were three acres less than ten the lessee must be content with it. In Portman v. Mill (*b*) the agreement was to sell 349 acres by estimation, be the same more or less, but on measurement it turned out to be 100 acres less, and Lord Eldon said, with respect to the difference, he never could agree that such a clause would cover so large a deficiency in the number of acres as was alleged to exist there. Sir Edward Sugden mentions a case decided in 1825, of Gell v. Watson, where the sale was according to a plan, and in enumerating the different quantities, the agreement proceeded to say the whole quantity was about 101 acres, 3 roods, and 29 perches. There was a deficiency of 2 acres in two of the closes which were stated to contain together 8 acres, 1 rood, and 4 perches, and the purchaser was held entitled to an abatement in the price. It is unnecessary to express any decided opinion upon the point whether the description contained in the commissioners' deed, supposing the jury to have found correctly, would pass the whole 420 acres, or should be confined to about 54 acres, because I am clearly of opinion that no more than the quantity mentioned in the inquisition, (suppose that be sufficient), can ever be held to have become vested in the commissioners—though if Mallory had more lands than those mentioned, they would be vested in the crown; but the commissioners could convey no more than under the act became vested in them; and because I am fully of opinion that the inquisition itself, in respect of the want of certainty of the description of the lands and of whom held, did not sufficiently authorize the commissioners to sell or dispose of any particular lands as belonging to Mallory—that is, certainly not as applicable to those sought to be recovered in this action.

(*a*) Owen, 133. (*b*) 2 Russ. 571.

The second question which naturally presents itself is, whether Mallory had any forfeitable interest in the lands in dispute between these parties. Suppose the description in the commissioners' deed can be held to embrace the land, it appears from the document intended to be a lease, which the lessor of the plaintiff has put in evidence, that the land in question was part of the lands set apart by General Haldimand for the Six Nations of Indians. The instrument setting apart these lands is referred to in the lease now produced, as bearing date the 20th March, 1795, and as being duly registered in the office of the secretary of the province. It is matter of history, as is well known, that the British Government were originally the proprietors of the lands on the Grand River, and that these lands were set apart by General Haldimand, the then Governor of the province of Quebec, in order to permit the Mohawk Indians, and others of the Six Nations, who had lost their settlements situated within the American States, in consequence of their adherence to the British standard, to take possession of, and to settle upon them, and which they and their posterity were to enjoy forever. The fee simple in the lands was in the first instance vested in the commissioners; and one question is, whether the crown had divested itself of that interest, or only permitted the Indians the use and enjoyment of the lands—the crown acting in fact in the light of a parent and guardian of them, as it were, for these tribes. It never can be pretended that these Indians while situated within the limits of this province, as a British province at least, were recognized as a separate and independent nation, governed by laws of their own, distinct from the general law of the land, having a right to deal with the soil as they pleased; but they were considered as a distinct race of people, consisting of tribes associated together distinct from the general mass of the inhabitants, it is true, but yet as British subjects, and under the control of, and subject to the general law of England. As regards these lands on the Grand River, the Indians had no national existence nor any recognized patriarchal or other form of government or management, so far as we see in, any way;

the lands, as appears from the document under which the tribes claim title to them, shew that they belonged to the British Government. There seems to have been no trust created in these lands in any person or body of persons for the Indians, neither was it necessary there should be, for it was more natural the crown should be in a situation to protect their interests and treat them as a people under its care, not capable of disposing of their possessions. Although they are distinct tribes as respects their race, yet that gave them no corporate powers or existence; but so far as the lands are concerned, for all we can see, the government intended that all members of the tribe should be upon an equal footing, and each individual should have an interest in the lands to him and his posterity. The government must have considered these people as placed in such a position, and must have intended to have treated them in that light, and consequently never intended to have parted with the proprietorship of the soil. It is quite clear from the instrument signed by General Haldimand, that the government never did more than through the governor of the province permit the Indians the occupation of the lands. This permissive occupation constituted them, as it were, mere tenants-at-will to the crown; and if that be so, then it follows that they could grant no interest to Mallory, such as is pretended in this case, which could be forfeited by reason of his treason, and the plaintiff can have no title through the inquisition. Beside this view of the question there is another, which appears to be beset with insurmountable difficulties: The lease which the plaintiff produces purports to be made between the Six Nations of Indians residing on the Grand River, by Joseph Brant, principal chief and agent duly authorized in the name of them, the said Six Nations, and in their behalf to execute leases of such parts and parcels of their lands, as by the said Joseph Brant, shall be thought fit to be leased of the one part, and Mallory of the other part. It is not proved or shewn how, or in what manner Brant had or could have such authority mentioned; and, supposing the government intended the Indians to have something more in the lands

than a permissive occupation of them, it is difficult to conceive that any such authority as here pretended to be exercised amounts to a legal right of disposition. Brant professes to lease the land in dispute for a period of 999 years, and one of the absurdities of the instrument is, that it professes that the Six Nations of Indians covenant with Mallory for quiet and peaceable possession. It is a novel thing in our day to see a whole nation enter into a personal covenant for quiet enjoyment of lands, and the surprise with which that novelty strikes the mind is not the less because the parties who entered into such covenant happen to be a body of North American Indians. As before remarked, these tribes cannot be looked upon or treated as corporate bodies, without being created such in some way known to our law; and, so far as we know, there were no means by which Brant could be appointed or have delegated to him the authority of each individual member of the tribe for himself and his posterity, to grant and dispose of the lands as he thought fit to be leased. We read that Abraham and Abimelech entered into a covenant in regard to a well, and the same thing occurs even to the present day, that the chiefs of the nomadic tribes of some parts of the east bind the tribe in respect of their dealings, though the tribe, with other tribes, is under the government of a superior authority. Whether the Indian tribes of this continent acknowledge such absolute authority, and whether it would require to be delegated by a council, I do not know; but, whatever may be the Indian laws or customs in this respect, I take it to be clear that the property in the lands which were confessedly at one time in the crown, must be dealt with and disposed of according to the general law of the country, unless we see that the crown has intended it to be governed by some other law. Most certainly by our law, without something more than a person designating himself an agent, and signing himself as such, a whole body of persons could not be bound by the act of one. The government perhaps in transactions with a tribe may recognize the acts of those known to be the principal chiefs as being the acts of the whole body; but that is a

very different matter from calling upon a court of justice to give effect to the alienation of lands, which, for all we can see, must be governed by the same rules and laws which regulate the title to all property within our jurisdiction. No authority is shewn in any way which could warrant Brant disposing, on behalf of the Six Nations, of these lands by such an instrument as produced in this case. It is very true, the Indians are not contesting the validity of the act of their chief; but inasmuch as the plaintiff undertakes to prove that he has a good title to the lands because Mallory owned them, and forfeited them by reason of his treason, the defendant has a right to put the plaintiff to prove a strictly legal title, and forces upon our consideration the question whether in truth Mallory had any legal interest upon which the inquisition can attach. The case of Dunn on the demise of Warren v. Fearnside (*a*), bears out this position.

Whether the jury have arrived at a sound conclusion in regard to the starting point of the description of the land may well, I think, be doubted: but that, however, was a matter within their province to decide.

Upon the legal right, however, of the lessor of the plaintiff, I feel clear he must fail, and that he never can succeed in this action, or in any action of ejectment founded upon this inquisition and Mallory's title under the instrument produced at this trial.

DRAPER, J., being concerned in this case when at the bar, gave no judgment.

JONES v. WALKER ET AL.

Covenant—Construction.

The plaintiff, Jones, had chartered a boat called the "Favorite," of Mr. Cayley, for several years. Before the expiration of this charter, a copartnership was formed between the now plaintiff and the now defendants. When this copartnership was dissolved, there was still a year to run of the above charter; and the plaintiff and defendants entered into an agreement whereby the defendants undertook to assume the above charter for the time unexpired, and to pay "F. M. Cayley, Esq., the sum of 360*l.* for the use of said steamer for the year 1847, (the remaining year of the charter,) and shall and will deliver up to the said R. Jones, or to the said F. M. Cayley, the said steamer "Favorite," on the expiration of the said charter, or otherwise account to the said Jones, or to the said Cayley, for the value of the said boat; and *generally and without exception* shall and will save the said R. Jones harmless therefrom, and from the *said charter*, and from all the obligations thereof."

T-1762-73

The Queen on the information of the Deputy Attorney General (*Plaintiff*)

v.

Gilbert A. Smith (*Defendant*)

Trial Division, Dubé J.—Newcastle, New Brunswick, September 7 and 8, 1976, May 16, 17, 18 and 19, 1977; Ottawa, September 9, 1977.

Indians — Information by Crown — Reserve lands — Lands allegedly surrendered to Crown to be sold for Band's benefit — Not sold and no benefit received — Lands occupied by defendant and predecessor in title since 1838 — Whether or not lands vested in Province at surrender in 1895 — Whether or not defendant validly holds lands in adverse possession — Indian Act, R.S.C. 1970, c. I-6, s. 31.

This information under section 31 of the *Indian Act* claims on behalf of the Red Bank Band of Indians the right of possession as against the defendant of a parcel of land allegedly located on their Reserve. Plaintiff claims the lands were surrendered to the Crown to be sold for the benefit of the Band and alleges that the land had neither been sold, nor had any benefit been received. Defendant, however, claims that he bought the land, supporting his allegation with registered indentures of deed. Defendant argues that the land became vested in the Province at surrender in 1895, and alternatively claims the lands by adverse possession.

Held, the action is dismissed. The 1895 surrender was not a definite, final surrender by the Red Bank Band to the Crown, but merely a conditional surrender which became absolute only upon completion of the sale and the placing of the monies to the credit of the Band. The 1958 Canada-New Brunswick Agreement settles all outstanding problems concerning Indian lands, including vesting, *vis-à-vis* Canada and the Province, and enables the Queen in right of Canada to deal effectively with reserve land. To do so, the Queen in right of Canada may properly file a claim before this Court on behalf of the Indians under the *Indian Act*. But to succeed, a claim must rest on a right which has not been extinguished. Unexercised rights of occupancy do not necessarily last forever. From 1838 to the date of the information in 1973, adverse possession has not been effectively interrupted by any of the parties entitled to do so, namely the Province of New Brunswick from 1838 to 1958, the Government of Canada from 1958 to 1973, and the Red Bank Band with reference to their own rights of occupancy throughout the period.

ACTION.

T-1762-73

La Reine, sur la dénonciation du sous-procureur général du Canada (*Demanderesse*)

c.

Gilbert A. Smith (*Défendeur*)

Division de première instance, le juge Dubé—Newcastle (Nouveau-Brunswick), les 7 et 8 septembre 1976, les 16, 17, 18 et 19 mai 1977; Ottawa, le 9 septembre 1977.

Indiens — Dénonciation par la Couronne — Terres de réserve — Terres prétendument cédées à la Couronne pour être vendues au bénéfice de la bande — Terres non vendues et bénéfices non reçus — Terres occupées par le défendeur et ses prédécesseurs en titre depuis 1838 — Ont-elles été confiées à la province lors de la cession en 1895? — Le défendeur détient-il valablement ces terres en vertu d'une possession acquisitive? — Loi sur les Indiens, S.R.C. 1970, c. I-6, art. 31.

Cette dénonciation produite en vertu de l'article 31 de la *Loi sur les Indiens* réclame au nom de la bande d'Indiens Red Bank le droit de possession, à l'encontre du défendeur, d'un lopin de terre qui serait situé dans leur réserve. La demanderesse prétend que ce lopin de terre a été cédé à la Couronne pour être vendu au bénéfice de la bande et allègue que ce lopin n'a jamais été vendu et que la bande n'en a jamais bénéficié. Le défendeur prétend, cependant, avoir acheté ce lopin de terre, et possède trois contrats enregistrés à l'appui de sa prétention. Il allègue que ledit lopin a été confié à la province lors de la cession en 1895, et que, subsidiairement, il détient ce lopin en vertu d'une possession acquisitive.

Arrêt: l'action est rejetée. La cession de 1895 n'était pas une cession définitive, finale consentie par la bande Red Bank à la Couronne, mais simplement une cession conditionnelle qui ne devenait absolue qu'après la vente et le dépôt de l'argent au crédit de la bande. La convention de 1958 entre le Canada et le Nouveau-Brunswick règle tous les problèmes en suspens relatifs aux terres indiennes, y compris celui de leur transfert entre le Canada et la province, et permet à la Reine du chef du Canada de prendre des mesures efficaces à l'égard des terres faisant partie desdites réserves. A cette fin, la Reine du chef du Canada peut légitimement déposer une réclamation devant cette cour au nom des Indiens en vertu de la *Loi sur les Indiens*. Mais pour réussir, une réclamation doit s'appuyer sur un droit non éteint. Les droits d'occupation dont on ne fait pas usage ne durent pas indéfiniment. De 1838 à la date de cette dénonciation en 1973, la possession acquisitive n'a été effectivement interrompue par aucune des parties ayant droit de le faire, soit la province du Nouveau-Brunswick de 1838 à 1958, le gouvernement du Canada de 1958 à 1973, et la bande Red Bank pour ce qui touche leur propre droit d'occupation pendant la période.

ACTION.

COUNSEL:

J. M. Bentley, Q.C., and *Robert R. Anderson* for plaintiff.

James E. Anderson, John D. Harper and *William J. McNichol* for defendant.

SOLICITORS:

Deputy Attorney General of Canada for plaintiff.

Anderson, MacLean & Chase, Moncton, for defendant.

The following are the reasons for judgment rendered in English by

DUBÉ J.: This is an information exhibited by the Deputy Attorney General of Canada under section 31 of the *Indian Act*[1], claiming on behalf of the Red Bank Band of Indians the right of possession, as against the defendant of a parcel of land allegedly located in the Red Bank Indian Reserve No. 7, Northumberland County, Province of New Brunswick.

The plaintiff claims that the parcel of land lies within the portion of the Reserve which was surrendered to the Crown in 1895 to be sold for the benefit of the Band. It is alleged that this particular parcel was in fact never sold and that the Band never received any benefit from it.

On the other hand, defendant claims that he purchased the parcel of land from one Isaac Mutch and has three registered indentures of deed, dated September 26, 1952, September 8, 1958 and July 16, 1959 to support his allegation.

Filed as Crown exhibits were early nineteenth century surveys, plans and acts tracing the record of Indian reserve land on the Little Southwest Miramichi River, one of several branches of the Miramichi River. The surrender document itself, dated June 6, 1895, transferred to the Queen *inter alia* lots 1, 2, 3, 5, 6, 7 and 17 on the north side of the Little Southwest Miramichi River. An accompanying report to the Superintendent General, Indian Affairs, dated July 30, 1896, states that the lots "are occupied by squatters, the object of the surrenders being to enable the Department of Indian Affairs to sell the lots to the parties in occupation".

[1] R.S.C. 1970, c. I-6.

AVOCATS:

J. M. Bentley, c.r., et *Robert R. Anderson* pour la demanderesse.

James E. Anderson, John D. Harper et *William J. McNichol* pour le défendeur.

PROCUREURS:

Le sous-procureur général du Canada pour la demanderesse.

Anderson, MacLean & Chase, Moncton, pour le défendeur.

Ce qui suit est la version française des motifs du jugement rendus par

LE JUGE DUBÉ: Il s'agit d'une dénonciation produite par le sous-procureur général du Canada en vertu de l'article 31 de la *Loi sur les Indiens*[1] réclamant au nom de la bande d'Indiens Red Bank le droit de possession, à l'encontre du défendeur, d'un lopin de terre présumément situé dans la réserve indienne Red Bank n° 7, comté de Northumberland, province du Nouveau-Brunswick.

La demanderesse prétend que ce lopin de terre est situé dans la partie de la réserve qui a été cédée à la Couronne en 1895 pour être vendue au bénéfice de la bande. On allègue que ce lopin précis n'a, en fait, jamais été vendu et que la bande n'en a jamais bénéficié.

Par ailleurs, le défendeur prétend avoir acheté le lopin de terre à un certain Isaac Mutch et possède trois contrats enregistrés, en date du 26 septembre 1952, du 8 septembre 1958 et du 16 juillet 1959 à l'appui de sa prétention.

Les pièces produites pour la Couronne comptent des levés, plans et actes du début du dix-neuvième siècle indiquant les possessions des terres de la réserve indienne sur la rivière Little Southwest Miramichi, l'un des nombreux embranchements de la rivière Miramichi. Le document de cession lui-même, en date du 6 juin 1895, a cédé à la Couronne, entre autres, les lots 1, 2, 3, 5, 6, 7 et 17 sur le côté nord de la rivière Little Southwest Miramichi. Un rapport concomitant envoyé au surintendant général, Affaires indiennes, en date du 30 juillet 1896, déclare que les lots [TRADUCTION] «sont occupés par des colons sans titre, la cession ayant pour but de permettre au ministère des Affaires indiennes de vendre les lots aux parties qui les occupent».

[1] S.R.C. 1970, c. I-6.

A letter dated July 15, 1898, from the Department of Indian Affairs agent to the "Secretary, Department of Indian Affairs, Ottawa" reports that "in obedience to instructions. . .I have visited this reserve". The agent found that lots 6, 7 and 8 were occupied by James Mutch.

A memorandum dated August 12, 1898 to the Secretary after an investigation into "the question of Squatters on the Red Bank Indian Reserve" reports as follows with reference to lot 6, north of the Little Southwest River:

Lot	Occupant	Remarks
6	James Mutch	Occupant wishes to purchase and will pay part of purchase money next Fall.

In a letter dated July 5, 1901, to the Deputy Minister of Justice, Ottawa, the Secretary writes:

> I am directed to enclose a statement of facts regarding squatters on the Red Bank Indian Reserve, County of Northumberland, N.B., and to request that steps be taken to compel the squatters to make payment for the lands.

. . .

The statement of facts listed the names of "the occupants on the undisposed" lots, including the name of James Mutch for lot 6, north of Little Southwest River.

In a letter dated March 14, 1919, from H. G. Buoy, Timber Inspector, to a Mr. Orr, it is recommended "that Mr. Isaac Mutch be given the opportunity of purchasing this land at the rate of $2.00 per acre", referring to the "east half of lot no. 6 on the north side of the Little South West Miramichi River in the Redbank Reserve".

In a subsequent letter between the same parties dated June 10, 1919, Buoy concludes "I agreed with him (Mutch) that $2.00 per acre over the whole lot would be an excessive price and that in my opinion a fair and reasonable price would be $1.50 per acre".

A memo dated March 16, 1960, from the Superintendent of the Miramichi Indian Agency reveals

Une lettre en date du 15 juillet 1898 envoyée par un représentant du ministère des Affaires indiennes au «Secrétaire, ministère des Affaires indiennes, Ottawa», rapporte que [TRADUCTION] «conformément aux directives ... j'ai visité cette réserve». Le représentant a noté que les lots 6, 7 et 8 étaient occupés par James Mutch.

Un mémoire en date du 12 août 1898, envoyé au secrétaire après la tenue d'une enquête concernant [TRADUCTION] «la question des colons sans titre de la réserve indienne Red Bank» relate ce qui suit concernant le lot 6, au nord de la rivière Little Southwest:

[TRADUCTION]

Lot	Occupant	Remarques
6	James Mutch	L'occupant désire acheter et paiera partie du prix l'automne prochain.

Dans une lettre en date du 5 juillet 1901 adressée au sous-ministre de la Justice, Ottawa, le secrétaire écrit:

> [TRADUCTION] On me demande d'inclure un exposé des faits concernant les colons sans titre de la réserve indienne Red Bank, comté de Northumberland (N.-B.), et d'exiger que des mesures soient prises pour les forcer à payer les terres.

. . .

L'exposé des faits énumère les noms [TRADUCTION] «des occupants des [lots] non vendus» y compris celui de James Mutch pour le lot 6, au nord de la rivière Little Southwest.

Dans une lettre en date du 14 mars 1919 de H. G. Buoy, inspecteur forestier, à un certain M. Orr, on recommande [TRADUCTION] «que l'on offre à M. Isaac Mutch la possibilité d'acheter cette terre au prix de $2 l'acre», faisant référenee à la [TRADUCTION] «moitié est du lot nº 6 du côté nord de la rivière Little South West Miramichi dans la réserve Redbank».

Dans une lettre postérieure entre les mêmes parties en date du 10 juin 1919, Buoy conclut [TRADUCTION] «je partage son opinion (celle de Mutch) que $2 l'acre pour toute la terre serait un prix excessif et à mon avis $1.50 l'acre représenterait un prix raisonnable et équitable».

Un mémoire en date du 16 mars 1960, provenant du surintendant de la Miramichi Indian

that "lots 6 and 17 were previously surrendered for sale but have never been sold".

The metes and bounds description of the subject property appearing in the statement of claim was prepared in 1973 by W. D. McLellan, a land surveyor, who testified extensively at the trial and established to my satisfaction that the subject property is truly the same parcel of land retraced to the surrender of 1895.

The affidavit of H. R. Phillips, Registrar of Indian Lands and Officer in charge of the Surrendered Land Register, filed as an exhibit, confirms that there appears in the register no document to transfer the said lands to the defendant or to any one.

The two main grounds of defence raised by the defendant are firstly that as a result of the surrender of 1895, the land became vested in the Queen in right of New Brunswick, not Canada, and secondly that the defendant holds the subject property in adverse possession against the whole world.

In *St. Catherine's Milling and Lumber Company v. The Queen*[2], the Privy Council held that section 109 of *The British North America Act, 1867* gives to each province 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, subject to such rights as the Dominion can maintain under sections 108 and 117. By the 1763 *Royal Proclamation*[3] possession to the lands in question in Ontario had been granted to certain Indian tribes. In 1873 by formal treaty with certain Indian tribes these lands were surrendered to the Government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing.

[2] (1866) 10 O.R. 196, affirmed (1886-87) 13 O.A.R. 148, affirmed (1887) 13 S.C.R. 577 (1889) 14 App. Cas. 46.

[3] (R.S.C. 1970, Appendix II.) Under *The Royal Proclamation* King George erected four separate governments, styled Quebec, East Florida, West Florida and Grenada. It did not apply to Nova Scotia which at the time included New Brunswick.

Agency révèle que [TRADUCTION] «les lots 6 et 17 ont été antérieurement cédés pour vente mais n'ont jamais été vendus».

La description des limites du terrain en question qui apparaît dans la déclaration a été préparée en 1973 par W. D. McLellan, arpenteur géomètre, qui a beaucoup témoigné au procès et a établi à ma satisfaction qu'en remontant à la cession de 1895 la propriété en question est vraiment le même lopin de terre.

L'affidavit de H. R. Phillips, Conservateur des terres indiennes et fonctionnaire responsable du Registre des terres cédées, produit comme pièce, confirme qu'il n'existe au registre aucun document transférant lesdites terres au défendeur ou à qui que ce soit.

Le défendeur soulève principalement deux moyens de défense, premièrement, qu'en raison de la cession de 1895, la terre est devenue propriété de la Couronne du chef du Nouveau-Brunswick, et non du Canada, et deuxièmement qu'il détient la propriété en question en vertu d'une possession acquisitive opposable à tous.

Dans *St. Catherine's Milling and Lumber Company c. La Reine*[2], le Conseil privé a jugé que l'article 109 de l'*Acte de l'Amérique du Nord britannique, 1867*, donne à chaque province le plein droit de propriété de la Couronne sur toutes les terres à l'intérieur de ses limites, qui, au moment de l'union, appartenaient à la Couronne, sous réserve des droits que le Dominion peut conserver en vertu des articles 108 et 117. Par la *Proclamation royale* de 1763[3] la possession des terres en question en Ontario avait été accordée à certaines tribus indiennes. En 1873 par traité formel avec certaines tribus indiennes ces terres ont été cédées au gouvernement du Dominion pour la Couronne, sous réserve d'un certain privilège restreint de chasse et de pêche.

[2] (1886) 10 O.R. 196, confirmé (1886-87) 13 O.A.R. 148, confirmé (1887) 13 R.C.S. 577, (1889) 14 App. Cas. 46.

[3] (S.R.C. 1970, Appendice II.) En vertu de la *Proclamation royale*, le roi George a établi quatre gouvernements distincts, savoir: ceux de Québec, de la Floride orientale, de la Floride occidentale et de Grenade. Elle ne s'applique pas à la Nouvelle-Écosse qui à l'époque comprenait le Nouveau-Brunswick.

The Privy Council said that by force of the proclamation, the tenure of the Indians was a personal and usufructuary right dependent on the goodwill of the Crown and that by virtue of the surrender the entire beneficial interest in the lands, subject to the hunting and fishing privilege, was transmitted to the province in terms of section 109 of *The British North America Act, 1867*.

Defendant submits that the *St. Catherine's* decision is applicable to the instant case and is authority of the highest order for holding that, upon surrender of the lands by the Red Bank Band in 1895, the beneficial interest and title in the subject property vested in the Crown in right of the Province of New Brunswick free of any Indian burden or interest. The Queen in right of Canada would therefore, defendant alleges, have no standing to maintain this action.

Two years after the *St. Catherine's* decision or in 1890, the New Brunswick Court of Appeal in *Burk v. Cormier*[4] held that the title to land in the Province reserved for the Indians is in the Provincial Government and not in the Dominion Government. The Chief Justice said at page 149:

> 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.

and further down:

> 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.

In 1895, the Supreme Court of Canada in *The Province of Ontario v. The Dominion of Canada and the Province of Quebec*[5] held that by *The British North America Act, 1867*, the Dominion of Canada assumed the debts and liabilities of the Province of Canada and that section 109 of *The British North America Act, 1867* provided that all lands belonged to the provinces in which they were situated "subject to any Trusts existing in respect thereof. . . ." In 1850 the late Province of Canada had entered into treaties with some Indian tribes

[4] (1890) 30 N.B.R. 142.
[5] (1896) 25 S.C.R. 434.

Le Conseil privé a dit qu'en raison de la proclamation, le droit de propriété des Indiens était un droit personnel et usufructuaire assujetti au bon vouloir de la Couronne et qu'en vertu de la cession, la propriété réelle des terres, sous réserve du privilège de chasse et de pêche, a été cédée à la province aux termes de l'article 109 de l'*Acte de l'Amérique du Nord britannique, 1867*.

Le défendeur allègue que l'arrêt *St. Catherine's* s'applique en l'espèce et est une autorité du plus haut ordre pour dire qu'au moment de la cession des terres par la bande Red Bank en 1895, la propriété réelle et le titre du bien en question ont été dévolus à la Couronne du chef de la province du Nouveau-Brunswick, libre de tout intérêt ou obligation des Indiens. Le défendeur prétend donc que la Reine du chef du Canada n'a pas qualité pour agir dans cette action.

Deux ans après l'arrêt *St. Catherine's*, soit en 1890, la Cour d'appel du Nouveau-Brunswick a jugé dans *Burk c. Cormier*[4] que le titre des terres réservées aux Indiens dans la province, appartient au gouvernement provincial et non au gouvernement fédéral. Le juge en chef a dit à la page 149:

> [TRADUCTION] Ici, encore, il me semble que les arguments à l'appui des droits provinciaux sont plus forts que dans l'arrêt St. Catherine's parce que, dans cette province, le droit de propriété de la Couronne sur les terres en litige n'est assujetti (selon ce qui ressort de la preuve) à aucun titre indien.

et plus bas:

> [TRADUCTION] Il n'y a jamais eu de doute dans cette province, que le titre des terres réservées à l'usage des Indiens est demeuré, comme celui de toutes les autres terres non cédées, à la Couronne, les Indiens ayant tout au plus un droit d'occupation.

En 1895, la Cour suprême du Canada a jugé dans *La province de l'Ontario c. Le Dominion du Canada et la province du Québec*[5] qu'en vertu de l'*Acte de l'Amérique du Nord britannique, 1867*, le Dominion du Canada a pris à sa charge les dettes et obligations de la province du Canada et que l'article 109 de l'*Acte de l'Amérique du Nord britannique, 1867* a prévu que toutes les terres appartiennent aux provinces dans lesquelles elles sont sises «sous réserve des fiducies existantes». En 1850, l'ancienne province du Canada avait passé

[4] (1890) 30 N.B.R. 142.
[5] (1896) 25 R.C.S. 434.

wherein Indian lands were surrendered lands in consideration for annuities.

The Privy Council in 1902 in *Ontario Mining Company, Limited v. Seybold*[6] followed the *St. Catherine's* decision and held that lands in Ontario surrendered by the Indians by the Treaty of 1873 belong in full beneficial interest to the Province of Ontario. The Crown therefore can only dispose thereof on the advice and under the seal of the Province. Lord Davey said at page 82:

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.

Anglin J., of the Supreme Court of New Brunswick, in his 1958 decision in *Warman v. Francis*[7] quoted extensively from the *St. Catherine's* decision and added at page 207:

This view in 1888 of the nature of the Indian title was in effect that which prevailed in New Brunswick with respect of the Reserves which the Governor in Council "made" in New Brunswick shortly after its establishment as a Province in 1784. The volume of the Statutes of New Brunswick for 1838 contains as an appendix a report by the Commissioner of Crown Lands enumerating the "Lands reserved for the use of the Indians in this Province ... the time such reserves were made. ..." At the foot thereof is the following:

Nature of Reserves—To occupy and possess during pleasure.

Defendant relies on these, and many other decisions subsequent to the *St. Catherine's* decision, to submit that the Red Bank Band of Indians surrendered absolutely in 1895 the land in question which vested in the Province of New Brunswick free from the burden of any Indian interest.

On the other hand, plaintiff contends that the *St. Catherine's* decision is not applicable to the instant case. He submits that the 1895 surrender was not absolute but conditional and would not extinguish the Indian title until such time as the conditions or the terms of the trust were per-

[6] [1903] A.C. 73.
[7] (1959-60) 43 M.P.R. 197.

des traités avec certaines tribus indiennes par lesquels des terres indiennes ont été cédées en contrepartie de rentes.

En 1902, dans *Ontario Mining Company, Limited c. Seybold*[6] le Conseil privé a suivi l'arrêt *St. Catherine's* et a jugé que les terres en Ontario, cédées par les Indiens aux termes du traité de 1873, sont la propriété réelle de la province de l'Ontario. La Couronne peut donc seulement en disposer sur l'avis de la province et sous son sceau. Lord Davey disait à la page 82:

[TRADUCTION] En vertu de l'art. 91 de l'Acte de l'Amérique du Nord britannique, 1867, le Parlement du Canada a compétence législative exclusive sur les «Indiens et les terres réservées aux Indiens», mais cela n'a investi le gouvernement du Dominion d'aucun droit de propriété dans ces terres ni d'aucun pouvoir de légiférer pour s'approprier les terres devenues terres publiques de la province, à titre de réserve indienne, en vertu de la cession du titre indien, en violation des droits de propriété de la province.

Le juge Anglin, de la Cour suprême du Nouveau-Brunswick dans *Warman c. Francis*[7] en 1958 cite un long passage de l'arrêt *St. Catherine's* et ajoute à la page 207:

[TRADUCTION] En 1888, cette opinion sur la nature du titre indien était en effet celle qui prévalait au Nouveau-Brunswick concernant les réserves que le gouverneur en conseil a «constituées» au Nouveau-Brunswick peu après l'établissement de cette province en 1784. Le volume des lois du Nouveau-Brunswick pour 1838 contient en annexe un rapport du commissaire des terres de la Couronne énumérant les «terres réservées à l'usage des Indiens dans cette province ... à l'époque où ces réserves ont été constituées ....» Au bas de ce rapport se trouve la mention suivante:

Nature des réserves—A occuper et posséder jusqu'à révocation.

Le défendeur s'appuie sur ces arrêts et sur plusieurs autres arrêts postérieurs à l'arrêt *St. Catherine's*, pour prétendre qu'en 1895 les Indiens de la bande Red Bank ont cédé de façon absolue la terre en question dont la propriété a été dévolue à la province du Nouveau-Brunswick, libre de tout intérêt indien.

Par ailleurs, la demanderesse prétend que l'arrêt *St. Catherine's* ne s'applique pas en l'espèce. Elle allègue que la cession de 1895 était conditionnelle et non absolue et n'éteint pas le titre indien tant que les conditions ou modalités de la fiducie ne sont pas remplies. Dans les modalités de la cession

[6] [1903] A.C. 73.
[7] (1959-60) 43 M.P.R. 197.

formed. The *habendum* of the surrender reads: "To have and to hold . . . in trust . . . and upon the further condition that all monies received from the sale thereof, shall . . . be placed to our credit . . .". Since the subject property was never sold, plaintiff claims, they are still subject to the trust and the Indian title has not been extinguished.

In support of that proposition plaintiff relies on a 1950 Supreme Court decision *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*[8] where it was held that there was not a total and definitive surrender to the Crown. What was intended was a surrender sufficient to enable a valid letting to be made to trustees "for such term and on such conditions" as the Superintendent General might approve.

The plaintiff relies also on a 1970 British Columbia Court of Appeal decision *Corporation of Surrey v. Peace Arch Enterprises Ltd. and Surfside Recreations Ltd.*[9] where it was held that the "surrender" was not final and complete, but merely conditional. It followed that the lands continued to be "lands reserved for the Indians" within the meaning of subsection 91(24) of *The British North America Act, 1867* and that exclusive legislative jurisdiction over the lands remained in the Parliament of Canada. Certain lands in the Semiahmoo Indian Reserve were surrendered under the following terms:

To Have And To Hold the same unto Her said Majesty the Queen, her Heirs and Successors in trust to lease the same to such person or persons, and upon such terms as the Government 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 leasing thereof, shall be distributed 90% to the locatees and the remaining 10% deposited to the Revenue account of the Band.

Maclean J.A., said at pages 384-385:

In my view the surrender here, a surrender to Her Majesty "*in trust* to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people" falls into the class of a qualified or conditional surrender.

Under this form of surrender, "in trust" and for a particular purpose that is "to lease the same" it seems to me that it cannot be said the tribal interest in these lands has been extinguished.

[8] [1950] S.C.R. 211.
[9] (1970) 74 W.W.R. 380.

on lit: [TRADUCTION] «Pour posséder et détenir. . . en fiducie. . . et à la condition que tout argent provenant de la vente nous soit. . .crédité. . .». La demanderesse fait valoir que, n'ayant jamais été vendue, la propriété en question est encore assujettie à la fiducie et que le titre indien n'a pas été éteint.

A l'appui de cette proposition la demanderesse invoque l'arrêt *St. Ann's Island Shooting and Fishing Club Ltd. c. Le Roi*[8] rendu en 1950 par la Cour suprême où on a jugé qu'il n'y avait pas de cession totale et définitive à la Couronne. On voulait faire une cession qui permette une location valide à des fiduciaires [TRADUCTION] «aux termes et conditions» que peut approuver le surintendant général.

La demanderesse s'appuie également sur un arrêt de la Cour d'appel de la Colombie-Britannique rendu en 1970, *Corporation of Surrey c. Peace Arch Enterprises Ltd. and Surfside Recreations Ltd.*[9], où on a jugé que la «cession» n'était pas finale et complète mais simplement conditionnelle. D'où, les terres demeuraient des «terres réservées aux Indiens» au sens du paragraphe 91(24) de l'*Acte de l'Amérique du Nord britannique, 1867* et le Parlement du Canada conservait sur les terres la compétence législative exclusive. Certaines terres de la réserve indienne Semiahmoo ont été cédées aux conditions suivantes:

[TRADUCTION] Pour que Sa Majesté la Reine, ses héritiers et successeurs possèdent et détiennent lesdites terres en fiducie pour les louer à la personne ou aux personnes et aux conditions que le gouvernement du Canada jugera les plus favorables pour notre bien-être et celui de notre peuple.

Et à la condition que 90% de l'argent provenant de leur location soient distribués aux locataires et les 10% restant déposés au compte de revenu de la bande.

Le juge d'appel Maclean disait aux pages 384 et 385:

[TRADUCTION] A mon avis la cession en l'espèce, une cession à Sa Majesté «*en fiducie* pour les louer à la personne ou aux personnes et aux conditions que le gouvernement du Canada jugera les plus favorables pour notre bien-être et celui de notre peuple» tombe dans la catégorie des cessions restreintes ou conditionnelles.

En vertu de cette forme de cession, «en fiducie» et pour un objet particulier, soit «les louer», il me semble qu'on ne peut dire que l'intérêt de la tribu dans ces terres s'est éteint. En toute

[8] [1950] R.C.S. 211.
[9] (1970) 74 W.W.R. 380.

In my respectful opinion the learned Judge below was in error when he held that the surrender was an "unconditional" one.

And further down page 385, he quotes the *St. Ann's Island Shooting and Fishing Club* decision and adds:

In my view the "surrender" under the *Indian Act* is not a surrender as a conveyancer would understand it. The Indians are in effect forbidden from leasing or conveying the lands within an Indian reserve, and this function must be performed by an official of the Government if it is to be performed at all: See sec. 58(3) of the *Indian Act*. This is obviously for the protection of the Indians. Further, it is to be noted that the surrender is in favour of Her Majesty "in trust". This obviously means in trust for the Indians. The title which Her Majesty gets under this arrangement is an empty one.

Then he concludes at page 387:

It might well be (but it is not necessary for me to decide) that if an absolute surrender were made by the Indians under the *Indian Act*, and this surrender was followed by a conveyance from the Government to a purchaser the land would cease to be a reserve under the *Indian Act* and would also cease to be "lands reserved for the Indians" under sec. 91(24) of the *B.N.A. Act, 1867*, but that is not the case here.

My conclusion is that the exclusive legislative jurisdiction over the land in question remains in the Parliament of Canada, and that provincial legislation (including municipal bylaws) which lays down rules as to how these lands shall be used, is inapplicable.

In my view the 1895 surrender was not a definite, final surrender by the Red Bank Band to the Crown, but merely a conditional surrender which became absolute only upon completion of the sale and placing of the monies to the credit of the Band. In any event the question whether New Brunswick Indian lands are now vested in right of the Province, or the right of Canada, was settled in 1958 by the Canada-New Brunswick Agreement of that year. (*An Act to Confirm an Agreement between Canada and New Brunswick respecting Indian Reserves*, S.N.B. 1958, c. 4.)

The agreement settles all outstanding problems relating to Indian reserves in that Province and transfers to Canada all rights of the Province in reserve lands which may be of interest in the instant case. The relevant provisoes read as follows:

NOW THIS AGREEMENT WITNESSETH that the parties hereto, in order to settle all outstanding problems relating to Indian reserves in the Province of New Brunswick and to enable Canada to deal effectively in future with lands forming part of

déférence, je suis d'avis que le savant juge de première instance a commis une erreur en concluant que la cession était «sans condition».

Et plus loin, à la page 385, après avoir cité l'arrêt *St. Ann's Island Shooting and Fishing Club* il ajoute:

[TRADUCTION] A mon avis la «cession» en vertu de la *Loi sur les Indiens* n'est pas une cession au sens où l'entendrait un notaire. On interdit en effet aux Indiens de louer ou de céder les terres de la réserve indienne, et, le cas échéant, seul un fonctionnaire du gouvernement peut le faire: voir l'art. 58(3) de la *Loi sur les Indiens*. Par là, on vise manifestement la protection des Indiens. De plus, il faut remarquer que la cession est en faveur de Sa Majesté «en fiducie». Cela signifie manifestement en fiducie pour les Indiens. Le titre que Sa Majesté la Reine reçoit en vertu de cette entente est vide.

Il conclut à la page 387:

[TRADUCTION] Il se pourrait fort bien (mais il n'est pas nécessaire que j'en décide) que si les Indiens ont effectué une cession absolue en vertu de la *Loi sur les Indiens* et que cette cession ait été suivie d'un transfert par le gouvernement du Canada à un acheteur, la terre cesserait d'être une réserve en vertu de la *Loi sur les Indiens* et cesserait également d'être «une terre réservée aux Indiens» en vertu de l'art. 91(24) de l'*A.A.N.B., 1867*, mais ce n'est pas le cas ici.

Je conclus que le Parlement du Canada conserve la compétence législative exclusive sur la terre en question et que les lois provinciales (y compris les règlements municipaux) qui édictent des règles relatives à l'usage de ces terres sont inapplicables.

A mon avis la cession de 1895 n'était pas une cession définitive, finale consentie par la bande Red Bank à la Couronne, mais simplement une cession conditionnelle qui ne devenait absolue qu'après la vente et le dépôt de l'argent au crédit de la bande. Quoi qu'il en soit, la question de savoir si les terres indiennes du Nouveau-Brunswick appartiennent maintenant à la province ou au Canada a été tranchée en 1958 par la convention Canada-Nouveau-Brunswick de cette même année. (*An Act to Confirm an Agreement between Canada and New Brunswick respecting Indian Reserves*, S.N.-B. 1958, c. 4.)

La convention règle tous les problèmes en suspens relatifs aux réserves indiennes dans cette province et transfère au Canada tous les droits de la province dans les terres de réserve pouvant représenter un intérêt en l'espèce. Voici les dispositions pertinentes:

[TRADUCTION] À CES CAUSES, LA PRÉSENTE CONVENTION FAIT FOI QUE les parties aux présentes, en vue de régler tous les problèmes en cours relatifs aux réserves indiennes dans la province du Nouveau-Brunswick, et de permettre au Canada de

said reserves, have mutually agreed subject to the approval of the Parliament of Canada and the Legislature of the Province of New Brunswick as follows:

1. In this agreement, unless the context otherwise requires,

. . .

(b) "reserve lands" means those reserves in the Province referred to in the appendix to this agreement;

. . .

3. New Brunswick hereby transfers to Canada all rights and interests of the Province in reserve lands except lands lying under public highways, and minerals.

And the appendix includes:

[RESERVE NO. 7] RED BANK — In the Parish of Southesk with a small part in the northeast corner in the Parish of Northesk. North of the Little Southwest Miramichi River opposite Red Bank Indian Reserve No. 4.

The twofold purpose of the agreement was firstly to settle all outstanding problems relating to the reserves and secondly to enable Canada to deal effectively in future with lands forming part of said reserves, including, of course, untransferred surrendered land. In order to deal effectively with those lands the Queen in right of Canada may properly file a claim before this Court on behalf of Indians under the *Indian Act*. But to succeed, a claim must rest on a right which has not been extinguished. Unexercised rights of occupancy do not necessarily last forever.

I now turn to the defence of adverse possession.

The onus of proving adverse possession is upon the party raising that defence. The defendant must show that he has been in actual, open, visible, exclusive, continuous and undisturbed possession. The possession necessary to gain title by adverse possession must be such as in the nature of the land would be considered suitable and reasonable. It must be considered in every case according to the peculiar circumstances of that case.

In the Province of New Brunswick, no person shall take proceedings to recover land but within

prendre à l'avenir des mesures efficaces à l'égard des terres faisant partie desdites réserves, sont convenues, sauf approbation du Parlement du Canada et de la Législature de la province du Nouveau-Brunswick, de ce qui suit:

1. Dans la présente convention, à moins que le contexte n'exige une interprétation différente,

. . .

b) l'expression «terres de réserve» désigne les réserves, dans la province, dont fait mention l'appendice de la présente convention;

. . .

3. Le Nouveau-Brunswick transfère par les présentes au Canada tous les droits et intérêts de la province dans les terres de réserve, sauf celles qui se trouvent sous les routes publiques, et les minéraux.

Et l'annexe comprend:

[TRADUCTION]:

[RÉSERVE N° 7] RED BANK — Dans la paroisse de Southesk avec une petite partie dans le coin nord-est de la paroisse de Northesk. Au nord de la rivière Little Southwest Miramichi, en face de la réserve indienne n° 4 de Red Bank.

Le double objet de la convention était tout d'abord de régler tous les problèmes en suspens relatifs aux réserves et deuxièmement de permettre au Canada de prendre à l'avenir des mesures efficaces à l'égard des terres faisant partie desdites réserves, y compris, bien sûr, les terres cédées mais non transférées. Afin de prendre des mesures efficaces à l'égard de ces terres la Reine du chef du Canada peut légitimement déposer une réclamation devant cette cour au nom des Indiens en vertu de la *Loi sur les Indiens*. Mais pour réussir, une réclamation doit s'appuyer sur un droit non éteint. Les droits d'occupation dont on ne fait pas usage ne durent pas indéfiniment.

J'étudierai maintenant le moyen de défense fondé sur la possession acquisitive.

L'obligation d'établir la possession acquisitive incombe à la partie qui soulève ce moyen. Le défendeur doit établir qu'il a eu une possession réelle, publique, exclusive, non interrompue et paisible. La possession nécessaire pour acquérir un titre par possession acquisitive doit être telle qu'elle sera jugée raisonnable et convenable selon la nature du bien-fonds. Elle doit être considérée dans chaque cas selon les circonstances particulières.

Dans la province du Nouveau-Brunswick nul ne peut engager de procédure en recouvrement de

twenty years[10] and no claim for lands by the Crown after a continuous adverse possession of sixty years[11]. Under the federal *Public Lands Grants Act*[12] no right or interest in or to public lands is acquired by any person by prescription. Under the *Nullum Tempus Act*[13] the right of the Crown is barred after sixty years. Both parties agree that if adverse possession is a defence in the instant case the sixty year rule applies whether the *Nullum Tempus Act* or the New Brunswick *Act Respecting Limitation of Actions in respect to Real Property* applies.

The defendant himself having acquired the subject property only in 1952 cannot of course establish a sixty-year period of adverse possession. Then, adverse possession, if any, must have been established by Mutch, or his predecessors in occupation, or a continuous combination of them and the defendant, uninterrupted by the title holder.

Possession of land has always been a cornerstone of the law; if the rightful owner does not come forward and claim his right within the prescribed period, his right is extinguished and the title goes to the possessor and his successors. Adverse possession is at times difficult to determine and the rightful owner compounds the problem when he allows years to go by before asserting his title.

In the case at bar, oral evidence was allowed in an attempt to assess the broad historical background of the area with a view to determine what specific acts of possession were carried out with reference to the subject property.

It is significant that while the documentary evidence leads inescapably to Indian legal rights of occupancy, the oral testimony reveals that the Little Southwest Miramichi River area, or the land on both banks thereof, including the subject property, was occupied and developed by non-Indians for more than a century. According to Profes-

[10] *Act Respecting Limitation of Actions in respect to Real Property*, R.S.N.B. 1903, c. 139, s. 3.

[11] *Act Respecting Limitation of Actions in respect to Real Property*, R.S.N.B. 1903, c. 139, s. 1.

[12] R.S.C. 1970, c. P-29, s. 5.

[13] 9 Geo. III, c. 16.

bien-fonds après un délai de vingt ans[10] et la Couronne ne peut réclamer de bien-fonds après une possession acquisitive non interrompue de soixante ans[11]. En vertu de la *Loi sur les concessions de terres publiques*[12], fédérale, nul n'acquiert par prescription un droit ou intérêt dans des terres publiques. En vertu de la *Nullum Tempus Act*[13] le droit de la Couronne est périmé après soixante ans. Les deux parties admettent que si la possession acquisitive est un moyen de défense en l'espèce, la règle de soixante ans s'applique, que la *Nullum Tempus Act* ou l'*Act Respecting Limitation of Actions in respect to Real Property* du Nouveau-Brunswick soit applicable.

Le défendeur n'ayant lui-même acquis la propriété en question qu'en 1952 ne peut bien sûr établir une possession acquisitive de soixante ans. Alors, la possession acquisitive, s'il en est, doit avoir été établie par Mutch ou ses prédécesseurs en occupation, ou par la possession cumulée continue de ces derniers et du défendeur, non interrompue par le détenteur du titre.

La possession de biens-fonds a toujours été une pierre angulaire du droit; si le propriétaire véritable ne vient pas réclamer son droit pendant la période prévue, son droit s'éteint et le titre passe au possesseur et à ses héritiers. Il est parfois bien difficile de décider de la possession de fait et le propriétaire véritable ajoute à la difficulté lorsqu'il laisse écouler plusieurs années avant de faire valoir son titre.

En l'espèce, on a permis la preuve verbale pour essayer d'évaluer le large passé historique de la région en vue de déterminer quels actes particuliers de possession ont été accomplis concernant la propriété en question.

Il est significatif que la preuve littérale aboutisse inévitablement aux droits d'occupation des Indiens alors que la preuve verbale révèle que la région de la rivière Little Southwest Miramichi, ou les terres sur ses rives, y compris la propriété en question, ont été occupées et exploitées par des non-Indiens durant plus d'un siècle. Selon le professeur W. D.

[10] *Act Respecting Limitation of Actions in respect to Real Property*, L.R.N.-B. 1903, c. 139, art. 3.

[11] *Act Respecting Limitation of Actions in respect to Real Property*, L.R.N.-B. 1903, c. 139, art. 1.

[12] S.R.C. 1970, c. P-29, art. 5.

[13] 9 Geo. III, c. 16.

sor W. D. Hamilton of the University of New Brunswick, a witness with extensive knowledge of the local history, the "tract", so called, was settled by non-Indian settlers in the 1830-1840 period.

Professor Smith has carried out considerable research and study of the history and genealogy of the people of the settlement, and in particular of the Isaac Mutch and Ebenezer Travis property, which has been affected by the following events subsequent to the creation of the Province of New Brunswick in 1784.

In 1808 the New Brunswick Executive Council granted a licence of occupation to "the Indians of the County of Northumberland in general".

On August 10, 1820, members of the Julian family of Indians leased the wild grass on a parcel of land, including the subject property, to one Richard McLaughlin, a lumberman, for a six-year period. Then in the 1830's the Julians leased the property in homestead-size lots to non-Indian settlers, and more particularly to one Ebenezer Travis (c1794-f1871) from about 1838.

A petition of Ebenezer Travis dated October 25, 1841, shows that he was claimant to the land which now includes the subject property.

In his "Reports on Indian Settlements", *Journal of Assembly*, Fredericton, 1842, Moses H. Perley, Indian Commissioner, reports his 1841 visit to the area he described as the "Little South West Tract". He writes that Barnaby Julian, Chief of the Micmac Nation, residing at the village of Red Bank, under a Commission from His Excellency Sir Archibald Campbell, dated September 20, 1836, assumed the right to sell and lease the greater part of the reserve of 10,000 acres on the Little South West and "has since then received nearly two thousand pounds in money and goods from various persons, as consideration for deeds and leases, and for rents. ... yet I found him so embarrassed in his pecuniary affairs, that he dare not come into Newcastle, save on Sunday, for fear of being arrested by the Sheriff."

Hamilton de l'université du Nouveau-Brunswick, un témoin ayant une connaissance étendue de l'histoire locale, la «région», ainsi désignée, a été colonisée par des non-Indiens dans les années 1830-1840.

Le professeur Smith a mené des recherches et des études poussées sur l'histoire et la généalogie du peuple de la région, et en particulier de la propriété d'Isaac Mutch et d'Ebenezer Travis qui a été touchée par les événements suivants, postérieurs à la création de la province du Nouveau-Brunswick en 1784.

En 1808, le Conseil exécutif du Nouveau-Brunswick a accordé un permis d'occupation aux [TRADUCTION] «Indiens du comté de Northumberland en général».

Le 10 août 1820, les membres de la famille indienne Julian ont loué l'herbe sauvage sur un lopin de terre, comprenant la propriété en question, à un nommé Richard McLaughlin, marchand de bois, pour une période de six ans. Ensuite, dans les années 1830, les Julian ont loué la propriété en lotissements de ferme à des colons non indiens, et en particulier à un nommé Ebenezer Travis (c1794-f1871), vers 1838.

Une pétition d'Ebenezer Travis en date du 25 octobre 1841, démontre qu'il réclamait la terre qui comprend maintenant la propriété en question.

Dans son «Reports on Indian Settlements», *Journal of Assembly*, Fredericton, 1842, Moses H. Perley, commissaire aux Indiens, relate la visite qu'il a effectuée en 1841 dans la région qu'il décrit comme «Little South West Tract». Il écrit que Barnaby Julian, chef de la nation Micmac, résidant au village de Red Bank, en vertu d'une commission de Son Excellence Sir Archibald Campbell, en date du 20 septembre 1836, s'est approprié le droit de vendre et de louer la plus grande partie de la réserve de 10,000 acres sur le Little South West et [TRADUCTION] «a depuis reçu presque 2,000 livres en argent et en biens de diverses personnes en considération d'actes et de baux et pour rentes. ... pourtant je le trouve tellement gêné par ses affaires pécuniaires, qu'il n'ose pas venir à Newcastle, sauf le dimanche, par crainte d'être arrêté par le shérif.»

The report then deals with the non-Indian settlers. "They are in general far above the squatters ... [at Indian Point] both in character and circumstances. It was not a little curious to contrast these persons, who supposed they had fair title, with those who had not a shadow of claim, and to mark the difference between the lawless squatter and the honest industrious settler."

From an extensive study and analysis of the documents relating to all of the properties along both sides of the Little Southwest Miramichi River, Professor Hamilton claims that the Isaac Mutch property as such came into being as a result of the 1901 survey of William E. Fish which reduced the size of the original Ebenezer Travis family property of which it had been a part for approximately 63 years.

It seems that at the time the Government of Canada was pressuring residents to purchase their property at a per-acre price and that they resisted. Ebenezer Travis in particular who had lived on that land all his life, objected, as revealed in an 1898 Department of Indian Affairs document, which reads in part: "Mr. Travis stated to me that they got their possessions from Jared Tozer who got possession of it from the Indians over 60 years ago. Claim it theirs of right."

Tradition has come down to Professor Hamilton, a native of the area, whose grandfather was a brother-in-law of Isaac Mutch and who also worked as a chainman for surveyor Fish, that an altercation occurred between the latter and Travis, from which Fish stomped away in a rage, leaving his equipment on the line, but returning the following day to have his way and to create the Isaac Mutch property in the process.

Professor Hamilton's opinion is that there was a locally-acknowledged Indian interest, and that of an absentee and indefinite character, in these lands for only about 40 years, or roughly the first half of the 19th century. He contrasts that interest with non-Indian occupancy from the 1830's onward.

Most witnesses on adverse possession were non-Indians called by the defendant. The only Indian, called by the plaintiff on that score (brought to the

Le rapport parle ensuite des colons non indiens. [TRADUCTION] «Ils se situent en général bien au-delà des colons sans titres ... [au point Indien] tant par leur caractère que par leur situation. Il était très étrange de comparer ces personnes, qui croyaient avoir un bon titre, avec celles qui n'avaient pas l'ombre d'un droit et de remarquer la différence entre le colon sans titre, désordonné, et le colon honnête et travailleur.»

Suite à une étude approfondie et à une analyse des documents concernant toutes les propriétés des deux côtés de la rivière Little Southwest Miramichi, le professeur Hamilton prétend que la propriété d'Isaac Mutch, comme telle, existe depuis un arpentage fait par William E. Fish en 1901 lequel a réduit la grandeur de la propriété originale de la famille Ebenezer Travis dont elle avait fait partie pendant environ 63 ans.

Il semble qu'à ce moment le gouvernement du Canada faisait pression pour que les résidents achètent leur propriété à un prix déterminé l'acre, et qu'ils ont refusé. Ebenezer Travis en particulier qui avait vécu sur cette terre toute sa vie, a refusé, tel qu'il ressort d'un document de 1898 du ministère des Affaires indiennes, dont voici un passage: [TRADUCTION] «M. Travis m'affirme qu'ils ont eu leur propriété de Jared Tozer qui l'avait eue des Indiens il y a soixante ans. Ils prétendent qu'elle leur appartient de droit.»

Selon la tradition qui est parvenue au professeur Hamilton, natif de la région, dont le grand-père était un beau-frère d'Isaac Mutch et qui travaillait également comme chaîneur de l'arpenteur Fish, une dispute s'est produite entre ce dernier et Travis suite à laquelle Fish est parti en furie, laissant son équipement sur la ligne, mais est revenu le lendemain pour agir à sa guise et créer en même temps la propriété Isaac Mutch.

Le professeur Hamilton est d'avis qu'il existait un titre indien localement reconnu, de caractère forain et indéfini, dans ces terres, depuis environ 40 ans seulement, ou approximativement la première partie du dix-neuvième siècle. Il oppose ce titre à l'occupation par des non-Indiens à partir de 1830.

La plupart des personnes qui ont témoigné sur la possession acquisitive étaient des non-Indiens cités par le défendeur. Le seul Indien cité par la deman-

Court by bench warrant) admitted under cross-examination that, as far back as he could remember, that strip along the river had never been occupied by Indian people. The witness is 66 years of age and has lived at the village of Red Bank, the Indian community, since the age of three.

From the oral evidence, it is abundantly clear that the tract of land between the two Indian reserves, Red Bank Reserves No. 7 and No. 4, was peacefully settled by non-Indians in the past century, and was treated by Indians and non-Indians alike as a non-Indian settlement. Some witnesses testified that they saw no Indians in that area in their lifetime. Indians live at the village of Red Bank, an organized community on the south side, whereas the land in question lies in the non-Indian community of Lyttleton on the north side of the Little Southwest Miramichi River, some 5½ miles upriver from Red Bank.

From 1952, the defendant himself has undoubtedly occupied the land in adverse possession with colour of title. He has obtained a deed in good faith and paid for it. He has built a lodge shortly after purchase and has lived there with his family most summers. He has purchased two additional lots from Mutch to enlarge his initial acquisition, paying the total sum of $1,600 for the three parcels. He has spent money on improving the building, sold gravel from a gravel pit located between the lodge and the main road. He has paid taxes to the Province every year, about $100 yearly on land and building. Although not an angler himself he has had guests at the lodge to fish the public salmon pool near the property. He intends to retire there. Neighbours regard the subject property as being his land.

According to the evidence, Isaac Mutch purchased the old nearby Sillekars schoolhouse in July 1904 and moved it to where it is today, on the north side of the main road, directly across the property he purported to sell to the defendant in 1952. He converted the schoolhouse into a home where he lived and raised a family. He had a barn and animals on that northerly side of the road.

deresse sur ce point (amené à la Cour par un mandat d'arrêt lancé en cours d'audience) a admis au contre-interrogatoire qu'en autant qu'il puisse se souvenir, cette lisière le long de la rivière n'avait jamais été occupée par des Indiens. Le témoin est âgé de soixante-six ans et vit dans le village de Red Bank, l'agglomération indienne, depuis l'âge de trois ans.

Il ressort manifestement de la preuve orale, que la lisière de terre divisant les deux réserves indiennes, les réserves Red Bank nº 7 et nº 4, a été paisiblement colonisée par des non-Indiens au siècle dernier et considérée par les Indiens et les non-Indiens comme une colonisation non indienne. Certains témoins déclarent n'avoir vu aucun Indien dans cette région de toute leur vie. Les Indiens habitent le village de Red Bank, une agglomération organisée sur le côté sud, alors que la terre en question est sise dans l'agglomération non indienne de Lyttleton sur le côté nord de la rivière Little Southwest Miramichi, à quelques 5½ milles en amont de Red Bank.

Depuis 1952 le défendeur a manifestement occupé lui-même le terrain en y exerçant une possession acquisitive avec apparence de droit. Il a obtenu un titre de bonne foi et a payé pour l'avoir. Il a construit un chalet peu après l'achat et a vécu là avec sa famille presque tous les étés. Il a acheté deux lots additionnels à Mutch pour agrandir son achat initial, payant au total $1,600 pour les trois lopins. Il a dépensé de l'argent pour améliorer la construction, il a vendu du gravier d'une carrière de gravier située entre le chalet et la route principale. Il a payé les taxes provinciales chaque année, environ $100 annuellement sur le terrain et la construction. Bien qu'il n'ait pas été lui-même pêcheur, il a eu des invités au chalet qui pêchaient le saumon dans l'étang public près de la propriété. Il a l'intention de se retirer là-bas. Les voisins considèrent que la propriété en question lui appartient.

Selon la preuve, Isaac Mutch a acheté l'ancienne école Sillekars avoisinante en juillet 1904 et l'a déménagée où elle se trouve aujourd'hui, du côté nord de la route principale, directement en face de la propriété qu'il a prétendu vendre au défendeur en 1952. Il a transformé l'école en maison où il a vécu et élevé une famille. Il avait une ferme et des animaux sur le côté nord de la route.

On the south side of the main road and extending down to the river lie the 26 acres of land deeded to the defendant. Defendant's lodge stands on a bluff near the bank of the river and there is a gravel road from the lodge to the main road. That road was used by Mutch to get to the river where he carried out some log driving in the spring. Mutch was a lumberman who at times cut trees on both sides of the main road. According to his son there were spruce and fir on the south side which were sold as pulp wood. Some Christmas trees were also felled in the area where defendant's lodge presently stands.

Mutch was also a farmer. He grew hay, potatoes, oats, on a small island called Hay Island which lies in the river in front of the subject property. He had to traverse the subject property to get to the island. He also at times cultivated a small fenced-in area called the "interval" lying, at times partly submerged, near the shore on the subject property. He ran his horses and trucks from his barn across the main road, down the gravel road, to the "interval" and over onto the island. He paid taxes to the Province on these lands throughout his life. For a number of years before 1960, Mutch lived in another farm house, called Sommer's Farm, about half a mile distant. During that period the Mutch home was rented to other parties. He died in 1965, leaving the property to his wife who deeded it to their son Weldon Vincent Mutch.

There is evidence to the effect that Mutch's land came to him from his father Edmond who got it from James the grandfather. It is to be recalled that in 1898 the occupant of lot 6 was listed as James Mutch in the Indian Affairs agent's report. Much of this evidence was given by old time local residents whose memory reach as far back as 70 years ago. Throughout that period the farm next door was occupied by William Mutch, another son of Edmond and brother of Isaac.

The type of possession required to establish adverse possession varies with the type of land being possessed, the real test being that such acts be shown as would naturally be carried out by the true owner if he were in possession. *Vide Jackson*

Du côté sud de la route principale jusqu'à la rivière, se trouvent les 26 acres de terrain vendus au défendeur. Le chalet du défendeur est sis sur une falaise près de la berge de la rivière et un chemin de gravier relie le chalet à la route principale. Mutch utilisait ce chemin pour se rendre à la rivière où il faisait de la drave au printemps. Mutch était un marchand de bois qui coupait occasionnellement des arbres de chaque côté de la route principale. Selon son fils il y avait des sapins et des épinettes sur le côté sud qui étaient vendus pour la pulpe de bois. On coupait également des arbres de Noël à l'endroit où se trouve maintenant le chalet du défendeur.

Mutch était également fermier. Il cultivait le foin, la patate, l'avoine sur une petite île, appelée Hay Island, située dans la rivière face à la propriété en question. Il devait traverser la propriété pour se rendre à l'île. A l'occasion il cultivait également une petite étendue clôturée, appelée «*interval*», parfois partiellement submergée près de la rive sur la propriété en question. Il conduisait ses chevaux et ses camions à partir de la grange de l'autre côté de la route principale, descendant le chemin de gravier jusqu'à l'«*interval*» et l'île. Il a payé les taxes provinciales sur ces terres toute sa vie. Pendant plusieurs années antérieurement à 1960, Mutch a vécu dans une autre maison de ferme appelée Sommer's Farm à environ un demi mille de là. La maison des Mutch était alors louée à d'autres personnes. Il est mort en 1965 laissant la propriété à sa femme qui l'a transférée à leur fils Weldon Vincent Mutch.

Selon la preuve, Mutch a eu la terre de son père Edmond qui l'avait eue de James, le grand-père. Il faut se souvenir qu'en 1898 l'occupant du lot n° 6 était inscrit sous le nom de James Mutch dans le rapport du représentant des Affaires indiennes. Une bonne partie de cette preuve vient de témoins qui habitent la région depuis longtemps et dont la mémoire remonte jusqu'à 70 ans. Pendant toute cette période la ferme voisine a été occupée par William Mutch, autre fils d'Edmond et frère d'Isaac.

La sorte de possession nécessaire pour établir la possession acquisitive varie selon le type de terre possédée, le vrai critère étant d'établir les actes que le propriétaire véritable accomplirait normalement s'il était en possession. Voir *Jackson c.*

v. Cumming[14], *Levy v. Logan*[15], *Wallace v. Potter*[16], *Attorney General of Canada v. Krause*[17].

What would constitute sufficient evidence of possession with reference to modern city lots, or village lands, or cultivated areas, is not required in order to show possession of semi-wilderness areas in the early years of the century. The acts carried out by Mutch before he deeded the subject property to the defendant appear to me to be the type of acts that would normally and suitably be performed by a lumberman farmer in those days on the Miramichi River.

As previously reported, the land in question was visited by the Indian Affairs agent in 1898. The price per acre was discussed in 1919 between Buoy, the timber inspector, and Isaac Mutch. Then, silence till the 1970's. Although not in issue, it would appear from the evidence of some of the witnesses that the recent interest in the subject property was aroused by the activation of the gravel pit, near defendant's lodge, and the revenues it generated.

On February 24, 1919, Isaac Mutch had written to the Department of Indian Affairs to obtain the grant to his property. His letter reads:

> I am living on a piee [sic] of Indian land which lies on the North side of the Lytle South West River the East side of Lot No 6 x 42 Rods in width Bounded on the West by land claimed by Ebenezar Traviss And I would like to get the grant of it

Learned counsel for the plaintiff argues that the letter is, "the most poignant piece of evidence adduced as to the status of the land and the state of mind of Isaac Mutch and constitutes an acknowledgment of the Crown's title such as to interrupt the running of the limitation period".

The letter raises obvious difficulties. It seems clear from previous decisions (*vide Hamilton v. The King*[18], *Sanders v. Sanders*[19]) that once a title is established under a statute and the right of a prior owner is extinguished, the title cannot be

[14] (1917) 12 O.W.N. 278.
[15] (1976) 14 N.S.R. (2d) 80.
[16] (1913) 10 D.L.R. 594.
[17] [1956] O.R. 472.
[18] (1917) 54 S.C.R. 331, at p. 346.
[19] (1881-82) 19 Ch. D. 373, at p. 382.

Cumming[14], *Levy c. Logan*[15], *Wallace c. Potter*[16], *Le procureur général du Canada c. Krause*[17].

Pour établir la possession dans des régions à moitié incultes du début du siècle, on n'exige pas la même preuve que pour les lots des villes modernes ou les terres de village ou les régions cultivées. Les actes accomplis par Mutch avant la vente de la propriété en question au défendeur me paraissent être le type d'actes qu'accomplirait normalement et convenablement un marchand de bois fermier à cette époque sur la rivière Miramichi.

Comme je l'ai déjà mentionné, un représentant des Affaires indiennes a visité la terre en question en 1898. En 1919, Buoy, l'inspecteur forestier et Isaac Mutch ont discuté du prix l'acre. Ensuite, il n'est question de rien avant les années 1970. Bien que ce point ne soit pas en litige, la déposition de quelques témoins indique que l'intérêt soudain dans la propriété en question aurait été éveillé par l'exploitation de la carrière de gravier, située près du chalet du défendeur, et les revenus qu'elle produit.

Le 24 février 1919 Isaac Mutch a écrit au ministère des Affaires indiennes pour obtenir cession de sa propriété. Voici le libellé de sa lettre:

> [TRADUCTION] Je vis sur une parcelle de terre indienne située entre le côté nord de la rivière Lyttle South West, le côté est du lot n° 6, mesurant 42 perches de largeur, bornée à l'ouest par une terre réclamée par Ebenezar Traviss et j'aimerais en obtenir la concession.

Le savant avocat de la demanderesse prétend que la lettre est [TRADUCTION] «le meilleur élément de preuve fourni sur le statut de la terre et l'état d'esprit d'Isaac Mutch et constitue une reconnaissance du titre de la Couronne, ce qui interrompt la période de prescription».

La lettre soulève manifestement des difficultés. Il ressort clairement de décisions antérieures (voir *Hamilton c. Le Roi*[18], *Sanders c. Sanders*[19]) que lorsqu'un titre est établi en vertu d'une loi et que le droit d'un propriétaire antérieur est éteint, le titre

[14] (1917) 12 O.W.N. 278.
[15] (1976) 14 N.S.R. (2e) 80.
[16] (1913) 10 D.L.R. 594.
[17] [1956] O.R. 472.
[18] (1917) 54 R.C.S. 331, à la p. 346.
[19] (1881-82) 19 Ch. D. 373, à la p. 382.

defeated by subsequent acknowledgment by those who have acquired this statutory title. But proper acknowledgment could interrupt incomplete adverse possession.

The *Nullum Tempus Act* contains no reference to acknowledgments, but it provides that an interruption by entry or rents shall stay the running of the period. In *Hamilton v. The King* the Supreme Court of Canada said at page 344 that "It would seem a bold step for the Court to add yet another fact or incident to those the Nullum Tempus statute expressly mentions as interrupting possession against the Crown."

In that same decision, Fitzpatrick C.J., also said at pages 339-340:

The Crown permitted the defendants or their predecessors in title to remain in undisturbed possession for fifty-eight years before taking action in 1890 and took no steps to enforce the judgment then obtained during the ensuing twenty-four years. During this long lapse of time all parties concerned have died. The form of government of the country has been repeatedly changed, and the then newly founded and insignificant By-town has become a great city, the capital of the Dominion of Canada. Under these circumstances, I think the courts need not hesitate to require the strictest proof of a claim to oust the defendants. Failing this, I think substantial as well as legal justice will have been done by leaving them undisturbed in the possession which they have so long held.

The New Brunswick *Limitation of Actions Act*, R.S.N.B. 1952, c. 133, however does include a provision respecting acknowledgment of title: the present section 45 appeared as section 14 of the *Act Respecting Limitation of Actions in respect to Real Property*, c. 139, Consolidated Statutes of New Brunswick 1903. It reads:

45. When an acknowledgment in writing of the title of a person entitled to any land is signed by the person in possession of the land or in receipt of the profits thereof, or by his agent in that behalf, and has been given to the person entitled or his agent prior to his right to take proceedings to recover the land having been barred under the provisions of this Act, then the possession or receipt of profits of or by the person by whom such acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment was given at the time of giving the same, and the right of the last mentioned person, or of any person claiming through him, to take proceedings shall be deemed to have first accrued at, and not before, the time at which the acknowledgment, or the last of such acknowledgments, if more than one, was given.

ne peut être annulé par une reconnaissance postérieure de ceux qui ont acquis ce titre établi en vertu de la loi. Mais une reconnaissance en bonne et due forme pourrait interrompre une possession acquisitive incomplète.

La *Nullum Tempus Act* ne contient aucune mention de reconnaissance, mais elle prévoit qu'une interruption par entrée ou loyer, arrêtera la prescription. Dans *Hamilton c. Le Roi* la Cour suprême du Canada a dit à la page 344 que [TRADUCTION] «il serait un peu audacieux pour la Cour d'ajouter un autre fait ou incident à ceux que la Loi Nullum Tempus mentionne expressément comme constituant une interruption de prescription contre la Couronne.»

Dans cette même décision le juge en chef Fitzpatrick a également dit aux pages 339-340:

[TRADUCTION] La Couronne a permis aux défendeurs ou à leurs prédécesseurs en titre de conserver la possession paisible pendant 58 ans avant de prendre une action en 1890 et, au cours des 24 années suivantes, n'a pris aucune mesure pour faire respecter le jugement obtenu. Pendant ce long délai toutes les parties concernées sont décédées. Le type de gouvernement du pays a maintes fois changé et le By-town d'alors, nouvellement fondé et sans importance, est devenu une grande ville, la capitale du Dominion du Canada. Dans ces circonstances, je crois que les cours peuvent exiger la preuve la plus rigoureuse d'un droit à l'éviction des défendeurs. A défaut de quoi, je crois que justice inhérante et une justice fondée sur la loi auront été faites si on ne trouble pas la possession qu'ils ont eu depuis si longtemps.

La loi du Nouveau-Brunswick concernant la prescription contient cependant une disposition au sujet de la reconnaissance de titre: l'article 45 actuel, l'ancien article 14 de l'*Act Respecting Limitation of Actions in respect to Real Property*, c. 139, Consolidated Statutes of New Brunswick 1903. Il prévoit:

45. Lorsqu'une reconnaissance écrite du titre de propriété d'une personne ayant droit à tout bien-fonds est signée par la personne qui se trouve en possession du bien-fonds ou en reçoit les profits, ou par son représentant autorisé à cet égard, et a été donnée à cet ayant droit ou à son représentant avant que son droit d'engager des procédures en recouvrement du bien-fonds ait été prescrit par les dispositions de la présente loi, la possession ou la perception des profits par la personne qui a donné cette reconnaissance est alors réputée, conformément au sens de la présente loi, avoir été celle exercée ou effectuée par la personne à laquelle, ou au représentant de laquelle, cette reconnaissance a été donnée à la date de sa remise, et le droit de cette dernière personne ou de tout ayant droit de cette dernière d'engager des procédures est réputé avoir initialement pris naissance exactement à la date à laquelle la reconnaissance, ou la dernière de ces reconnaissances, s'il en a plusieurs, a été donnée.

In the *Hamilton* case, an 1871 letter had been introduced as an acknowledgment. In his judgment (46 years later), Idington J., was reluctant to attach much significance to the document. He said at page 350:

> I should be loathe to attach much (if any) importance to such a document without the fullest information at least on the part of the Crown relative to the import of what such a claim as made therein implied, and how it could be treated as an acknowledgment taking away the rights acquired by the statute.

The Crown in the instant case having waited more than 50 years after the alleged acknowledgment to launch this action is hard put to show now exactly what the 1919 letter meant. Bearing in mind that the land in question lies within a non-Indian community, the description "Indian land" used by the settler conceivably meant land outside the Indian reserve, land on which he lived and for which he wanted to "get" a Crown grant, an official paper to confirm his own title. The evidence is that he did not pay for it, thus presumably did not attach much value to the legal document.

I cannot accept Mutch's letter as being an acknowledgment sufficient to extinguish the adverse possession already established at the time, which amounted to some 15 years in the case of Isaac Mutch on the specific piece of land, and to at least half a century more by his predecessors over the area, including lot 6. Moreover the letter was not addressed to the Province, the person then entitled, but to a federal department.

Had the Crown moved at the time and commenced entry proceedings, witnesses would have been available then, including Isaac Mutch, to determine with more certainty the import of the letter and the period of adverse possession. It would be manifestly unfair if one party's procrastination became the other party's downfall. "Long dormant claims have often more of cruelty than of justice in them."[20]

Plaintiff also contends that the 1958 agreement transferring all Provincial rights and interests in the reserves to the Federal Government closes the prescription period against the defendant. The

[20] *A'Court v. Cross* (1825) 3 Bing. 329 at p. 332, 130 E.R. 540 at p. 541, Best C.J.

Dans l'affaire *Hamilton* une lettre de 1871 avait été produite à titre de reconnaissance. Dans son jugement (46 ans plus tard), le juge Idington était réticent à accorder beaucoup d'importance à ce document. Il a dit à la page 350:

> [TRADUCTION] Je suis peu disposé à accorder beaucoup d'importance à un tel document (s'il en a) sans recevoir au moins de la Couronne, le plus de détails possibles sur ce que la teneur d'une telle réclamation implique, et sans savoir comment on peut la considérer comme une reconnaissance éteignant les droits acquis en vertu de la loi.

En l'espèce, la Couronne ayant attendu plus de 50 ans après la prétendue reconnaissance pour intenter cette action peut difficilement établir maintenant ce que la lettre de 1919 signifiait. En gardant à l'esprit que la terre en question est située dans une agglomération non indienne, la description «terre indienne» utilisée par le colon signifiait probablement une terre située à l'extérieur de la réserve indienne, terre sur laquelle il vivait et pour laquelle il désirait «obtenir» une concession de la Couronne, un document officiel confirmant son propre titre. La preuve montre qu'il n'a pas payé pour ce titre, donc on peut présumer qu'il n'attachait pas beaucoup de valeur à ce document.

Je ne peux accepter que la lettre de Mutch est une reconnaissance suffisante pour éteindre la possession acquisitive déjà accumulée à l'époque, soit quelque 15 ans par Isaac Mutch sur ce lopin de terre précis et au moins un demi-siècle par ses prédécesseurs sur toute la région, y compris le lot 6. De plus la lettre n'était pas adressée à la province, la personne alors en titre, mais à un ministère fédéral.

Si la Couronne avait agi à l'époque et intenté des procédures, les témoins auraient été disponibles, y compris Isaac Mutch, pour déterminer avec plus de certitude la teneur de la lettre et la durée de la possession acquisitive. Il serait manifestement injuste que l'inaction d'une partie devienne la ruine de l'autre. [TRADUCTION] «Les droits longtemps inexercés sont souvent plus cruels que la justice qu'ils abritent.»[20]

La demanderesse prétend également que la convention de 1958 transférant tous les droits et intérêts provinciaux dans la réserve au gouvernement fédéral a mis fin à la prescription. La *Loi sur les*

[20] *A'Court c. Cross* (1825) 3 Bing. 329, à la p. 332, 130 E.R. 540, à la p. 541, le juge en chef Best.

Public Lands Grants Act, earlier referred to, provides that no right to public lands may be acquired by prescription but it cannot be inferred that the Act will retroactively extinguish adverse possession already established.

In short, after the creation of the Province of New Brunswick in 1784, the Indians were granted a licence of occupancy in 1808 by the Province, which they neglected to exercise over the tract of land along the Little Southwest Miramichi River. From the 1830's to the surrender of 1895 the Indians lost their right of occupancy through adverse possession. The 1895 surrender could not, of course, transfer to the Crown in the right of Canada what the surrenderers had already lost and adverse possession throughout that period ran against the Crown in the right of the Province, the person entitled, up to the agreement of 1958. The latter agreement could not affect adverse possession already established. The federal statute barring prescription, the *Public Lands Grants Act* could not, of course, apply to the land in question before the agreement of 1958 and by that time adverse possession had been established and the rights of prior owners extinguished.

Within that tract of land along the Little Southwest Miramichi River lies the present day non-Indian community of Lyttleton wherein is located the parcel of land possessed in 1838 by Ebenezer Travis. From that parcel, lot 6 was admittedly occupied by James Mutch in 1898. His grandson Isaac built on it in 1904 and sold from it to the defendant in 1952, 1958 and 1959, the property now being claimed in the present information.

During that whole period, from 1838 to the date of this information in 1973, or a period of 135 years, adverse possession has not been effectively interrupted by any of the parties entitled to do so, namely the Province of New Brunswick from 1838 to 1958, the Government of Canada from 1958 to 1973, and the Red Bank Band with reference to their own rights of occupancy throughout the period.

I therefore find that the defendant and his predecessors have established adverse possession on

concessions de terres publiques mentionnée plus tôt, prévoit qu'on ne peut acquérir par prescription aucun droit dans des terres publiques, mais on ne peut en déduire que la Loi éteindra rétroactivement une possession acquisitive déjà établie.

En bref, après la création de la province du Nouveau-Brunswick en 1784, la province a accordé aux Indiens en 1808 un permis d'occupation, qu'ils ont négligé d'exercer sur le lopin de terre longeant la rivière Little Southwest Miramichi. De 1830 jusqu'à la cession de 1895, les Indiens ont perdu leur droit d'occupation en raison de la possession acquisitive. La cession de 1895 ne pouvait évidemment pas transférer à la Couronne du chef du Canada ce que les cédants avaient déjà perdu et la possession acquisitive au cours de cette période jouait contre la Couronne du chef de la province, la personne alors en titre, jusqu'à la convention de 1958. Cette convention ne pouvait pas porter préjudice à une possession acquisitive déjà établie. La loi fédérale interdisant la prescription, la *Loi sur les concessions de terres publiques*, ne pouvait bien sûr s'appliquer à la terre en question avant la convention de 1958 et, à ce moment-là, la possession acquisitive avait été établie et les droits des propriétaires antérieurs étaient éteints.

Sur cette lisière de terrain longeant la rivière Little Southwest Miramichi se trouve l'agglomération non indienne actuelle de Lyttleton où se situe le lopin de terre que possédait Ebenezer Travis en 1838. En 1898, James Mutch occupait manifestement le lot 6 de ce lopin. Son petit-fils Isaac a construit sur ce lot en 1904 et, en 1952, 1958 et 1959, en a vendu au défendeur les parties qui composent la propriété maintenant réclamée dans la présente dénonciation.

Pendant toute cette période, de 1838 à la date de cette dénonciation en 1973, soit pendant 135 ans, la possession acquisitive n'a été effectivement interrompue par aucune des parties ayant droit de le faire, soit la province du Nouveau-Brunswick de 1838 à 1958, le gouvernement du Canada de 1958 à 1973 et la bande Red Bank pour ce qui touche leur propre droit d'occupation pendant la période.

Je conclus donc que le défendeur et ses prédécesseurs ont établi la possession acquisitive sur la

the subject property as against anyone and I dismiss plaintiff's action with costs.

Both parties adduced expert evidence at the hearing with a view to establish the market value of the subject property. In the event that my findings in the matter become useful in further proceedings, I find that the value of the Gilbert A. Smith property is as follows: land and site improvements $12,000; buildings $16,000; gravel reserves $8,000. Total, $36,000.

propriété en question à l'encontre de tous et je rejette l'action de la demanderesse avec dépens.

Les deux parties ont fait témoigner des experts pour établir la valeur marchande de la propriété en question. Dans l'éventualité où mes conclusions sur la question deviendraient utiles dans des procédures ultérieures, voici mes conclusions sur la valeur marchande de la propriété de Gilbert A. Smith: terre et améliorations de l'emplacement $12,000; constructions $16,000; carrière de gravier $8,000. Total $36,000.

T-1745-77

Springbank Dehydration Ltd. and Seabird Island Farms Ltd. (*Plaintiffs*)

v.

Archie Charles, Harold Peters, Allan Peters and all other persons belonging to the Class of Band Members of the Seabird Island Band, Agassiz, of the Vancouver Distriet in the Province of British Columbia and the Queen as represented by the Minister of Indian and Northern Affairs (*Defendants*)

Trial Division, Mahoney J.—Vancouver, May 2 and 3, 1977.

Crown — Indian reservation lands — Head lease expired — Rights of sub-lessee re agreement of land transfer — Application for injunction — Interest in subject lands necessary for injunction to issue — Whether plaintiffs had an interest to support application — Indian Act, R.S.C. 1970, c. I-6, s. 28.

The plaintiffs had been sub-lessees of lands belonging to the defendants. An agreement was made between the defendants and the plaintiffs respecting a land transfer between plaintiffs. The defendants subsequently ratified this agreement and applied for ministerial approval. When the head lease was terminated the plaintiff Springbank declined the Minister's offer of a new lease, as per a clause in the sub-lease. Although the Minister recommended the Band's granting a lease for the lands involved in the exchange, the Band then refused to grant the lease and decided to carry on business for themselves. The defendants were about to replace the plaintiffs' crop with a crop of beans.

Held, the application is dismissed. The plaintiffs' claim for injunctive relief is entirely premised on the existence of a subsisting legal interest in the Seabird lands, the Springbank lands and the Consolidated lands. The statement of claim does not disclose such an interest and accordingly the injunction should not be granted. As to the Springbank lands *per se*, the plaintiff Springbank's interest expired with the head lease on September 30, 1976, the Minister's offer not having been accepted. The interest in the Consolidated lands depends entirely on the effect of the agreement and the subsequent resolution of the Band Council which agreement is void under section 28(1) of the *Indian Act*. The interest in Seabird lands depends entirely on the effect of the Minister's recommendation and the Minister's offer *vis-à-vis* the Seabird lands, being for one year only, might have had some effect by virtue of section 28(2) if it had been a permit.

APPLICATION.

COUNSEL:

B. K. Atkinson and *P. J. Jones* for plaintiffs.

T-1745-77

Springbank Dehydration Ltd. et Seabird Island Farms Ltd. (*Demanderesses*)

c.

Archie Charles, Harold Peters, Allan Peters et toutes les autres personnes appartenant à cette catégorie de membres de la bande de l'île Seabird, Agassiz, district de Vancouver (Colombie-Britannique) et la Reine représentée par le ministre des Affaires indiennes et du Nord canadien (*Défendeurs*)

Division de première instance, le juge Mahoney—Vancouver, les 2 et 3 mai 1977.

Couronne — Terres comprises dans la réserve indienne — Bail principal expiré — Droits du sous-locataire dans une entente concernant l'échange de certaines terres — Demande d'injonction — Droit sur les terres en cause nécessaire pour accorder l'injonction — Les demanderesses avaient-elles un droit à l'appui de leur demande? — Loi sur les Indiens, S.R.C. 1970, c. I-6, art. 28.

Les demanderesses sous-louaient des terres appartenant aux défendeurs. Ces derniers ont conclu avec les demanderesses un accord visant un échange de terres entre elles. Les défendeurs ont subséquemment ratifié cet échange et demandé l'approbation du Ministre. A l'expiration du bail principal, la demanderesse Springbank a refusé l'offre par le Ministre d'un nouveau bail, comme il était prévu dans une clause du contrat de sous-location. La bande a refusé d'accorder le bail concernant les terres comprises dans l'échange et ce, malgré la recommandation du Ministre; elle a décidé de s'établir à son compte et de remplacer les cultures fourragères des demanderesses par la culture de haricots.

Arrêt: la demande est rejetée. La réclamation des demanderesses repose entièrement sur l'existence d'un droit valide sur les terres Seabird, les terres Springbank et les Terres réunies. La déclaration ne révèle aucun droit semblable et, par conséquent, l'injonction ne doit pas être accordée. En ce qui concerne les terres Springbank, il appert que le droit de la demanderesse Springbank s'est éteint à l'expiration du bail principal, le 30 septembre 1976, l'offre du Ministre ayant été refusée. Le droit sur les Terres réunies dépend uniquement des effets de l'entente, nulle en vertu de l'article 28(1) de la *Loi sur les Indiens*, et de la résolution ultérieure du Conseil de la bande. Le droit sur les terres Seabird dépend entièrement des effets de la recommandation du Ministre et l'offre de ce dernier à l'égard des terres Seabird, valide pour un an seulement, aurait pu avoir quelque effet en vertu de l'article 28(2) si elle avait équivalu à un permis.

DEMANDE.

AVOCATS:

B. K. Atkinson et *P. J. Jones* pour les demanderesses.

R. E. Eades for defendants, except the Queen.

SOLICITORS:

Jestley Kirstiuk, Vancouver, for plaintiffs.

Volrich, Eades, Wark & Mott, Vancouver, for defendants, except the Queen.

The following are the reasons for order rendered in English by

MAHONEY J.: The facts alleged in the statement of claim and in the affidavit supporting the plaintiffs' application for an interim injunction are not disputed by the defendants against whom the injunction is sought, *i.e.* all except Her Majesty. Her Majesty was not represented at the hearing of the application; the other defendants were.

The plaintiffs were, prior to September 30, 1976, sub-lessees from the same head lessee of certain lands contained in the Seabird Island Indian Reserve near Chilliwack, B.C. The plaintiff Springbank leased about 400 acres and the plaintiff Seabird about 200 acres, respectively hereafter called the Springbank and Seabird lands. The Springbank sub-lease contained a covenant by the Minister of Indian and Northern Affairs that, if the head lease were terminated, a new lease for the balance of the term of the sub-lease would be granted. Seabird and Springbank appear to share common management and, at least some, common ownership.

On June 26, 1976, Springbank and the defendant Band entered into an agreement in writing whereby it was agreed that approximately 160 acres of the Seabird lands would be transferred to Springbank in exchange for approximately 180 acres of the Springbank lands, the resulting parcel to be leased to Springbank being called the Consolidated lands. The head lessee determined to surrender its lease effective September 30, 1976 and on September 2, in pursuance of his covenant, the Minister made an offer, open to September 29, to lease the original Springbank lands to Springbank. On September 28, the Council of the defendant Band, by resolution, ratified, approved and confirmed the said exchange and requested

R. E. Eades pour les défendeurs à l'exception de la Reine.

PROCUREURS:

Jestley Kirstiuk, Vancouver, pour les demanderesses.

Volrich, Eades, Wark & Mott, Vancouver, pour les défendeurs à l'exception de la Reine.

Ce qui suit est la version française des motifs de l'ordonnance rendus par

LE JUGE MAHONEY: Les faits allégués dans la déclaration et dans l'affidavit présenté à l'appui de la demande d'injonction provisoire ne sont pas contestés par les défendeurs à l'encontre de qui l'injonction est sollicitée et qui étaient tous représentés à l'audience, soit tous les défendeurs à l'exception de Sa Majesté.

Jusqu'au 30 septembre 1976, les demanderesses sous-louaient au même locataire principal certaines terres comprises dans la réserve indienne de l'île Seabird, près de Chilliwack (Colombie-Britannique), la demanderesse Springbank environ 400 acres (ci-après appelées les terres Springbank) et la demanderesse Seabird, environ 200 (ci-après appelées les terres Seabird). Aux termes du contrat de sous-location de Springbank, le ministre des Affaires indiennes et du Nord canadien s'engageait à accorder, à l'expiration du bail principal, un nouveau bail pour le temps restant à courir dudit contrat de sous-location. Il appert que Seabird et Springbank gèrent conjointement ces terres et, dans une certaine mesure, les détiennent en copropriété.

Le 26 juin 1976, Springbank et la bande défenderesse ont convenu par écrit de transférer à Springbank environ 160 acres des terres Seabird en échange d'environ 180 acres des terres Springbank, la pièce de terre résultante, louée à Springbank, étant dénommée Terres réunies. Le locataire principal a décidé d'abandonner son bail le 30 septembre 1976 et, le 2 septembre 1976, le Ministre a fait, conformément à son engagement, une offre valable jusqu'au 29 septembre, de location à Springbank des terres primitivement louées à ce dernier. Le 28 septembre, le Conseil de la bande défenderesse a, par résolution, ratifié, approuvé et confirmé le susdit échange et demandé au Ministre de louer à Springbank les Terres réunies. S'ap-

the Minister to grant a lease of the Consolidated lands to Springbank. Relying on the agreement of June 26 and the resolution of September 28, Springbank did not accept the Minister's offer and, further, expended money on the Consolidated lands.

On March 22, 1977, the Minister advised Seabird that he would recommend to the Band that a lease of the Seabird lands be granted to it. On April 5, he advised Seabird that the Band had decided not to grant such a lease. It appears that the Minister's consent to the Seabird sub-lease had never been obtained and, accordingly, no covenant like that respecting the Springbank lands existed in respect of the Seabird lands.

The Band has decided to go into business for itself on the lands and to replace the plaintiffs' crops of grass legumes with a crop of beans. On or about April 18, 1977, a contractor engaged by the Band moved onto the lands and commenced activities that will undoubtedly destroy the plaintiffs' crops thereon. The plaintiffs commenced an action in the Supreme Court of British Columbia and obtained an *ex parte* injunction prohibiting those activities which was dissolved May 2 upon that Court determining it had no jurisdiction to entertain the action. On May 2 an action was commenced in this Court and the application for an injunction was heard.

As I indicated at the close of the hearing, I am satisfied that, if the statement of claim discloses that the plaintiffs now have an interest in any of the lands, the injunction ought to issue in respect thereof.

As to the Springbank lands *per se*, the plaintiff Springbank's interest would appear to have expired with the head lease on September 30, 1976, the Minister's offer not having been accepted. The interest in the Consolidated lands depends entirely on the effect of the agreement of June 26, 1976 and the subsequent resolution of the Band Council. The interest in the Seabird lands depends entirely on the effect of the Minister's recommendation.

puyant sur l'entente du 26 juin et la résolution du 28 septembre, Springbank a refusé l'offre du Ministre et de plus, a engagé des dépenses relativement aux Terres réunies.

Le 22 mars 1977, le Ministre a informé Seabird qu'il se proposait de recommander à la bande de louer à bail les terres Seabird à celle-ci. Le 5 avril, le Ministre a fait connaître à Seabird le refus de la bande de lui consentir ledit bail. Il semble que le consentement du Ministre au contrat de sous-location de Seabird n'ait jamais été obtenu et que, par conséquent, aucun engagement semblable à celui concernant les terres Springbank n'ait existé à l'égard des terres Seabird.

La bande a décidé de s'établir à son compte sur les terres et d'y remplacer les cultures fourragères par la production de haricots. Vers le 18 avril 1977, un entrepreneur recruté par la bande a commencé à exécuter sur ces terres des travaux qui auraient à coup sûr anéanti les récoltes des demanderesses. Ces dernières ont intenté une action en Cour suprême de la Colombie-Britannique et ont obtenu une injonction *ex parte* interdisant la continuation des travaux. Le 2 mai, la Cour suprême a annulé l'injonction au motif qu'elle n'avait pas compétence pour connaître de l'action. Le même jour, les demanderesses ont entamé des procédures devant la présente cour, qui a instruit la demande d'injonction.

Comme je l'ai souligné à la clôture de l'audience, je suis convaincu que si la déclaration démontre que les demanderesses ont actuellement un droit sur l'une ou l'autre des terres, l'injonction sera accordée à l'égard de ladite terre.

En ce qui concerne les terres Springbank, il appert que le droit de la demanderesse Springbank s'est éteint à l'expiration du bail principal, le 30 septembre 1976, l'offre du Ministre ayant été refusée. Le droit sur les Terres réunies dépend uniquement des effets de l'entente du 26 juin 1976 et de la résolution ultérieure du Conseil de la bande, et le droit sur les terres Seabird, des effets de la recommandation du Ministre.

The *Indian Act*[1] provides:

28. (1) Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

The agreement as to the Consolidated lands would appear to be clearly void by virtue of subsection 28(1). That matter has been dealt with too often to be open to any doubt in spite of apparent equities.[2] Likewise, the resolution can have no effect, the agreement being void.

The Minister's offer *vis-à-vis* the Seabird lands, being for one year only, might have had some effect by virtue of subsection 28(2) if it had been a permit but the offer is clearly expressed: "the Department is prepared to recommend to the Band Council to extend to your company a lease for one year. . . ." That is not, in my view, a permit by any definition.

The plaintiffs' claim for injunctive relief is entirely premised on the existence of a subsisting legal interest in the Seabird lands, the Springbank lands and the Consolidated lands. The statement of claim does not disclose such an interest and accordingly the injunction should not be granted.

[1] R.S.C. 1970, c. I-6.

[2] *E.g. The King v. McMaster* [1926] Ex.C.R. 68; *Easterbrook v. The King* [1931] S.C.R. 210 and *The King v. Cowichan Agricultural Society* [1950] Ex.C.R. 448.

La *Loi sur les Indiens*[1] prévoit que:

28. (1) Sous réserve du paragraphe (2), est nul un acte, bail, contrat, instrument, document ou accord de toute nature, écrit ou oral, par lequel une bande ou un membre d'une bande est censé permettre à une personne, autre qu'un membre de cette bande, d'occuper ou utiliser une réserve ou de résider ou autrement exercer des droits sur une réserve.

(2) Le Ministre peut, au moyen d'un permis par écrit, autoriser toute personne, pour une période d'au plus un an, ou, avec le consentement du conseil de la bande, pour toute période plus longue, à occuper ou utiliser une réserve, ou à résider ou autrement exercer des droits sur une réserve.

En vertu du paragraphe 28(1), l'entente concernant les Terres réunies semble évidemment nulle et non avenue. Cette question a fait l'objet d'une jurisprudence trop constante pour être encore susceptible d'équivoques malgré le cas d'équité manifeste.[2] L'entente étant nulle et de nul effet, la résolution l'est également.

L'offre du Ministre concernant les terres Seabird, valide pour un an seulement, aurait pu avoir quelque effet en vertu du paragraphe 28(2) si elle avait équivalu à un permis; mais elle a été clairement exprimée en ces termes: [TRADUCTION] «le ministère est disposé à recommander au Conseil de la bande de proroger, en faveur de votre compagnie, le bail pour une durée d'un an. . . .» Cela n'équivaut pas, à mon avis, à un permis, quelle qu'en soit la définition.

La réclamation des demanderesses visant l'obtention d'une injonction repose entièrement sur l'existence d'un droit valide sur les terres Seabird, les terres Springbank et les Terres réunies. La déclaration ne révèle aucun droit semblable et, par conséquent, l'injonction ne doit pas être accordée.

[1] S.R.C. 1970, c. I-6.

[2] Ex. *Le Roi c. McMaster* [1926] R.C.É. 68; *Easterbrook c. Le Roi* [1931] R.C.S. 210 et *Le Roi c. Cowichan Agricultural Society* [1950] R.C.É. 448.

BRITISH COLUMBIA

COURT OF APPEAL

Before Maclean, Nemetz and Taggart, JJ.A.

Corporation of Surrey et al (Plaintiffs) Respondents v. Peace Arch Enterprises Ltd. and Surfside Recreations Ltd. (Defendants) Appellants

Indians — Surrender of Part of Reserve to Crown for Leasing Purposes — Whether Lands Surrendered Subject to Federal or Provincial Jurisdiction.

Where an Indian Band "surrendered" in trust to the Crown lands which formed part of their reserve, for the purpose of leasing them to the appellants, it was *held* that the "surrender" was not final and complete, but merely conditional, and that the lands in question did not thereby cease to be "set apart by Her Majesty for the use and benefit of a band"; it followed that the lands continued to be "lands reserved for the Indians" within the meaning of sec. 91 (24) of the *B.N.A. Act, 1867*, that exclusive legislative jurisdiction over the lands remained in the Parliament of Canada, and that the appellants as developers thereof were not subject to municipal bylaws or regulations made under the provincial *Health Act*, RSBC, 1960, ch. 170; *St. Ann's Island Shooting & Fishing Club Ltd. v. Reg.* [1950] SCR 211, at 219, [1950] 2 DLR 225, affirming [1949] 2 DLR 17, 18 Can Abr (2nd) 2759; *St. Catherine's Milling & Lbr. Co. v. Reg.* (1888) 14 App Cas 46, at 55, 58 LJPC 54, 4 Cart 107, affirming (1887) 13 SCR 577, 7 Can Abr (2nd) 161 applied.

[Note up with 13 CED (2nd ed.) *Indians*, secs. 4, 8, 17.]

L. Page, for appeliants.

A. K. Thompson, for respondents.

N. D. Mullins, Q.C., for Atty.-Gen. of Can.

D. Sigler, Q.C., for Atty.-Gen. of B.C.

April 22, 1970.

The judgment of the Court was delivered by

MACLEAN, J.A. — The appellants, who are constructing an amusement park with restaurant facilities within the municipal limits of the respondent corporation of the District of Surrey, appeal against a judgment declaring that their acts are in breach of the bylaws of the municipality and of the *Health Act*, RSBC, 1960, ch. 170, and regulations passed thereunder, and restraining them from proceeding with the construction which is admittedly in breach of the bylaws and the *Health Act* and regulations passed thereunder.

Both the Attorneys-General of Canada and of British Columbia appeared by counsel on this appeal in response to a

notice given under the *Constitutional Questions Determination Act*, RSBC, 1960, ch. 72.

The action was tried on an agreed statement of facts; documents were also put in evidence at the trial, and from these circumstances it emerges that:

(1) The construction works of the appellants are within the boundaries of the Semiahmoo Indian Reserve which was created as a reserve and allotted to the Semiahmoo Tribe on June 14, 1887.

(2) That the Semiahmoo Indian Reserve is within the municipality of the Corporation of the District of Surrey.

(3) That on October 20, 1963 the tribe "surrendered" the lands in question (lot 7 of the reserve) to Her Majesty the Queen in the right of Canada for leasing purposes under a "surrender" dated October 20, 1963, approved by order in council P.C. 1963-1810 dated December 12, 1963.

The document of surrender reads as follows:

"Department Of Citizenship And Immigration
Indian Affairs Branch

File No. 153-32-13-0
c.c. 153/32-13-0-56

"Surrender Form

"Know All Men By These Presents That We

"the undersigned Chief and Councillors of the Semiahmoo Band of Indians resident on our Reserve Semiahmoo Indian Reserve in the Province of British Columbia and of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby surrender unto Her Majesty the Queen in right of Canada, her Heirs and Successors, All And Singular, that certain parcel or tract of land and premises, situate, lying and being in Semiahmoo Indian Reserve in the Province of British Columbia containing by admeasurement 93.6 acres, to be the same, more or less, and being composed of:

"The whole of Lots 4, 7 and 8 according to a plan of survey recorded in Canada Land Surveys Records as number B.C. 1107.

"To Have And To Hold the same unto Her said Majesty the Queen, her Heirs and Successors in trust to lease the same to such person or persons, and upon such terms as

the Government 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 leasing thereof, shall be distributed 90% to the locatees and the remaining 10% deposited to the Revenue account of the Band.

"And We, the said Chief and Councillors of the said Semiahmoo Band of Indians do on behalf of our people and for ourselves hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing of the said land.

"In Witness Whereof, we have hereunto set our hands and affixed our seals this twentieth day of October in the year of Our Lord one thousand, nine hundred and Sixty-three.

"Signed, Sealed And Delivered	[Sgd.] RAMOND CHARLES
In the presence of	[Sgd.] MRS. DORIS DOLAN
[Sgd.] J. DUNN	[Sgd.] JAMES DOLAN

"Superintendent Indian Agency."

The lease dated February 1, 1964 entered into between Her Majesty and the appellant Peace Arch Enterprises Ltd. is for a term of 30 years at a rental starting at $1,200 per year, finally escalating to $11,550 per year.

The lease contains provisions for termination in the event that the lessee fails to pay rent or fails to comply with the terms of the lease.

The appellant Peace Arch Enterprises Ltd. is entitled to physical possession of the premises during the currency of the lease.

The appellant Surfside Recreations Ltd. holds an undisclosed interest in the lease, and is apparently what one might call the manager of the amusement park which is even now in the course of construction.

The respondent municipality submits that the appellants must comply with the bylaws of the municipality providing for zoning, and specifications for buildings, water services and sewerage disposal, and requirements under the *Health Act* and regulations passed thereunder.

The appellants on the other hand claim immunity from the bylaws and regulations, submitting that they are inapplicable

to lands within an Indian reserve. The alternative is, of course, that in so far the bylaws and regulations purport to apply to the lands in question they are unconstitutional as infringing on the exclusive legislative jurisdiction of Parliament, derived from subsec. 24 of sec. 91 of the *B.N.A. Act, 1867*, which reads as follows:

> "91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—
>
> * * *
>
> "(24) Indians, and lands reserved for the Indians:"

It seems to me that the first thing that must be determined here is whether the lands in question here are "lands reserved for the Indians" within the meaning of that expression appearing in sec. 91 (24) of the *B.N.A. Act, 1867*.

If the answer to that question is in the affirmative, then one must ask whether there is any room for provincial and municipal legislation which purports to regulate how land shall be used and what types of buildings may or may not be erected on the land. The zoning bylaws of the municipality do spell out very explicitly the manner in which the land can and cannot be used, and the same may be said of the regulations under the *Health Act* of the province.

In my view the zoning regulations passed by the municipality, and the regulations passed under the *Health Act*, are directed to the use of the land. It follows, I think, that if these lands are "lands reserved for the Indians" within the meaning of that expression as found in sec. 91 (24) of the *B.N.A. Act, 1867*, that provincial or municipal legislation purporting to regulate the use of these "lands reserved for the Indians" is an unwarranted invasion of the exclusive legislative jurisdiction of Parliament to legislate with respect to "lands reserved for the Indians".

The respondent municipality and counsel for the intervener, the government of the province, succeeded in convincing the

learned Judge below that once the lands in question were surrendered "to Her Majesty the Queen * * * in trust to lease the same * * * upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people," and once a lease was granted following the surrender, that the lands ceased to be lands "set apart * * * for the use and benefit of a band" as these words are used in the definition of "reserve" occurring in sec. 2 of the *Indian Act*, RSC, 1952, ch. 149, with the consequence that they ceased to be lands within a "reserve" which is defined as follows:

> "2. (1) (*o*) 'reserve' means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band;"

It was argued that after the surrender and lease, although the lands were then still set apart for the "benefit" of the band, thenceforth they were not set apart for the "use" of the band, and hence were no longer "reserves" as that expression is defined in the *Indian Act*.

The expression "surrendered lands" is defined in sec. 2 (1) (*q*) of the *Indian Act* as:

> "2. (1) (*q*) 'surrendered lands' means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart."

Secs. 37 and 38 of the Act also deal with the subject of "surrender":

> "37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.
>
> "38. (1) A band may surrender to Her Majesty any right or interest of the band and its members in a reserve,
>
> "(2) A surrender may be absolute or qualified, conditional or unconditional."

In my view the surrender here, a surrender to Her Majesty "*in trust* to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people" falls into the class of a qualified or conditional surrender.

Under this form of surrender, "in trust" and for a particular purpose that is "to lease the same" it seems to me that it cannot be said the tribal interest in these lands has been extinguished. In my respectful opinion the learned Judge below was in error when he held that the surrender was an "unconditional" one.

The subject of "surrender" under the *Indian Act* was dealt with in *St. Ann's Island Shooting & Fishing Club Ltd. v. Reg.* [1950] SCR 211, [1950] 2 DLR 225, affirming [1949] 2 DLR 17, where Rand, J. said at p. 219:

> "I find myself unable to agree that there was a total and definitive surrender. What was intended was a surrender sufficient to enable a valid letting to be made to the trustees 'for such term and on such conditions' as the Superintendent General might approve. It was at most a surrender to permit such leasing to them as might be made and continued, even though subject to the approval of the Superintendent General, by those having authority to do so. It was not a final and irrevocable commitment of the land to leasing for the benefit of the Indians, and much less to a leasing in perpetuity, or in the judgment of the Superintendent General, to the Club. To the Council, the Superintendent General stood for the government of which he was the representative. Upon the expiration of the holding by the Club, the reversion of the original privileges of the Indians fell into possession."

In my view the "surrender" under the *Indian Act* is not a surrender as a conveyancer would understand it. The Indians are in effect forbidden from leasing or conveying the lands within an Indian reserve, and this function must be performed by an official of the Government if it is to be performed at all: See sec. 58 (3) of the *Indian Act*. This is obviously for the protection of the Indians. Further, it is to be noted that the surrender is in favour of Her Majesty "in trust". This obviously means in trust for the Indians. The title which Her Majesty gets under this arrangement is an empty one.

The learned Judge below goes on in his judgment to hold that "for land to be regarded as a reserve it must be set aside both for the use and benefit of the Indians." I take it that the learned Judge here refers to a "reserve under the Indian Act". He then holds in effect that once the land is leased following the surrender it is no longer held for the "*use* and benefit" of the Indians and hence is no longer a reserve: See definition of "reserve" in the *Indian Act*, sec. 2 (1) (*o*):

"2. (1) (*o*) 'reserve' means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band;"

Then having concluded that the land is no longer a "reserve" under the *Indian Act,* the learned Judge concludes:

"If land no longer constitutes a reserve within the meaning of the former statute, it equally cannot be considered as being reserved for Indians within the meaning of the latter (the B.N.A. Act)."

In my respectful view this reasoning is fallacious as it seeks to interpret sec. 91 (24) of the *B.N.A. Act, 1867* by legislation (the *Indian Act*), parts of which were not passed till over 80 years later.

In my opinion the land in question is still within the category of lands described in sec. 91 (24) of the *B.N.A. Act, 1867,* i.e., "lands reserved for the Indians." This land was reserved for the Indians in 1887, and the Indians still maintain a reversionary interest in it.

Counsel for the Attorney-General of Canada sought to uphold his submission that Parliament has exclusive legislative jurisdiction by referring to sec. 91 (1) of the *B.N.A. Act, 1867* which gives Parliament exclusive legislative jurisdiction over "the public debt and property". I think that this submission is without merit.

Lord Watson in *St. Catherine's Milling & Lbr. Co. v. Reg.* (1889) 14 App Cas 46, at 56, 58 LJPC 54, 4 Cart 107, affirming (1887) 13 SCR 577, said:

"Sect. 108 enacts that the public works and undertakings enumerated in Schedule 3 shall be the property of Canada. As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the Provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purpose of national defence, and of 'lands set apart for general public purposes.' It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use."

I emphasize the sentence "It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use."

It might well be (but it is not necessary for me to decide) that if an absolute surrender were made by the Indians under the *Indian Act*, and this surrender was followed by a conveyance from the Government to a purchaser the land would cease to be a reserve under the *Indian Act* and would also cease to be "lands reserved for the Indians" under sec. 91 (24) of the *B.N.A. Act, 1867*, but that is not the case here.

My conclusion is that the exclusive legislative jurisdiction over the land in question remains in the Parliament of Canada, and that provincial legislation (including municipal by-laws) which lays down rules as to how these lands shall be used, is inapplicable.

I would allow the appeal and set aside the judgment appealed against.

ALBERTA

SUPREME COURT — PRIMROSE, J.

Connolly v. City Cab Co. Ltd.

Negligence — Passenger Falling while Alighting from Taxi-Cab — Whether Driver Negligent in Failing To Stop beside Curb.

Plaintiff sued for damages for injuries suffered when she fell while alighting from defendant's taxi-cab; because there were cars parked on both sides of the street where plaintiff lived defendant's driver did not try to draw up beside the curb outside plaintiff's house but stopped in the middle of the street where there was some snow and ice, although there was no evidence that plaintiff slipped on it: it appeared rather that her foot gave way under the weight of her body as she got out.

It was *held* that plaintiff's action must be dismissed; although it was clear law that a carrier was under a duty to carry a passenger to his destination with due care, he was not an insurer of his passenger's safety; in the absence of evidence in the case at bar that at the point where defendant stopped the road surface was hazardous or that there was some unusual or unseen danger which constituted a risk, it could not be said that defendant's driver had not discharged his duty: *Day v. Toronto Transportation Commn. and Clarkson* [1940] SCR 433, at 441, [1940] 4 DLR 484, 5 Can Abr (2nd) 1378 applied; *Mizenchuk v. Thompson and Nash Taxi & U-Drive Co.* [1947] 2 WWR 849, 55 Man R at 400, [1948] 1 DLR 136, affirming [1947] 1 WWR 1075, 55 Man R 389, [1947] 3 DLR 545, 7 Abr Con (2nd) 735 (C.A.); *Donner v. Mallett* (1968) 63 WWR 669, Can Abr (2nd) Cum Supp 447 (B.C.); *Folb v. Metro. Corpn. of Gr. Winnipeg* (1968) 65 WWR 49, Can Abr (2nd) Cum Supp 448 (Man.) distinguished.

[Note up with 16 CED (2nd ed.) *Negligence*, sec. 4.]

Turner v. Cox, 21 L. T. Rex. 173; Paull v. Simpson, 9 Q. B. 365; Thompson v. Harding, 2 Ell. & Bl. 630; Oxenham v. Clapp, 2 B. & Ad. 309.

Sherwood, Q. C., shewed cause and cited Graham v. Nelson 6 C. P. 280; McDade dem. O'Connor v. Dafoe, ante, page 386; Williams on Exrs. Am. Ed. 224, note 2; Nass v. Vanswearingen, 7 Serg. & R. 192, 10 Serg. & R. 144; Green v. Dewit. 1 Root 183.

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

This point, whether real estate can be legally sold in this province under an execution against an executor *de son tort*, has already been determined in this court, and in more than one case; and it has also been determined in the court of Common Pleas, that the lands of a deceased debtor cannot be sold under the 5th Geo. II., ch. 7, under an execution against a party who does not rightfully represent him.—Graham v. Nelson et al. (6 C. P. 280).

We think it was in the case of McDade on the demise of O'Conner v. Dafoe that the point first came up, and in a case like the present, where the purchaser at the sheriff's sale was the plaintiff in the *fi. fa.*, and therefore bound to take care that the proceedings were regular, or at least illegal.

By some accident that case seems not to have been printed. We therefore refer to the grounds of the judgment as stated in it, and the case itself as reported with this, for the information of the profession (*a*). We adhere to that judgment, and discharge this rule, which leaves the heir of the deceased debtor in possession of the verdict.

Rule discharged.

TOTTEN v. WATSON.

Sale of land by Indians—13 & 14 Vic., ch. 74.

The 13 & 14 Vic., ch. 74, which prohibits the sale of land by Indians, applies only to lands reserved for their occupation, and of which the title is still in the crown, not to lands to which any individual Indian has acquired a title.

EJECTMENT for the north half of lot 24 in the 16th concession of Rawdon.

(*a*) Ante, page 386.

William John knew well the nature of the deed that he was executing.

The land was proved to be worth at the time of the trial about nine hundred dollars.

It was left to the jury to find—1st. Whether William John knew what he was doing when he executed the deed to Cuthbertson, or whether he was imposed upon by the grantee, and made to execute an instrument which was represented to him to be of a different kind from what it was. 2ndly. Whether it was a voluntary deed, without consideration. 3rdly. Whether when that deed was executed there was any one in possession, holding adversely to William John. 4thly. Whether the deed made by William John to the plaintiff in 1856, was a voluntary deed, or made for value.

The jury found, that William John was imposed upon, and did not know what he was doing, when he signed the conveyance to Cuthbertson: that he received no value from Cuthbertson for the land: that no person was in possession holding adversely to him at the time; and that there was value given to William John by the plaintiff for the conveyance which he took from him.

It appeared that in 1842, if not before, some squatters had gone upon the land, who were succeeded by some one else, and after several others had been in possession the plaintiff bought out the last person some years before he took out his deed, and cultivated the land, and had about forty acres cleared.

A verdict was rendered for the plaintiff, and both parties agreed that upon the evidence and the finding of the jury. the court should direct a verdict for either party, according to their opinion of the right.

Jellett obtained a rule *nisi* to enter a verdict for defendant, to which *Henderson* shewed cause.

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

The only question to be determined is whether the statute 13 & 14 Vic., ch. 74, secs. 1 & 2, affects this case. That enacts "That no purchase or contract for the sale of land in Upper Canada, which may be made of or with the

Defence for the whole.

At the trial at Belleville, before *Hagarty*, J., it was shewn that the crown, on the 30th of June, 1801, issued a patent to Captain John Desorontyon, a Mohawk chief, living on the Bay of Quinté, for 1200 acres of land, including the hundred acres in question. He had three sons, John, William, and Peter. John died intestate before his father, but leaving lawful issue, his eldest son and heir, William John. Afterwards the patentee died intestate. His son William had died before the eldest son John, leaving no issue. Peter survived his father.

In 1856, William John, the grandson and heir of the patentee, being the eldest son of his eldest son John, conveyed by bargain and sale to the plaintiff, William Totten, for a consideration of £7 10s. He was examined upon the trial, and said the price was named by himself, and that he was quite satisfied with it. He had never been in possession of the land, nor so far as he knew had his father or grandfather. The deed was read to William John, before he signed it, and he had before sold the other half of the lot at the same price. The plaintiff had been in possession of the 100 acres long before he took this deed.

It was objected against the plaintiff's title, that the grantor, William John being an Indian, was prevented by statute 13 & 14 Vic., ch., 74, from disposing of his land.

And it was proved that the same William John who made the deed to the plaintiff in 1856, had on the 20th of July, 1842, executed a conveyance by bargain and sale of 1000 acres of land, including the 100 acres in question in this action, to one Cuthbertson, for a consideration expressed of £100.

William John swore upon the trial that he was imposed upon when he was got to execute that deed in 1842: that Cuthbertson, who was his cousin, never gave him any consideration for the land; and that he was persuaded that the paper he signed was merely an authority to Cuthbertson to look after his land for him.

On the other hand, a subscribing witness to the deed, and the attorney in whose office it was executed, swore that

strong evidence, we think, that the act, as it regards the protection of the Indians in the possession and enjoyment of their land, concerns only such lands as Indians are merely permitted to occupy at the pleasure of the crown, and not lands of which a title has been made by letters patent to any individual Indian.

From the earliest period the Government has always endeavoured, by proclamation and otherwise, to deter the white inhabitants from settling upon Indian lands, or from pretending to acquire them by purchase or lease; but it has never attempted to interfere with the disposition which any individual Indian has desired to make of land that had been granted to him in free and common soccage by the crown. Very few such grants have been made, and only to leading persons among the Indians, who, like the patentee in this case, Captain John, had been treated by the crown as officers in their service, and who, it might be assumed, had sufficient intelligence to take care of their property.

In the last session of parliament, an act was passed for the further protection of the Indians, 20 Vic., ch. 26, which confirms us in the opinion we have expressed. We refer particularly to the first section of that act.

The postea, in our opinion, should go to the plaintiff.

Rule discharged.

MAHONY v. CAMPBELL.

Conveyance—Description of land—Reference to survey—Estoppel.

J. A., by deed, dated 22nd of January, 1840, conveyed to the plaintiff lots 134, 135, and 136, in the third concession of Sandwich, adding this description, "which said lots were patented to the said James Askin, bearing date the 15th of March, 1836, and which was surveyed and laid off by John Alexander Wilkinson, D. P. S., on the 21st of January, 1840."

Held, that the plaintiff was not bound by such survey, but could claim the whole of lot 136 as laid out by Government.

Ejectment, for part of lot 136 in the 3rd concession of Sandwich.

At the trial, at Sandwich, before *Richards. J.*, it appeared that on the 15th of March, 1836, the crown granted this

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."

If we construe this provision by itself and literally, it will extend to the deed made by William John, an Indian, in 1856, to the plaintiff, of land which the crown had granted by patent to his grandfather, in his natural individual capacity, and which the grandson took by descent, as any other subject of the Queen in this Province would do. But if we look at the scope and intention of the statute, we find much reason to conclude that this enactment could only have been meant to extend to what are understood by the term "Indian lands;" that is, lands which the crown had reserved for the occupation of certain Indian tribes, but of which the title is still in the Queen: and not to land which an individual Indian has either acquired by purchase, devise, or inheritance, or by grant from the crown made to himself as an individual.

In the case of The Queen v. Baby, in this court (12 U. C. R. 346), we had occasion to consider this point, though it was not necessary that we should determine it. In this case we are called upon to do so. The conclusion we come to, on a view of the whole act, is that it is not meant to extend, and does not extend, to any but Indian lands properly so called. If the enacting part of the first clause stood alone, it would clearly take in this case, for it would extend literally to all lands in Upper Canada that any Indian might attempt to sell; and we should find it not difficult to suppose that the legislature might possibly have intended to protect the Indians to that extent, for they are a helpless race, much exposed, from their want of education and acquaintance with business, and the intemperate habits of many of them, to be taken advantage of in their dealings with white people.

But the title and preamble of the act, one of its provisions in the second clause, the third clause more especially, and also the 4th, 5th, 10th, 11th, and 12th clauses, contain

COURT OF APPEAL

Before Macdonald, C.J.A., Galliher and Eberts, JJ.A.

In re the Water Act, 1914
Western Canada Ranching Company, Limited
(Plaintiff) Appellant
v. Department of Indian Affairs
(Defendant) Respondent

Water—Irrigation—Indians—B.C. Water Act, 1914, S. 288 —Jurisdiction of Board.

It was held that the Board of Investigation under the *Water Act, 1914,* had acted without jurisdiction in granting a conditional license to the Department of Indian Affairs to divert water from St. Paul's Creek for use of the Indian tribe on the Kamloops Reserve.

Per Macdonald, C.J.A.: The powers conferred upon the Board as to adjudicating on claims under sec. 288 of said Act do not extend to a claim not founded upon a record or right obtained pursuant to an Act or Ordinance, and the Indians' claim was not so founded; the parties would be left in respect of their rights in the position which they occupied respectively at the date of the initiation of proceedings before the Board.

Per Galliher, J.A.: The Indians did not hold under any former Act or Ordinance, and the facts in support of their claim did not show that they held under a record; therefore the Board acted beyond the jurisdiction conferred by sec. 288.

Appeal by plaintiff from an order of the Board of Investigation under the *Water Act, 1914,* ch. 81, alloting a certain amount of water to the defendant for use upon the Kamloops Indian Reserve. Appeal allowed.

E. C. Mayers, for plaintiff, appellant.

W. D. Carter, K.C., for defendant, respondent.

April 29, 1921.

Macdonald, C.J.A.

MACDONALD, C.J.A.—The ranching company claim to be the present holders of two water records, the first issued to Robert Thompson and James Todd, on December 9, 1869, and the second to John Holland on December 14, 1869. At the foot of the first record, the official who made it added these words:

> This Record is made subject to the rights of the Indians, of using water on the Reserve opposite Kamloops.

The *Land Act, 1865,* under which water records were then made, enacted that "Every person lawfully occupying and *bona fide cultivating lands, may divert any unoccupied water*" for certain specified purposes.

The Indian lands on which the water in dispute has been used were reserved for the use of the Kamloops tribe in 1866. No record, under said *Land Act* or any other Act or Ordinance in favour of the Indians or of any individuals of the tribe, has been produced or proven. It was indeed not argued that there was a record of that nature at all. In 1877, the "Indian Reserves Commission," instructed by the Governments of Canada and British Columbia, fixed the boundaries of the Kamloops Reserve and they added these words to their report:

> The prior right of the Indians as the oldest owners and occupiers of the soil to all the water which they require or may require for irrigation and other purposes from St. Paul's Creek, [the creek in question] and its sources, and northern tributaries, is, so far as the Commissioners have authority in the matter, declared and confirmed to them.

Again in the schedule of "Indian Reserves" in the supplement to the annual report of the Department of Indian Affairs, for the year ending June 30, 1902, there is this item in the column headed "Remarks":

> Five hundred inches of water recorded from St. Paul's Creek allotted by Joint Reserves Commission, July 29th, 1877.

It appears that on September 26, 1888, an application for a record of 500 miners' inches of water from this creek for use on the said Indian reserve, was filed in the office of the Dominion lands agent, at New Westminster. It is upon these four items and riparian rights that the Indian Department respondent relies to sustain the order for the conditional license made by the Board, allotting 500 inches to the respondent for use upon the reserve.

The Board constituted under the provisions of the *Water Act, 1914*, ch. 81, was by sec. 288 of the Act, given its powers to investigate into and adjudicate upon conflicting claims for the use of water. As I read that section, the power conferred is confined to adjudication upon the claims of persons holding or claiming to hold records under any former Act or Ordinance, and upon all other claims and rights to the use of water under any former Act or Ordinance. If therefore the respondent's claim was one not falling within the language just used, that is to say, was not one founded upon a record or right obtained pursuant to an *Act or Ordinance*, the Board had no jurisdiction to make the order appealed from, which is one granting a conditional license to the respondent to divert 500 inches of water from said creek for use of the Indian tribe on the Kamloops reserve. Whatever rights to the use of the water the respondent or the Indian tribe or the individuals thereof may have outside the jurisdic-

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tion of the Board, either at common law or by virtue of the Acts and declarations referred to above, I am constrained to think that those put forward do not fall within the language of said sec. 288.

Apart from any power which may have been conferred upon the Board by sec. 6 of the Act, which section was not relied upon by counsel, doubtless because the time had passed for taking advantage of it, the jurisdiction of the Board is as defined in said sec. 288. I do not find, and we were not referred to any other section of the Act giving the Board a larger or more extensive jurisdiction, at all events, a jurisdiction which would cover the facts relied upon by the respondent as establishing its right to apply for a license to divert and use water from this creek.

This will leave the parties in respect of their several rights in the position which they occupied respectively at the date of the initiation of the proceedings before the Board.

I would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.—I agree with Mr. Mayers' contention that the Board had no power to create rights.

The Board is defined in the interpretation clause to the Act, ch. 81 of 1914 of the Statutes of British Columbia, as follows:

"Board" means the Board of Investigation under this Act.

and in part VIII. of the Act, its functions and procedure are set out, sec. 288, and stated to be

shall hear the claims of all persons holding or claiming to hold records of water and all other claims and rights to the use of water under any former Act or Ordinance.

It is clear the Indians do not hold under any former Act or Ordinance—the question then is—Do they hold under a record? The Board evidently proceeded upon the ground that they did. The evidence adduced in support of this was:

A photostal copy of a list showing water alloted to the Indians by the Indian Reserve Commission in 1877, and filed by J. W. Mackay, Indian agent, with the agent of Dominion Lands at New Westminster. Dealing with this—The Indian Reserve Commission had no power to allot or deal with water allotment under their commission. In their report they have dealt with it in this way (A.B. 118b): [See *ante*, p. 835.]

This can in no sense be called an allotment and, if it could, would be beyond their powers. The fact that it was treated

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as an allotment in the *Dominion Blue Book, 1902,* does not in my opinion, add any force to the contention.

I can find nothing in the evidence to justify the Board in treating the different steps taken as constituting a record. The records granted Robert Thompson and James Todd on December 9, 1869, were made subject to the rights of the Indians. Do these latter words mean subject to what rights they then had or whatever rights might at some future time be determined? I agree with Mr. Fulton's submission before the Board that it was the then rights of the Indians. To adopt the other construction might be to render useless the records granted to Thompson and Todd and under which the complainants now base their claim.

In fact Mr. Mayers has convinced me that, in so far as taking water from the creek is concerned, that would be the outcome. In this view it appears to me that the ruling of the Board was wrong and that the appeal should be allowed.

EBERTS, J.A. concurred in allowing the appeal.

Eberts, J.A.

COURT OF APPEAL

Before Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A.

Ullock (Plaintiff) Respondent
v. **Pacific Great Eastern Railway Company** (Defendant) Appellant

Railways—Negligence—Collision at Railway Crossing—Application of B.C. Railway Act SS. 191-192—Meaning of "Train"—Control Over Motor Car Approaching Railway Crossing.

The Court, Galliher, J.A. dissenting, refused to reverse a judgment, on the verdict of a jury, giving damages to plaintiff for injury sustained in a collision of his motor car with defendant's train at a railway crossing.

Martin, J.A., dealing with an objection that secs. 191-192 of the B.C. *Railway Act* (requiring ringing of bell, etc. and limit of speed) do not apply to a single passenger car with its motive power, a gasoline engine, in the forepart of it all under one roof, such not being a "train" in view of the context and of the other sections of the group headed "The Working of Trains," rejected such contention, holding that the defendant's combination gas car in question in operation on the railway was a "train" within the meaning of the said group of sections.

Galliher, J.A., dissenting, held the jury could not reasonably have acquitted the plaintiff, as they did, of contributory negligence; that the duty of one approaching on the highway a dangerous railway crossing is not fulfilled

W., 4), Ferguson v. Mahon (9 A. & E., 245), Alston v. Mills (*Ib.*, 243), Dite v. Hawker (7 Jur., 768), Jubb v. Ellis (9 Jur., 1057), Calvert v. Gordon (7 B. & C., 809).

DRAPER, J., concurred.

Judgment for plaintiff on demurrer.

CHRISTOPHER YOUNG AND ABEL YOUNG v. SCOBIE.

Receipts for purchase-money of land—Omission of purchaser's name, effect of—Land sales acts, 4 & 5 Vic. ch. 100, 12 Vic. ch. 81—Misjoinder of plaintiffs in ejectment—14 & 15 Vic. ch. 114.

The plaintiff produced two receipts of certificates of deposits to the credit of the Receiver General, on a purchase of certain lands. In both receipts the money was expressed to have been received from the plaintiff: in the first a blank was left for the name of the person to whom the sale was made, the words "sold to" being inserted: in the second no mention was made of the purchaser. *Held*, that the receipts imported a sale to the plaintiff, in the absence of any proof to the contrary.

The agent for disposing of the Indian Lands on the Grand River does not come under the designation of a district agent of the Commissioner of Crown Lands, so as to entitle purchasers holding his certificate to the benefit of the provisions in the land sales' acts.

Quære as to the effect of a misjoinder of plaintiffs in ejectment under the new act, 14 & 15 Vic. ch. 114.

EJECTMENT for lot 2, east side of Argyle street, in Caledonia.

The defendant limited his defence to that part of the rear of lot No. 2 which is situated immediately in the rear of the residence of the defendant, and which is now occupied by him as a garden.

On the part of the plaintiffs, at the trial at Cayuga, before Sullivan, J., a receipt was produced, dated the 18th of June 1830, signed by David Thorburn, Esq, the Commissioner for the sale of the lands of the Six Nations Indians on the Grand River, in these words: "Received from Christopher Young a certificate of deposit to the credit of the Receiver General, with the Gore Bank, of this day's date, for £25, being the first instalment, one-third of the purchase money on Lot 2, east side of Argyle street, in the town of Caledonia, in the county of Haldimand, sold to – ——, at the rate of £75, the balance payable in six equal annual instalments, with interest to be reckoned from the date of this receipt."

"It is an express condition of the above sale, that the purchaser, or his heirs and assigns, shall regularly pay the instalments, together with interest, as they become due, till the whole shall have been paid and satisfied, under pain of forfeiture of the lot above sold, and also of all the instalments paid on account of the same."

They produced also a second receipt, as follows: "Received, 24th June 1852, from Christopher Young, a certificate of deposit to the credit of the Receiver General, of the sum of £18 13s. 9d., as the 2nd and 3rd instalments on new sale, No. 1263, being for Lot No. 2, on the east side of Argyle street, in the town of Caledonia, in the county of Haldimand."

These receipts were relied upon as sufficient to entitle the plaintiffs to recover under the Land Sales Act.

It was objected that the receipts were only for payments from Christopher Young, and that this being a joint action by him and Abel Young, neither could recover separately. 2ndly. That it did not appear from the receipts to whom the sale was made.

The learned judge directed a verdict for the plaintiff, Christopher Young, reserving leave to move for a non-suit to be entered for the defendants on these objections.

Martin obtained a rule *nisi* for a non-suit, or new trial without costs, for misdirection, and for the reception of improper evidence. He cited Doe dem., Anderson et. al. v. Errington, 1 U. C. R., 159; Doe dem., Barwick et. al. v. Clement, 7 U. C. R., 549; 14 & 15 Vic. ch. 114.

Freeman shewed cause.

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

Supposing, which it is not necessary to determine, that Mr. Thorburn stands in the place of one whose certificates come within the Land Sales Act, we think the receipts import a sale to Christopher Young, who paid the money, and to him only, in the absence of any proof that the fact was otherwise; that no title was shewn in the other plaintiff; and therefore that, ejectment being no longer a fictitious action, ostensibly maintained by John Doe on a demise from others, but an actual claim of right in the

plaintiffs who are suing, we must hold that there was a misjoinder of the plaintiffs, which, as in other actions, must be fatal in ejectment; and indeed if this action had been in the old form, the late case of Doe dem. Wilton et ux. v. Beck (20 L. Times, 67, 13th Nov. 1852), shews that the objection would have been fatal, and that it could not have been cured by any amendment that could be properly made at *Nisi Prius*.

Rule absolute (*a*).

DAME v. CARBERRY.

Customs Act, 10 & 11 Vic. ch. 31—Construction of—Notice of claim—Value of vessel—Trespass.

On the 7th of June, the defendant, a collector of customs, seized the plaintiff's vessel for a breach of the revenue laws. The plaintiff sent a petition to the government, and on the 7th of July received an answer from the defendant, informing him that they had refused to interfere. On the 8th of July the plaintiff served a notice of claim.

Held, first, that the notice of claim, required by sec. 48 of 10 & 11, Vic. ch. 31, to be given within one calendar month from the day of seizure, could not be waived by any representation of the defendant to the plaintiff.

Secondly, that no notice having been given within the time allowed, the vessel was *thereby* condemned; and that by the act of seizure the plaintiff was deprived of his right of property, and therefore unable to maintain trespass.

Thirdly, that in this case it was not necessary that the value of the vessel should be determined by the jury.

This was an action of trespass, tried at the last assizes held at Kingston before his Lordship the Chief Justice. The plaintiff complained that the defendant seized and took a vessel of his called the "Canadian," on the 15th of July 1852, and unlawfully kept and detained her, and converted and disposed of her to his own use.

(*a*) NOTE.—The court intimated, at the time of giving judgment, that the agent for disposing of the Indian Lands on the Grand River did not, in their opinion, come under the designation of a district agent of the Commissioner of Crown Lands, so as to entitle purchasers holding his certificate to the benefit of the provisions in the Land Sales Acts, 4 & 5 Vic. ch. 100, and 12 Vic. ch. 81; and in that view of the case, this action could not be sustained independently of the objection of misjoinder of the plaintiffs. As regards that objection, the new Ejectment Act was not adverted to by the court in giving judgment, though relied on in the argument. See 14 & 15 Vic. ch. 114, preamble, and secs. 7, 8, 9, 10, 12, 13, 14, which seem to bear on this question of a misjoinder of the plaintiffs being fatal; and the question of the effect of the 7th clause on the point of misjoinder of plaintiffs, when compared with the preamble and the other parts of the statute, may be considered as still open to discussion.

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THE ATTORNEY GENERAL v. FOWLDS.

Statute, repeal of, by implication—Indian Lands.

The Act respecting Indian Lands authorized the Governor in Council to declare applicable thereto the Act respecting timber on public lands; an order in Council was issued accordingly; eight years afterwards another Act was passed which contained a clause authorizing the Governor in Council to declare the timber Act applicable to Indian Lands, and to repeal any such order in Council and substitute others, and another clause authorizing the Governor in Council to make regulations and impose penalties for the sale and protection of timber on Indian Lands:

Held, that the Timber Act continued in force until revoked or altered by a new order in Council.

On the 29th September, 1870, the Superintendent General of Indian Affairs granted to the defendant *Fowlds* a license to cut timber on certain Indian lands on terms specified in the license. It appeared from the evidence that the license had been issued in the interest of the Indians, and that the terms were the highest which could have been obtained. At the hearing the defendant was not charged with any impropriety either in procuring a license or in acting under it. The Indians, however, having been dissatisfied, the license was revoked. The question in issue before the Court was, whether the license had been legally granted. On that question depended the defendant's right to the timber which he had cut before the revocation. This right was the only matter in issue. Statement.

On behalf of the Indians it was contended, that the supposed authority under which the license had been issued was not in force at the time of the license being granted.

The license was in terms of the Consolidated Act, chapter 23, "respecting the sale and management of timber on public lands." The subsequent Act 23 Victoria, chapter

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151, transferred to the province the management of the Indian affairs, which had previously been managed by the Imperial anthorities. That Act made the Commissioner of Crown Lands, for the time being, Chief Superintendent of Indian Affairs, and enacted, that the Governor in Conncil might "from time to time declare the provisions of the Act respecting the sale and management of the pnblic lands passed in the" same session, and the Consolidated Statnte as to the timber on public lands, "or any of such provisions, to apply to Indian lands or to the timber on Indian lands; and the same shall therenpon apply and have effect as if they were expressly recited or embodied in this Act." Under this Act the Governor in Council passed an order in Council, dated sixth of May, 1862, declaring the Timber Act thus mentioned to apply to Indian lands. This order in Council had never been revoked; and it was not disputed that, from the time it was made until the passing of the Act, 31 Victoria, chapter 42, the provisions of the Timber Act applied to Indian lands, and had the same effect with respect to them as if these provisions had been embodied in the Act 23 Victoria, chapter 151, nnder which the order in Council had been issued.

Statement

Previous Acts(a), as well as this Act, had authorized the Governor in Council to declare the laws enacted respecting the sale and management of other pnblic lands to apply to Indian lands. Whether this power had ever been exercised did not appear from the evidence in the cause.

The Act 31 Victoria, chapter 42, was "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." It provided amongst other things that "the Secretary of State shall be the

(a) 16 Vic. ch. 159, sec. 15; 22 Vic. ch. 22; 23 Vic. ch. 22.

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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 Act gave the Secretary of State some new powers in regard to Indian lands; authorized the Governor in Council to make regulations from time to time for the protection and management of such lands and the timber thereon, and for these purposes to impose penalties (*a*); and it re-enacted almost all the provisions of the Act 23 Victoria, chapter 151, in nearly the same language. It contained a clause (*b*) corresponding with the seventh clause of the previous Act (*c*) as to the power of the Governor in Council to apply to Indian lands the Acts, Consolidated Canada, chapter 23 (timber), and 23 Victoria, chapter 2, but in addition gave the Governor in Council power to from time to time repeal orders in Council passed for that purpose, and to substitute others. The part of the clause referring to Indian lands was as follows: "The Governor in Council may direct that the said two Acts or either of them, or any part or parts of either or both of them shall apply to the Indian lands in the provinces of Quebec and Ontario, or to any of the said lands, and may from time to time repeal any such order in Council, and make any other or others instead thereof." No new order in Council was made after the passing of this Act.

The cause came on for the examination of witnesses and hearing at the Spring Sittings 1871, at Lindsay.

Mr. *Bain*, for the informant.

Mr. *Crooks*, Q.C., and Mr. *Moss*, contra.

August 22.

MOWAT, V. C.—The Department considered that, by virtue of the order in Council of August 23, 1862, the

(*a*) sec. 37. (*b*) sec. 38. (*c*) 23 Vic. ch. 151, sec. 7.

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Timber Act continued applicable under the last Act (*a*). The principal argument now urged against this is, that the circumstance of the last Act giving to the Governor in Council authority to apply the previous Acts to Indian lands implies, that they were not to be applicable unless the Governor in Council should thereafter by order in Council make them so.

Now it must be assumed that the Legislature when passing the last Act were aware that the Timber Act was then in force with respect to Indian lands as fully as if its provisions had been embodied in the previous Act (*b*); and it would be a very strong thing to hold that the provisions so in force and known to be in force were intended to be repealed by the form of enactment referred to. Acts of Parliament often contain enactments of old and recognized rules as if they were new, but the Courts do not in such cases hold that such enactments unsettle the existing law; the implied opinion of the Legislature that the provisions are new is not construed as an authoritative declaration that they are new, or as an enactment that the Courts are so to regard them.

Judgment.

It is further to be observed, that the presumption of law is against a repeal by implication. Then, in the present case, the policy of the Legislature at the time of passing the last Act, as shewn by its provisions generally, affords no argument in favor of an intention to repeal by Act of the Legislature; but the contrary. The Timber Act had at this time been applicable to Indian lands for eight years; by the new Act, confessedly, the Governor in Council might at any moment, again put the same Timber Act in force with respect to those lands; the provisions of the Timber Act, when examined, appear as beneficial and desirable for Indian lands as for any other; there might be considerable

(*a*) 31 Vic. ch. 42. (*b*) 23 Vic. ch. 15.

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inconvenience from there being a Legislative repeal without any special provision for past matters; and I think that such a construction of the new Act is not a necessary or probable implication. I think that I shall best carry out the intention of the Legislature, and shall do no violence to the language of the Act, by holding, in accordance with the view on which the license now in question was granted, that, under sections 35 and 37 (*a*), the Governor in Council had power to, from time to time, withdraw Indian lands from the provisions of the Timber Act, and to, from time to time, direct that they should be again applicable, but that, meanwhile, and until the Governor in Council should act, the provisions in question continued in force.

Judgment.

The information must therefore be dismissed. I believe the Attorney General raises no question as to the propriety in that case of the defendant getting his costs.

Abell v. McPherson. [In Appeal*].

Patent for invention—Novelty.

The plaintiff had obtained a patent for an improved gearing for driving the cylinder of threshing machines; and the gearing was a considerable improvement: but, it appearing that the same gearing had been previously used for other machines, though no one had before applied it to threshing machines—it was *held*, [affirming the decree of the Court below,] that the novelty was not sufficient under the Statute to sustain the patent.

This was an appeal by the plaintiff from the decree pronounced by Vice Chancellor *Mowat* dismissing his bill with costs; as reported *ante* Volume XVII., p. 28.

Mr. *Blake*, Q.C., and Mr. *McLennan*, for the appeal.

(*a*) 31 Vic. ch. 42.

* [*Present.*—Draper, C. J., Morrison, J., Mowat, V. C., Wilson, Gwynne, and Galt, JJ.]

ATTORNEY-GENERAL OF CANADA v. TOTH et al.

Saskatchewan Queen's Bench, Davis J. December 12, 1959.

Crown Lands I, III—Constitutional Law I—

Transfer of natural resources to Saskatchewan—Reservation to Canada of "ungranted lands reserved for the purpose of the federal administration"—Crown (Canada) transferring land to Soldier Settlement Board—Whether minerals reserved by Board pass to Province—Inapplicability of provincial legislation to Federal land or minerals—Certain land and minerals therein which originally stood in the name of the Crown (Canada) was set aside as an Indian Reserve and subsequently the personal and usufructuary right of the Indians was surrendered for a money payment and in 1920 the Crown (Canada) transferred the land, without any reservation of minerals, to the Soldier Settlement Board which was an agent of the Crown (Canada). The deed of transfer was registered under the then *Land Titles Act*, 1917 (Sask.), c. 18 which by s. 174 declared (with certain exceptions) the conclusiveness of the certificate. Subsequent certificates of title indicated a reservation of minerals. By subsequent agreement and confirming legislation the Crown (Canada) transferred natural resources to the Province and this passed all its rights save, *inter alia*, "any ungranted lands of the Crown upon which public money of Canada has been expended or which are in use or reserved by Canada for the purpose of the federal administration". *Held*, if in fact the mineral rights were reserved to the Crown (Canada) or to its agent the Soldier Settlement Board, their right thereto could not be affected by provincial legislation such as the *Land Titles Act*. Notwithstanding the transfer from the Crown to the Board, it must be held that the land and minerals (which passed to the Board) remained ungranted because it was a purely internal transaction and not an alienation. While the cash payment to the Indians was not an expenditure of public money within the exception above recited (since this exception contemplated money spent on improvements), yet the land and minerals had been reserved "for the purpose of the federal administration" by being passed to the Board. Hence, the minerals did not pass to Saskatchewan and they were unaffected by the provincial *Land Titles Act*. [*Prudential Trust Co. v. The Registrar, Land Titles Office, Humboldt Land Registration Dist.*, 9 D.L.R. (2d) 561, [1957] S.C.R. 658; *Saskatchewan Natural Resources Reference*, [1931], 1 D.L.R. 865, S.C.R. 263; affd [1931], 4 D.L.R. 712, 3 W.W.R. 488, [1932] A.C. 28; *Reese et al. v. The Queen*, 10 D.L.R. (2d) 479, [1957] S.C.R. 794, apld]

TRIAL of an issue to determine the right to certain minerals.

H. J. Fraser, Q.C., for plaintiff; *J. H. C. Harradence*, holding a watching brief on behalf of defendant Fred Toth.

DAVIS J.:—These proceedings were commenced by way of notice of motion by the Attorney-General of Canada on behalf of Her Majesty the Queen as represented by the Department of Indian Affairs, or, alternatively, by the Soldier Settlement Board of Canada, for an order under s. 82 of the *Land Titles Act*, R.S.S. 1953, c. 108, vesting in Her Majesty in the right of Canada the mineral rights in the N. ½, sect. 35, tp. 47, rge. 6, W./3rd. in the Province of Saskatchewan.

As will appear hereafter, the said mineral rights presently stand reserved in the certificate of title to the said land and unless they passed to Her Majesty in the right of the Province of Saskatchewan by virtue of the Natural Resources Agreement of October 1, 1930, (confirmed by Parliament, 1930 (Can.), c. 41, and by the Legislature of the Province of Saskatchewan, 1930, c. 12), they now stand reserved to the Crown as represented by the Soldier Settlement Board and consequently this application is unnecessary. What the Crown was asking for in effect was a declaratory judgment, but this could not be made under s. 82 of the *Land Titles Act*. However, when the matter came on for hearing in Chambers before McKercher J. he directed that an issue be tried. I have not had the opportunity of reading the fiat of my brother McKercher (as it is not on file) but I have before me the issue, which appears to have been drafted and filed by counsel for the plaintiff. The issue as drafted is more in the nature of a submission on behalf of the plaintiff. As no one interested has objected to the procedure, I will assume, from what is before me, my brother McKercher directed that an issue be tried as to whether the plaintiff, representing the Crown in the right of Canada and the Crown in the right of the Soldier Settlement Board, or the defendants are the owners of the said mineral rights. By order of my Lord the Chief Justice, the Minister of Natural Resources and the Attorney-General for the Province of Saskatchewan were served with a copy of the notice of motion. Neither appeared. At my request a written argument was filed on behalf of the Attorney-General, which has been of assistance to me.

There was no necessity for the adding of Balind Toth as a party defendant. He was the immediate predecessor in title to the land of the defendant Fred Toth but makes no claim to the mineral rights therein. Fred Toth appeared at the trial by counsel holding a watching brief but took no part in the proceedings.

The history of the land and minerals in question is as follows:

The land originally stood in the name of the Crown in the right of the Dominion of Canada. By the Treaty of 1876 made with the Chief of the Mistawasis Indian Band, a tract of land, including that in question, was set aside by the Crown as a Reserve for the use of the Band. It was officially described as the Snake Lake Indian Reserve Number 103, but became popularly known as the Mistawasis Indian Reserve. The establishment of the Reserve was authorized by the *Indian Act*, 1876 (Can.), c. 18. Section 3, para. 6 of the said Act reads: "6. The term 'reserve' 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 legal title is in the Crown, but which is unsurrendered, and includes all trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein."

It is quite clear from the authorities that the Mistawasis Indian Band held no title to the land or the minerals therein. It merely had a right of tenure which was a "personal and usufructuary right, dependent upon the goodwill of the Sovereign": Lord Watson in *St. Catherine's Mllg. & Lbr. Co.* v. *The Queen* (1888), 14 App. Cas. 46 at p. 54; see also *A.-G. Que.* v. *A-G. Can., Re Indian Lands*, 56 D.L.R. 373, [1921] 1 A.C. 401; *Point* v. *Dibblee Construction Co.*, [1934], 2 D.L.R. 785, O.R. 142.

By deed bearing date August 8, 1919, the Mistawasis Indian Band, for a cash consideration, surrendered to the Crown its rights to a portion of the Reserve, including the land in question.

By deed of transfer dated April 19, 1920, the Crown, as represented by the Superintendent of Indian Affairs, transferred all the lands covered by the deed of transfer to the Soldier Settlement Board of Canada. This deed, known as Grant No. 21856, was registered in the Land Titles Office of the Prince Albert Land Registration District and title to the lands issued to the Board on August 22, 1923.

No minerals were reserved to the Crown in the right of Canada in the deed of transfer to the Soldier Settlement Board.

Upon registration of the deed of transfer to the Soldier Settlement Board, the land, with the mineral rights therein, was brought under the then *Land Titles Act*, 1917 (Sask.), c. 18. Section 174 thereof (now s. 200, R.S.S. 1953, c. 108) provides:

"174(1) Every certificate of title and duplicate certificate granted under this Act shall, except:

"(*a*) in case of fraud wherein the owner has participated or colluded; and

"(*b*) as against any person claiming under a prior certificate of title granted under this Act in respect of the same land; and

"(*c*) so far as regards any portion of the land by wrong description of boundaries or parcels included in such certificate of title;

be conclusive evidence so long as the same remains in force and uncancelled in all courts, as against his Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations implied under the provisions of this Act.

"(2) If more than one certificate of title has been issued in respect of any particular estate or interest in land, the person claiming under the prior certificate shall be entitled to such estate

or interest; and that person shall be deemed to hold under a prior certificate who is the holder of, or whose claim is derived directly or indirectly from the person who was the holder of, the certificate first issued."

But it does not follow that either the land or the mineral rights thereby became subject to the above provisions. If in fact the mineral rights were reserved to the Crown, either in the right of Canada or as represented by its agent, the corporation known as the Soldier Settlement Board, provincial legislation would be inoperative so as to adversely affect this right: *Prudential Trust Co.* v. *The Registrar, Land Titles Office, Humboldt Land Registration Dist.*, 9 D.L.R. (2d) 561, [1957] S.C.R. 658.

Title to the N.E. 35-47-6-W.3rd (together with the south-east quarter of the same section) issued to the Soldier Settlement Board under certificate of title No. 54 L.E. on August 22, 1923. This title bore two conflicting notations, namely: "MINERALS INCLUDED" and "RESERVING ALL MINES AND MINERALS UPON OR UNDER THE SAID LAND".

Title to the N.W. 35-47-6-W.3rd (together with the south-west quarter of the same section) issued to the Soldier Settlement Board under certificate of title No. 55 L.E. on August 22, 1923. That title bore the same conflicting notations as to minerals as did certificate of title 54 L.E.

Thus, on August 22, 1923, the Soldier Settlement Board became registered as owner of the N. ½, sect. 35, tp. 47, rge. 6, W./3rd under certificates of title No. 54 L.E. and No. 55 L.E., both of which bore the above conflicting notations.

The Soldier Settlement Board sold the N. ½, sect. 35, tp. 47, rge. 6, W./3rd to one Julie Barsi, and executed a transfer thereof to her on January 30, 1935. This transfer contained the clause: "Saving and reserving all mines and minerals and subject to the provisos and conditions contained in the original grant from the Crown and *the existing Certificate of Title.*" (The italics are mine.) The transfer was registered on May 5, 1935, and on the same day a new title, No. 192Q0, issued to Julie Barsi.

In view of the fact that the existing certificates of title (Nos. 54 L.E. and 55 L.E.) contained conflicting notations respecting mineral rights, it is difficult to say definitely what this clause meant, as it, too, is conflicting. However, the Registrar of Land Titles seems to have construed it as meaning that the transfer carried with it the minerals, as certificate of title No. 192Q0 bore the notation "MINERALS INCLUDED". It also had endorsed thereon the notation "MINERALS IN THE CROWN", but this was struck out and initialled by the then Deputy Registrar.

On March 9, 1945, Julie Barsi, for valuable consideration, transferred the land to one Balind Toth. Title issued to him on April 7, 1945, bearing the notation "MINERALS INCLUDED".

On February 10, 1948, Balind Toth, for valuable consideration, transferred the land to the defendant Fred Toth, the present registered owner thereof. Title issued to Fred Toth on February 13, 1948, as No. 220 Z.F. This title bore the notation "MINERALS INCLUDED", but the notation was struck out by the then Deputy Registrar on August 17, 1951. There also appears on the title No. 220 Z.F. the notation, "Subject to the mineral exceptions, reservations, and conditions contained in an Instrument registered as Number B.K. 1970", being the transfer from the Soldier Settlement Board to Julie Barsi. There is no evidence before me as to when the latter notation was endorsed on the title, but the chances are that it was substituted for the notation which was struck out on August 17, 1951.

It now becomes important to examine the provisions of the Natural Resources Agreement, *supra*, and ascertain whether or not the mineral rights in question passed to the Province of Saskatchewan thereunder or remained in the Crown in the right of Canada or as represented by the Soldier Settlement Board.

The material parts of cl. (1) of the Natural Resources Agreement provide: "In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *British North America Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province."

The only material exceptions to cl. (1) may be found in cl. (19) of the Agreement, which reads: "Except as herein otherwise expressly provided, nothing in this agreement shall be interpreted as applying so as to affect or transfer to the administration of the Province (*a*) any lands for which the Crown grants have been made and registered under the *Land Titles Act* of the Province and of which His Majesty the King in the right of His Dominion of Canada is, or is entitled to become the registered owner at the date upon which this agreement comes into force, or (*b*) any ungranted lands of the Crown upon which public money of Canada has been expended or which are, at the date upon which this agreement comes into force, in use or reserved by Canada for the purpose of the federal administration."

Exception (*b*) affected only lands ungranted at the date of the Agreement. The land in question, although transferred, was not granted in the sense in which the word was used in the Agreement. The transfer to the Soldier Settlement Board was simply an *inter partes* transaction. There was no alienation of the land. It was not granted to any one, as ownership still remained in the Crown as represented by its agent the Soldier Settlement Board: *Saskatchewan Natural Resources Reference*, [1931], 1 D.L.R. 865, S.C.R. 263 [affd [1931] 4 D.L.R. 712, [1932] A.C. 28].

Had public money of Canada been expended on the land (and minerals), or had they been reserved by Canada for the purposes of the Federal administration?

The Crown, through counsel, submits that public money of Canada had been expended, both on the survey of the Reserve and also for the surrender of the land by the Mistawasis Indian Band.

There is no evidence that any money was expended on the survey, or for that matter that a survey had been made. However, I am entitled to take judicial notice of the existence of the survey, but there is nothing to indicate when the survey was made, or whether it was part of a general survey or one done especially to fix the boundaries of the Reserve. In any case, it seems obvious that an expenditure for a survey was not the sort of expenditure contemplated in the exception, as otherwise the Natural Resources Agreement would be virtually meaningless. At the date of the Agreement practically all the Province had been surveyed and public money of Canada expended thereon. The payment to the Mistawasis Indian Band for the surrender of the land was not an expenditure on the land, or for the land (the Crown already owned it), but for the surrender of the right to the use and occupation of the land, which is quite a different thing. I am of the opinion that the reference to the expenditure of public money meant money paid out for such improvements as buildings, dams, waterways, drainage, air fields and things of a like nature by which the land was substantially benefited.

The question of whether the mineral rights were "reserved by Canada for the purpose of the federal administration" involves the further question of whether the mineral rights passed to the Soldier Settlement Board or were retained by the Crown in the right of Canada. This may seem academic, as the Board was the agent of the Crown, but in fact it is not. If the mineral rights were retained by the Crown in the right of Canada, they would have passed to the Province by virtue of cl. (1) in the Agreement, unless falling within the exceptions of cl. (19) thereof. There is no

evidence that the Crown ever reserved the mineral rights for any reason other than for the purposes of the *Soldier Settlement Act*. In my opinion the mineral rights in the land were intended to, and did pass to the Soldier Settlement Board. As has been seen, the transfer from the Crown in the right of Canada to the Soldier Settlement Board was silent as to mineral rights. I can find no provision restricting the right of the Crown to transfer the mineral rights to an agent of the Crown. Hence the transfer would carry with it all the interest of the Crown in the right of Canada to the land, including, of course, the mineral rights.

Unquestionably, when the land proper (apart from the minerals) was transferred to the Soldier Settlement Board, it was then reserved for the purposes of Federal administration. Were the mineral rights transferred for the same purpose? I must confess I first entertained some doubts if such was the purpose, as s. 57 of the *Soldier Settlement Act* specifically reserved the minerals in the Board and prevented the Board from alienating them. See: *Reese et al. v. The Queen*, 10 D.L.R. (2d) 479, [1957] S.C.R. 794. But this does not mean that because the Board was unable to deal with the minerals the Crown did not reserve them (albeit, in the name of its agent) for the purpose of Federal administration. By placing the minerals in the name of the Board I think it must be said they were being reserved for some public purpose. They were in effect being locked up in the Board for future administration. And I would think the almost irresistible inference is that they were reserved for the same administrative purpose as that for which the *Soldier Settlement Act* was passed. I can conceive of no other reason for the conveyance to that particular agent. It is true that from April 19, 1920, until the year 1949 the Crown appears to have done nothing to evidence the purpose of the reservation, and in the *Reese* case successfully denied to veteran claimants in Alberta any legal right to the minerals in lands they had acquired from the Board, but that may have resulted from a combination of policy and expediency. In 1949, however, the Crown decided to give to purchasers under the Act the privilege of applying for the mineral rights, which, I think tends to confirm my conclusion that the minerals were initially reserved in the Board for the purposes of the Board, conditional upon the approval of the Crown in the right of Canada. See: *Ferguson* v. *Saunders*, (1956-57) 20 W.W.R. 266 [affd 12 D.L.R. (2d) 688]; and the *Reese* case, *supra*, at p. 482 D.L.R., pp. 797-8 S.C.R. Accordingly, as the mineral rights were at all times reserved to the Crown, they did not pass to the Province of Saskatchewan under the Natural Resources Agreement of 1930. Consequently they would stand un-

affected by the provisions of s. 174 of the *Land Titles Act*, *supra*, and title thereto would remain in the Crown as represented by its agent, the Soldier Settlement Board.

The Registrar of Land Titles for the Prince Albert Land Registration District caused a caveat to be filed against the land on January 31, 1955, in which he claimed an interest in the mines and minerals upon or under the said lands. The caveat sets forth the history of the various transactions above related but does not state whether the Registrar is claiming on behalf of Her Majesty in the right of Canada, or Her Majesty in the right of the Province of Saskatchewan. However, in the written argument submitted on behalf of the Attorney-General for Saskatchewan, no claim is made by the Province to the mineral rights but rather the opinion is there expressed that they belong to the Crown in the right of Canada. I do not know the reason for the caveat as it was filed nearly four years after the title had already been corrected as to the mineral rights, and no claim to the mineral rights had been made by Fred Toth or his predecessors in title. In view of my finding it will no doubt be withdrawn.

There will be a declaration that the mineral rights in the N. ½, sect. 35, tp. 47, rge. 6, W./3rd in the Province of Saskatchewan are the property of and vest in Her Majesty the Queen as represented by the Soldier Settlement Board of Canada.

There will be no order as to costs.

RE COLUMBIA GYPSUM CO.

British Columbia Supreme Court, Lord J. December 29, 1958.

Companies VI A—

Application by minority shareholders to wind up company under "just and equitable" rule—Application only granted when no possibility company can carry on business or lack of probity proven against directors — Dissatisfaction with domestic policy of company not sufficient—Although a Court will order the winding-up of a company under the "just and equitable rule" (even against the wishes of an overwhelming majority of the shareholders) where the substratum thereof is no longer in existence and where, accordingly, there is no possibility of the company carrying on the business for which it was formed, it will make no such order on the petition of the minority shareholders where the company still retains considerable assets and the complete failure of the company to achieve its objects is still a question of speculation and the subject-matter of conflicting opinion among the rival groups of shareholders. Likewise no such order will be made under the "just and equitable" rule on the ground that the minority shareholders lack confidence in the conduct of the directors where such "lack of confidence" stems from dissatisfaction at being outvoted on matters of domestic policy and does not rest on proof of a lack of probity in the conduct and management of the

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JOHN R. BOOTH (SUPPLIANT).....APPELLANT;

AND

HIS MAJESTY THE KING (RESPONDENT)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

License to cut timber—Indian lands—R.S.C. [1886] *c. 43, ss. 54 and 55—License for twelve months—Regulations—Renewal of license.*

Section 54 of R.S.C. [1886] ch. 43 (now R.S.C. [1906] ch. 81) enacted that licences might be issued to cut timber on Indian lands and sec. 55 that "no licence shall be so granted for a longer period than twelve months from the date thereof." By a regulation made by the Governor-General in Council and sanctioned by Parliament it was provided that licence holders who had complied with all existing regulations should be entitled to renewal on application.

Held, affirming the judgment of the Exchequer Court (14 Ex. C.R. 115) that a licence holder who has complied with the regulations has no absolute right to a renewal as a regulation making perpetual renewal obligatory would be inconsistent with the statutory limitation of twelve months and, therefore, non-operative.

APPEAL from a judgment of the Exchequer Court of Canada(1), dismissing the suppliant's petition of right with costs.

The suppliant has for many years past carried on and continues to carry on the business of a lumberman in the City of Ottawa in the County of Carleton and on the 5th day of October, A.D. 1891, a licence to cut timber on Indian lands was issued to him by the Superintendent General of Indian Affairs. The said licence purports to have been issued by authority of

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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the 43rd chapter of the Revised Statutes of Canada and amendments thereto and bears the date aforesaid, and gives full power and licence to cut pine timber and saw logs from trees of not less than nine inches diameter at the stump upon Indian Reserve No. 10 on the northerly side of Lake Nipissing containing 108 square miles, exempting, however, from the operation of the licence an Indian village and certain Indian improvements in said licence mentioned. The said Act under the authority of which the licence was issued, authorized the said Superintendent General to grant licences to cut trees on reserves and ungranted Indian lands at such rates and subject to such conditions, regulations and restrictions as from time to time might be established by the Governor-in-Council.

On the recommendation of the Superintendent General, to whom was given by the said Act the control and management of the said Indian lands, an order in council was passed on the 15th day of September, 1888, making regulations for the sale of timber on Indian lands in the Provinces of Ontario and Quebec. The said regulations were in force at and prior to the date when said licence was issued, and the suppliant acquired the said licence under the authority of said Act and subject to and upon the terms contained in said regulations.

Section 11 of said regulations provides that "all timber licences are to expire on the 30th of April next after the date thereof, and all renewals are to be applied for before the 1st of July following the expiration of the last preceding licence; in default whereof the berth or berths may be treated as *de facto* forfeited." Section 5 provides "that licence holders, who

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shall have complied with all existing regulations, shall be entitled to have their licences renewed on application to the Superintendent General of Indian Affairs."

The said licence has since that date thereof been renewed from year to year, the last renewal expiring on the 30th day of April, 1909. The suppliant has made due application for a renewal of said licence for the year ending on the 30th day of April, 1910, and has duly complied with the said regulations, which has been refused by the Superintendent General and the said limits and the timber aforesaid, have been advertised for sale by his authority.

Shepley K.C. and *Lafleur K.C.* for the appellant cited *Balmer* v. *The Queen*(1); *Lakefield Lumber and Mfg. Co.* v. *Shairp*(2); *McPherson* v. *Temiskaming Lumber Co.*(3).

Chrysler K.C. for the respondent referred to *Smylie* v. *The Queen*(4).

DAVIES J.—I concur with Mr. Justice Anglin.

IDINGTON J.—The appellant obtained in 1891 from the Superintendent of Indian Affairs a licence to cut timber on certain Indian lands.

This licence was granted under the "Indian Act," chapter 43 of the Revised Statutes of Canada, 1886, section 54 of which is as follows:—

54. The Superintendent General or any officer or agent authorized by him to that effect, may grant licences to cut trees on reserves and ungranted Indian lands, at such rates and subject to such conditions, regulations and restrictions, as are, from time to time, estab-

(1) 23 Can. S.C.R. 488.
(2) 19 Can. S.C.R. 657.
(3) [1913] A.C. 145.
(4) 31 O.R. 202; 27 Ont. R. App. R. 172, at p. 176.

lished by the Governor-in-Council, and such conditions, regulations and restrictions shall be adapted to the locality in which such reserves or lands are situated.

Section 55 provides, amongst other things, as follows:—

No licence shall be so granted for a longer period than twelve months from the date thereof.

Section 56 provides that:—

56. Every licence shall describe the lands upon which the trees may be cut, and the kind of trees which may be cut, and shall confer, for the time being, on the licensee the right to take and keep exclusive possession of the land so described, subject to such regulations as are made: * * *

and proceeds to declare that every licence shall vest in the holder thereof the property in all trees of the kind specified

cut within the limits of the licence during the term thereof

and to give a right of action against any trespassers and to recover damages, if any, and

all proceedings pending at the expiration of any licence may be continued to final termination, as if the licence had not expired.

The licence in question was in conformity with these provisions and upon a number of conditions expressed therein and further upon condition that the said licensee or his representatives must comply with all regulations that are or may be established by order in council, etc., on pain of forfeiture of the licence.

There is not a word express or implied therein looking to a renewal thereof, much less expressive of any obligation to renew.

In fact from year to year there was indorsed on this licence for many years a renewal of said licence and each renewal as such accepted by appellant.

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It is certainly difficult to understand how under such a statute and such an instrument there can be claimed a right of another renewal; yet that is what is insisted upon herein, though the term "renewal" used throughout by the department and the regulations to be referred to hereafter, is in argument disclaimed.

It is conceded that the respondent at the expiration of any single year could insist upon raising the amount of stumpage dues to become payable in future.

One might suppose that this alone should end all argument.

Yet it does not, for the appellant relies upon the fact that amongst the regulations made, which the Governor in Council is alleged to have been acting under the powers in the said statutes to make, are the following:—

Sec. 5. Licence holders who shall have complied with all existing regulations, shall be entitled to have their licences renewed on application to the Superintendent General of Indian Affairs.

Sec. 11. All timber licences are to expire on the 30th of April next after the date thereof, and all renewals are to be applied for before the 1st of July following the expiration of the last preceding licence; in default whereof the berth or berths may be treated as *de facto* forfeited.

It seems almost too clear for argument that in face of the absolute restriction in the statute limiting the duration of a licence to twelve months, that the Governor in Council could make any regulation which would in fact nullify the statute.

And if the said regulation, section 5, means what appellant urges, then it exceeds the power given in the statute.

This is not a regulation which by publication as in some cases is provided by statute shall after the lapse of a certain period of time within the next en-

suing session of Parliament become law unless revoked by Parliament.

Its publication is simply for the enlightenment of those concerned, including members of Parliament. If *ultra vires* it goes for nothing. Its frame may be misleading, but in no sense can it create any legal right. If it did mislead in fact, and thereby do the appellant any damage that might form ground for an appeal to the proper consideration of Parliament, but no such case is made here, nor if attempted could the court, without Parliamentary sanction, entertain such a claim.

It cannot rest on contract, for it is not within the terms of the contract.

It cannot rest upon statute, for the regulation is not a statute in itself or to be deemed as having statutory force and so far as exceeding the statutory power is non-operative.

The only regulations pointed to in the contract are of an entirely different character and for an entirely different purpose. Indeed the word "regulation" as used in the statute is of an entirely different meaning and for an entirely different purpose from what is sought herein to be imparted to it.

In short it seems to me that to give any legal effect to this section 5 of the regulations in the way the appellant claims would be to give him a licence in perpetuity which certainly would be quite inadmissible, even for Parliament to attempt if regard is had to the trust reposed in it by the transactions leading to Canadian control over the subject-matter of these Indians and their lands so called.

Counsel tried to disclaim this by suggesting a

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general regulation could be passed annulling the section. The annulling regulation then could be passed the day before the expiration of any renewal of the license.

It is idle to say that it could not be made so as to apply to the territory over which the licence prevails, for the very terms of the section 54 looking to such regulations expressly preserves the right to deal with that which shall be adapted to the locality.

That is almost exactly what did happen. An order in council was passed dealing with the tract of Indian lands over which the licence in whole or chief part prevailed.

Instead of taking the form of a regulation it took the form of an order in council.

If the argument is good it would seem that all that is to be complained of is matter of form, having no substance.

It is not necessary that I should try and give the section 5 relied upon either the meaning and purpose counsel for the Crown suggested, or any meaning.

But I do not think it would be very difficult to make a reasonable surmise of its purpose which would shew it never necessarily conveyed to the minds of those concerned the idea of its containing either a contractual or statutory obligation upon which they had a right to seek a remedy at law.

I think the appeal should be dismissed with costs.

DUFF J.—The licence in question in this case was issued on the 5th day of October, 1891, under the authority of sections 54, 55, 56 and 57 of R.S.C., 1886, ch. 43. The legislation is still in force, being now con-

tained in chapter 81, R.S.C., 1906, secs. 73-76. These sections are as follows:—

54. The Superintendent General or any officer or agent authorized by him to that effect, may grant licences to cut trees on reserves and ungranted Indian lands, at such rates, and subject to such conditions, regulations and restrictions, as are, from time to time, established by the Governor in Council, and such conditions, regulations and restrictions shall be adapted to the locality in which such reserves or lands are situated.

55. No licence shall be so granted for a longer period than twelve months from the date thereof: and if, in consequence of any incorrectness of survey or other error, or cause whatsoever, a licence is found to comprise land included in a licence of a prior date, not being reserve, or ungranted Indian lands, the licence granted shall be void in so far as it comprises such land, and the holder or proprietor of the licence so rendered void shall have no claim upon the Crown for indemnity or compensation by reason of such avoidance.

56. Every licence shall describe the lands upon which the trees may be cut, and the kind of trees which may be cut, and shall confer, for the time being, on the licensee the right to take and keep exclusive possession of the land so described subject to such regulations as are made; and every licence shall vest in the holder thereof all rights of property whatsoever in all trees of the kind specified, cut within the limits of the licence, during the term thereof, whether such trees are cut by the authority of the holder of such licence or by any other person, with or without his consent; and every licence shall entitle the holder thereof to seize in revendication or otherwise, such trees and the logs, timber or other product thereof, if the same are found in the possession of any unauthorized person, and also to institute any action or suit against any wrongful possessor or trespasser, and to prosecute all trespassers and other offenders to punishment, and to recover damages, if any, and all proceedings pending at the expiration of any licence may be continued to final termination, as if the licence had not expired.

57. Every person who obtains a licence shall, at the expiration thereof, make to the officer or agent granting the same, or to the Superintendent General, a return of the number and kinds of trees cut, and of the quantity and description of saw-logs, or of the number and description of sticks or square or other timber, manufactured and carried away under such licence; and such statement shall be sworn to by the holder of the licence, or his agent, or by his foreman; and every person who refuses or neglects to furnish such statement, or who evades or attempts to evade any regulation made by the Governor in Council, shall be held to have cut without authority, and the timber or other product made shall be dealt with accordingly.

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The appellant alleges that by virtue of certain regulations dated the 15th September, 1888, and professedly made in pursuance of section 54, chapter 43, R.S.C., 1886, now section 73, chapter 81, R.S.C, 1906, and reproduced above, which regulations are still in force he became entitled and is still entitled to have his licence annually renewed at the expiration of the term thereof on the condition that during each term he should have complied with all the existing regulations affecting his licence. This contention is based upon sections 5, 11, and 12 of the regulation. Sections 5 and 11 are as follows:—

5. Licence holders who shall have complied with all existing regulations, shall be entitled to have their licenses renewed on application to the Superintendent General of Indian Affairs.

11. All timber licences are to expire on the 30th day of April next after the date thereof, and all renewals are to be applied for before the 1st day of July, following the expiration of the last preceding licence; in default whereof the berth or berths may be treated as forfeited.

The original licence granted to the appellant in October, 1891, expired on the 30th of April, 1892. But the Superintendent of Indian Affairs for the time being granted renewals down to the year 1909, the last expiring on the 30th of April, 1909, the grant of the renewal in each case being recorded in a simple memorandum declaring that the licence was renewed. At the expiration of the last mentioned licence the Government refused to grant any further renewals. Interpreting the regulations in accordance with the natural meaning of the words there could hardly be a serious answer to the appellant's contention in the absence of any dispute touching their legal validity when construed in that sense. The only question in debate, as I understand the controversy be-

tween the parties, is whether the regulations so read were beyond the competence of the Governor in Council exercising the powers conferred by section 54, or, to put the question in another way, whether assuming the regulations to have been validly made, we are not constrained by the provisions of the statute from which they derive their force to construe them in a way which necessarily defeats the appellant's claim. This question must be considered under two heads. First, what is the true construction of the Act of 1886, reading it as it stands, without reference to the course of legislation or judicial or administrative interpretation before and since the statute was passed; secondly, if, as I am constrained to hold that the view of the regulations upon which the appellant's claim necessarily rests is incompatible with the statute when effect is given to its language construed apart from the course of legislation and interpretation just referred to, does this course of legislation and interpretation justify another construction and one which will support the appellant's claim? As to the first point. The enactment of section 55, "No licence shall be so granted for a longer period than twelve months from the date thereof" appears to me to import a prohibition which disables the Governor in Council when exercising authority conferred by section 54 from validly passing any regulations having for their effect, (1) the constituting of a contract for renewal such as that alleged between the Crown and the licensee as one of the incidents of a licence granted under section 54, or (2) the vesting in a licensee as such of a right whether contractual or not to have a fresh licence issued to him on the expira-

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tion of the term of the licence upon the sole condition that the stipulations of the original licence have been fulfilled. It may be assumed that if the word "licence" in the enactment of section 55 quoted ought to be read as merely descriptive of the instrument there would be no necessary incompatibility between that section and such a regulation. But if it were the instrument as such that was contemplated by that section one would naturally expect to find some other form of expression than the words "shall be so granted" which words seem more appropriate as making provision for the duration of the right than as merely dictating the form of the instrument; and, I think, reading these sections as a whole, that it is the duration of the right which is being provided for. If that is the true construction it would follow that the Governor in Council is powerless to attach to the grant of a licence any incident by regulation or otherwise having the effect of entitling the grantee as such to exercise the rights of a licensee for a longer term than a single year.

As to the second point. Regulations in the form in question were, as pointed out by Mr. Justice Osler and Mr. Justice Maclennan in the passages quoted from their judgments in *Smylie* v. *The Queen* (1), promulgated under the Ontario Act of 1868, and these regulations had been in force for more than twenty years when the regulations now in question were framed in professed exercise of authority conferred in terms identical in effect with those of the Act of 1868.

The statute of 1886 was re-enacted in 1906 and if one had to consider the statute and the regulations alone one would, I think, be driven to the conclusion

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that there had been an administrative interpretation of the statute in accordance with the view contended for by the appellant, and it would have been necessary then to consider whether there had not been a legislative adoption of that interpretation. I am disposed to think, however, in view of the course of judicial opinion, that this administrative interpretation is not entitled to very much weight. Questions as to the proper effect of these or identical enactments and regulations have many times come before the courts during the last forty years and have been the subject of many expressions of judicial opinion, and these expressions have been overwhelmingly against the appellant's view; it is unnecessary to specify the decisions, which are referred to in the judgments in *Smylie v. The Queen*(1). In these circumstances, we are, I think, compelled to give effect to the statute in accordance with what appears to us to be the proper reading of the language of the sections themselves.

ANGLIN J.—The facts of this case are sufficiently set forth in the judgment of the learned judge of the Exchequer Court. By his petition the suppliant prays that he may be declared entitled to the renewal of a timber licence held by him over Indian lands, which the Crown refuses to grant, and he asks consequential relief.

The material parts of the relevant sections of the Revised Statutes of Canada of 1886, ch. 43, are as follows:—

54. The Superintendent General or any officer or agent authorized by him to that effect may grant licences to cut trees on reserves and ungranted Indian lands * * * subject to such * * * regula-

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tions * * * as are from time to time established by the Governor-in-Council. * * *

55. No licence shall be so granted for a longer period than twelve months from the date thereof. * * *

Sections 73 and 74 of chapter 81, R.S.C, 1906, are in terms similar to sections 54 and 55 of the Act of 1886.

The original provisions, which these sections reproduce, were consolidated as sections 1 and 2 of the "Public Lands Timber Licences Act," chapter 22 in the C.S.C., 1859, which were made applicable to Indian lands by 31 Vict. ch. 42, sec. 35.

Pursuant to the provisions of section 54 of the Revised Statutes of 1886 the following regulations *inter alia* were duly enacted and promulgated on Sept. 5th, 1888:—

5. Licence holders who shall have complied with all existing regulations, shall be entitled to have their licences renewed on application to the Superintendent of Indian Affairs.

11. All timber licences are to expire on the 30th day of April next after the date thereof and all renewals are to be applied for before the first day of July following the expiration of the last preceding licence, in default whereof the berth or berths may be treated as forfeited.

A number of other provisions in the regulations contain references to the renewal of licences.

The suppliant, appealing from an adverse judgment of the Exchequer Court, contends that the statute, properly construed, does not prohibit the issue of a renewable licence; that the regulations expressly authorize the issue of such licences and that, having been laid before Parliament, they must be taken to have received its sanction; and that, having paid a large sum of money for his licence on the faith of obtaining a right to a renewal under the statute and

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regulations, he is either contractually or equitably entitled to such renewal as of right.

On the construction of the statute the appellant's contention is, in my opinion, hopeless. The language of section 55 is too plain to admit of any doubt. To interpret it as authorizing the issue of a licence renewable as of right after the lapse of the year for which it was granted, and so on from year to year, would defeat its obvious intent. There is no real distinction between a perpetual licence and a licence perpetually renewable. Both are equally obnoxious to a provision which forbids the granting of a licence for a longer period than twelve months.

Nor is the appellant's position improved by invoking regulation No. 5. The early history of that regulation is given by Maclennan J.A., in *Smylie* v. *The Queen* (1), at pp. 183-4, as follows:—

> Regulation 5 provides that licence holders who have complied with all existing regulations shall be entitled to have their licences renewed on application, and regulation 11, that all licences shall expire on the 30th of April next after the date thereof, and that renewals are to be applied for and issued before the 1st of July following the expiration, on default whereof the right to renewal shall cease, and the berth shall be treated as forfeited. The original regulations of the 5th of September, 1849, *Canada Gazette*, vol. 8, p. 6999, are expressed differently. Regulation 8 declares that licensees who have complied, etc., will be considered as having a claim to the renewal of their licences in preference to all others on application, etc., failing which the limits are to be considered vacant, etc. A change was made on the 23rd of June, 1866, since which the regulation relating to renewal has continued to be in the form approved of on the 16th of April, 1869.

The learned judge continues in language which I respectfully adopt:—

> The question is whether these two regulations were intended or can be held to weaken or qualify the clear terms of the statute, and

(1) 27 Ont. App. R. 172.

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to confer a right not expressed in the licence itself, and I think it impossible so to hold. In the first place it was not so intended. The second clause of the order in council expressly refers to the *requirements of the statute*, as matters which were to govern licences and renewals thereof, as well as the regulations, conditions and restrictions, which were then being ordained. Again by regulation 24, the exact form of the licence is prescribed, and in the form the term is expressed to be from its date to the 30th of April *and no longer;* and there is not a word in it about renewal. I think, therefore, the intention of the regulations is to comply with, and not to qualify, the statute. But if the regulation is not in accordance with the statute, if it assumes to confer a right of renewal, it must give way to the statute, and can confer no right beyond what the statute authorized the Land Commissioner to grant, and that is a licence for a term not exceeding twelve months. The regulations which the Lieutenant-Governor in Council was authorized to establish were in respect of licences which were not to exceed twelve months in duration. So far as they go beyond that they cannot bind the Crown.

That the holder of a licence, subject to a regulation identical with that now relied upon, was not entitled to a renewal as of right had been held in a series of Ontario cases. *Contois* v. *Bonfield,* in 1873-6(1); *McArthur* v. *Northern and Pacific Junction Railway Co.,* in 1890(2); *Shairp* v. *Lakefield Lumber Company,* in 1890-1(3); and *Muskoka Mill and Lumber Co.* v. *McDermott,* in 1894(4).

As put by Moss J.A. in *Smylie* v. *The Queen,* in 1900(5), at pp. 190-191:—

> It is enough to say that an agreement for a renewal is something which the law has not empowered the Commissioner of Crown Lands or the Department of Crown Lands to enter into. It is not within the statute, which authorizes no more than the giving of a right to cut timber, and even that for a period not longer than twelve months.
>
> The regulations must be construed as not intending to enlarge the rights of persons dealing in respect of timber beyond such as the statute authorizes, and no greater effect has been attributed to them

(1) 25 U.C.C.P. 30; 27 U.C.C.P. 84.
(2) 17 Ont. App. R. 86.
(3) 17 Ont. A.R. 322; 19 Can. S.C.R. 657.
(4) 21 Ont. App. R. 120.
(5) 27 Ont. App. R. 172.

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by the courts of the province whenever it has become necessary to consider them.

The term "renewal" seems to be applied to licences issued after the first. But in reality this is not an accurate description. They are not in the nature of a restoration or revival of a right. Each is a new grant. It bears no necessary relation to the preceding licence It may or not be couched in the same language and subject to the same conditions, regulations and restrictions, as the former. It is not the continuance of an old or existing right, but the creation of a new original right.

It is probably now quite too late to contend that regulation No. 5 should be given a construction which, assuming its validity, would confer on timber licensees, complying with the regulations, an absolute right to renewal; but, if the 5th regulation should be so construed, it is still more hopeless to contend for its validity in the face of the explicit language of section 55 of the statute.

It was conceded at bar that regulation No. 5 might be revoked or altered at any time by the Governor-in-Council and that the suppliant's rights as licensee would be subject to such revocation or alteration. But it is maintained that, in the absence of such revocation or alteration, the regulation is binding upon the Crown. In so far as it is authorized and subject to proper construction, this is no doubt the case. But the fact that it may be so revoked or altered does not warrant a construction of an existing regulation in conflict with the prohibition of the statute. Nor does it render it valid while it stands unrepealed or unchanged, if only such a construction can be put upon it.

Although the statute requiring regulations passed under the "Indian Act" to be laid before Parliament appears to have been enacted only in the year 1894

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(57 & 58 Vict. (D.), ch. 32, sec. 12), if it may be assumed in favour of the appellant that the regulation in question was duly laid before both Houses of Parliament that would not materially affect his case. Parliament may be taken to have known the construction which the courts had put upon this regulation and to have allowed it to remain unchallenged in the expectation that that construction would be adhered to. Moreover, although the fact that a regulation which has been laid before Parliament remains in force unchanged is, no doubt, a circumstance entitled to weight as raising a probability of its being valid and in conformity with the intention of Parliament, it does not suffice to render the regulation effectual and unimpeachable, if, on the only construction of which it is susceptible, it contravenes an express statutory provision. On the other hand, it affords a very strong ground for giving to the regulation a construction not obnoxious to the statute.

Nor has the suppliant any such right as he asserts to the favourable consideration of a Court of Equity.

His original licence in 1891 was expressly limited to the term "from 5th October, 1891, to 30th April, 1892, and no longer." It contained no provision for renewal. Each of the so-called renewals in like manner extends only to the ensuing 30th April and contains no allusion to further renewal. There is no evidence of any contract for renewal, and, if there were, no such contract which its officers might purport to make could bind the Crown in the face of the statutory prohibition. But whether the suppliant bases his claim upon contract or upon the effect of the regulation, he must be assumed to have known the law ap-

plicable to the licence which he sought and obtained, and to have taken it subject to that law.

There is no evidence before us as to the value of the timber limits in question when the appellant became licensee or of their subsequent appreciation. But it is common knowledge, which we cannot disregard, that this appreciation has been very great of recent years. Whether the sum paid by the suppliant for his licence, by way of bonus, premium or otherwise, should be deemed large or small would necessarily depend upon these considerations. Whatever sum he paid to obtain the licence was, no doubt, paid in the expectation that it would probably be renewed from year to year, as is ordinarily the case with Crown timber licences, but always subject to the right of the Crown, in its discretion, to refuse such renewal. Of an adverse exercise of that discretion at any time he took the risk and he cannot be heard to complain. Under such circumstances there can be no ground for curial intervention in his behalf.

A construction of the regulations which would give to licensees who have complied with them an absolute right to renewals not only directly conflicts with the prohibition of the 55th section of the statute, but would also do grave injustice to the bands of Indians for whom the Crown holds the Indian lands in trust.

The appeal, in my opinion, fails and must be dismissed with costs.

BRODEUR J.—The appellant claims that he was entitled to have a renewal of his licence to cut timber on Indian lands.

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The licence itself, which embodies the rights and obligations of the department, on one side, and of the licensee on the other, does not contain any such right on the part of the licensee.

He relies on certain regulations passed by the Governor in Council.

It would not be necessary for me to examine if those regulations could bear such a construction, because, then, they would be in violation of the statute, which declares that no licences should be granted for a longer period than twelve months, and the Governor in Council could not make any regulations that would be in contravention with a statutory enactment so explicit.

It could be stated also that the Indians are the wards of the state and no policy should be adopted that would deprive the Indians of the fruits that their reserves could procure for them. It may be that at one time their lands could be more advantageously exploited as timber lands but at some other time they should be converted into farm lands in the interest of the Indians. Then it would be a pity that through some previous concessions to timber licence holders that beneficial change could not take place.

For those reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Christie, Greene & Hill.*
Solicitors for the respondent: *Chrysler, Bethune & Larmonth.*

appears that they were doing a profitable business. He might reasonably set up a right to use the moneys on the strength of these profits, and, however improper this might have been, it would not amount to embezzlement.

In my opinion the plaintiff has failed in making out a case, and I must grant a nonsuit with costs.

Nonsuit granted.

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Exchequer Court of Canada, Cassels, J. February 13, 1913.

1. PUBLIC LANDS (§ I B—7)—LICENSE TO CUT STANDING TIMBER—RIGHT OF RENEWAL, HOW LIMITED.

Under the provisions of sec. 54, of ch. 43, R.S.C., 1886, and the later revision of R.S.C. 1906, ch. 81, sec. 73, giving authority to the Superintendent-General of Indian Affairs to grant licenses to cut timber on Indian lands, the licensee is not entitled at the expiration of his term of license to a renewal of the privilege as a matter of right, but his right to such renewal must depend upon whether or not a contract has been entered into between the Crown and himself entitling him to such renewal, in view of the provisions of sec. 55 of ch. 43, R.S.C. 1886, to the effect that no license shall be granted for a longer period than twelve months.

[*Bulmer* v. *The Queen*, 23 Can. S.C.R. 488; *Lakefield Lumber Co.* v. *Shairp*, 19 Can. S.C.R. 657, followed; *Attorney-General* v. *Contois*, 25 Grant 346; *Muskoka Mill Co.* v. *McDermott*, 21 A.R. (Ont.) 129; *Smylie* v. *The Queen*, 27 A.R. (Ont.) 172; *W. C. Edwards Co.* v. *D'Halewyn*, 18 Que. K.B. 419, applied.]

2. STATUTES (§ II A—97)—CONSTRUCTION AND EFFECT—TO UPHOLD STATUTES AGAINST INCONSISTENT DEPARTMENTAL RULES—LICENSE TO CUT STANDING TIMBER.

Any regulation or contract whereby the Crown binds itself to grant a license to cut timber on Indian lands from year to year, practically in perpetuity, is *ultra vires*, as being contrary to the terms of the statute R.S.C. 1886, ch. 43, and the later revision R.S.C. 1906, ch. 81, since the lands in question are held by the Crown in trust for the Indians and the only right conferred by the statute is the granting of a license for one year.

Statement

PETITION of right to restrain the sale of certain timber and for a declaration that the petitioner is entitled to a renewal of a license to cut said timber issued to him and renewed for a large number of years.

The petition was refused.

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Shepley, K.C., and *A. C. Hill*, for suppliant.
Chrysler, K.C., and *Bethune*, for the Crown.

CASSELS, J.:—This was a petition of right on behalf of John Rudolphus Booth. The suppliant sets forth in his petition that on October 5, 1891, a license was issued to him by the Superintendent-General of Indian Affairs, to cut timber on Indian lands. The license was issued pursuant to the authority of ch. 43, of the Revised Statutes of Canada, and amendments thereto. The suppliant alleges that the said license, since the date thereof, had been renewed from year to year, the last renewal expiring on April 30, 1909. He then alleges that due application for a renewal of the said license for the year ending on April 30, 1910, had been applied for which application was refused by the Superintendent-General; and the suppliant further alleges that the said limits and the timber aforesaid had been advertised for sale by his authority.

The prayer of the petition is that the said sale may be restrained, and that the suppliant may be declared to be entitled to the renewal of the said license and to a renewal from year to year thereafter.

The Crown in its defence denies the right of the suppliant and alleges, among other grounds of defence, that the lands comprised in the timber limits affected were, in fact, required for purposes incompatible with the licenses in question. There are other defences set out, which, on reference to the statement of defence, will appear.

The license bearing date the 5th day of October, 1891, purports to be signed by Mr. VanKoughnet, the deputy of the Superintendent-General of Indian Affairs. It purports to be made pursuant to the provisions of ch. 43 of the Revised Statutes of Canada, and amendments thereto; and it gives to J. R. Booth of the city of Ottawa, his agents and workmen, full power and license to cut pine timber and saw logs from trees of not less than nine inches diameter at the stump upon the location described upon the back hereof; and to hold and occupy the said location to the exclusion of all others except as hereinafter mentioned, from October 5, 1891, to April 30, 1892, and no longer.

The license provides among other things, that the dues to which the timber cut under its authority are liable shall be paid as follows: namely, as set forth in the regulations for the disposal of timber on Indian lands and reserves established by order of His Excellency the Governor-General-in-council, dated September 15, 1888.

The amount payable for ground rent is mentioned as the sum of $324—the renewal fees, $2—and it provides that the above-

named licentiate shall be bound before or when paying the ground rent and renewal fee, if the license is renewed, to declare on oath whether he is still the *bonâ fide* proprietor of the limit hereby licensed, or whether he has sold or transferred it or any part of it, or for whom he may hold it.

A series of renewals, so called, were granted down to January 4, 1909; and they are practically all to the same effect, namely, that the conditions of the within license having been complied with the same is hereby renewed. Subsequently, certain manufacturing conditions were imposed by order-in-council of April 19, 1901, and the renewals were made subject to the manufacturing conditions. There is no objection to this term subsequently imposed, in order to conform apparently to regulations which had been provided for by the Province of Ontario in regard to licenses granted by them of timber berths owned by the province.

No question arises in regard to the form of renewals. I will deal with this subject later on when discussing the various authorities bearing on the case. In point of fact "renewals" was the wrong term. There is no authority in ch. 43, R.S., referred to, or in any of the subsequent statutes which provided for renewals of licenses. Each so-called annual renewal was a new and independent license by itself.

The right of the suppliant to maintain his petition must depend upon whether or not a contract has been entered into between the Crown and himself entitling him to such renewal.

The statute, ch. 43 of the Revised Statutes of Canada, 1886, provides in the interpretation clause, that the expression "Superintendent-General," means Superintendent-General of Indian Affairs; and the expression "Deputy Superintendent-General" means the Deputy Superintendent-General of Indian Affairs.

It is provided by sec. 4 of this statute that the Minister of the Interior or the head of any other Department appointed for that purpose by the Governor-in-council, 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.

It is also provided that there shall be a department of the civil service of Canada, which shall be called the Department of Indian Affairs, over which the Superintendent-General shall preside.

It is provided by sec. 14 of the said statute that all reservations for Indians or for any band of Indians or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as they were held before the passing of the Act and shall be subject to the provisions of this Act.

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Sec. 41 of the statute provides 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 this Act, and shall be managed, leased and sold as the Governor-in-council directs, subject to the conditions of surrender and the provisions of this Act.

Chapter 81 of the Revised Statutes of Canada, 1906, is practically similar to ch. 43, Revised Statutes of Canada, 1886. Section 15 of said ch. 43, provides that the Superintendent-General may authorize surveys, plans, and reports to be made of any reservation for Indians, shewing and distinguishing the improved lands, the forest and lands fit for settlement, and such other information as is required, and may authorize the whole or any portion of a reserve to be sub-divided into lots.

Sec. 20 of ch. 81, of the Revised Statutes of Canada, 1906, is in similar terms.

By ch. 81, sec. 48, of R.S.C. 1906, it is provided that except as in this part otherwise provided no reserve or portion of a reserve shall be sold, alienated or leased, until it has been released or surrendered to the Crown for the purposes of this part.

By ch. 43, sec. 54, of the Revised Statutes of 1886, it is provided as follows:—

> The Superintendent-General or any officer or agent authorized by him to that effect may grant licenses to cut trees on reserves and ungranted Indian lands at such rates and subject to such conditions, regulations and restrictions as are from time to time established by the Governor-in-council, and such conditions, regulations and restrictions shall be adapted to the locality in which reserves or lands are situate.

Sec. 55 provides that no license shall be so granted for a longer period than 12 months from the date hereof.

Then follow subsequent provisions as to making returns, etc.

Sec. 73, ch. 81, R.S.C. 1906, and the following sections, are in similar terms to the earlier statute of 1886.

It is obvious that the Superintendent-General or other officer authorized by him to that effect had no power to grant a license for a longer period than twelve months from the date thereof.

It is equally obvious that the conditions, regulations and restrictions referred to in sec. 54, ch. 43, R.S.C. 1886, and of sec. 73, ch. 81, R.S.C. 1906, could only refer to such conditions, regulations and restrictions as are applicable to the yearly license, and would not include any such regulations which contemplated a further renewal of the license to a period beyond the year referred to.

In point of fact the license of the 5th October, 1891, referred merely to the payment of the dues. It reads:—

> That the dues to which the timber cut under its authority are liable, shall be paid as follows, namely: As set forth in the regulations for the disposal of timber on Indian lands and reserves established by order of His Excellency the Governor-General-in-council, dated the 15th September, 1888.

I am of opinion that, taking the license of October 5, 1891, by itself, and considering the authority conferred upon the Superintendent-General by sec. 54 of the earlier revision of the Revised Statutes, 1886, and sec. 73 of the later revision of 1906, there is no contract between the Crown and the suppliant which would entitle the suppliant to a judgment against the Crown as prayed for. The suppliant is, therefore, forced to rely upon the Indian land regulations and timber regulations adopted and established by orders of His Excellency the Governor-General-in-council on September 15, 1888, and to maintain his claim he must establish a contractual relation existing between the Crown and himself by reason of these regulations.

Sec. 2 of these regulations provides that the Superintendent-General of Indian Affairs, before granting any licenses for new timber berths in unsurveyed Indian reserves or lands, shall cause such berths to be surveyed; and the Superintendent-General of Indian Affairs may cause any reserve or other Indian lands to be sub-divided into as many timber berths as he may think proper. Then, there is a provision for sale by auction; and section 5 provides that license holders who shall have complied with all existing regulations shall be entitled to have their licenses renewed on application to the Superintendent-General of Indian Affairs.

Sec. 11 provides that all timber licenses are to expire on the 30th April, next, after the date thereof, and all renewals are to be applied for before the first of July following the expiration of the last preceding license. In default thereof the berth or berths shall be treated as *de facto* forfeited.

Sec. 12 provides that no renewal of any license shall be granted unless the limit covered thereby has been properly worked during the preceding season, or sufficient reason be given under oath and the same to be satisfactory to the Superintendent-General of Indian Affairs for the non-working of the limit; and unless or until the ground rent and all costs of survey and all dues to the Crown on timber, saw-logs or other lumber cut under and by virtue of any license other than the last preceding shall have been first paid.

Mr. Shepley, in his very able and lucid argument before me, rested his case in the main upon these regulations. His argument is shortly that while, by the statute, the Superintendent-

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General can only grant a license for a year, nevertheless the Crown might, by valid contract, bind itself to grant a renewal or a new license from year to year, practically in perpetuity. I am unable to agree with this contention. The lands in question are held in trust for the Indians. There are provisions referred to above which contemplate sales of Indian reserves by the Crown for the benefit of the Indians. I don't think the Crown was bound for all time to keep lands set apart as timber berths if in its discretion it was considered advisable in the interest of its *cestui que trustent* to sell these lands. In the present case it appears that a surrender was made with the view to enable the Crown to sell the limits in question. They were put up for sale by auction. There is nothing imputing want of good faith on the part of those representing the Crown, and I must assume that the Crown is dealing with the lands in question in a manner best calculated to promote the interest of those whom it represents. Moreover, I have come to the conclusion that any regulation which would have the effect of tying up for practically all time the limits in question would, if they are so construed, be *ultra vires* as being contrary to the terms of the statute. The statute is that the Superintendent-General may grant licenses.

While I do not consider myself as bound to follow the various decisions which I shall refer to, with the exception of *Bulmer* v. *The Queen*, 23 Can. S.C.R. 488, they are the decisions of Judges of very great eminence; and even if I held a view contrary to their views, I would be loth to set up my personal judgment as against their opinions. but would prefer to leave it to a higher Court, to place a different construction upon the statutes. I may say, however, that I agree with their conclusions.

The first case which is important is the case of *Contois* v. *Bonfield*, 27 U.C.C.P. 84. This was an appeal from the judgment of the Court of Common Pleas. In this particular case a patent had been issued by mistake. It had been intended that the rights of the licensee to the timber should have been reserved to the patentee. The official of the Crown merely endorsed the reservation on the patent and it was held that this had no effect. An action was subsequently brought in the Chancery Division and tried by the late Chancellor Spragge, in the suit of the *Attorney-General* v. *Contois*, 25 Grant 346, and the patent was set aside. The importance of the *Contois* case in the Court of Appeal is the reference—the further renewal is made after the issue of the patent.

The case of *Attorney-General* v. *Contois*, 25 Grant 346, was decided under the Act respecting the sale and management of

timber on public lands, ch. 23, of the Consolidated Statutes of Canada, 1859. That Act provides as follows:—

> The Commissioner of Crown Lands or any officer or agent under him authorized to that effect may grant licenses to cut timber on the ungranted lands of the Crown at such rates, and subject to such conditions, regulations and restrictions as from time to time he established by the Governor-in-council, and of which notice shall be given in the Canada Gazette.

By sub-sec. 2 it was enacted that no licenses shall be so granted for a longer period than 12 months from the date thereof. And then follow provisions very similar in terms to the provisions of the statutes governing this case.

The late Chief Justice Thomas Moss, in his judgment is reported, as follows:—

> The patent on its face grants the land absolutely and unconditionally. It may, therefore, be said to grant more than the subject-matter of the treaty between the Crown and the patentees. This excess in the grant may be fairly taken to have been the result of an improvident act of the official whose duty it was to draw a proper patent, and we are not prepared to hold that in such a case the Crown cannot, in equity, obtain the relief which, under analogous circumstances would be awarded to a subject. But we rest our judgment upon the ground that, even if the memorandum endorsed had been embodied in the patent, the appellant would, for all that is alleged, have been without defence to this action. On that supposition the language of the patent would have been that it was subject to the rights, powers, and privileges of the defendant under the existing license.

Proceeding, the late Chief Justice Moss states:—

> It was suggested upon the argument that the difficulty arising from want of privity was met by the commissioner's renewal of the license for the period of a year, and that this should be treated as a *quasi* assignment by the Crown of any rights which could have been enforced against the plaintiff at its instance. The answer offered to this was that the powers of the commissioner are prescribed and regulated by statute; that an agreement for a renewal of a license is something which the law has not empowered him to make, and is, indeed, not within the contemplation of the statute; and that he can only give a right to cut timber upon ungranted lands, and even that for no longer period than twelve months.
>
> These positions are fully supported by the statute.

In the case of the *Muskoka Mill and Lumber Co.* v. *McDermott et al.*, 21 A.R. (Ont.) 129—also a case in the Court of Appeal for Ontario—the following is the language of the Court. Osler, J., states at page 132, as follows:—

> The Act respecting timber on public lands expressly enacts that no license to cut timber on the ungranted lands of the Crown shall be so granted for a longer period than twelve months.

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And he proceeds to point out the terms and the rights conferred upon the licensee. Then he states:—

> No language could more forcibly express the limitation of the right of the holder to the period of the license, as well as the limitation of the period for which it may be granted, and the license itself is expressed, as it ought to be, in accordance with the requirements of the Act. It is needless to say that no conditions, regulations or restrictions can be established by the Lieutenant-Governor-in-council which are opposed to these requirements. . . . The legal right of the licensee, except as excepted by the last clause of sec. 2 of the Act, ceased with the expiration of each license, and I am not aware of any equitable right to renewal capable of being enforced against the Crown. That is a matter which rests with the Crown, which no doubt will act justly in each particular case. But there is nothing so far as I know to prevent the Crown from withdrawing any lot from a timber limit, and declining to renew the license over such lot at the expiration of the license year.

Then he refers to the language of the late Chief Justice Moss, in the case of *Contois* v. *Bonfield*, 27 U.C.C.P. 84, which I have quoted. The late Chief Justice Hagarty concurred with the judgment of Mr. Justice Osler.

The next case of importance is the case of *Smylie* v. *The Queen*, 31 O.R. 202, decided by the late Mr. Justice Street. This decision was based upon the contract entered into between the parties. The contention in that case was that the subsequent orders-in-council which required the timber to be manufactured in Canada were not binding upon the licensee. The judgment of Mr. Justice Street proceeded upon the ground that by the original contract the rights of the licensee to a renewal were subject to such regulations as may from time to time be established. The licensee refused to accept a renewal of the license containing the regulations requiring him to comply with these subsequent regulations, and Mr. Justice Street dismissed the action, basing his judgment upon the ground that the licensee, if he took a renewal, was compelled to take it subject to these regulations, and having refused to do so he was out of Court.

I rather gather from the judgment of Mr. Justice Street that his own opinion would more than likely have been in favour of the right to a renewal. This case was taken to the Court of Appeal in Ontario, and while the reasons of the various Judges may have been *obiter dicta*, nevertheless their views are entitled to very great weight. The case is reported, *Smylie* v. *The Queen*, 27 A.R. (Ont.) 172, 176. Mr. Justice Osler refers to the regulations, and amongst others, is one that licensed holders who have duly complied with all existing regulations, shall be entitled to a renewal of their licenses on complying with certain conditions. He states at p. 177, as follows:—

In these regulations we find for the first time language which might imply an intention to take authority to sell the timber berths or limits themselves, instead of, as hitherto, selling the yearly license to cut timber thereon, and stress was laid on this by the appellant as if he had thereby acquired some larger title to the timber than the yearly license would confer upon him. We cannot, however, assume that the Lieutenant-Governor-in-council intended to do anything opposed to the statute, which only authorizes the Commissioner of Crown Lands to grant licenses to cut timber on the lands—licenses which by law must expire at the expiration of twelve months from their date. Such a license was, in my opinion, the only thing authorized and intended by these regulations to be sold, however large the sum paid at the sale, which can only be regarded as a premium or bonus for the license, as indeed the conditions of sale in each case expressly describe it. It may be, that, under the power to make "conditions, regulations, and restrictions," the Lieutenant-Governor-in-council had authority to provide, as these regulations purport to do, for renewing the license on proper terms. It is not necessary to decide that, although it does appear to be quite opposed to the clear words of the Act, which seem to contemplate that the Crown should be perfectly unfettered and free to deal with the timber at the expiration of each license year as it might think fit.

On page 181, he says:—

Considering, however, that every license is a new and independent license.

Mr. Justice Maclennan, at page 182, refers to the various statutes, and he points out that

Sec. 2 of the statute declares that no license shall be so granted for a longer period than twelve months from the date thereof.

And he says:—

Now, there is not, and there has never been, during fifty years, any enactment in any way qualifying or limiting that plain declaration of the Legislature, that no license shall be for a longer term than twelve months, and the law has been re-enacted during that period three different times. How absolute the intention of the Legislature was, and has been, in thus limiting the duration of licenses, appears from sec. 3, which defines the rights which the license was intended to confer.

He proceeds:—

I think the Legislature could hardly have used more clear, unambiguous, emphatic language to express its intention, that there should be no license for a longer period than twelve months, that at the end of that time they should expire. . . . They have always been for a term not exceeding twelve months, terminating on a day certain, which for many years has been the 30th of April, and no longer. Such is the language of the statute, and such is the title which has been granted to and accepted by the suppliants in pursuance thereof.

They contend, however, that the clear language of the Legislature and of the license issued in pursuance thereof, is to be qualified by the regulations, particularly regulation 5, and by the practice of the

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land department for many years of granting renewals annually to the previous licensee. Regulation 5 provides that license holders who have complied with all existing regulations shall be entitled to have their licenses renewed on application. . . .

The question is, whether these two regulations were intended or can be held to weaken or qualify the clear terms of the statute, and to confer a right not expressed in the license itself, and I think it impossible so to hold.

He then proceeds:—

I think, therefore, the intention of the regulations is to comply with, and not to qualify, the statute. But if the regulation is not in accordance with the statute, if it assumes to confer a right of renewal, it must give way to the statute, and can confer no right beyond what the statute authorized the land commissioner to grant, and that is a license for a term not exceeding twelve months. The regulations which the Lieutenant-Governor-in-council was authorized to establish were in respect of licenses which were not to exceed twelve months in duration. So far as they go beyond that they cannot bind the Crown. I think the regulations in question were ordained, merely for the guidance of the officials of the land department, and not for the purpose of conferring any contractual or other right of renewal upon licenses, which they could enforce against the Crown.

The learned Judge came to the conclusion, as follows:—

I am, therefore, of opinion that the suppliants have no contractual or other right, as licensees, to compel the Crown to renew their licenses.

The late Sir Charles Moss, at his death Chief Justice of the Court of Appeal, points out as follows:—

There powers are prescribed and regulated by the statute, and reference to it must be had in every case when it becomes necessary to ascertain what may and what may not be done in regard to the public timber. I fail to find in the statute any warrant for the suppliants' contention. On the contrary, I think it is made thereby very plain that the authority to give or grant a right to any one to cut timber upon the public lands of the province for the purpose of manufacturing it into logs, lumber, or square timber, is limited to the grant of a license for a period of twelve months from the date thereof.

These enactments indicate an intention to retain the entire right to and control over all timber not cut during the term of a license, and over the grant of licenses from year to year, and the power to withhold from the licensee of one year any claim whatever to the issue to him of a license for the next or any future year.

He further states:—

The term "renewal" seems to be applied to licenses issued after the first. But in reality this is not an accurate description. They are not in the nature of a restoration or revival of a right. Each is a new grant. It bears no necessary relation to the preceding license.

In regard to this latter point, reference may be had to the case of the *Lakefield Lumber and Manufacturing Co.* v. *Shairp*, 19 Can. S.C.R. 657. Mr. Justice Gwynne, in his judgment at page 671, states:—

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As to the point that the license, which issued on the 3rd May, 1888, was the same license as that issued in all the years subsequent to and in the year 1913, when the first appears to have been granted and before the lot in question was sold, and that, therefore, the license of 1888 covered the lot in question equally as did that issued in 1883, and in prior years, it does not seem to me to be necessary to make any observations, further than that it cannot be entertained.

To the same effect in the Province of Quebec, in the case of *W. C. Edwards Co., Ltd.* v. *D'Halewyn*, 18 Que. K.B. 419.

The only other case that I have been referred to, and which has a bearing, is the case of *Bulmer* v. *The Queen*, 3 Can. Ex. R. 184. At page 212, the late Judge of the Exchequer Court, Mr. Justice Burbidge, seems to have yielded to Mr. McCarthy's argument and read the word "may" as meaning the word "shall," and came to the conclusion there was a contract to renew. In that particular case it appeared subsequently that the Dominion had no right or title to the limits, the subject-matter of the suit. The question therefore resolved itself into one of damages, the title not being in the Dominion, and the learned Judge proceeded to assess damages under the doctrine enunciated in *Bain* v. *Fothergill*, L.R. 7 H.L. 158, and allowed some $5,000 damages.

This case was taken to the Supreme Court, and the judgment of that Court was pronounced by the late Chief Justice Strong, and is reported, *Bulmer* v. *The Queen*, 23 Can. S.C.R., at 488. The Court differed entirely from the view taken by the Judge in the Court below. Apparently it declined to read the word "may" as "shall." And it is pointed out that, by the words of the statute, the right conferred is discretionary. No valid cross-appeal was taken so that the Supreme Court was unable to reduce the damages, and therefore dismissed the appeal. The case is important as shewing that no contract had been entered into merely by the orders-in-council not acted upon by the granting of the license. The learned Chief Justice points out that the right of the suppliant must, therefore, depend upon the terms of the lease or license itself, and no contract was evidenced by the terms of the license.

One or two other cases were cited before me, as, for instance, *Booth* v. *McIntyre*, 31 U.C.C.P. 183, and *Foran* v. *McIntyre*, 45 U.C.Q.B. 288, and *McArthur* v. *The Northern and Pacific Junction R. Co.*, 17 A.R. (Ont.) 86.

I have carefully read these various cases, but do not find that they assist in any way to a determination of this case.

I am of opinion for the reasons given that the suppliant has failed to prove a contract enforceable against the Crown.

The petition is dismissed with costs.

Petition dismissed.

[DIVISIONAL COURT.]

D. C.
1904
July 7.

BRIDGE v. JOHNSTON.

Indians—Indian Lands—Sale of Timber—Registration—Notice.

The locatee of Indian lands is, except as against the Crown, in the same position as if the land had been granted to him by letters patent, and can assign his interest in the land or in the timber. Actual notice of such an assignment, even though the assignment has not been registered in accordance with the provisions of the Indian Act, is sufficient to prevent a subsequent assignee from obtaining priority.
Judgment of Ferguson, J., 6 O.L.R. 370, affirmed.

AN appeal by the plaintiff from the judgment of Ferguson, J., reported 6 O.L.R. 370, was argued before a Divisional Court [MEREDITH, C.J.C.P., MACMAHON, and TEETZEL, JJ.] on the 11th of February, 1904. The facts are stated in the report below and in the judgment in this Court.

E. D. Armour, K.C., for the appellant. A locatee of Indian lands is, under the Act, entitled to the use and occupation thereof, but has no right to sell them or any interest in them. The alleged assignment of the timber was therefore invalid and void. Even if, however, the assignment was not void, it lost its priority by not being registered in accordance with the provisions of the Indian Lands Act. The learned Judge was in error in holding that it was a conditional assignment and therefore not capable of registration. It really is an absolute assignment with a limitation as to the time of removal. Condition is not used in the Act as equivalent to stipulation. What is evidently referred to is such an instrument as a mortgage, in which there is an absolute grant subject to what is correctly described as the "condition" of redemption. See *Johnston* v. *Shortreed* (1886), 12 O.R. 633; *Steinhoff* v. *McRae* (1886), 13 O.R. 546. The assignment could and should have been registered and the equitable doctrine of notice does not avail to give it priority.

H. G. Tucker, for the respondent. A locatee has, subject to the rights of the Crown, power to deal with the land or any interest in it, and the assignment in question was therefore

valid. Whether it could have been registered or not is immaterial, for there was the most direct notice of it, and nothing more was necessary.

Armour, in reply.

July 7. The judgment of the Court was delivered by MEREDITH, C.J.:—The appellant is the assignee of the original purchaser from the Crown, one Freckelton, of the lands in question, which are Indian lands. The assignment is dated the 15th November, 1900, and was registered as provided by sec. 42 of the Indian Act, on the 29th November, 1900.

The original sale and purchase was made on the 17th of December, 1886, and by the terms of it one-fifth of the purchase money was to be paid down and the remainder in annual instalments.

It appears from the duplicate of the receipt which was given for the "down" payment, that the sale was made subject to certain conditions, which are expressed on the face of the receipt in the following words:—

"The conditions of this sale are as follows:—

Fifth of the purchase money shall be paid at the date of the purchase, and the balance of the purchase money in equal consecutive yearly instalments, bearing interest at six per cent. on each, until the whole amount has been paid.

Settlement by actual occupation and improvement shall commence within six months from the date of sale, and be continuous for a period of three years previous to the issue of letters patent; within which time there shall be cleared and fenced at least five acres upon each parcel of land containing one hundred acres of land or a less quantity; a dwelling not less than 24 x 18 feet to be likewise erected. A non-fulfilment of any of the conditions will cause a cancellation of the purchase and a forfeiture of the money paid. It is also a condition that no timber, staves, saw-logs, lathwood, shingle-wood or cordwood, or any other descriptions of wood, are to be cut for sale until the patent for the lot has issued, except under license issued, to the party living thereon, by the Indian Lands Agent, permitting him to sell such trees, wood or timber, other than pine, as may be cut in actually clearing the land for

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cultivation. Any violation of the above will also render the land forfeitable. The land to be subject to any timber license covering the same in force at the date of sale, or granted within three years thereafter."

The appellant paid the last instalment of the purchase money on the 16th February, 1903, but it was not made to appear at the trial whether or not the settlement duties had been performed so as to entitle the purchaser's assignee to the patent, or whether or not letters patent had been issued.

The respondent claims to be entitled to the timber on the land, ten inches and over in size, as assignee of Jamieson Johnston, to whom the purchaser Freckelton purported to sell it by an instrument dated the 27th November, 1899, the material provisions of which are as follows:—

"The party of the first part agrees to sell, and the party of the second part agrees to purchase, all the timber, 10 inches and over in size, on lot 8, concession 8, township of Eastnor, E.B.R., for the price or sum of three hundred and fifty dollars of lawful money of Canada, payable as follows: $60 cash; $40 on the 27th of December, 1899; $50 on the 1st of February, 1900; $75 on the 1st of March, 1900; $50 on the 27th of November, 1900; and $75 on the 1st of February, 1901. The party of the second part is to have five years from the date hereof to cut and remove said timber, having the right to make roads and go in and out on said property during said term."

Neither the assignment from Freckelton to Jamieson Johnston nor the subsequent transfers under which the respondent claims were registered pursuant to the provisions of sec. 43 of the Indian Act.

The contention of the respondent is that under these assignments he is the absolute owner of the timber which was the subject of the sale to him, and entitled to cut and remove it from the land.

To this it is answered by the appellant that the assignment of the timber was an unlawful act on the part of Freckelton, done in contravention of the provisions of the Indian Act and in violation of the conditions upon which the sale was made, and that in any case his registered assignment is entitled to

prevail over the unregistered assignment from Freckelton under which the respondent claims.

The respondent answers these contentions of the appellant by saying that his assignment is valid; that the appellant, before he became the assignee of Freckelton's interest in the lands, had actual notice of the agreement under which the respondent claims and of his rights under it, and that the appellant is not, therefore, entitled to rely on the registration of the assignment under which he claims to defeat the prior assignment of the timber under which the respondent claims, and that in any case the latter assignment was a conditional one and could not therefore be registered, and not being one which could be registered is not defeated by the registered assignment under which the appellant claims.

I am of opinion that the objection taken to the validity of the assignment of the timber is not well founded.

Freckelton, by his purchase and the effect of the provisions of the Indian Act, was placed as against all the world but the Crown upon the footing of a full and beneficial owner to the same extent as if the land was granted to him by letters patent.

That such is the position of a locatee of public lands whose rights are declared in substantially the same language as is used in declaring the rights of a purchaser of Indian lands in the Indian Act, was held in *Church* v. *Fenton* (1878), 28 C.P. 384, 390, affirmed (1879), 4 A.R. 159, and (1880), 5 S.C.R. 239.

The exception as to the Crown to which reference is made by Mr. Justice Gwynne, at p. 390 of the report of the case in the Common Pleas, was, no doubt, intended to include the rights of the Crown by virtue of such conditions as existed in the case at bar as to settlement duties and as to the timber.

Doubtless neither the purchaser Freckelton nor his assignee was entitled to the patent for, and the full ownership of, the land until the settlement duties were performed and the purchase money had been paid, but upon obtaining the patent the full and absolute ownership of the land, with all the timber then upon it, would pass to him.

There is nothing either in the Act or in the conditions of the sale in any way to restrict the right of Freckelton or his assignee to dispose of his whole interest in the land, including

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the timber, as he might see fit; what, therefore, was there to prevent him from disposing of his rights in the timber, whatever they might ultimately turn out to be, separately from the land itself? Nothing, that I can see. All the conditions restrain him from doing is the *cutting for sale* before the patent should be issued, unless under license to the person living on the land, any timber, staves, saw-logs, lathwood, shinglewood, cordwood, or any other description of wood.

If the land had been under timber license at the time of the sale, or had been put under license within three years after the sale, the purchaser's rights would have been subject to those of the holder of the license, but it does not appear that any license existed at the time of the sale, or that the Crown ever exercised the right which it reserved to put the land under license, and no difficulty arises, therefore, on this branch of the conditions of sale.

The only right in respect of the timber remaining in the Crown was the right to prevent the cutting of any of the kinds of timber and wood mentioned in the conditions, except under the authority of a license to the person living on the land, until the patent should be issued, and if the purchaser or his assignee chose to leave the timber standing on the whole of the land, except the five acres which he was required to clear as part of his settlement duties, he had clearly the right to do so, and upon the issue of the letters patent the whole of the timber then standing on the lot would have passed to him as well as the land itself.

The sale of the timber to Jamieson Johnston was not in itself a breach of the conditions of the sale, and I see, therefore, no reason why the assignment of it to him should be held to be invalid; it was, on the contrary, I think, a perfectly good and effectual conveyance of the timber, subject to the conditions upon which the sale of the land to Freckelton had been made.

If the patent had not yet been issued, for the respondent to cut any of the kinds of timber and wood mentioned in the conditions of sale would be to contravene these conditions, and, it may be, would entitle the Crown to cancel the sale and forfeit the rights of the purchaser, but it is the Crown only that may do that; and, as far as appears, the Crown has not intervened

and does not intend to do so; and the rights of the appellant to the land have not been put in jeopardy by anything which the respondent has done, nor would they be, by anything which he proposed to do with regard to the timber, and I can see no reason why the appellant should be permitted to invoke the aid of the conditions of sale to prevent the respondent from doing the very thing that Freckelton covenanted with his assignor Jamieson Johnston that he should have the right to do.

Thus far I have dealt with the case on the assumption that the appellant has no higher right as against the respondent than Freckelton would have had, and that, I think, is the true position.

The testimony of Jamieson Johnston at the trial was that before the appellant acquired his rights by the assignment from Freckelton to him, he (Jamieson Johnston) gave the appellant distinct notice of the agreement as to the timber and of his rights under it. This testimony was given with particularity as to the circumstances under which the interview between him and the appellant, when the notice is said to have been given, took place. The appellant no doubt gave a categorical denial to the testimony in this respect of Jamieson Johnston, but he admitted that he was told both by Freckelton and by Bowsley, who had some right under Freckelton, at the time he was dealing with them in reference to the transfer of the land, that Jamieson Johnston had the right to take timber off the lot, but he afterwards qualified this admission by saying that he was not told and did not understand that there was any writing evidencing the right of Jamieson Johnston, and that he was told that Jamieson Johnston's right to take off the timber would terminate in the spring of 1902.

There can be no doubt that it was a term of the agreement between Freckelton and Bowsley and the appellant that the latter should take subject to the right of Jamieson Johnston to take the timber, though, if the appellant's testimony is to be accepted, he was told, as I have said, that the right would terminate in the spring of 1902.

How such a statement could have been made, unless fraudulently, it is difficult to understand, for the terms of the agreement

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are plain that Jamieson Johnston was to have five years from the date of the agreement (27th of November, 1899) to take off the timber.

Upon the whole it was, in my opinion, proved that the appellant had actual notice of the agreement with Jamieson Johnston, and of his rights as they were declared by the assignment from Freckelton to him. The testimony of Jamieson Johnston on this branch of the case is to be preferred to that of the appellant, and if accepted puts this beyond question, and it is also, I think, much more likely that the appellant was told the truth by Freckelton and Bowsley as to the time within which, as the agreement provided, Jamieson Johnston was to take the timber off, than that, apparently with no end to serve by not telling the truth, they made an untrue statement on the point.

It may be said that my late brother Ferguson must have found against the statement of Jamieson Johnson, to which I have referred, but I did not think so. From the papers before us it appears that my late brother, who did not deliver his judgment until some time after the trial (9th September, 1903), procured from the official reporter a transcript of the testimony of the appellant, but not of the evidence of the other witnesses, and it appears to me that the testimony of Jamieson Johnston cannot have been before him or in his recollection when he was examining the case for the purpose of deciding it; had it been, I feel satisfied that he would have made some reference to it, and to his reasons for not giving effect to it.

Having come to these conclusions, it follows, I think, that the judgment appealed from is right and should be affirmed, for I entirely agree with my learned brother that actual notice being proved the appellant cannot set up the registration of the assignment to him to defeat the prior assignment of the timber to Jamieson Johnston.

There is, in my opinion, no reason why the cases decided upon the Registry Acts should not apply to registration under the Indian Act. The purposes which the Acts are designed to serve are the same, and if in the one case actual notice of an instrument is the equivalent of the registration of it, it should have the same effect in the other.

In the view I have taken, it is unnecessary to consider the point upon which my late brother Ferguson decided against the contention of the appellant as to the effect of the registration of the assignment to him.

The appeal should, in my opinion, be dismissed with costs.

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[IN THE COURT OF APPEAL.]

TABB v. GRAND TRUNK RAILWAY COMPANY.

C. A.
1904
June 29.

Railways—Negligence—Failure to Fence—Contributory Negligence—Infant.

A street ran to the north and to the south from the defendants' tracks in a city but did not cross them. With the tacit acquiescence of the defendants, however, foot passengers were in the habit of crossing the tracks from one part of the street to the other and for convenience in doing so part of the fence between the tracks and each part of the street had been removed. A boy of nine intending to cross from one part of the street to the other walked through the opening in the fence to one of the tracks. While he was standing and playing upon this track waiting for a train on another track to pass he was struck by a train running at a speed of about forty miles an hour and was killed:—

Held, that there was a clear neglect of a statutory duty by the defendants in permitting the track to remain unfenced and at the same time running at such a high rate of speed; that it was for the jury to say whether upon all the facts the deceased had displayed such reasonable care as was to have been expected from one of his tender years; and that their verdict in favour of the child's father could not be interfered with.

Judgment of Falconbridge, C.J., affirmed.

THIS was an appeal by the defendants from the judgment at the trial in favour of the plaintiff for $400 and costs.

The action was brought to recover damages for negligence in causing the death of an infant son of the plaintiff, and was tried at Hamilton before Falconbridge, C.J.K.B., and a jury on the 7th of October, 1903.

Questions were submitted and answered as follows;—

1. Was the death of the late Phillip Henry Tabb caused by any failure or neglect of duty on the part of the defendants? Yes.

[FERGUSON, J.]

1903

Sept 9.

BRIDGE v. JOHNSTON.

Indian Lands—Assignment of Timber—Interest in Land—Registration—Conditional Assignment—Priorities—Actual Notice.

The owner of unpatented Indian lands administered by the Department of Indian Affairs for Canada, under the provisions of the Indian Act, R.S.C. 1886, ch. 43, made a sale of certain timber thereon and executed an assignment or transfer to the vendee, by which the vendor agreed to sell and the vendee to purchase all the timber of a certain specified kind upon the land described, for a named price, payable as set out, and by which the vendee was "to have five years from the date hereof to cut and remove the said timber, having the right to make roads and go in and out of the said property during the said term:"—

Held, that the interest assigned was an interest in land, and not a mere chattel interest.

Summers v. *Cook* (1880), 28 Gr. 179, and *Ford* v. *Hodgson* (1902), 3 O.L.R. 526, followed.

Held, also, that the assignment was not an unconditional assignment within the meaning of sec. 43 of the Indian Act, and was incapable of being registered in the manner prescribed by the Act, and therefore did not require registration to preserve its priority, and was entitled to priority over a subsequent registered assignment.

Harrison v. *Armour* (1865), 11 Gr. 303, followed.

Semble, that, although there is no provision in the Indian Act as to "actual notice," the law laid down in *Agra Bank* v. *Barry* (1874), L.R. 7 H.L. 135, at pp. 147, 148, would apply if the subsequent assignee had at the time of registration such notice of the prior assignment.

ACTION for an injunction and damages in respect of alleged trespasses to land. The facts are stated in the judgment.

The action was tried by FERGUSON, J., without a jury, at Walkerton, on the 26th May, 1903.

David Robertson, for the plaintiff.

C. S. Cameron, for the defendant.

September 9. FERGUSON, J.:—The lands in question are lot number 8 in the 8th concession east of the Bury road in the township of Eastnor, in the county of Bruce, and are lands originally surrendered by and set apart for the use of the Chippewas of Saugeen, Owen Sound Indians, and held, sold, and administered by the Department of Indian Affairs for Canada, under the provisions of the Indian Act, R.S.C. ch. 43. The lands are unpatented. It was freely admitted by counsel at the trial that on the 27th November, 1899, James W. Freckleton was the owner of and had a good title to these lands. On that day the said James W. Freckleton made a sale

of certain timber on these lands to one Jamieson Johnston, and duly executed an assignment or transfer of this timber. The operative parts of the assignment are in the words and figures following, that is to say:—

"The party of the first part (Freckleton) agrees to sell and the party of the second part (Jamieson Johnston) agrees to purchase all the timber 10 inches and over in size on lot 8, concession 8, township of Eastnor, E.B.R., for the price or sum of $350, payable as follows." (The times and mode of payment of the purchase money are then stated.) "The party of the second part is to have five years from the date hereof to cut and remove the said timber, having the right to make roads and go in and out of the said property during the said term."

Jamieson Johnston did not register this assignment in the office of the Superintendent General, nor has it, nor have any of the assignments made under it hereafter referred to, been so registered.

On the 2nd March, 1902, Jamieson Johnston assigned and transferred all his interest in respect of the said timber and land to his brother Robert James Johnston, and on the 16th December, 1902, the said Robert James Johnston assigned and transferred all his right and interest to another brother, Samuel Johnston, the defendant.

A part of the timber mentioned in the assignment to Jamieson Johnston has been cut and removed, but there is a substantial part of it remaining uncut upon the land. On the 15th November, 1900, the said James W. Freckleton sold, assigned, and transferred the land, this lot No. 8, to the plaintiff, Thomas John Bridge, his heirs and assigns forever, and at the trial it was admitted that this conveyance had been duly registered in the office of the Department of Indian Affairs, with the Superintendent General, on the 29th November, 1900. Freckleton had contracted to sell the land to one Bosley, who had contracted to sell it to the plaintiff. It was agreed that Freckleton should convey and assign to the plaintiff, instead of having two conveyances, and the conveyance was accordingly made directly to the plaintiff. At the time this was done, and of course before the plaintiff registered his conveyance, both Bosley and Freckleton told him that Jamieson Johnston had

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the right to cut timber on the land until the spring of 1902, but there was not anything said about any assignment or transfer from Freckleton to him, and it is not shewn that the plaintiff had notice or knowledge of such an assignment or transfer till long after the registration by him of the transfer to himself.

The defendant was proceeding to cut and take away timber from the lot in the spring of 1903, when the plaintiff brought this action.

Section 43 of the Act provides for the keeping of a book by the Superintendent General for registering, at the option of the party interested, the particulars of any assignment, and provides that every assignment registered shall be valid against any assignment, previously executed, which is subsequently registered or is unregistered, and that every assignment when registered shall be unconditional in its terms. The original Act, 43 Vict. ch. 28, sec. 43 (D.), provides, amongst other things, that any assignment to be registered must be unconditional in its terms.

This law of registration seems to apply to an assignment made as well by the original purchaser or lessee of Indian lands or his heirs or legal representatives, as by any subsequent assignee or the heirs or legal representatives of any such assignee. The section of the Act respecting registration would, according to its terms, seem to be absolutely decisive as to priority. There does not seem to be any provision (as in our Registry Act) as to "actual notice" had by the subsequent assignee who first registers his assignment, but I think the law so clearly laid down by Lord Cairns in the case *Agra Bank* v. *Barry* (1874), L.R. 7 H.L. 135, at pp. 147, 148, must apply, and that, although the plaintiff's assignment was registered as aforesaid, yet, if he had at the time actual notice of the assignment to Jamieson Johnston, he cannot have the priority he seeks. Such actual notice has not, I think, been proved. There are other cases to the same effect as the *Agra Bank* case.

A question may arise as to whether the law of registration has any application. This rests upon the contention that the interest purchased by Jamieson Johnston from Freckleton was a chattel interest, and not an interest in land. The cases in our Courts relating to this subject are somewhat numerous and

not all in accord. I have perused a large number of these cases, among them being *Johnston* v. *Shortreed* (1886), 12 O.R. 633; *Corbett* v. *Harper* (1884), 5 O.R. 93; *Summers* v. *Cook* (1880), 28 Gr. 179; *McNeill* v. *Haines* (1889), 17 O.R. 479; *Steinhoff* v. *McRae* (1887), 13 O.R. 546; *Handy* v. *Carruthers* (1894), 25 O.R. 279; *Ford* v. *Hodgson* (1902), 3 O.L.R. 526; and I cannot avoid being of the opinion that the interest assigned by Freckleton to Jamieson Johnston was an interest in land and not a mere chattel interest. To this opinion I am bound by the cases *Summers* v. *Cook* and *Ford* v. *Hodgson*, above. It would appear, as I think, if there were no further or other controlling elements in the case, that the priority is in favour of the plaintiff. See the cases *McLean* v. *Burton* (1876), 24 Gr. 134, and *Ferguson* v. *Hill* (1854), 11 U.C.R. 530.

I am, however, after the best consideration I have been able to give the subject, of opinion that the assignment from Freckleton to Jamieson Johnston was a conditional document, that is to say, that it was not an unconditional assignment within the meaning of the Act. It was not, as I think, unconditional in its terms, and, according to the words, and, as I think, the spirit of the Act, it was incapable of being registered in the manner prescribed by the Act. The local agent of the Department was called as a witness, and he was of the opinion that the document was incapable of registration, and said that, had it been offered to him to forward for registration, he would have rejected it, on the grounds stated above. Then, according to the doctrine of the case *Harrison* v. *Armour* (1865), 11 Gr. 303, and the cases and authorities referred to in it, this document (the assignment from Freckleton to Jamieson Johnston) did not require registration to preserve its priority.

This assignment was first in time. It was not, as I think, affected by the registration of the assignment to the plaintiff. I am of the opinion that the title of the defendant is superior to that of the plaintiff, and that the plaintiff's action should be dismissed, and I see no good reason for withholding costs. The interim injunction is also dissolved with costs, including the costs of the motion for it. The action is dismissed with costs.

Order accordingly.

T. T. R.

MONTREAL, 22ND MARCH, 1856.

Coram DAY, J., SMITH, J., (C.) MONDELET, J

No. 997.

The Commissioner of Indian lands for Lower Canada vs. *Payant dit St. Onge et Payant dit St. Onge* (*Plaintiff en garantie*), vs. *On8anoron*, (*Defendant en garantie*).

Held: 1o. That Indians have not by law any right or title by virtue whereof they can sell and dispose of the wood growing upon their lands set apart and appropriated to and for the use of the tribe or body of Indians therein residing.

2o. That such wood is held in trust by the Commissioner of Indian lands for Lower Canada.

This was an action *en saisie-revendication* brought by the Plaintiff in the principal demand for the recovery of twelve cords and upwards of fire-wood of the value of £10, cut, felled and carried away by the Defendant in the principal demand; in November 1854, from and upon the unconceded lands of the Seigniory of Sault St. Louis, which for more than 20 years has been set apart and appropriated to and for the use of the tribe or body of Indians therein residing and as such is vested in the said principal Plaintiff. Besides the value of the wood, the principal Plaintiff claimed £50 for damages.

Before answering this demand; the principal defendant took out an action *en garantie* against the Indian On8anoron with whom he had made a contract for the wood; alledging; "Que par acte reçu à St. Isidore, devant Mtre. Lan-" gevin et son confrère Notaires, le 18 Décembre 1854, le demandeur et le dé-" fendeur convinrent ensemble et déclarèrent ce qui suit, savoir: que le dit dé-" fendeur avait donné, le 1er Novembre dernier au demandeur, un morceau de " terre d'environ un demi arpent en superficie, sur sa terre qu'il occupait alors " dans le dit Sault St. Louis, située au côté sud-est du chemin de fer de Mon-" tréal et New-York, à nettoyer et faire la terre du demi arpent en superficie au " rateau, (les souches exceptées) et livrable au printemps prochain, pour être " ensemencées, ce à quoi le dit demandeur consentit et s'obligea par le dit acte, " Et pour toute indemnité de la part du dit défendeur envers le dit demandeur " ce dernier enleverait dedans le dit morceau de terre tout le bois qui s'y trouvait " et en disposerait comme bon lui semblerait; tel fut expressement convenu." The defendant *en garantie* having appeared took up the *fait et cause* of the said principal defendant and pleaded as follows:

"Le défendeur en garantie prenant le fait et cause du défendeur principal et n'admettant en rien les allégations du demandeur principal, dit: pour exception péremptoire à sa demande:

"Que lui le défendeur en garantie a été pour plus de cinq ans, propriétaire en possession, et a joui pour son propre usage et avantage, et cela d'une manière distincte des autres terres formant partie des terres qui sont sous le contrôle du demandeur principal, d'un certain lot de terre sis et situé dans la Seigneurie du Sault St. Louis, au côté sud-est du chemin de fer de Montréal et New-York; lequel lot de terre est encore occupé par le dit défendeur en garantie.

"Qu'il en était ainsi en possession le ou vers le 1er Novembre dernier ainsi que du bois qui avait crû sur ce lot de terre.

cause was cut and carried off was within the limits of the said Seigniory and that the principal defendant is not of Indian blood.

2°. That the Indians residing in the said Seigniory of which the defendant *en garantie* is one, have certain rights of property to wit: The power to enter upon portions of the uncleared lands of the said Seigniory, for the purpose of clearing and cultivating the same for their own use and profit.

3°. That all Indians residing in the said Seigniory have the right to cut whatever wood they may require for fire or other purposes for their own use.

4°. That the possession or occupation of any portion of land in the said Seigniory by any individual Indian gives him right of property therein as against any other Indians.

5°. That the defendant *en garantie* had the common Indian right to the land from which the wood in question in this cause was cut.

6°. That the question of the right of Indians to sell wood off the lands of the said Seigniory has agitated the said community of Indians for a considerable period and that the chiefs thereof had warned the said Community not to traffic in wood, but the said parties defendants do not admit that the chiefs had any right to forbid the sale of wood so cut as aforesaid, and neither the defendant nor defendant *en garantie* plead ignorance that such traffic was forbidden by the said chiefs, but on the contrary the said parties were well aware of the said traffic being forbidden as aforesaid.

That the wood seized in this cause has grown upon the lot of ground in question, that is to say, the lot of ground described in the plea fyled by defendant *en garantie*, which lot of ground was at the time of the seizure and at the time of the sale made by the said defendant *en garantie* to the principal defendant of the wood in question, in the occupation of the said defendant *en garantie* in virtue of the right of property belonging to Indians as set forth in the admission, No. 2, and that it is in virtue of the agreement and bargain made between the defendant and the defendant *en garantie*, according to the sale and permission made and given by the latter to the former that the defeudant has cut the wood or caused the said wood, to be cut and carried off.

The Plaintiff does not admit however the right of the defendant *en garantie* to sell the wood aforesaid, leaving to the Court the appreciation of that right.

The parties having been heard upon the merits, the Court gave judgment in favor of the principal plaintiff, which is *motivé* as follows:

"The Court having heard the plaintiff and the defendant *en garantie* by their counsel upon the merits of this cause as well upon the principal demand as upon the *demande en garantie*; the principal Defendant not having pleaded to the said principal demand and being foreclosed from so doing, having examined the proceedings, proof of record, and seen the admissions made and given by the parties respectively in this cause, and having deliberated, considering that the Plaintiff hath established by evidence the material allegations of his declaration and that the Defendant *en garantie*, Saro Onsanoron, who hath taken the *fait et cause* of the Defendant Louis Payant dit St. Onge had not by law any right or title by virtue whereof he could sell and dispose of the wood in this cause leased to him the said Louis Payant dit St. Onge and that he the said Louis Payant dit St.

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"Que ce jour là il a permis au defendeur principal d'enlever du bois qui se trouvait sur le lot, et de le convertir à son propre usage ainsi qu'il a été convenu plus tard par acte fait le 18 Décembre 1854 devant Mtre. J. F. Langevin et son confrère Notaires, lequel acte est produit avec les présentes pour y référer comme en faisant partie.

"Que par les us et coutumes suivis dans la tribu Indienne du Sault St. Louis lui le défendeur en garantie avait droit de jouir du dit lot de terre et de convertir à son propre usage le bois qui avait crû sur ce lot.

"Que le défendeur principal qui avait acquis le bois du défendeur en garantie n'en pouvait être en aucune façon quelconque dépossédé par le demandeur principal et qu'ainsi la saisie de partie de ce bois faite en cette cause a été pratiquée à tort et le demandeur principal ne peut revendiquer la propriété du bois saisi.

"Pourquoi le défendeur en garantie demande le débouté de la dite action et saisie avec dépens."

To this Plea, the principal Plaintiff answered specially as follows:

"That even if the defendant *en garantie* did occupy the land mentioned in the said pleas, which the Plaintiff does not admit but on the contrary denies; yet the occupation thereof or the possession thereof under the customary Indian Title could confer no right on the occupant to sell and dispose of the wood thereon or any part thereof.

That the whole of the lands of the said Seigniory are held in trust by the Plaintiff for the benefit of the whole tribe of Indians therein residing and under the local regulations of the chiefs of the said tribe, duly appointed by competent authority.

That the right to take wood from off the said lands, by the said regulations and by law extends only to the taking of such wood as may be required for the individual uses of the Indians residing therein and confers on no party the right to sell and dispose of the same, and plaintiff specially denies that the defendant *en garantie* had any legal right to sell and dispose of the wood seized in this cause to the Defendant or to any other persons whatever and particularly to such persons as are by law prohibited from selling or holding property within the Indian lands of this province and of which persons the Defendant is one.

That both the defendant and the defendant *en garantie* were well aware of these facts yet contriving to despoil the said property of the wood growing thereon to the loss and injury of the community of Indians for whom the said plaintiff holds the said lands in trust, the defendant with the connivance of the defendant *en garantie* took the wood mentioned in the plaintiff's declaration from off the lands of the said Seigniory and removed the same out of the possession of the said plaintiff and to give a colour to the said unlawful act; the agreement fyled by the defendant *en garantie* was afterwards drawn up.

The parties having gone to proof; the following admissions were agreed upon by them:

The parties to avoid costs, admit:—

1°. That the plaintiff is vested with the lands of the Seigniory of Sault St. Louis in trust for the whole tribe of Indians therein residing as provided for in the statute in that behalf and that the land from which the wood seized in this

cause was cut and carried off was within the limits of the said Seigniory and that the principal defendant is not of Indian blood.

2°. That the Indians residing in the said Seigniory of which the defendant *en garantie* is one, have certain rights of property to wit: The power to enter upon portions of the uncleared lands of the said Seigniory, for the purpose of clearing and cultivating the same for their own use and profit.

3°. That all Indians residing in the said Seigniory have the right to cut whatever wood they may require for fire or other purposes for their own use.

4°. That the possession or occupation of any portion of land in the said Seigniory by any individual Indian gives him right of property therein as against any other Indians.

5°. That the defendant *en garantie* had the common Indian right to the land from which the wood in question in this cause was cut.

6°. That the question of the right of Indians to sell wood off the lands of the said Seigniory has agitated the said community of Indians for a considerable period and that the chiefs thereof had warned the said Community not to traffic in wood, but the said parties defendants do not admit that the chiefs had any right to forbid the sale of wood so cut as aforesaid, and neither the defendant nor defendant *en garantie* plead ignorance that such traffic was forbidden by the said chiefs, but on the contrary the said parties were well aware of the said traffic being forbidden as aforesaid.

That the wood seized in this cause has grown upon the lot of ground in question, that is to say, the lot of ground described in the plea fyled by defendant *en garantie*, which lot of ground was at the time of the seizure and at the time of the sale made by the said defendant *en garantie* to the principal defendant of the wood in question, in the occupation of the said defendant *en garantie* in virtue of the right of property belonging to Indians as set forth in the admission, No. 2, and that it is in virtue of the agreement and bargain made between the defendant and the defendant *en garantie*, according to the sale and permission made and given by the latter to the former that the defendant has cut the wood or caused the said wood, to be cut and carried off.

The Plaintiff does not admit however the right of the defendant *en garantie* to sell the wood aforesaid, leaving to the Court the appreciation of that right.

The parties having been heard upon the merits, the Court gave judgment in favor of the principal plaintiff, which is *motivé* as follows:

"The Court having heard the plaintiff and the defendant *en garantie* by their counsel upon the merits of this cause as well upon the principal demand as upon the *demande en garantie*; the principal Defendant not having pleaded to the said principal demand and being foreclosed from so doing, having examined the proceedings, proof of record, and seen the admissions made and given by the parties respectively in this cause, and having deliberated, considering that the Plaintiff hath established by evidence the material allegations of his declaration and that the Defendant *en garantie*, Saro On8anoron, who hath taken the *fait et cause* of the Defendant Louis Payant dit St. Onge had not by law any right or title by virtue whereof he could sell and dispose of the wood in this cause leased to him the said Louis Payant dit St. Onge and that he the said Louis Payant dit St.

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Onge did not by reason of the agreement dated the eighteenth day of December one thousand eight hundred and fifty-four and by him in the said cause filed as his exhibit number one, acquire any right to cut the said wood and to remove thence the same in manner and form as in and by the said agreement and by the exception of the said Defendant *en garantie* is set forth, dismissing the said exception and adjudging upon the merits of the said principal demand; doth declare the attachment or *saisie revendication* made in this cause of about twelve cords of fire wood good and valid and doth declare the same to be the property of the said Plaintiff in his said capacity, and it is ordered that the said twelve cords of fire wood be delivered up and restored to the said Plaintiff in his said capacity and the Court doth condemn the defendant Louis Payant dit St. Onge to pay the costs of this action and as to any other or further conclusions by the Plaintiff in and by his said declaration taken the same is hence dismissed; and the Court adjudging upon the *demande en garantie* in this cause: it is considered and adjudged that the said Defendant *en garantie* Saro Onsanoron do guarantee indemnify and hold harmless the said principal Defendant and Plaintiff *en garantie* Louis Payant dit St. Onge from the condemnation herein pronounced against him."

Dunlop, Attorney for principal Plaintiff.

Loranger et Pominville, Attorneys for principal Defendant and Plaintiff en garantie.

Coursol, Attorney for Defendant en garantie.

P. B. L.)

COURT OF QUEEN'S BENCH.

IN APPEAL.

FROM THE DISTRICT OF MONTREAL.

MONTREAL, 9TH JUNE, 1859.

Coram SIR L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., MEREDITH, J. C. MONDELET, J.

No. 51.

NIANENTSIASA, Appellant.

AND

AKWIRENTE ET AL., Respondents'

Held,—That the security bond given in appeal by Indians is valid, inasmuch as in the present case, the Indians who became securities were, as appeared by the affidavits, in possession as proprietors according to the Indian customary law, of certain real estate situated and lying within the tract of land appropriated to the uses of the tribe to which they belonged.

The Respondents having made a motion to set aside the security given by the Appellant, (which security consisted of two Indians, Ignace Kaneratahere and Thomas Tahantison), a rule was issued returnable on the 30th April, 1859, and which rule is in the following words:

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THE DEPARTMENT OF INDIAN AFFAIRS v. BOARD OF INVESTIGATION UNDER WATER ACT, AND CROSINA.

Water and watercourses—Application by Indian agent for record for reserve—Record issued—Provision as to Indian reserves not complied with—Conditions precedent—R.S.B.C. 1897, Cap. 190, Secs. 4 and 35; 1924, Secs. 308 and 337.

Section 35 of the Water Clauses Consolidation Act, 1897, provides that "The chief commissioner of lands and works, with the approval of the Lieutenant-Governor in Council, may upon such terms and conditions as to compensation to persons affected as the chief commissioner may think proper to impose, authorize the record for the benefit of all or any of the Indians located on any Indian reserve, of so much and no more of any unrecorded water," etc. On the application of an Indian agent a water record was issued by the assistant commissioner of lands and works on the 15th of August, 1899, authorizing the diversion of one hundred inches of water from Five Mile Creek for use upon the Williams Lake Indian Reserve. No authority was obtained from the chief commissioner for the issue of the record and there was no approval thereof by order in council until the 30th of May, 1908. Two water records for the same creek were issued to the respondent Crosina subsequent to the issue of the above record but prior to the order in council of 1908. It was held by the Board of Investigation under the Water Act that Crosina's records had priority.

Held, on appeal, affirming the decision of the Board of Investigation (McPHILLIPS, J.A. dissenting), that the authority of the chief commissioner and the approval of the Lieutenant-Governor in Council are conditions precedent to the power of the commissioner to make the record. The Indian agent's record was therefore a nullity until the passing of the order in council in 1908 and the Crosina records issued prior to that date take precedence.

Statement

APPEAL by the Department of Indian Affairs from the decision of the Board of Investigation under the Water Act, of the 4th of October, 1924, whereby the said department was granted a water licence out of Five Mile Creek in the Lillooet District for 672 acre feet for irrigation and 12,000 gallons per day for domestic purposes for use on Williams Lake Indian Reserve with priority as of the 2nd of June, 1908. The facts are that record No. 48 was granted by the assistant commissioner

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of lands and works to the Indian agent on the 15th of August, 1899, purporting to authorize the diversion of 100 inches of water from Five Mile Creek for use upon the Williams Lake Indian Reserve and the water was used from year to year in varying quantities in accordance with the record. Record No. 236 was granted by the assistant commissioner of lands and works to Louis J. Crosina on the 5th of December, 1904, for 100 inches of water from Five Mile Creek for use on lots 195-196, Cariboo District, and on October 9th, 1906, another record (No. 288) was granted Crosina for 100 inches from the same creek to be used on the same lots, and the water was used from year to year under both these records. Record No. 48 was never approved by the Lieutenant-Governor in Council until the 2nd of June, 1908, and Crosina never had notice of, nor was he aware of the requests made by the Department of Indian Affairs in 1906, 1907 and 1908 to the chief commissioner of lands and works to have the granting of record No. 48 formally approved by the Lieutenant-Governor in Council and no notice of the intention of the Lieutenant-Governor in Council to pass the required order in council was given Crosina. The total flow of Five Mile Creek is not sufficient to satisfy the requirements of said licences.

Statement

The appeal was argued at Vancouver on the 4th and 5th of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Ellis, K.C., for appellant: The right of appeal is under section 337 of the Water Act. The record was obtained under the consolidation of 1897. The investigation is under section 308 of the present Water Act. We obtained our record in 1899 but it was not approved by order in council until 1908. The order in council is not a condition precedent and we submit we are entitled to priority from 1899: see *Regina* v. *Hart* (1887), 2 B.C. 264.

Argument

Stuart Henderson, for respondent: An application for a record for Indians on a reserve is specially provided for by section 35 of the Act of 1897. The chief commissioner, with the approval of the Lieutenant-Governor in Council may authorize such a record. This was never done until 1908.

approval of the Lieutenant-Governor in Council. Both which conditions were absent until 1908. It is clear to me that the executive cannot make the approval and authorization retroactive, if on the true construction of the statute, the acts aforesaid are, as I think they are, conditions precedent to the power of the commissioner to make the record. It cannot be assumed that the chief commissioner authorized the making of the record in 1899 without the approval of the Lieutenant-Governor in Council. I think such authorization, if given, would be ineffective. It was not the chief commissioner's duty to authorize the making of the record until the approval of the Lieutenant-Governor in Council had been obtained. As the commissioner made it without the authority of the chief commissioner, it was a nullity. It must, therefore, be considered to have been made only when the requisite power to make it was bestowed, *viz.*, in 1908. The statute, section 17, declares that the record shall speak from the day on which it was made.

MACDONALD, C.J.A.

The appeal should be dismissed.

MARTIN, J.A.: I would dismiss the appeal.

MARTIN, J.A.

GALLIHER, J.A.: My sympathies are all with the Indians in this contest; they on their part, or through their representative, having done what was required of them, and having enjoyed their rights which they assumed had been properly granted them for a period of five years before Crosina procured his first record, they afterwards find that no order in council, as provided for in the Act, had been passed approving of the granting of the record. This order in council was not passed until 1908, four years after the grant of the first record to Crosina (December, 1904), No. 236, and two years after the second record (October 9th, 1906), No. 288.

GALLIHER, J.A.

So far as the records before us shew, the matter does not seem to have been taken up by the superintendent of Indian affairs (Mr. Vowell) with E. Bell, Indian agent at Clinton, until October 25th, 1906, nine days after the granting of the second record to Crosina. Mr. Vowell then took the matter up with the chief commissioner of lands and works, at Victoria, by letter on 3rd December, 1906—see letter of April 12th, 1907.

priority to the licences issued to them in that the approval of the Lieutenant-Governor in Council was not obtained for the licence until the 2nd of June, 1908, a date subsequent to the licences held by him, and it would appear that the Board of Investigation in its determination and order held that the licence issued to the Indians in 1899 should only take precedence from the 2nd of June, 1908, thereby displacing the record and rendering it subsequent to the records of the respondent Crosina, they being given precedence respectively the 5th of December, 1904, and the 9th of October, 1906, the result being that the prior record granted to the Indians, *viz.*, in 1899, is rendered valueless owing to insufficiency of water—for records obtained in one case five years after and in the other, seven years after the record made to the Indians, of which the respondent Crosina must be held to have had notice.

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Now, the short point is this: did the Board of Investigation arrive at a proper conclusion in holding that the record granted to the Indians was only entitled to be given effect upon the date of the approval of the record, *viz.*, on the 2nd of June, 1908?

MCPHILLIPS, J.A.

The section of the Act which governs in the consideration of the point is section 35, of the Water Clauses Consolidation Act, 1897. The order in council granting approval of the record to the Indians reads as follows: [The learned judge here set out the record and continued].

The record may be made by the chief commissioner of lands and works, or, as here, by the assistant commissioner, who has equal authority (see section 2, interpretation section of the Act). A multitude of matters have to be gone into and examinations had. This had to precede the approval by the Lieutenant-Governor in Council. It was only after all this was done that the approval could be applied for. That there was delay in obtaining the approval did not really work any injury to anyone. The record being made, the water has been used by the Indians for years. This was a matter of general public knowledge and unquestionably was known to the respondent, Crosina; in any case, he was affected with notice, the record being made by the proper officer and of record in the public office. The objection taken is one absolutely without merit, and with no equity to

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of lands and works to the Indian agent on the 15th of August, 1899, purporting to authorize the diversion of 100 inches of water from Five Mile Creek for use upon the Williams Lake Indian Reserve and the water was used from year to year in varying quantities in accordance with the record. Record No. 236 was granted by the assistant commissioner of lands and works to Louis J. Crosina on the 5th of December, 1904, for 100 inches of water from Five Mile Creek for use on lots 195-196, Cariboo District, and on October 9th, 1906, another record (No. 288) was granted Crosina for 100 inches from the same creek to be used on the same lots, and the water was used from year to year under both these records. Record No. 48 was never approved by the Lieutenant-Governor in Council until the 2nd of June, 1908, and Crosina never had notice of, nor was he aware of the requests made by the Department of Indian Affairs in 1906, 1907 and 1908 to the chief commissioner of lands and works to have the granting of record No. 48 formally approved by the Lieutenant-Governor in Council and no notice of the intention of the Lieutenant-Governor in Council to pass the required order in council was given Crosina. The total flow of Five Mile Creek is not sufficient to satisfy the requirements of said licences.

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Argument

Stuart Henderson, for respondent: An application for a record for Indians on a reserve is specially provided for by section 35 of the Act of 1897. The chief commissioner, with the approval of the Lieutenant-Governor in Council may authorize such a record. This was never done until 1908.

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The consent must be added before it is a record. They had nothing until 1908. In the meantime we obtained our records and they take precedence.

Ellis, in reply, referred to *Quinn* v. *Beales* (1923), 3 W.W.R. 561; *Western Canada Mortgage Co., Ltd.* v. *O'Farrell* (1921), 1 W.W.R. 121 and on appeal (1921), 2 W.W.R. 626; *Scott* v. *Tremblay* (1923), 1 W.W.R. 1259 at p. 1263.

Cur. adv. vult.

4th June, 1925.

MACDONALD, C.J.A.: In my opinion the appeal cannot succeed. The Indian agent applied, in 1899, to the commissioner for a record of water out of the stream in question, and after complying, as I shall assume, with all the provisions of the Water Clauses Consolidation Act, R.S.B.C. 1897, Cap. 190, on his part to be observed, he became, subject to the approval of the chief commissioner of lands and works, and the Lieutenant-Governor in Council, entitled to a water record in pursuance thereof. It was at that time the duty of the commissioner to make a report on the application of the Indian agent (see section 35(2) (*d*)) to the chief commissioner, and should the latter be satisfied that a record should be made, and upon obtaining the approval of the Lieutenant-Governor in Council, he might authorize the same.

MACDONALD, C.J.A.

I will assume, though there is nothing in the case to shew it, that the commissioner made such report in this case. The water record, however, appears to have been made on 16th August, 1899, but there is nothing in the case to shew any authority therefor from the chief commissioner, and it is admitted that there was no approval by order in council, until the 30th of May, 1908, when the order in council was made confirming the record as from its date. Other records having been made between these dates, the respondent, the Water Board, held that these intervening records were entitled to priority over that of the Indian agent, and it is from this decision that the appeal is taken.

The record could not have been made except upon the authority of the chief commissioner, and then only with the

approval of the Lieutenant-Governor in Council. Both which conditions were absent until 1908. It is clear to me that the executive cannot make the approval and authorization retroactive, if on the true construction of the statute, the acts aforesaid are, as I think they are, conditions precedent to the power of the commissioner to make the record. It cannot be assumed that the chief commissioner authorized the making of the record in 1899 without the approval of the Lieutenant-Governor in Council. I think such authorization, if given, would be ineffective. It was not the chief commissioner's duty to authorize the making of the record until the approval of the Lieutenant-Governor in Council had been obtained. As the commissioner made it without the authority of the chief commissioner, it was a nullity. It must, therefore, be considered to have been made only when the requisite power to make it was bestowed, *viz.*, in 1908. The statute, section 17, declares that the record shall speak from the day on which it was made.

MACDONALD, C.J.A.

The appeal should be dismissed.

MARTIN, J.A.: I would dismiss the appeal.

MARTIN, J.A.

GALLIHER, J.A.: My sympathies are all with the Indians in this contest; they on their part, or through their representative, having done what was required of them, and having enjoyed their rights which they assumed had been properly granted them for a period of five years before Crosina procured his first record, they afterwards find that no order in council, as provided for in the Act, had been passed approving of the granting of the record. This order in council was not passed until 1908, four years after the grant of the first record to Crosina (December, 1904), No. 236, and two years after the second record (October 9th, 1906), No. 288.

GALLIHER, J.A.

So far as the records before us shew, the matter does not seem to have been taken up by the superintendent of Indian affairs (Mr. Vowell) with E. Bell, Indian agent at Clinton, until October 25th, 1906, nine days after the granting of the second record to Crosina. Mr. Vowell then took the matter up with the chief commissioner of lands and works, at Victoria, by letter on 3rd December, 1906—see letter of April 12th, 1907.

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Notwithstanding several letters and personal interviews passed between Mr. Vowell and the department of lands and works, the order in council was not passed until June 20th, 1908. No explanation of this is forthcoming and I imagine it would be hard to find one, but be that as it may, the first question that confronts us is, was the approval of the Lieutenant-Governor in Council a condition precedent to the issuance of a record to Indians? If so, that ends the matter, as no record could be deemed to have been issued, at all events, until the order in council above referred to was passed, and only from the date of such passing.

GALLIHER, J.A.

I have read and reread the Act and have examined such authorities as seemed to have a bearing on the question, but have found myself (with regret) unable to conclude that this is not a condition precedent. The appeal must, therefore, be dismissed.

McPhillips, J.A.: This appeal is one from the determination and order of the Board of Investigation under the Water Act, and is an appeal brought by the Department of Indian Affairs. The decision was given on the 14th of October, 1924.

The determination and order under appeal admits

"that a valid water record affecting the said claim was made under the authority of an Act passed prior to the 12th day of March, 1909, and that, under the said water record, the Williams Lake tribe or band of Indians was granted a right to take and use water from Five Mile Creek, a tributary of Williams Lake, for irrigation and domestic purposes on the Sugar Cane or Williams Lake Indian Reserve, being Reserve No. 1 of the said tribe or band."

MCPHILLIPS, J.A.

The admitted record No. 48 was granted by the assistant commissioner of lands and works, J. Bowron, to E. Bell, Indian agent, on August 15th, 1899, and the beneficial user of the water has ever since been enjoyed by the Indians, and the water is vital and necessary to the Indians. That in the years 1904 and 1906, two further records were made by the same assistant commissioner, each for 100 inches from the said Five Mile Creek. The fact now is that the water available is not sufficient to satisfy the requirements of all the licences.

The respondent, Lewis J. Crosina, before the Board of Investigation, objected to the licence to the Indians having

priority to the licences issued to them in that the approval of the Lieutenant-Governor in Council was not obtained for the licence until the 2nd of June, 1908, a date subsequent to the licences held by him, and it would appear that the Board of Investigation in its determination and order held that the licence issued to the Indians in 1899 should only take precedence from the 2nd of June, 1908, thereby displacing the record and rendering it subsequent to the records of the respondent Crosina, they being given precedence respectively the 5th of December, 1904, and the 9th of October, 1906, the result being that the prior record granted to the Indians, *viz.*, in 1899, is rendered valueless owing to insufficiency of water—for records obtained in one case five years after and in the other, seven years after the record made to the Indians, of which the respondent Crosina must be held to have had notice.

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Now, the short point is this: did the Board of Investigation arrive at a proper conclusion in holding that the record granted to the Indians was only entitled to be given effect upon the date of the approval of the record, *viz.*, on the 2nd of June, 1908?

MCPHILLIPS, J.A.

The section of the Act which governs in the consideration of the point is section 35, of the Water Clauses Consolidation Act, 1897. The order in council granting approval of the record to the Indians reads as follows: [The learned judge here set out the record and continued].

The record may be made by the chief commissioner of lands and works, or, as here, by the assistant commissioner, who has equal authority (see section 2, interpretation section of the Act). A multitude of matters have to be gone into and examinations had. This had to precede the approval by the Lieutenant-Governor in Council. It was only after all this was done that the approval could be applied for. That there was delay in obtaining the approval did not really work any injury to anyone. The record being made, the water has been used by the Indians for years. This was a matter of general public knowledge and unquestionably was known to the respondent, Crosina; in any case, he was affected with notice, the record being made by the proper officer and of record in the public office. The objection taken is one absolutely without merit, and with no equity to

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support it. Further, the deprivation of the right to the water so long enjoyed by the Indians, works grave injury to them. It is, therefore, a case calling for the application of the strictest principles of law, as the decision arrived at by the Board of Investigation in its result is destructive, upon the facts, of natural justice. The approval of the Lieutenant-Governor in Council would be obtained upon the motion of the chief commissioner of lands and works, not the motion of the Indian department, and it might well be that the Indian department would reasonably assume that the requisite approval was in due course obtained. That it was not obtained until the 2nd of June, 1908, was not the default of the Indian department. The question is, as I have above indicated, whether the approval is confirmatory of the record in favour of the Indians made on the 15th of August, 1899? In my opinion it is. The approval cannot be said to be at all a condition precedent to the record being made, as of necessity it must follow the making of the record, and the statute is silent as to when the approval of the Lieutenant-Governor in Council must be obtained. I know of no authority which holds that in a situation such as this, where a bare approval is to be obtained, that the approval may not be obtained at any time. Had the Legislature enacted that the approval should be obtained within a stated time after the making of the record, then there would be no question of the necessity for approval within that time. Here, however, the statute is silent. Only two cases were referred to upon the argument at this Bar bearing upon the point, and they would both appear to be helpful, if not determinative, of the point against the respondent. In *Regina* v. *Hart* (1887), 2 B.C. 264, Mr. Justice McCreight, a most eminent and learned judge, held that where an appointment was to be made by a municipal corporation subject to the consent of the Lieutenant-Governor in Council, that it was immaterial whether the assent of the Lieutenant-Governor in Council was obtained before or after the resolution of the municipal council. At p. 267, the learned judge said:

"It seems to me the resolution was complete before such assent was given, but I think further that it is immaterial in what order the action

of the Council and of the Lieutenant-Governor took place. What is required is the consent of both."

Here we have the record duly made and later it is true, six years later, the approval.

When local conditions are considered and the vastness of this Province, it may well be said that what is looked to is, first, the record and that is notice to the world; the approval being obtained will complete the matter, but surely the record being made is not to be defeated by delay in obtaining the approval, a matter subsequent, and one unquestionably of delay under the best of conditions. In *Quinn* v. *Beales* (1923), 3 W.W.R. 561, there is some analogy. The head-note well indicates the effect of the decision. It reads as follows:

"The omission to obtain leave to commence action, as required by *The Drought Area Relief Act, Alta.*, 1922, Ch. 43, Sec. 8, which provides 'that no action . . . . . shall hereafter be taken or continued without the leave of a judge,' does not necessarily make the proceedings taken before leave is obtained a nullity. The judge may grant such leave at trial so as to give effect to the proceedings already taken and such leave may be so given by a Supreme Court judge. The circumstances in question were held to be such as to warrant such leave being given by the Supreme Court judge on application therefor at trial of the action. (*Western Canada Mortgage Co. Ltd.* v. *O'Farrell* ([(1920)], 16 Alta. L.R. 429; (1921), 1 W.W.R. 121; (1921), 2 W.W.R. 626; *Scott* v. *Tremblay* (1923), 1 W.W.R. 1259; *Snowden* v. *Baker* (1922), 3 W.W.R. 1002; *Vanstone* v. *Wiles* (1923), 1 W.W.R. 832, cited)."

To graphically portray the matter, if the decision under appeal is correct, then this in illustration might have been the fact and the record in favour of the Indians defeated: A applies on the 16th of August, 1899, the day after the Indians' record, and is given a record. Plainly the approval of the Lieutenant-Governor in Council could not have been obtained by then, the record being in distant Cariboo, nevertheless, if this was the fact A's record would have precedence. This result cannot have been the intention of the Legislature, it would be manifest absurdity. In *The Duke of Buccleuch* (1889), 15 P.D. 86, Lindley, L.J., at p. 96, said:

"You are not so to construe the Act of Parliament as to reduce it to rank absurdity. You are not to attribute to general language used by the Legislature, in this case any more than in any other case, a meaning that would not only carry out its object, but produce consequences which to the ordinary intelligence are absurd. You must give it such a meaning as will carry out its objects."

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In my opinion the record in favour of the Indians, having received the approval of the Lieutenant-Governor in Council, was and is effective from the date of the record, *viz.*, from the 15th of August, 1899; the determination and order of the Board of Investigation in so far as precedence in the licence to the Indians is stated to be of the 2nd of June, 1908, should be reversed and the date of precedence in the licence should be amended to read the 15th of August, 1899.

The appeal, in my opinion, should be allowed.

MACDONALD, J.A.

MACDONALD, J.A.: The original water record (number 48 for 100 inches of water from Five Mile Creek) was, if valid, issued on August 15th, 1899, pursuant to section 35 of Cap. 190, R.S.B.C. 1897. Under that section, the chief commissioner of lands and works, with the approval of the Lieutenant-Governor in Council, might authorize the issuance of a record. Statutes often confer on the minister of a single department authority to do certain acts on his own initiative. Other statutes, in the express limitation of that power, require the assent of the executive council as evidenced by an order in council before a valid exercise of a power can be made. When we have such a statutory requirement it must be strictly followed, otherwise the act of the chief commissioner has no legal effect. No valid water record, therefore, was authorized in 1899. It was not possible either for the appellant to acquire title to the water by user for a number of years. That right being purely statutory, could only be acquired in the manner laid down by the statute.

An order in council was passed in 1908 purporting to validate this alleged water record as of the date of issuance. In the meantime, however, the respondent Crosina obtained two valid water licences for the diversion of 100 inches of water from the same creek. The total flow is insufficient to satisfy the requirements of the appellant under this so-called record number 48 and of the respondent under the licences referred to. This order in council not only had nothing to operate on, as it purports to validate a record in name only, but there was in fact no statutory authority for passing it. Even if it may be looked

upon as a belated order, meant to take the place of the order which should have been obtained in the first instance under section 35 of Cap. 190, R.S.B.C. 1897, it could not remedy an omission in the nature of a condition precedent. Possibly if the respondent had not acquired rights in the meantime this order in council might validate the original record from the date of its issuance, *i.e.*, 1908, but it is not necessary to decide that point. The respondent's rights were acquired at a time when there was no valid prior record standing in his way. I would dismiss the appeal.

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Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Ellis & Brown.*
Solicitor for respondent: *Stuart Henderson.*

PETER v. YORKSHIRE ESTATE COMPANY LIMITED AND THE YORKSHIRE AND CANADIAN TRUST LIMITED.

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PETER v. YORKSHIRE ESTATE CO.

Workmen's Compensation Act — Damages — Personal injuries — Action to recover—Order of Board that plaintiff comes within Act—Application to dismiss action—Refused—Appeal—R.S.B.C. 1924, Cap. 278. Secs. 4, 11(4), 12(3) and 74(j).

The plaintiff, who was employed as a salesman by a company occupying offices as tenants in a building, was injured through the falling of one of the elevators in said building after leaving his employer's offices. He brought action for damages against the owners of the building. On the application of the defendants the Workmen's Compensation Board made an order declaring that the accident was one in respect to which the plaintiff has a right to compensation under the Act. An application by the defendants for dismissal of the action on the ground that it is barred by the Workmen's Compensation Act was dismissed.

Held, on appeal, reversing the decision of MORRISON, J., that under the Act the Board has exclusive jurisdiction to inquire into and determine the facts and the law and the Board did determine that the plaintiff's right

FEGAN v. MCLEAN.

Indian land—Right of Indians to sell timber.

Held, that an Indian might sell cordwood cut by him on unsurrendered Indian reserve land, of which he was in occupation as a member of the tribe.

Morrison, J., concurred on the ground only that the wood in this case might, for all that appeared, have been cut by the Indian in clearing the land with a view to its cultivation by him.

SPECIAL CASE stated in a cause removed from the Division Court by *certiorari*.

Trespass for taking the plaintiff's goods at the township of Tuscarora, in the county of Brant.

Pleas.—Not guilty; and that the goods were the goods of the defendant, and not of the plaintiff. Issue.

The case stated that the cordwood, the subject of the action, was cut on Indian lands, part of the Indian Reserve, by one John Peters, an Indian, who occupied the land on which the wood was cut, such occupation by him being as a member of an Indian tribe, and that the cutting was without the license of the Indian Department or of any commissioner thereof.

The wood when made into cordwood was sold by Peters to the plaintiff, and was to have been delivered by Peters off the Indian Reserve, and was at the commencement of this suit still on the reserve.

The Indian Reserve was unsurrendered Indian land, set apart by the Crown for the use of the Six Nations Indians, of which Peter was one.

The cordwood was seized on the reserve by instructions from the Indian Department by the defendant, who was one of the commissioners appointed for the management of Indian affairs, and who was also forest warden over the reserve. The defendant contended the cutting of the cordwood was without lawful authority

This seizure was the trespass complained of.

By order in council, dated 5th May, 1862, made under the 23 Vic. ch. 151, sec. 7, the following sections and sub-

sections of ch. 23 of Consol. Stat. C. were made applicable to Indian lands: namely, sec. 1, sub-sec. 2, secs. 2, 3, 4, 5, 6, 7, 8 and sub-sec. 2, secs. 11, 12 and 13.

The questions for the opinion of the court were,

1. Did the plaintiff acquire property in the cordwood under the facts stated?

2. Had the defendant a right, as such forest warden and commissioner, to seize the cordwood?

If the court were of opinion that the plaintiff did acquire property in the cordwood, or that the defendant had no right to seize it, their judgment was to be given for the plaintiff. But if the court were of opinion that the plaintiff had no property in the cordwood, and that the defendant had a right to seize the same, then judgment was to be given for the defendant.

The case was argued in Michaelmas Term last.

Furlong for the plaintiff. John Peters was the actual and lawful occupant of the land. He had the right to take the timber, and to dispose of it. Unless it plainly appears Peters had no such right, and that the defendant's authority was as extensive as he asserts it to have been, the plaintiff must recover. Even if the defendant had the power to seize the cordwood, he did not lawfully pursue his authority. The 8th section of Consol. Stat. C. ch. 23 required an affidavit to be first made before a justice of the peace that the wood had been cut without authority on reserve land, to justify the defendant in seizing it as agent for the Crown. He referred to 12 Vic. chaps. 9 and 30; *Vanvleck* v. *Stewart*, 19 U. C. R. 489; *Doe Jackson* v. *Wilkes*, 4 O. S. 142; *Miller* v. *Clark*, 10 U. C. R. 9; *Bown* v. *West*, 1 E. & A. 118; *Bank of Montreal* v. *McWhirter*, 17 C. P. 506.

J. Martin, contra. Indians on reserve lands have no interest in the soil. They have the right of occupation and cultivation, and of clearing the land for cultivation, and of taking their necessary firewood for use upon the premises; they have not the right of cutting and selling the timber without regard to cultivation: *Weller* v. *Burnham*, 11 U.

C. R. 91; *Doe Sheldon* v. *Ramsay*, 9 U. C. R. 119; *Mutchmore* v. *Davis*, 14 Grant, 357; Consol. Stat. C. ch. 9. The timber having been cut without license, the commissioner had authority to seize it without an affidavit having been first made: Consol. Stat. U. C. ch. 81, secs. 12, 30; Dominion Act, 31 Vic. ch. 42, secs 22, 37. He commented on the cases referred to for the plaintiff.

WILSON, J.—The land in question is admitted to be unsurrendered land, set apart and reserved for the use of the Indians. The land either belongs to or is held by the Crown in trust for the Indians. The Crown has a right to proceed against persons taking possession of or doing trespass on such lands. The Indians for whom these lands are reserved, or by whom such lands have not been surrendered, are entitled to the use and occupancy of them: 3 *Kent's* Com. 466 to 492. That they cannot surrender or sell them to any private person, without the license of the Crown, is a general principle of law. Consol. Stat. U. C. ch. 81, sec. 21, and the Consol. Stat. C. ch. 9, making special provisions with respect to lands which are allotted to enfranchised Indians, confirm this principle. The Consol. Stat. U. C. ch. 81, also makes it a penal offence, without the license of the Crown, to purchase or lease, or contract for the purchase or lease of, any land or any interest therein from the Indians, or from any of them.

There is nothing in the statutes referred to, nor in the tenure and interest which the Indians have in such unsurrendered or reserved lands, which prevents the Indian occupant from cutting more cordwood than he requires for his own use upon and from the land he occupies. He cannot be prosecuted or punished in any way for doing so. Having cut this cordwood, what is there to prevent his selling it and passing the property in it to the purchaser? I see nothing by way of enactment or of rule of law to prohibit such sale. If any one trespassed on land occupied by an Indian, he might most likely be proceeded against under sec. 30 of the Consol. Stat. U. C. ch. 81, and the Dominion

Act 31 Vic. ch. 42, sec. 22, at the instance of the Crown or its authorized officers, notwithstanding the actual occupation by the Indian. But when the alleged act of trespass was done by the consent of the occupant, he himself having the right to do the very act *licensed* if he chose, I do not see that the act so done can be a trespass. In this case the plaintiff committed no actual trespass on the land, and all he did do was with the occupant's consent.

If the trees or standing timber are to be considered an interest in land, then by the plain terms of the statute a contract relating to the purchase of them is absolutely void. Here, however, the purchase was not of an interest in land, but of mere chattels of cordwood made and ready for delivery.

The case of *Vanvleck* v. *Stewart*, 19 U. C. R. 489, so far as it is a decision, is in support of the view I take.

It may be that the Indians should be prohibited from cutting cordwood, or timber, or logs, for the purpose of sale, or selling it, without leave so to do, but that is a subject for legislation. I do not see that they are restricted at the present time from doing so, and I must therefore state what the law is in my opinion.

I think the plaintiff did acquire the property in the cordwood in question by reason of his purchase from John Peters, and that the defendant had no right to seize it.

The judgment should be for the plaintiff.

MORRISON, J.—I concur in thinking that under the circumstances appearing in this case our judgment should be for the plaintiff. I rest my opinion entirely on the ground that it does not appear that the cordwood in question was not cut by the Indian in clearing land with a view to its lawful occupancy by him, for if it was cut in so clearing the land, I think the Indian might dispose of it as he thought proper. I perfectly agree with the defendant's counsel, that it would be a great injustice to these Indians if any one or more of their number could, without any regard to the occupancy or use of the land for agricultural

purposes, cut down the trees and valuable timber, and convert them into cordwood, disposing of it much below its value to any evil disposed person who may prompt and induce an Indian so to destroy the property belonging to the whole tribe.

The consideration of this case discloses that the rights and interests of the Indians require to be further protected by such regulations as would in future prevent the reserves being liable to be injured and destroyed, in the manner in which, as contended on the part of the defendant (the forest warden), was done in this case.

RICHARDS, C. J., concurred.

Judgment for plaintiff.

LEDDINGHAM AND THE CORPORATION OF THE TOWNSHIP OF BENTINCK.

School sections—Separation—Informal by-law—Delay in moving to quash.

The corporation on the 7th December, 1867, passed a resolution, that a petition asking for a separation from school section 9, and to form a separate section consisting of certain lots, be granted, and a meeting be called to elect trustees.

On the 3rd October, 1868, they passed a by-law, enacting that this resolution should "remain confirmed, whole, and entirely without abatement whatsoever, with the force and effect of a by-law of this corporation."

The applicant in Michaelmas Term, 1868, moved to quash the by-law and resolution. It appeared that both had been passed after due notice, and after opposition by the applicant and others before the council, and that a school had been opened, and school taxes collected and expended in the section as separated:

Held, as to the resolution, that the delay in moving was a sufficient reason for refusing to interfere; and as to the by-law, (the merits being against the application, on the affidavits) that though informal it was not substantially defective, and was not open to objection as being retroactive. The rule was therefore discharged, but without costs.

IN last Michaelmas Term *Harrison*, Q. C., obtained a rule calling on the corporation to shew cause why a resolu-

VANVLECK ET AL., V. STEWART ET AL.

Indian lands—Power of commissioners—2 Vic., ch. 15; 12 Vic. chaps. 9, 30; 13 & 14 Vic., ch. 74; 20 Vic., ch. 26.

Semble, that the commissioners for restraining trespasses on Indian lands are not authorised to seize and sell timber cut by the Indians themselves, or by white people with their consent.

This was an action of replevin for 400 pine saw-logs, tried at Cayuga, before *McLean*, J., and a verdict rendered for the plaintiff.

As to the greater portion of the logs, the question was only whether they had been bought by the plaintiff Vanvleck at a sale made by the public commissioners acting on behalf of the Indians, whose right to sell was not disputed; but as to a small number there was some evidence to shew that they had been purchased by the plaintiff from the Indians, or cut by their assent on their lands, and afterwards seized and sold by the commissioners to defendants. The learned judge charged the jury that logs cut by the Indians on Crown lands, called Indian reserve lands, in the township of Oneida, without license of the Crown, were not unlawfully cut, and that the Indians could legally cut and sell timber off of said lands without license from the Crown.

J. R. Martin obtained a rule *nisi* for a new trial upon the evidence, and for misdirection. He cited Regina v. Hagar, 7 C. P. 380; Regina v. Baby, 12 U. C. R. 346; Miller v. Clark, 10 U. C. R. 9; Chisholm v. Seldon, 1 U. C. Chy. Rep. 318; Regina v. Strong, Ib. 392; Totten v. Watson, 15 U. C. R. 392; Consol. Stats. U. C., ch. 81; Consol. Stats. C., ch. 23.

Upon the evidence, which it is not material to report, the court thought the verdict warranted as to all the logs, and it therefore became unnecessary to determine the legal question raised, but the Chief Justice in his judgment said upon this point:

"If it were necessary to consider whether these logs—supposing they had not gone through the process of a previous sale by commissioners as having been illegally cut on

Indian lands—could be properly seized and sold to the defendant, as it seems they were in the latter part of the year 1859, then I suppose that question would have to be determined upon a consideration of the statutes 2 Vic., ch. 15: 12 Vic., chs. 9 & 30; 13 & 14 Vic., ch. 74, and 20 Vic., ch. 26. I shall only at present say, that if it be thought advisable, as I dare say it is, for other reasons besides the preservation of the timber, to prevent white persons from buying from the Indians pine and other merchantable timber growing upon their lands, I take it the intention to protect it should be made more clear than it seems to be upon the existing statutes, for I do not see that saw logs cut on Indian lands by the Indians themselves, or cut by white people by the assent of the Indian occupants, are liable to be seized and sold by the commissioners for restraining trespasses upon the lands under any of the statutes referred to; but further consideration of the question might lead me to a different opinion.

Rule discharged.

THE CORPORATION OF THE CITY OF KINGSTON v. THE CITY OF KINGSTON WATERWORKS COMPANY.

Agreement—Construction.

Held, that under the agreement between the city of Kingston Water Works Company, and the Corporation of the City of Kingston, set out below, the company were not bound to supply water gratuitously to the city for any purpose at more than twenty hydrants.

This was a special case stated for the opinon of the court by Robert Dalton, barrister, as arbitrator appointed by rule of reference in the cause.

The following are the material facts:

By articles of agreement, made on the 31st of December, 1850, between the city of Kingston Water Works Company, of the first part, and the city of Kingston, of the other part; —after reciting that the said company had determined to erect works for the purpose of supplying the said city with water, for the purposes and under the provisions of 12 Vic., ch. 158: that it had been agreed that the city should take eighty shares of stock of the said company, and should receive from them, in lieu of dividends, &c., thereon, a supply

SUPREME COURT OF NEW BRUNSWICK.

[QUEEN'S BENCH DIVISION.]

WARMAN v. FRANCIS ET AL.

Before ANGLIN J.

Lands contained in Indian Reservations — Crown grants of such lands — Title to such lands — Rights of the Indians to such lands.

The plaintiff is a farmer residing in Kent County, New Brunswick who alleges he is the owner of a certain lot of land upon which the defendants, members of an Indian band, cut and refused to desist from cutting timber. The defendants claim the right to cut such timber as it is in the bounds of the Richibucto Reserve surveyed in 1805 by the Provincial Government for use by the Big Cove Band of Micmac Indians residing along the Richibucto River. Plaintiff claims title from a Crown grant of 1868 and the issue involves the ownership of the land.

Held,

1. (a) No treaty or agreement by the Crown with the Micmacs conceded or vouchsafed to them any paramount title to the land.

(b) The Richibucto Reserve was made by the Government of New Brunswick from its Crown lands "for the use of" Indians such as the Big Cove Band now residing thereon.

(c) The Royal Proclamation of 1763 applied to such a reserve if and when made and it vested only a "personal and usufructuary" interest in the band of the Richibucto Reserve, which interest was dependent on the goodwill of the Sovereign". Such interest might be "surrendered" by the Band or "extinguished" by the Sovereign.

(d) In 1844 a New Brunswick statute provided for the disposal of the Indian Reserves in the province. Its preamble recited that "the extensive tracts of valuable land reserved for the Indians in various parts of this Province tend greatly to retard the settlement of the country." This act was referred to and approved by Her Majesty in Council. It was superseded by a revised statute in 1854.

(e) The plaintiff's title to the lot in question is derived from a Crown grant under that statute, and he is entitled to succeed in his claim against the defendants.

1956. June 5 and 6 and August 21 and May 1958, *J. E. Murphy, Q.C.* and *R. W. Mollins* for the plaintiff.

E. T. Richard and *Andrew Paull* of North Vancouver, B.C., Grand Chief and president, North American Indian Brotherhood, for the defendants.

J. A. Creaghan, Q.C., for the Province of New Brunswick with watching brief.

R. J. Broderick, for the Amalecite Indians of New Brunswick with watching brief.

1958. May. ANGLIN J.:—The plaintiff is a farmer residing in Kent County, New Brunswick, and alleges that he is the owner of a certain lot of land upon which the defendants cut timber and refused to desist from so doing until served with the writ in this action. The plaintiff claims damages and an injunction. At the trial he rested his ownership of the lot on a chain of title from a Provincial Crown grant in 1868. The lot was then within the bounds of the Richibucto Reserve which was first surveyed and established in 1805 by the Government of New Brunswick for use by the Big Cove Band of Micmac Indians residing along the Richibucto River. Bands of Micmacs now dwell on various such Reserves scattered along the east coast of New Brunswick and Nova Scotia, which was their habitat before the coming of the White man. The defendants are members of the Big Cove Band. The Reserve and the Band have since Confederation been administered under the Indian Act of Canada. The defendants admit going upon the lot and cutting pulpwood, but deny that the plaintiff owns the lot and allege that it is the property of the Band by virtue of a treaty made beween King George III and "the Micmac Nation of Indians" in 1752. They contend also that in any event the Tribe owns the land as aborigines and it has never surrendered its rights.

Counsel with watching briefs on behalf respectively of the Government of New Brunswick and the Amalecite Indians of western New Brunswick attended the trial. I may add that Mr. Andrew Paull of North Vancouver, B.C., Grand Chief and President of the North American Indian Brotherhood, was heard on behalf of the defendants as a friend of the Court and he ably assisted their Counsel.

It appears that the lot in question is one of numerous lots long since occupied by white settlers and which lie within the original bounds of the western end of the Richibucto Reserve;

and also that members of the Big Cove Band have from time to time cut or attempted to cut pulpwood on those lots as they considered that the Band was entitled to do so in spite of grants by the Crown to white settlers. I understand that this action was brought at the instance of some of the present owners of such lots to have determined once and for all the dispute over ownership. It has also been intimated that this test case would settle various other questions, such as whether the Crown in the right of the Province or the Crown in the right of Canada had the selling of lots from an Indian Reserve in New Brunswick, and such as riparian rights of fishing. Trial was had in June and August, 1956. Under the pleadings and on the evidence then adduced these large and important issues were raised. By December, 1956, I had prepared a draft of my reasons for judgment which necessarily had to deal at great length with the history and law pertinent to these problems. When this judgment was about to be pronounced new evidence was discovered respecting the history of the plaintiff's grant from the Crown in the right of the Province. Council for the plaintiff applied to have this new evidence added to the record. Counsel for the defendants opposed the application, but I considered that it should be granted for without it an adjudication would have been made on an incomplete record of the actual facts, and with those facts in hand it became unnecessary and would have been improper to deal with the larger and general issues otherwise involved. In brief, as will be seen later, the plaintiff's title to his lot can be readily established in law whatever may be the effect of past treaties with the Indians and whether the Province or Canada presently has the power of sale of lots in an Indian Reserve. As counsel have now completed the filing of this new evidence I have redrafted my reasons for judgment.

A preliminary issue was at the trial raised by the defence. It was contended that the defendants as Indians of the Richibucto Reserve registered under the Indian Act were wards of the Crown they might not be sued without prior notification to and

the joining of appropriate Government officials. In a sense they may be wards, but the Indian Act specifically provides that, subject to the terms of any treaty, the general provincial laws apply to them except that the property of an Indian on a Reserve may not be mortgaged or seised for a judgment debt. In *Ex parte Tenasse,* 2 M.P.R. 523, [1931] 1 D.L.R. 806, the New Brunswick Court of Appeal held that the Town of Newcastle Civil Court had jurisdiction to entertain a claim and enter judgment for the price of goods sold to an unenfranchised Indian living upon a reservation. See also *Campbell v. Sandy,* [1956] O.W.N. 441. The Treaty of Peace of 1752 upon which the defendants mainly rely in this action contains the following:

"All Disputes whatsoever that may happen to Arise between the Indians now at Peace and others His Majesty's Subjects in this Province shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefits, Advantages & Privileges as any other of His Majesty's Subjects."

The right of an Indian to defend an action of this nature is preserved to him by s. 31(3) of the Indian Act. It is clear that the defendants are properly in Court as ordinary litigants.

As to the defences on the main issue: first, as to what are called aboriginal rights. The nature of the interest in land once or now vested in a tribe or band of Indians differs throughout Canada, and each instance depends on its historical background. See the Annotation on Indian Lands in Canada, by Cameron, 13 S.C.R. 45. The ancient habitat of the Micmacs was the eastern shore of what is now New Brunswick and Nova Scotia, and the English sovereign originally laid claim to it by virtue of the voyages of Cabot. The French established small settlements and called the country Acadia. In 1621 the Crown made a grant of what it called Nova Scotia to Sir William Alexander, which embraced the eastern shore in question. In 1632 the Crown ceded Nova Scotia to France by the Treaty of St. Germainen-Laye. By the Treaty of Utrecht in 1732 France ceded "all Nova Scotia, or Acadia, to the Queen of Great Britain and to her Crown for-

ever." See Hannay's History of Acadia, 1879. There is no evidence that the Micmacs heretofore claimed to retain or that the Crown recognized any aboriginal proprietary rights in the Indians. In Cameron's Annotation above mentioned he says at p. 50:

"In treaties before Confederation cession of the lands (by the Indians) was uniformly made in general terms to His or Her Majesty.
(Footnote) No surrender of aboriginal rights has been made by the Indians in the Maritime Provinces."

So far as we are concerned with the Micmacs this can only mean that there was no surrender because there were no proprietary rights in our law in the circumstances. The historical background does not differ materially from that of the eastern coast of North America colonized by the British. In *Johnson v. McIntosh* (1823), 8 Wheaton 543, 5 U.S. 503, Chief Justice Marshall was dealing with land in Virginia and said:

"All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right. . . . According to the theory of the British constitution, all vacant lands are vested in the Crown. . . . So far as respected the authority of the Crown no distinction was taken between vacant lands and lands occupied by Indians. . . . The lands, then, to which this proclamation (of 1763 hereinafter mentioned) applied, were lands which the King had a right to grant, or to reserve for the Indians."

Following on the Treaty of Utrecht the Micmacs did not remain as a foreign nation (in the international sense) dwelling on British territory, but became British subjects. If a treaty was made with the tribe it was in the nature of a special agreement based on goodwill and expediency made by the Crown with a body of inhabitants. See MacKenzie on Indians and Treaties in Law (1929), 7 Can. Bar Rev. 561. As subjects of the Crown they came under the law of the country, and any interest they

might thereafter have in land was only what the law of the new regime afforded them.

Next, as to the interest of the band in the Richibucto Reserve. New Brunswick was made a province separate from Nova Scotia in 1784. The Commission and Instructions from His Majesty to the first Governor in Chief of New Brunswick gave him authority to make grants of land which "shall be good and effective in law against us our Heirs and Successors." There was then only one Reserve for Micmacs which had been established on the Northwest Branch of the Miramichi River by a "Licence of Occupation" issued by Governor Parr of Nova Scotia in 1783. The Richibucto Reserve was established by order of the Governor in Council of New Brunswick in 1805. It comprised large areas on both sides of the Richibucto River. Its extent was reduced to an area on the north bank only by an Order in Council dated February 25, 1824:

"Ordered that a Reserve be made for the use of the Richibucto Indians on the north side of Richibucto River extending from etc."

The lot in question in this suit lies within the bounds given in the above order. The land for the Reserve was of course Crown land administered by the Governor in Council. There is no evidence as to when the band was organized which now claims title to the Reserve.

It is contended for the defendants that the land in this Reserve was once within the territory occupied by the Micmacs and contemplated in early days by treaties with the tribe and various proclamations. There is, however, no evidence of the limits of that territory on the east coast, but as the eastern boundary of the Reserve is some thirteen miles from the coast it might well be that such contention is warranted.

In 1752, as appears from evidence adduced for the defendants, one of the Chiefs of the Micmacs made a proposal for peace to the Governor of Nova Scotia and offered to bring all the

tribes of the Micmacs to enter into a treaty. The Governor replied in writing:

"It is with pleasure that we see thee here to commune with us touching the burying of the hatchet between the British children of His puissant Majesty King George and his children the Mickmacks of this Country. . . . You have acknowledged him for your Great Chief and Father. He has ordered us to treat you as our Brethren. . . . We will not suffer that you be hindered from hunting or fishing in this country as you have been in use to do, and if you shall think fit to settle your wives and children upon the River Shebenaccadie no person shall hinder it nor shall meddle with the land where you are. . . ."

On November 22, 1752, the Governor "on behalf of His Majesty" entered into a treaty with delegates "of the Tribe of Mick Mack Indians Inhabiting the Eastern Coasts of the said Province of Nova Scotia or Acadie" and the delegates executed it "for themselves and their said Tribe their heirs and the heirs of their heirs forever." The only terms therein that are material to the present problem were:

"2. . . . that the Indians shall have all favour, Friendship and Protection shown them from this His Majesty's Government. . . .

4. It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting and Fishing as usual. . . ."

It is of interest to note that in *R. v. Syliboy,* [1929] 1 D.L.R. 307, a Nova Scotia Court doubted whether this was a treaty and whether it had been made with the Micmac Tribes as a whole. In any event, it is clear that the treaty did not concede or grant any title to land, and did not repeat the Governor's equivocal expression in his previous letter—"nor shall (we) meddle with the land where you are."

Early in 1762 the Governor of Nova Scotia received from His Majesty instructions (apparently forwarded to all the Governors of Colonies in North America) which were entitled "Incroachments upon the Possessions and Territories of the Indians in the American Colonies." In consequence the Gover-

nor issued the following proclamation in May, 1762, a copy of which the defendants also put in evidence:

"His Majesty by His Royal Instruction, Given at the Court at St. James' the 9th day of December, 1761, having been pleased to Signify, That the Indians have made, and still do continue to make great Complaints, that Settlements have been made, and Possession taken of Lands, the Property of which they have by Treaties reserved to themselves, by Persons claiming the said Lands, under Pretence of Deeds of Sale & Conveyance, illegally, fraudulently, and surreptitiously obtained of said Indians, and that His Majesty had taken this matter into His Royal Consideration, as also the fatal Effects which would attend a Discontent among the Indians in the present situation of Affairs, and being determined upon all Occasions to support and protect the said Indians in their just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into with them. . . . I do accordingly publish this proclamation . . . requiring all persons whatever, who may either willfully or inadvertently have seated themselves upon any Lands so reserved by or claimed by the said Indians, without any lawful Authority for so doing, forthwith to remove therefrom. And, Whereas Claims have been made in behalf of the Indians for (describing points on the east coast from Canso to Bay de Chaleur) as the Claims and Possessions of the Indians, for the more special purpose of hunting, fowling and fishing, I do hereby strictly injoin and caution all persons to avoid all molestation of the said Indians in their said claims, till His Majesty's pleasure in this behalf be signified. And if any person or persons have possessed themselves of any part of the same to the prejudice of the said Indians in their Claims before specified or without lawful Authority, they are hereby required forthwith to remove, as they will otherwise be prosecuted with the utmost Rigour of the Law."

Expressions in that proclamation possibily relevant to the title to land should be construed in the light of a further document put in evidence by the defendants. It is a letter from the Governor under date of July 2, 1762, to The Lord Commissioners for Trade and Plantation in London, enclosing his proclamation of May 4, 1762. The letter contains the following:

"In obedience to this Royal Instruction from His Majesty, I caused a Proclamation to be published in His Majesty's name injoining all persons against any molestation of the Indians in their claims. Lest any difficulties might arise, it appeared advisable, previous to the proclamation, to inquire into the Nature of the Pretensions of the Indians for any part of the lands within this Province. A return was accordingly made to me for a Common-right to the Sea Coast from Cape Fronsac onwards for Fishing without disturbance or Opposition by any of His Majesty's Subjects. This claim was therefore inserted in the Proclamation that all persons might be notified of the Reasonableness of such a permission, whilst the Indians themselves should continue in Peace with Us, and that this Claim should at least be entertained by the Government, till His Majesty's pleasure should be signified. After the proclamation no claims for any other purposes were made. . . . Your Lordships will permit me humbly to remark that no other Claim can be made by the Indians in this Province, either by Treaties or long possession (the Rule, by which the determination of their Claims is to be made by Virtue of this His Majesty's Instructions) since the French derived their Title from the Indians and the French ceded their Title to the English under the Treaty of Utrecht . . ."

Counsel for the defendants also put in evidence the Royal Proclamation of 1763 issued by His Majesty with respect mainly to the boundaries and governments of the territories of Quebec, East Florida, West Florida and Grenada taken over under the Treaty of Paris. (The Proclamation will be found in the Revised Statutes of Canada, 1952, Vol. VI, p. 6127.) The Proclamation also dealt with the treatment of and reserves for Indians in all other territories in North America and therefore included Nova Scotia as it then was. Counsel contended that in view of expressions used in the Proclamation the Crown conceded that the Indians owned their reserves. But the Proclamation has been otherwise construed by Her Majesty on the advice of the Judicial Committee of the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen on the Information of the Attorney-General for Ontario* (1888), 14 A.C. 46. By treaty in 1873 a tribe of Ojibway Indians surrendered to the Government

of Canada for Her Majesty its right and title to lands it occupied in Ontario. The Privy Council said in part:

"Acting on the assumption that the beneficial interest in these lands had passed to the Dominion Government, their Crown Timber Agent, on the 1st of May, 1883, issued to the appellants, the St. Catherine's Milling and Lumber Company, a permit to cut and carry away one million feet of lumber from a specified portion of the disputed area. The appellants having availed themselves of that licence, a writ was filed against them at the instance of the Queen on the information of the Attorney-General of the Province (of Ontario). . . . The territory in dispute has been in Indian occupation from the date of the proclamation (of 1763) until 1873. . . . Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never 'been ceded to or purchased by' the Crown, the entire property of the land remained with them. That inference is, however, at variance with the term of the instrument, which shew that the tenure of the Indians was a personal and unsufructuary right, dependent on the goodwill of the Sovereign. The lands reserved are expressly stated to be "parts of our dominions and territories"; and it is declared to be the will and pleasure of the sovereign that, "for the present", they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case 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 surrendered or otherwise extinguished. . . . The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the

same", within the meaning of Sec. 109 (of the B.N.A. Act); and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some other provision of the Act of 1867 other than those already noticed. . . . It appears to be the plain policy of the Act, that, in order to ensure uniformity of administration, all such lands and Indian affairs generally shall be under the legislative control of one central authority. . . . 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."

This view in 1888 of the nature of the Indian title was in effect that which prevailed in New Brunswick with respect to the Reserves which the Governor in Council "made" in New Brunswick shortly after its establishment as a Province in 1784. The volume of the Statutes of New Brunswick for 1838 contains as an appendix a report by the Commissioner of Crown Lands enumerating the "Lands reserved for the use of the Indians in this Province . . . the time such reserves were made. . . ." At the foot thereof is the following:

Nature of Reserves—To occupy and possess during pleasure.

In the archives of the Provincial Secretary's Office there is a copy of a letter dated November 1, 1851:

"Gentlemen

I am to inform you that His Excellency the Lieut Governor has been pleased to appoint you Commissioners of the Indian Reserve at the Little Falls Madawaska and if the appointment be accepted it will become your duty to notify the occupants thereon that the fee or title on ownership of land is in the Crown and not in the Indians whose right to it consists merely in the guarantee of the Government that they shall have the personal use of the land for their own advantage in all respects but no right or power is given to them to alienate or give any part of it to others which cannot be done without the express authority and consent of Her Majesty's Representative in Council.

I have the Honour etc.
(sgd) J. R. Partelow.

L. R. Coombes
and John Emerson
Madawaska, Victoria."

It is also of historical interest that the Micmacs for their part did not in the early days of the last century apparently entertain any view of their interest which was in conflict with that above mentioned. In 1844 the Legislature of New Brunswick (as will be noted hereinafter) decided to have the Reserves in the Province surveyed, subdivided and sold. The following memorandum for the Lieutenant-Governor is of record in the archives of the Provincial Secretary's Office:

Secretary's Office
8 July 1845

"Memorandum

Louis Julian Junior (son of the Chief) wishes an order from His Excellency to the effect that he shall have a portion of the upper reserve on the Northwest Miramichi, and the whole of the reserve opposite Beaubair's Island set apart for the exclusive use and occupation of his tribe (the Micmacs). He makes no objections to the improvements of the settlers on the reserves being fully protected.

(Endorsement on back of memorandum over the initials of the Lieutenant-Governor)

It is my wish that the provisions of the Act in all that relates to the interests of the Indians and in the settlement of their locations should be construed liberally."

It is clear therefore on the relevant evidence and the highest authority that:

(a) No treaty or agreement by the Crown with the Micmacs conceded or vouchsafed to them any paramount title to any land.

(b) The Richibucto Reserve was "made" by the Government of New Brunswick in 1824 from its Crown lands "for the use of" Indians such as the Big Cove Band now residing thereon.

(c) The Royal Proclamation of 1763 applied to such a reserve if and when made and it vested only a "personal and usufructuary" interest in the Band of the Richibucto Reserve, which interest was "dependent on the goodwill of the Sovereign". Such interest might be "surrendered" by the Band or "extinguished" by the Sovereign.

(d) There is no evidence that the Micmacs (prior to the present case) ever claimed any greater interest in lands on the east coat of New Brunswick or in this Reserve in particular.

Finally, as to the plaintiff's claim of title to his lot. The Journals of the New Brunswick Legislature contain the following, under date of February 23, 1838:

On motion of Mr. Weldon

"Whereas there are various tracts of land in the County of Kent, reserved for the use of the Indians, lying in an uncultivated state, and which are of no benefit to the Indians, but tend much to retard the improvement and settlement of lands lying in the neighbourhood of such Reserves; therefore

Resolved, that an humble Address be presented to His Excellency the Lieutenant Governor, praying that His Excellency will adopt such measures, whereby the said Reserves or portions thereof may be disposed of to persons desirous of becoming settlers, and making permanent improvements; the proceeds arising from the disposal of such Reserves or any part thereof, to be appropriated by Commissioners to be appointed by His Excellency for the benefit of aged and distressed Indians interested in such Reserves."

Apparently this resolution provoked consideration of the situation with respect to the Indian Reserves throughout the rest of the Province. In the result, in 1844 the New Brunswick Legislature passed a statute entitled "An Act to Regulate the Management and Disposal of the Indian Reserves in this Province". Its preamble was:

"Whereas the extensive Tracts of valuable Land reserved for the Indians in various parts of this Province tend greatly to retard the settlement of the Country, while large portions of them are not, in their present neglected state, productive of

any benefit to the people, for whose use they were reserved: And whereas it is desirable that these Lands should be put upon such footing as to render them not only beneficial to the Indians but conducive to the Settlement of the Country."

It is not necessary to review the provisions and effect of this Act because it was repealed in 1854 when it was included, slightly revised, as Chapter 85, "Of Indian Reserves", in the Revised Statutes of that year. It is, however, important to note that, in view of the interest in the Reserves vested in the Indians by the Royal Proclamation of 1763, it was essential to refer the proposed legislation to the Sovereign for approval. That this was done is shown by a footnote to the Act as follows:

"(This Act was finally enacted, ratified and confirmed by Order of Her Majesty in Council, dated 3rd September, 1844, and published and declared in the Province on the 25th day of September, 1844.)"

The following are extracts from the Act of 1854 which are material to our present problem:

"1. The Governor in Council shall cause surveys to be made of the Indian Reserves. . . .

2. The Governor in Council shall cause such Reserves, or any part thereof, to be leased or sold under the direction of the local Commissioners to the highest bidder . . . upon the conditions determined by the Governor in Council. . . .

3. The Governor in Council shall appoint Commissioners, not exceeding three for each County containing such Reserves, who shall look after the same, superintend the survey and sale thereof . . . take charge of the interests of the Indians generally in their respective Counties. . . .

7. The proceeds annually arising from the sales and leases . . . deducting expenses . . . shall be applied to the exclusive benefit of the Indians . . . first, for relief of indigent and infirm Indians; second, for procuring seed, implements of husbandry, and domestic animals, as the Governor may direct. . . .

10. The local Commissioners . . . shall lay off any tract of such Reserves, or any part thereof, into villages or town plots for the exclusive benefit of the Indians of their County . . . ; location tickets of these lands free of expense shall be

granted to such Indians as the Governor in Council may deem fit objects therefor, to any of them whom the Governor in Council may make absolute grants thereof free of expense, after they shall have resided upon and improved the same for at least ten years."

Comment on these two statutes was made by Chief Justice Allen in the New Brunswick Court of Appeal in *Burk v. Cormier* (1890), 30 N.B.R. 142:

"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 Vict. 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 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 (from Canada) under which the plaintiff claimed was inoperative, and conveyed no title."

I may add that the learned Chief Justice also remarked in his judgment that the Indian Reserve lands in New Brunswick were not affected by the Royal Proclamation of 1763. With the greatest respect I would think that such remark was in error for the terms of the Proclamation were broad enough to include what was later New Brunswick. See *Re Eskimos,* [1939] 2 D.L.R. 417, (Supreme Court of Canada) I would also question the validity of the above observation that the Government of New Brunswick retained after Confederation the power "to manage and sell the lands reserved for the use of the Indians". Subsection 24 of s. 91 of the British North America Act vested in the Dominion Parliament exclusive legislative authority over "Indians, and Lands reserved for the Indians". This to my mind

imports the right of management and also to provide, as has been done in every Indian Act of the Dominion since 1867, that no land in a Reserve may be sold unless first surrendered by the Band concerned. Thus the power of sale of its "public lands", otherwise preserved to the Province by the British North America Act, is subject now to such restriction when part of an Indian Rserve. Such observation may not be necessary to resolving the present case, as will appear later, but I digress to make it in view of some of the submissions made by Counsel in argument based on the *Burk Case*.

There is still another matter to be tidied up. By Chapter 42 of its statutes of 1868 the Dominion Parliament first dealt with its management of Indian Reserves. Section 32 thereof provided as follows:

"The eighty-five chapter of the Revised Statutes of New Brunswick (1854) respecting Indian Reserves is hereby repealed, and the Commissioners under the said Chapter shall forthwith pay over all monies in their hands arising from the selling or leasing of Indian Lands or otherwise under the said Chapter to the Receiver General of Canada. . . . And all Indian lands and property now vested in the said Commissioner, or other person whatsoever, for the use of the Indians, shall henceforth be vested in the Crown and shall be under the management of the Secretary of State."

It is a nice question whether the Parliament of Canada had the power under s. 129 of the British North America Act to repeal the New Brunswick Statutes of 1854 in so far as the latter dealt with the survey and disposal of Indian Reserve lands in which the Province retained the proprietary title subject to the Interest of the Indians, but the matter is academic now for the *St. Catherine's Milling Case* in 1888 established that such lands upon surrender were fully the property of the Province, and they may not now be disposed of by the Province until surrender. The latter clause of the above repealing section shows, however, a misconstruction of the New Brunswick Act of 1854. It did not vest any title in the Commissioners. Furthermore, if the clause

purported to vest the title to Indian Reserves in the Crown in the right of Canada, it showed a misconception of the extent of the Dominion power to legislate with respect to "lands reserved for Indians." At Confederation the Richibucto Reserve was Provincial Crown land set apart for the use of the Indians, and they had a vested interest therein, as we have seen, because of the effect of the Royal Proclamation of 1763. Section 109 of the British North America Act provided that "all lands . . . belonging to . . . New Brunswick at the Union . . . shall belong to New Brunswick . . . subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

The plaintiff's lot is the southern half of a 100 acre tract of land in the Richibucto Reserve, which tract was the subject of a petition by one George Horton to the Lieutenant-Governor of New Brunswick in 1866. The petitioner stated in his petition that he was "desirous of purchasing one hundred or less acres of Crown Land on the Indian Reserve" etc., and it appears from the recommendation for "the favourable consideration of the above" endorsed at the foot of the petition and signed by two men who were probably the Commissioners having charge of that Reserve that the tract had been improved "by the petitioner and his father." No reference is made in the petition to the New Brunswick Statute of 1854 authorizing the sale of lots from the Indian Reserves, but the petition is described on its back as "Indian Reserve Petition No. 5097" and in all I think it may be fairly assumed that the document deals with an intended purchase and sale under that statute. The next document in the chain of title also put in evidence subsequently to the trial is a quit claim deed dated September 22, 1866, by which George Horton sold his interest in the tract for $550 to the Hon. David Wark of Richibucto. Apparently it was Wark who completed the payments due the Crown for the tract. There are notations on the back of the petition: "All paid May, 1867"; "Ordered to proceed 29/4/68"; "12484 25/9/68". The last notation

obviously refers to the New Brunswick Crown Grant given David Wark of the tract in question being grant No. 12484 under date of September 25, 1868. (This grant was Exhibit P-1 of the trial record, and it was the above petition and quit claim deed that were discovered and introduced in evidence after the trial. The significance of this discovery hereafter appears.)

If the Hon. David Wark had been given his New Brunswick Crown Grant premptly in May, 1867, when the payments for the tract had been completed there would be no difficulty about his title for the grant would have been clearly valid under the New Brunswick Statute of 1854. However, in the circumstances now of record I think that the difficulties raised by Confederation on July 1, 1867, can be resolved and that the grant stands as the plaintiff's source of title. The difficulty arises from the repeal of the New Brunswick Statute of 1854 by the Canadian Parliament's Chapter 42 of its Acts of 1868 dealing with Indian Affairs, which came into force in March, 1868. The above notations on Horton's petition show that it was in April, 1868, that apparently the appropriate authorities in New Brunswick ordered that proceedings on the petition be carried out, and it was not until September, 1868, that the New Brunswick Crown Grant was actually issued. Were these proceedings subsequent to March, 1868, valid? The essential element is the completion of the payments for the tract, and in view of the admissible evidence of a grant I think that it is proper to take the notation on an ancient document of payments being completed as good and sufficient evidence thereof. In that event, Wark was entitled to his grant in May, 1867, and in equity his rights were settled as of that time. When the Province went into Confederation New Brunswick held the tract in trust for him as provided generally by s. 109 of the British North America Act. The subsequent order to proceed and the issuing of the grant by New Brunswick were merely administrative or ministerial acts which the Province was

bound to carry out under the maxim that "equity looks upon that as done which ought to be done". See Halsbury's Laws of England, 3rd. Ed., Vol. 11, para. 544; Snell's Principles of Equity, 22nd Ed., p. 22; *McIntyre v. Royal Trust Co.*, [1946] 1 D.L.R. 655 (Man. C.A.); *Turvey and Mercer v. Lauder*, [1956] 4 D.L.R. 225, (Supreme Court of Canada).

In short, the plaintiff's course of title was this Crown Grant to Wark and it was validly made under the New Brunswick Statute of 1854 which the defendants as members of the Big Cove Band cannot impugn no matter what their interest in the Richibucto Reserve may be under any prior treaties with the Sovereign or otherwise.

There are also in evidence documents showing a chain of title from this grant to the plaintiff respecting the lot in question.

I may add that there are further documents in evidence purporting to show, *inter alia*, that in 1875 the Crown in the right of Canada made a grant to Senator David Wark of this lot, and that the Big Cove Band in 1879 surrendered to the Crown in the righ of Canada a number of lots in the Reserve including the one in question. The validity of that surrender and the grant was vehemently attacked at the trial by Counsel for the defendants, but it is not necessary to consider them in view of the plaintiff's title being supportable on other grounds as above shown. Why such surrender and grant, at least in so far as we are concerned with the lot in question, were thought necessary by those concerned at the time is now a matter of conjecture. I would venture to suspect that they were due to the view which the Dominion authorities took of their rights with respect to Indian Reserves prior to the *St. Catherine's Milling* case in 1888.

In the result, the plaintiff is entitled to a declaration that he is the owner in fee simple of the lot described in his statement of claim, and the defendants and their servants and agents are enjoined from trespassing or cutting timber on the said

lot. The evidence does not establish that the defendants were the persons who actually cut and carried away all the pulpwood which has lately disappeared from this lot. On such evidence as there is as against the defendants I assess the damages as follows: Douglas Francis, $100; Stephen Simon $25; Peter J. Augustine $25. These defendants will pay the costs of the proceedings apart from those relating to the introduction of evidence subsequently to the trial. Costs respecting the latter will be borne by the plaintiff. Costs are to be taxed under Column I of the Supreme Court scale. The name of Louis Claire is stricken from the record as he was not served with the writ.

Judgment accordingly.

an exercise of discretion by the learned trial Judge but the deprivation of a substantial right.

In a case such as this (which is clearly one to be tried by a jury so long as the jury system prevails), even if the evidence objected to had been admissible, it would seem to me, that on the authorities, counsel for the parties should have been given a full opportunity to be heard on the point as to whether the trial should proceed with or without a jury, or be traversed for trial by another jury: see *Fillion* v. *O'Neill*, [1934], 4 D.L.R. 598, O.R. 716, and *Craig* v. *Milligan*, [1949], 4 D.L.R. 712, O.R. 806. In the instant case the learned trial Judge announced his decision to dismiss the jury without inviting the views of counsel, and in these circumstances there would seem to me little which counsel could do but accept such decision subject, of course, to a right to question it on appeal.

In the result, therefore, I would allow the appeal and direct a new trial.

Appeal dismissed.

ATTORNEY-GENERAL OF CANADA v. KRAUSE

Ontario Court of Appeal, Laidlaw, Roach and J. K. Mackay JJ.A. May 10, 1956.

Limitation of Actions I B, II A — Crown Lands III — Prescriptive claim against Crown — Whether 60 years' continuous adverse user shown — Nullum Tempus Act (Imp.) —

Where a litigant asserts that as against the otherwise lawful owner he has title by possession the burden is on him to prove it. This requires that the land claimed be described with reasonable certainty. Where prescriptive title is claimed against the Crown by 60 years' continuous and uninterrupted possession under the *Nullum Tempus Act*, 1769 (Imp.), c. 16, the occupation that must be established to bar the Crown must be such as would constitute civil possession against a subject owner and thus involves exclusive occupation, for the necessary period, in the physical sense, *i.e.* detention, and *animus possidendi*. Seasonal acts of trespass are not sufficient to show continuous possession in ouster of the Crown. The occupation of buildings upon certain land is not sufficient to establish a prescriptive right to that or any surrounding land where the buildings had not stood for the prescriptive period and there was no evidence that prior to the erection of the present buildings there were other buildings continuously on the site of the present ones beginning as of the date of commencement of the prescriptive period. Moreover, where the land in question had been leased to others by the Crown, it was during the term of the lease being "answered the rents" within the *Nullum Tempus Act*, and even if the rent was from time to time unpaid, possession could not be adverse to the Crown during the leasehold term. *Held*, further, acceptance by the claimant during the prescriptive period of a permit of occupation from the

Crown was consistent with and an acknowledgment of the Crown's title.

Cases Judicially Noted: *Hamilton* v. *The King*, 35 D.L.R. 226, 54 S.C.R. 331; *Sherren* v. *Pearson*, 14 S.C.R. 581; *McLean* v. *Wilson*, 31 D.L.R. 260, 36 O.L.R. 610; *A.-G. N. S. W.* v. *Love*, [1898] A.C. 679, apld.

Affidavit—Depositions—Evidence XIII—Affidavit before action by person since deceased—Whether admissible to prove issue raised by pleadings—R. 269 (Ont.)—

Rule 269 (Ont.) in allowing a Judge to order that any particular facts may be proved by affidavit at a trial does not authorize a Judge to admit in evidence at a trial an affidavit made by a person who has since died where the affidavit was made before the commencement of the action and was not styled in this cause or in any other. The Rule does not authorize admission in evidence of an affidavit purporting to prove any fact placed in issue by the pleadings and which is essential to be proved by a party to the action.

Statutes Considered: *Nullum Tempus Act*, 1769 (Imp.), c. 16; *Rules of Practice* (*Ont.*), R. 269.

APPEAL by plaintiff from a judgment of Kelly J., [1955] 5 D.L.R. 19, dismissing an action to recover possession of certain land. Reversed.

W. B. Williston, Q.C., and *J. W. Swackhamer*, for (plaintiff) appellant.

J. J. Robinette, Q.C., for (defendant) respondent.

The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the plaintiff from the judgment pronounced by Kelly J. on June 28, 1955, [[1955], 5 D.L.R. 19, O.W.N. 827] following the trial by him without a jury, dismissing the action with costs.

The plaintiff's claim was to recover possession of certain lands on Point Pelee in the Township of Mersea, in the County of Essex, which lands are described by metes and bounds in the statement of claim and are said to contain 1.6 acres more or less, and for a declaration that the plaintiff is the rightful owner thereof and that the defendant has no right, title or interest therein. The defendant pleaded that he and his predecessors have been in continuous and uninterrupted possession of part of the lands described in the statement of claim for a period in excess of 100 years and he makes no claim to the balance of those lands and he pleaded the *Nullum Tempus Act*, 1769 (Imp.), c. 16.

The defendant is a commercial fisherman residing on Point Pelee and fishing in Lake Erie. The lands to which he claims he has acquired title by possession are not described in his state-

ment of defence by metes and bounds or otherwise than as "the property presently used by him in his fishing operations" (para. 2) and "that property occupied by him in his business comprising the parcel of land between his residence and the shore of Lake Erie having a frontage of approximately five hundred (500') feet" (para. 6).

Point Pelee is a peninsula shaped like a long and narrow triangle running into Lake Erie from the north shore.

In 1881 the southerly part was set aside as a naval reserve and that part was first surveyed in 1883. A plan of that survey is dated February 27, 1883, and was registered in the Registry Office for the County of Essex on October 23, 1886, as No. 297 (ex. 2).

That plan is entitled: "Plan of the Naval Reserve at Point Pelee, in the Township of Mersea, Shewing Each of the Squatters' Holdings Thereon."

It shows a road commencing at the base of the Point running southerly toward the tip and about half-way out to the tip the road Y's and two roads continue for some distance and then unite again into one road which continues to the tip of the peninsula. The holdings of the squatters north of the Point where the road Y's are all shown as lying east of that road. In the evidence that plan was referred to as the Baird Plan, Baird being the surveyor who made the survey and plan.

A later survey was made by a surveyor G. M. McPhillips, and a plan of his survey, dated July 30, 1889, was subsequently registered in the Registry Office for the County of Essex as Plan No. 397 (ex. 3.). This plan was approved and confirmed by the Surveyor-General in the Dominion Lands Office on November 6, 1889. The holding of each squatter is delineated on that plan as a lot and given a lot number. Endorsed on the plan is a key setting forth the lot numbers, the names of the claimants to each lot and the acreage of each lot. It shows the road commencing at the base of the peninsula and running southerly to the tip. With one exception, which does not affect the instant case in any way, all the squatters' lots north of the point where the road Y's are shown as being on the east side of that road.

After that plan was prepared and registered a Crown grant was given to each claimant of the land claimed by him and as shown on that plan and the key endorsed thereon. That was all completed about 1892. Among the lots thus conveyed was Lot 15, which is on the east side of that road and to part of which the defendant now has title. It is on that part that he

has his residence and when in his statement of defence he refers to "that property occupied by him in his business comprising the parcel of land between his residence and the shore of Lake Erie having a frontage of approximately five hundred (500') feet" he is thereby referring to land lying west of the road and which according to Plan 397 was not occupied and claimed by any squatter as of the date of that plan.

At the opening of the trial counsel filed an admission: "THAT, subject to any prescriptive right to ownership the Defendant or his predecessors in title may have acquired to the lands, the subject matter of this action, ownership of the said lands is regularly and properly vested in Her Majesty the Queen in right of Canada, and that the same comprises part of Point Pelee National Park."

When a litigant asserts that as against the otherwise lawful owner he has title to land by possession the onus rests upon him to prove it. This requires that the land be described with reasonable certainty. From the pleadings, the admission filed and the evidence, all that can be said with respect to the location and area of the lands in dispute is that they consist of, first, the land upon which stand two buildings consisting of a storehouse 20 ft. by 60 ft. and an ice-house 18 ft. by 30 ft. in dimension and some undefined area of land surrounding those buildings, the whole having a frontage of 500 ft. approximately measured along some line which may be, for all that appears, the road shown on the plan, the shore-line, or, indeed, a line described in the evidence as a trail running from the road toward the beach and which is used by the public for access to the beach and by the defendant for access to those buildings. I rather suspect that the defendant, when he refers in his pleading to a frontage of 500 ft. approximately, means a frontage measured along the westerly side of the road shown in the plan. On that assumption where are the northerly and southerly boundaries of the parcel? I do not know.

Apart from the road there are not now and never have been any visible boundary-lines, either natural or man-made, of lands of which the defendant claims he has title and possession. To the north and to the south of the lands occupied by the buildings and the lands in front thereof there is a beach running for a great distance in both directions. It would, of course, be possible to determine by a survey the exact location of the buildings presently occupied by the defendant, but by reason of the paucity and vagueness of evidence no surveyor could run boundary-lines around any larger area and then say that they

enclose the area to which the defendant has said in evidence that he has possession and title.

Counsel agreed that the *Nullum Tempus Act* applies to this case. Under that Act the right of the Crown is barred with respect to and the defendant is entitled to "have, hold and enjoy", as against the Crown, those lands, if any, that the defendant or those under whom he claims "have held or enjoyed" for the space of 60 years prior to the issue of the writ unless within that space of 60 years the Crown, by virtue of its right or title has been, in the words of the Act, "answered the rents", thereof or "that the same have or shall have been duly in Charge, or stood insuper of Record".

The writ was issued on August 26, 1953. In order to succeed, the defendant would have to prove that he and those through whom he claims were in continuous, open or visible and notorious possession of whatever land he now claims for a period commencing not later than August 26, 1893.

The defendant called as a witness one James Walter Grubb. As of the date of the trial, December, 1954, Mr. Grubb was 81 years old. He was born on Point Pelee and still lives there. Until he reached the age of retirement he was a commercial fisherman. As might be expected, he did not pretend to be accurate or precise as to dates. However, his memory carried him back, so he said, to when he was about 10 years of age; that would be about 1883, which by a coincidence is the year in which the Baird Plan was prepared, and as of the date of the McPhillips' Plan Mr. Grubb would be about 16 years of age. Mr. Grubb was familiar with the location of the defendant's buildings and he recalled that when he was about 10 years of age one Philip Delaurier "fished there" and he gave the names of those who in succession to Delaurier down to the defendant "fished there". It is clear that by that language Mr. Grubb meant that Delaurier and his successors used some area between the road and the shoreline in general proximity to the defendant's building as the base of their fishing-operations during the fishing-season and as the place to which, out of the fishing-season, they pulled their boats out of the water and where they piled the net stakes and stored their equipment. His attention was directed to the defendant's buildings, and then he was asked the following questions and gave the following answers:

"Q. Can you remember as a little boy whether or not there were buildings on that same territory? A. Yes I rode down there when small and they had buildings and put some of the fishing-gear in. Q. What age were those buildings, so far as

you can recall? A. Little buildings, just ready to fall down. Q. They were not new buildings? A. No, not new buildings, and had big long shingles like that. Somebody called them clapboards, for shingles . . . Q. And how big a fishery was this when you were a boy? How many nets did they fish with? A. When I first knew it there was only one net there. Q. That would be one pond net? A. Yes. Q. And they were dried on the poles—leave them out. They had only one fishing licence at that time? A. That is all they would be allowed to have at that time. Q. How old would you be at that time 10, 11 years old maybe? A. 10 or 11 somewhere around that. Q. Now for a fishery of that size would they use very much land on the beach? A. Them little buildings he had would not occupy much land but I imagine—where he pulled his boats up, maybe a strip, maybe 100 or so feet long. Q. How deep? A. When he pulled his boats up and saved them from the sea touching them and everything like that. Q. Would that be 50, 60 ft.? A. More than that he would have to have 100 ft. or so."

I pause in my reference to Mr. Grubb's evidence to point out that he does not suggest that the strip of "100 ft. or so" extended back to the road, notwithstanding that elsewhere in his evidence he indicates that he was well acquainted with that road and had travelled along it as a boy, a youth and then a man, many, many times. One would think that if that road bore any relation to the land which Delaurier was occupying and using for his fishing purposes Mr. Grubb would have said so.

I continue now with Mr. Grubb's evidence:

"Q. And how big would the buildings be at that time for a catch of one net? A. This poor old Frenchman only had a small building, I suppose, only 20 ft. square or something like that. Q. And he would use that for a store house and packing house? A. Yes, he had a place to put his fish in and some of his nets. Q. And I suppose at a later date the fishery became a bigger operation? A. That is right."

According to Mr. Grubb when Philip Delaurier's son John grew to manhood he, John, worked along with his father and there came a time when the father, no doubt by reason of his advanced age, was succeeded by the son John.

John Delaurier carried on until about 1905 when he sold the business, so it would appear from Mr. Grubb's evidence, to one David Livingstone. At the time John quit he was fishing two nets which meant of course that there was more equipment to be piled or stored on the shore. Mr. Grubb was asked these

questions and made these answers with reference to John's operations at about the time that he, John sold to Livingstone:

"Q. How much land was John using? A. He used quite a little bit. It wasn't just what he had his shanty on. It was where he built — where he piled the stakes along the shanty I would say 300 or 400 ft. altogether."

The shanty was torn down by Livingstone about 1905 according to Mr. Grubb, and another larger building was erected by him, but there is no evidence that the land covered by that new building included the site of the shanty. Over the years since then there have been additions to and demolitions of existing buildings and entirely new buildings erected until presently there are the buildings occupied by the defendant in his business which I earlier described. Without attempting to review all those changes in detail it will suffice to say that the evidence does not establish that any part of the present buildings stands on land which has been covered by a building continuously since August 6, 1893, so that it could be said that for a period of 60 years prior to the issue of the writ the defendant and those through whom he claims together had possession of that part as the site of a building. This much is certain from the evidence, namely, that the total area of land on which the present buildings stand has not continuously since 1893 been covered by a building. The present ice-house was erected between 1915 and 1923 and there had not previously been any building on the site presently occupied by it.

In the winter months the defendant and his predecessors stored their nets and rope and no doubt other equipment, in the building or buildings wherever those buildings may have stood and the net-stakes were piled outside nearby; the boats were pulled up on the beach a safe distance from the water's edge. In each succeeding spring when fishing was resumed the boats were launched and the other equipment was put to use. It is possible that during the fishing season there might be excess stakes piled here or there in the general area, or, indeed, there might have been times when they were all in use.

This is Mr. Grubb's evidence on that matter:

"Q. And in that case you could not tell me whether, or can you, the exact measurements when you had it? A. No there was times when I used 400 or 500 ft. of it. Q. And at times a lesser amount? A. About all the time whenever I pulled stakes, covered up that territory. Q. And what did you use? A. I used all in that shanty and 20 or 30 ft. around it. Q. The shanty would be only 20 by 60. You would only use about

100 ft.? A. Right around the shanty, 100 ft. of beach front. I would have the shanty there and a place to pull the boat there, scow, up. Q. And that is all you would use from December 15th until April 15th when you would pull up stakes? A. Yes."

Mr. Grubb had purchased the fishing business and equipment from Mr. Livingstone in 1910 and carried on for from 3 to 5 years, at the end of which time he sold it. Plainly, during the period Mr. Grubb was "fishing there" the only land wheih he occupied to the continuous ouster of the Crown was the land upon which the "shanty" stood, and no one has attempted to define its boundaries. In the fishing-season he passed back and forth from the water's edge to the "shanty" as the exigencies of his fishing-operations required, and as occasion required he used some undefined area or areas along the beach for drying his nets. During the non-fishing months he occupied some bit of land where the boat or scow rested and some bit of land where the stakes were piled.

The evidence of other witnesses called by the defendant covered the history of the fishery operations by successive owners subsequent to 1915.

Over the objection of counsel for the plaintiff the learned trial Judge admitted in evidence, as part of the defendant's case, an affidavit made by David Livingstone. It will be recalled that the witness Grubb had purchased the fishery from Livingstone. That affidavit was not styled in this cause or in any other. It had been made before this action was commenced. Mr. Livingstone died in the spring of 1953.

It was argued before the learned trial Judge, and in this Court, that Rule 269 authorized the learned trial Judge to admit that affidavit in evidence as part of the defendant's case. That Rule reads as follows:

"269. The witnesses at the trial of an action or an assessment of damages shall be examined *viva voce* and in open Court, but a Judge may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial, on such conditions as he may deem just, or that any witness whose attendance ought for some sufficient cause to be dispensed with, be examined before an examiner; but where the other party *bona fide* desires the production of a witness for cross-examination, and such witness can be produced, an order shall not be made authorizing his evidence to be given by affidavit."

In my respectful opinion that Rule does not and was not intended to authorize a trial Judge to admit in evidence an affidavit purporting to prove any fact placed in issue by the pleadings and which is essential to the case to be proved by a party to the action. The death of Mr. Livingstone may have been an unfortunate circumstance for the defendant, but it would be eminently unfair to a litigant to permit facts to be proved against him by an affidavit on which he had no opportunity to cross-examine the deponent. In considering this appeal, therefore, I have ignored that affidavit.

It is my opinion that the defendant has failed to prove that for a continuous period of 60 years prior to the issue of the writ, lands upon which the defendant's buildings now stand, and any definite area around them, had been in the continuous and exclusive possession of the defendant and those through whom he claims, so as to bar the Crown and to give to the defendant the right "to have, hold and enjoy" them against the Crown.

So far as the land upon which the present buildings stand is concerned, there has been adverse and continuous and exclusive possession since they were erected, but at the risk of repetition I point out that there is no evidence that prior to their erection there were any buildings continuously since August, 1893, on any part of the sites of the present buildings. So far as the surrounding land to which the defendant now claims title is concerned, and excluding therefrom the part or parts, if any, on which a building or buildings from time to time stood, the evidence establishes no more than this, namely, that over the years dating back to 1893 and earlier, there have been in each year seasonal trespasses on the whole or parts thereof.

The occupation, the holding or enjoying contemplated by the *Nullum Tempus Act* and which would bar the Crown, is such as would constitute a civil possession against a subject owner: see the reasons of Duff J., as he then was, in *Hamilton* v. *The King* (1917), 35 D.L.R. 226 at p. 253, 54 S.C.R. 331 at p. 371. This means that throughout the statutory period as against the Crown, there must have been if the defendant is to succeed, (1) exclusive occupation in the physical sense, *i.e.*, detention, and (2) the *animus possidendi*.

What constitutes exclusive possession? It must be actual possession, an occupation exclusive, continuous, open or visible and notorious. It must not be equivocal, occasional or for a special or temporary purpose. What the law requires is the ouster of the Crown: *Sherren* v. *Pearson* (1887), 14 S.C.R. 581.

In that case Henry J. at p. 592 said this: "Numerous acts of trespass only amount to so many acts of disseisin; when a man trespasses on the land the true owner ceases to have full possession for the time being; but the moment the trespass is at an end the trespasser's disseisin is at an end and the complete possession is again in the actual owner. It is therefore required that the party should not only take possession, not only disseise the owner, but that he should continue that disseisin so as to amount to an ouster, and that ouster maintained for the statutory period. That can only be done by some act of possession not merely by a temporary disseisin, and it must be over every inch of the land of which the party claims possession."

At p. 595 Taschereau J. said this: "The effect to be given to repeated entries upon the land, or acts of user or possession, depend largely upon the nature of the property. What might be sufficient evidence in the case of cultivated lands to go to a jury would not constitute any evidence in those of wilderness lands. If the property is of a nature that cannot easily be protected against intrusions, mere acts of user by trespassers will not establish a right."

Applying what Taschereau J. there said to the instant case: Here was an open strip of beach several miles in length extending back from the water's edge to some higher land that was wooded and from that point the terrain extended out to the road to which I earlier made reference. That extensive strip of beach and higher land could not be easily protected against trespassers intruding thereon. There would be no practical way of doing so. What was more natural than that fishermen fishing the waters of Lake Erie on the west side of Point Pelee would during the fishing season as a matter of convenience, and unless there was objection from the Crown or its lessee—in this case, as will later appear, there was a lessee—use the beach for the purpose of landing thereon and departing therefrom, leaving excess equipment here and there along the beach, perhaps not more than once in the same spot, drying their nets and in the winter piling such of their equipment as they were willing to have exposed to the weather, some safe distance back from the water's edge and at a place which would be convenient when they would resume operations in the following spring? In doing those things fishermen would be using parts of this strip of beach for a temporary and special purpose, not with the intention of excluding others from the beach and not always using the same precise areas. Such acts in my opinion, were mere seasonal acts of trespass and no more.

The instant case bears some resemblance in its facts to *McLean* v. *Wilson* (1916), 31 D.L.R. 260, 36 O.L.R. 610. In that case the defendant, a fisherman, had built a shack near the shore of Lake Huron on land belonging to the plaintiff. In an action by the plaintiff to recover possession, the defendant alleged that over 20 years he had continuous, peaceable and undisputed possession of the land on which the shack was erected, a right-of-way thereto from the water's edge and a right-of-way from a side-road to the shack. Writing the judgment of this Court Meredith C.J.O. at p. 263 said this: "I am also of opinion that the appellant [defendant] failed to shew a possession of any part of the land of which possession is claimed, except that part of it which was occupied by the original shack or hut which he built, sufficient to extinguish the title of the respondent. Such use as he made of the strip of land between the road allowance and the water's edge of the lake was as a mere trespasser; and, being but a trespasser, it was necessary for him to shew pedal possession. Apart from the occupation of the site of the shack or hut, he went upon the land only for a few days in the spring or autumn, when he was engaged in fishing, and at all other times the true owner was, in the eye of the law, in possession. It is well settled that possession, in order to extinguish the title of the owner, must be actual, continuous, and visible. The appellant's possession was not of that character and indeed was not a possession at all, but his acts were but a series of successive trespasses with long periods of time between them."

I earlier made reference to a lessee of these lands from the Crown. These are the particulars. On April 6, 1885, the Crown granted to the South Essex Gun Club a lease for 21 years of the property known as the Naval Reserve containing 3,190 acres. It is admitted that the lands thereby demised included the lands in question in this action. That lease was in effect until it was cancelled on December 5, 1902. The yearly rent thereby reserved was the sum of $400 and it was paid by the lessee to the Crown. If the Crown from time to time was not in actual possession of part of the lands in question in this action, the Crown was during the term of that lease being "answered the rents" therefor.

What is meant by being "answered the rents" within the meaning of the *Nullum Tempus Act*? In *A.-G. N.S.W.* v. *Love*, [1898] A.C. 679 at p. 686, it was held that: "If the Crown is not actually in possession, but that in the Crown's accounts some person is charged with the rent which they had not paid and still stand as a Crown debtor in the Crown books, and that

condition of things has existed within the sixty years, the title by that condition of things, although the possession may have been for sixty years, was not adverse, because during that period something was payable to the Crown which had not been paid."

From time to time there would be rent unpaid by the South Essex Gun Club to the Crown but in the Crown's accounts that rent would be charged against the gun club until it was eventually paid and having been paid would later begin to accrue again. During the currency of that lease the Crown could not, in violation of its terms, grant any right of occupation to any other person.

The defendant purchased this fishery business and equipment and part of Lot 15 in December, 1937, from James E. and Harry McLellan. The sale of the equipment was under a conditional sales contract dated December 11, 1937. The equipment included the buildings on the land and in that contract they are described as "erected on Government lands adjacent to the fishery". The respondent must have known that those vendors were not then asserting any title to these lands.

On April 1, 1944, a building permit was issued to the defendant for the erection of a fish and storage building and on the same date a permit of occupation was granted to him to "occupy a site 40′ x 60′ . . . . situate a distance of thirty (30) rods westerly from the Main Drive and opposite Lot No. 15, according to the [McPhillips Plan]". That permit called for the payment of an annual fee and was subject to other terms therein stated. The fee was paid up to and including the year ending March 31, 1951. That permit specifically provided that the defendant accepted it on the terms therein contained and the defendant signed it. That permit provided that upon termination the defendant "shall, at the option of the Minister, remove or destroy without delay the improvements placed on the said lands and shall deliver up possession of the said lands to the Minister in a condition satisfactory to the Superintendent of the Park and should the permittee neglect or fail to do so within thirty days of the receipt of written notice from the Minister or his authorized representative, the Minister may accept such refusal or negligence of the permittee to remove such improvements as a forfeiture of all rights or claims to the improvements and the same may then be disposed of by the Minister in such a manner as he may consider advisable, and in the case of such action by the Minister the permittee shall have no right or claim for damages resulting therefrom".

In 1951 it came to the attention of officers of the National Parks Branch of the Department of Mines and Resources that the defendant was occupying land additional to that covered by the permit granted to him in 1944, including a second building. By a letter dated June 5, 1951, addressed to the defendant, that permit of occupation was cancelled as of March 31, 1951, and a new licence of occupation of an area large enough to include the site of both the buildings together with an area sufficient for the storage of boats, nets and other equipment in season, was offered to the defendant, but the defendant refused it taking the position that he has taken in this action, namely, that he had acquired title by possession.

The acceptance by the respondent of the permit of occupation dated April 1, 1944, and the payment of the annual fee thereunder must be construed as an acknowledgment by him to the Crown of the Crown's title to the lands therein described. It is unnecessary to consider what effect that acknowledgment and agreement to surrender would have had if as of that date the title of the Crown had been barred by the operation of the statute. I have already held that it was not and therefore the acknowledgment was consistent with the fact.

The permit having been cancelled the Crown became entitled to possession of the lands described therein. There is no claim by the respondent in this action for relief from the forfeiture of the buildings thereon. Those buildings have a substantial value and it would be a severe hardship on the respondent if they were forfeited to the Crown. The Crown may still be willing to grant the respondent the more extensive permit which he earlier rejected, containing the permission to remove the buildings on the termination thereof.

I would allow the appeal with costs and direct that judgment be entered for the plaintiff for the relief claimed together with the costs of the action, that judgment to be without prejudice to any claim which the respondent may make within 90 days in an action for relief against the forfeiture of the buildings.

Appeal allowed.

Certainly this appears to be the view of Tritschler, J.A., and Coyne, J.A., in the *Casselman* case. I think, too, that it is reasonable to assume that this view is implicit in the reasoning of the Supreme Court of Canada in the *Hagan* case. Although the constitutional issue was not argued in the *Hagan* case, the *Casselman* case certainly was the focal point of the argument, in which the constitutional issue had been fully discussed. In each case, of course, the Courts concerned themselves only with the effect of the legislation as regards the original parties to the transaction. In the *Casselman* case, Coyne, J.A., specifically pointed out that if the argument regarding validity related to a holder in due course, different considerations might prevail.

In my opinion, the same observation is applicable to this case. I think that a Legislature is acting within its authority by passing legislation of this kind in so far as it relates to the parties to the original contract. In my opinion this is preeminently a matter of property and civil rights. However, as Tritschler, J.A., pointed out in the *Casselman* case, I have serious doubts as to whether the legislation is *intra vires* the Legislature in so far as it relates to a holder in due course. However, I am not faced with that particular problem. In the circumstances, I hold that the legislation is *intra vires* as regards to the parties to this transaction. Accordingly, I dismiss the action with costs.

Action dismissed.

CHITTICK et al. v. GILMORE

New Brunswick Supreme Court, Appeal Division, Hughes, C.J.N.B., Bugold and Ryan, JJ.A. August 1, 1974.

Real property — Adverse possession — Colour of title — What acts sufficient to establish adverse possession — Limitation of Actions Act, R.S.N.B. 1952, c. 133, ss. 29, 60.

The defendant had obtained a tax deed in 1948 which included the property in dispute. Although the tax deed was void the defendant was unaware of this and was in "possession" under colour of title. The plaintiff held paper title to the property and alleged that the defendant had trespassed on it. The land was unfenced. Between 1948 and 1973 the defendant had cut wood on the land each year and in 1950 he built a camp on the property where one of his employees lived for three years. Finally, in 1957, he opened a gravel pit and removed gravel from it each year. The plaintiff's predecessor in title, her husband, was aware of these acts. The plaintiff was successful in obtaining an injunction restraining the defendant from acts of trespass and in recovering damages for past acts. A counterclaim for an order declaring the plaintiff's title had been extinguished was dismissed. The defendant appealed.

Held, the appeal should be dismissed. The defendant was only in actual possession during the three years when his employee lived in the camp on the property and when he or his work crews were cutting trees or removing gravel. Even if the opening of the gravel pit and removal of gravel from it was to be regarded as continuous actual possession there was a hiatus in actual possession between 1953 and 1957 when the only act of possession was the cutting of wood. This was not a case where land had been improved by the clearing and cultivation of a portion of it under colourable title whereby actual possession of the part was to be extended by construction to all the lands within the deed.

[*Stewart v. Goss* (1933), 6 M.P.R. 72; *Sherren v. Pearson* (1887), 14 S.C.R. 581; *Wood v. LeBlanc* (1904), 34 S.C.R. 627; *MacMillan v. Campbell et al.*, [1951] 4 D.L.R. 265, 28 M.P.R. 112, apld]

Evidence — Hearsay — Plan of survey — Surveyor verifying plan — Whether plan hearsay.

Where a surveyor verifies a plan of survey and affirms that it represents his observations on the ground, the plan is not hearsay. It is admissible to show what he knew or believed with respect to matters illustrated on the plan.

[*Anticknap v. Scott* (1914), 16 D.L.R. 20, 26 W.W.R. 952, 19 B.C.R. 81, distd]

APPEAL from a judgment granting an injunction and awarding damages for acts of trespass and dismissing a counterclaim for an order declaring that the plaintiff's title had been extinguished.

David G. Barry, for defendant, appellant.
Hugh H. McLellan and *C. Dwight Allaby*, for plaintiff, respondent.

The judgment of the Court was delivered by

HUGHES, C.J.N.B.:—This is an appeal by the defendant from a judgment in the Queen's Bench Division whereby it was ordered that the plaintiff was entitled to (a) an injunction restraining the defendant, his agents, servants and employees from trespassing on the plaintiff's property situate in the Parish of Lepreau in the County of Charlotte, described in para. 2 of the statement of claim and restraining them and each of them from removing, selling or dealing with any wood, gravel or rock from the plaintiff's said property, and (b) damages to be assessed by a Master of the Supreme Court, and (c) costs of the action, and directing that the defendant's counterclaim for a declaration that the plaintiff's right to take proceedings to recover the property is barred and her right and title thereto extinguished, be dismissed without costs.

The action was commenced by a writ of summons issued August 3, 1973, for alleged trespasses by the defendant to the

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westerly half of a lot or tract of land granted to James Dawson by a Crown grant dated October 16, 1822, in which the land, herein sometimes referred to as the "Dawson Grant" is described as:

> all that Lot or Tract of Land situate in the Parish of Pennfield and County of Charlotte in our Province of New Brunswick and bounded as follows, to wit Beginning at a Spruce Tree on the South side of Saint Andrews Road two hundred and seventy rods East of the twenty eight mile Board and at the North East angle of Lot number twenty three Military Location and running along the said Lot South by the magnet one hundred and forty chains of four poles each thence East twenty five chains, thence North on hundred and thirty chains to a Fir Tree on the said Road thence along the said Road by its various courses to the place of beginning containing three hundred acres more or less with ten per Cent allowance for Roads and Waste being wilderness land and also particularly described and marked on the plot or plan of Survey hereunto annexed.

From the exhibits admitted in evidence it appears that the Dawson Grant is bounded westerly by Lot No. 23 granted by the Crown to Thomas Shaw, April 14, 1834, and easterly by a parcel of land granted to Richard Bartlett by Crown grant dated May 8, 1826.

The plaintiff, who brought this action as executrix of the estate of her late husband who died in the spring of 1972 as well as in her own right, claims title to the westerly half of the Dawson Grant through a deed from John Fisher to Richard Shaw dated April 13, 1846, and duly registered in which the land which she claims was described as follows:

> ALL that certain piece of parcel of land, situated in the Parish of Pennfield, County of Charlotte, Province of New Brunswick and bounded as follows, to wit:
>
> BEGINNING at a spruce tree on the south side of the Saint Andrew's Road, 270 rods east of the twenty-eight mile board and at the north-east angle of lot number 23 military location and running along the said lot south by the magnet one hundred forty chains of four poles each;
>
> THENCE east twelve and one-half chains;
>
> THENCE north one hundred thirty-five chains until it strikes the said road; and
>
> THENCE along the said road by its various courses to the place of beginning, containing ninety-five acres more or less with ten percent allowance for roads and water lands, the above being the one half part of a certain parcel of land and premises being ninety-five acres aforesaid and running across the lot aforesaid, twelve and one-half chains aforesaid to a cedar post drove into the flats on the southern extremity of beforementioned line.

The abstract of title of the lands comprised within the Dawson Grant shows that Elizabeth Shaw conveyed the westerly

half to Samuel Edward Chittick by a deed dated April 16, 1947, which was duly registered. Mr. Chittick resided on the property from 1947 until his death and the plaintiff who married Mr. Chittick in 1950 has resided on the property ever since her marriage.

Notwithstanding the fact that the grant by the Crown of the Dawson Grant and the conveyances through which the plaintiff claims title describe a single lot extending southerly from the old St. Andrews road there is cogent evidence that the Dawson Grant consists of two separate parcels of land separated by land previously granted by the Crown in 1813 to John Salkeld. At the present time the Dawson Grant is traversed by the new Saint John-St. Stephen highway on the southerly side of which the plaintiff's residence is located. A railway right of way of the Canadian Pacific Railway Company and a transmission line right of way of the Power Commission also cross the Dawson Grant northerly of the new highway.

The defendant admits that the plaintiff is the registered owner of the westerly half of the Dawson Grant but denies that the acts of trespass which the plaintiff alleges he committed took place on the plaintiff's property. The plaintiff therefore had the burden of proving that the *locus in quo* was within the boundaries of her property.

The defendant claims all that part of the Dawson Grant lying northerly of the new highway under a deed dated April 23, 1948, which he obtained from the Sheriff of the County of Charlotte in which the Sheriff purported to convey:

> ALL that certain lot, piece or parcel of land situate lying and being in the Parish of Lepreau in the County of Charlotte and Province of New Brunswick on the south side of the old St. Andrew's Road containing 300 acres more or less and being the lot granted by The Crown to James Dawson.

The defendant conceded that his tax deed is void because no taxes were legally assessed or owing with respect to the property when it was sold for taxes but he contends he entered into possession of the portion of the property presently in dispute under the tax deed and that he acquired a title to it by adverse possession prior to the commencement of the action and pleads the *Limitation of Actions Act*, R.S.N.B. 1952, c. 133, ss. 7, 8, 9, 29 and 60.

The learned trial Judge found the alleged trespasses took place within the western half of the Dawson Grant claimed by the plaintiff as located on the ground by H. P. Lingley, a New Brunswick land surveyor, and as shown by him on a plan of

survey dated August 16, 1973, and admitted in evidence as ex. P-1. The Court also found that the defendant had failed to establish a title by adverse possession to any part of the land claimed by the plaintiff.

In this appeal counsel for the defendant sought to have the judgment reversed contending the trial Judge erred in law (a) in admitting into evidence ex. P-1; (b) in not holding the plaintiff was estopped from bringing the action because of the actions of herself and her predecessors in title; (c) in not holding the defendant had proved title by adverse possession, and (d) in not holding the plaintiff was estopped from claiming damage for trespass.

To establish that the alleged acts of trespass by the defendant were committed within the westerly half of the Dawson Grant the plaintiff engaged Mr. Lingley to locate the boundaries of the land which she claimed. Mr. Lingley examined the plans attached to the Crown grant to Dawson dated 1822, the grant to Bartlett and others abutting the easterly boundary of the Dawson Grant issued in 1826, the grant to Shaw of Lot No. 23 abutting the westerly boundary of the Dawson Grant issued in 1834 and the grant to John Salkeld issued in 1813, all of which grants were received in evidence, and also some other plans on file in the Department of Natural Resources.

While there does not appear to be any dispute as to the correct location of the boundaries of the Salkeld Grant on the ground, it is impossible to reconcile the boundaries of the Dawson Grant with those of the Salkeld Grant as shown on the plan attached to the grant to Bartlett and others of land abutting the easterly side of the Dawson Grant and with the Shaw Grant of Lot No. 23 which abuts its westerly boundary. The plan attached to the Bartlett Grant shows the north-westerly corner of the Salkeld Grant extending westerly into the Dawson Grant approximately 12.5 chains or half the width of the lot while the plan attached to the Shaw Grant shows the Salkeld Grant extending the full width of the Dawson Grant so as to divide it into two portions, and extending westerly into the easterly side of Lot No. 23 in the Shaw Grant about 50 to 100 ft.

Mr. Lingley stated that in his opinion the plan attached to the Crown grant to Bartlett which grant was made after the grant to Dawson does not show the Dawson Grant in its proper location and that Lot No. 1 in the Bartlett Grant overlies the Dawson Grant to the extent of about 13.5 chains along the whole of its easterly side. He speculated that the Crown grant to Dawson was issued without any actual survey

having been made of the land granted and consequently the plan attached to the grant to Dawson does not disclose that it overlies a portion of the Salkeld Grant.

Mr. Lingley cruised the property claimed by the plaintiff but was unable to find the point of beginning referred to in the description of the grant from the Crown. In order to locate the western boundary he first located what he believed to be the westerly boundary of Lot No. 24 in the grant to Shaw and measured easterly across Lots 24 and 23 a distance of 1,937.9 ft. to a point which he regarded as the easterly boundary of Lot No. 23 and the westerly boundary of the Dawson Grant. In doing so he found that the measurement of the width of the two lots came within 12.1 ft. of the correct width of the grant to Shaw. He then ran a course northerly to the old St. Andrews road along which he found evidence of a very old line on which were trees bearing three hacks indicating they were on a boundary line. This marked line extended from the new highway northerly to the hydro line crossing the property claimed by the plaintiff. He then ran his line southerly crossing the new Saint John-St. Stephen highway and found the line well marked on the headland next to the Lepreau Basin. He said this line was much older than another line which he observed and believed had been run by Land Surveyor Morrell in 1949. He also noted that when he projected his line to the northerly side of the St. Andrews road the line was approximately 10 ft. easterly of a post which bore markings indicating a division line between Lots 23 and 22 the side lines of which were prolongations northerly of the side lines of the Dawson Grant and the Shaw Grant as shown on the plans attached to those grants. He also found that the line run by Surveyor Morrell which was approximately parallel to and 89 ft. easterly from the line run by himself would, if projected southerly, pass through the residence occupied by the plaintiff on the southerly side of the new highway. Having located the westerly line of the Dawson Grant, Surveyor Lingley measured easterly a distance of 12.5 chains to establish the easterly boundary of the property claimed by the plaintiff, and ran this line parallel to the westerly boundary of the Dawson Grant.

On cross-examination Mr. Lingley conceded that if the length of the westerly boundary of the eastern portion of the Dawson Grant, *viz.*, 72 chains, 50 links, as specified in the deed thereof dated July 28, 1846, from John Fisher to Robert Stafford, was correct, the Dawson Grant would have to be located about 500 ft. westerly of the location claimed by himself to be correct since the scaled length of the westerly boundary of

that portion of the Dawson Grant shown on ex. P-1 was about 65 chains or between seven and eight chains short. He also conceded that he did not verify the place of beginning as located by him with the measurement to the 28-mile board referred to in the grant to Dawson.

While Mr. Lingley's evidence taken alone is by no means conclusive that he has located precisely the boundaries of the Dawson Grant there is other evidence which lends support to the conclusion that his westerly boundary line is approximately correct. Shortly after the defendant purchased the property in 1948, he engaged a land surveyor, Ralph Hanson, to determine the boundaries of the Dawson Grant. The defendant testified Mr. Hanson ran a line marking the westerly boundary in a location if projected southerly would have passed through the house in which the plaintiff and her husband resided and he realized the line was probably not correctly located. Later he took the matter up with the Crown Land Office in Fredericton and as a result Surveyor Morrell surveyed the line run by Hanson and apparently confirmed it. This line is approximately 89 ft. easterly of the line run by Mr. Lingley which in turn is approximately parallel to and about 50 ft. easterly of the Mink Brook road which leads southerly from the old St. Andrews road. There is evidence that Moses Shaw, one of the predecessors in title to the plaintiff who resided in the house presently occupied by the plaintiff, in the early 1930's, conducted lumber operations on the disputed area and regarded the Mink Brook road as his westerly boundary.

Counsel for the defendant contended the learned trial Judge erred in law in admitting into evidence ex. P-1, on the ground the plan is based on hearsay, and cited *Anticknap v. Scott* (1914), 16 D.L.R. 20, 26 W.W.R. 952, 19 B.C.R. 81, in support of that contention. In that case the Court rejected, as hearsay, evidence of two land surveyors who had not actually inspected the property lines in dispute and had no personal knowledge of them but testified from field notes made by their assistants.

A plan based wholly on hearsay has, of course, no evidential value. In my opinion ex. P-1 is by no means solely based on hearsay. It shows the lines and surveyor's monuments found by Mr. Lingley in the general area of the disputed property even though such lines and monuments are not proven to be correctly located. It also shows the lines which Mr. Lingley believes correctly represent boundaries of the westerly half of the Dawson Grant. Without the plan a large part of the evi-

dence adduced by both parties would not have been intelligible. Furthermore, it was used in cross-examination by counsel for the defendant. Mr. Lingley verified the plan and thereby, in effect, affirmed that it represented his observations on the ground. To that extent it was admissible to show what he knew or believed with respect to the matters which are illustrated on the plan.

As the defendant adduced no evidence to show that the boundaries as located by Mr. Lingley are incorrect the learned trial Judge was justified in concluding on the evidence before him that the boundaries of the western half of the Dawson Grant as located by Mr. Lingley and shown on ex. P-1 were correct and that the plaintiff was the owner thereof subject to the defendant's claim to title by adverse possession.

I see no merit in the defendant's contention that the plaintiff is estopped from bringing the present action because she and her late husband did not bring an action earlier to prevent the defendant from cutting pulpwood and removing gravel from the property which they claimed to own. Even if the defendant believed Mr. Chittick was acquiescing in the use of the property the defendant certainly did not act to his detriment in taking pulpwood, firewood and gravel from the property. This is not a case where an owner stands by and permits an innocent trespasser to improve the owner's property in the belief that it is his own.

The only remaining ground of appeal is the defendant's contention that he has acquired title by adverse possession to the *locus in quo* and that by virtue of ss. 29 and 60 of the *Limitation of Actions Act*, the plaintiff's title was extinguished before the action was commenced.

The learned trial Judge found the acts committed by the defendant and his servants and agents on the disputed area had been open and visible and were known or should have been known by the plaintiff and the late Mr. Chittick but that the acts were not sufficiently continuous to establish a title by adverse possession.

The alleged acts of trespass took place on that part of the western half of the Dawson Grant containing about 65 acres which lies between the Salkeld Grant and the southerly side of the old St. Andrews road. This area was unfenced and I gather from the whole of the evidence that there was no division line between the eastern half and the western half of the Dawson Grant until it was established by Mr. Lingley in 1973.

The defendant testified that he entered into possession of

the whole of the Dawson Grant extending from the new highway to the old St. Andrews road in 1948 and although his deed purported to convey the whole of the Dawson Grant containing 300 acres he does not claim the land south of the new highway. Shortly after obtaining the tax deed to the property he attempted to establish the westerly boundary. He also testified that in each year from 1948 until 1973, he cut an average of 75 cords of pulpwood and firewood but the evidence is not clear whether this quantity was taken from the whole of the Dawson Grant or only from the westerly half. In 1950 he built a camp near the westerly boundary of the property and one of his employees lived in the camp for the next three years. In 1956 the defendant located a gravel pit on what is shown in ex. P-1 as approximately the whole width of the westerly half of the Dawson Grant and he bulldozed a road from the pit across the property. He stated that between 1957 and the commencement of the present action he removed gravel from the pit each year. A small field surrounded by a barbed wire fence located near the old St. Andrews road was used by the defendant as a place to keep cattle. The fenced area is mainly on the eastern half of the Dawson Grant but a portion of it extends into the westerly half.

The defendant testified he told the late Mr. Chittick in 1948 about the line run by surveyor Hanson and stated that he was never aware that Mr. Chittick claimed any part of the land easterly of the Mink Brook road and that he thought Mr. Chittick's land lay westerly of that road. There is very little evidence to show that Mr. Chittick ever visited the disputed area other than on one occasion in 1966, when he attempted to stop the defendant's workmen from cutting trees in the vicinity of the Mink Brook road. Mrs. Chittick testified she was present on that occasion and that when her husband was unable to stop the cutting he consulted a lawyer in Saint John who wrote the defendant concerning the alleged trespass. Shortly thereafter the defendant visited Mr. Chittick at his home and told him he owned the property and that Mr. Chittick did not own anything there and had no right to put the men off the property. I find it impossible to believe Mr. Chittick was unaware the defendant was taking pulpwood, firewood and gravel from the property. Witnesses for the plaintiff suggested that Mr. Chittick objected to the defendant's trespasses but this is denied by the defendant. There appears to have been some discussion between Mr. Chittick and the defendant concerning the latter's claim to the Dawson Grant as a result of which the defendant consulted three solicitors in

succession. Mrs. Chittick stated that her husband decided to take action against the defendant in 1971 but died before he was able to do so.

The evidence, I think, establishes that the defendant entered into possession of the disputed area under a *bona fide* belief that he had acquired ownership of it under his tax deed. The fact that the deed was invalid does not disentitle him from claiming the benefit of the colour of title: See *Stewart v. Goss* (1933), 6 M.P.R. 72 at p. 82. I am unable to determine from the evidence when the defendant found that his deed was invalid.

The acts of possession relied on by the defendant are those which an owner of land such as that in dispute might normally be expected to do. Counsel for the defendant contends that all that is necessary in order to entitle the defendant to the benefit of title by adverse possession is proof of acts of ownership normally performed by owners of land of the kind in dispute. He cites *Limitations of Actions in Canada* by J. S. Williams at p. 101 in support of the proposition.

The nature of the possession necessary to extinguish the title of a true owner where a claimant seeks to establish title by adverse possession was decided by the Supreme Court of Canada in two decisions. In the first, *Sherren v. Pearson* (1887), 14 S.C.R. 581, the alleged trespasses occurred on a strip of woodland lying between two roads which the jury found to be within the boundaries of the plaintiff's deed. The defendant claimed by adverse possession, relying on his cutting of trees on the disputed area for a long number of years previous to the action. I quote the following passages from the judgment of Ritchie, C.J., at pp. 585-7 as relevant to the issue to be decided in the present case:

> To enable the defendant to recover he must show an *actual* possession, an occupation exclusive, continuous, open or visible and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose.
>
> I cannot discover anything in this case to indicate that the defendant or those under whom he claims at any time made an entry on the land with a view of taking possession of it under a claim of right or color of title, or with a view of dispossessing the actual owner, such as running the lines around it, spotting the trees, or acts of this character, assuming such would have been sufficient against the true owner, or by any other open, visible, continuous acts, and there is no evidence whatever to show that the acts relied on were done with the knowledge of the owner. The acts relied on were nothing more, as against the true owner, than isolated acts of trespass having no connection one with the other. The mere acts of going on wilderness land from time to time in the absence of the owner, and cutting logs or poles, are not such acts, in themselves, as would deprive the

owner of his possession. Such acts are merely trespasses on the land against the true owner, whoever he may be, which any other intruder might commit. There was no occupation of the lot by the defendant; there was nothing sufficiently notorious and open to give the true owner notice of the hostile possession begun. An entry and cutting a load of poles or a lot of wood, being itself a mere act of trespass, cannot be extended beyond the limit of the act done, and a naked possession cannot be extended by construction beyond the limits of the actual occupation, that is to say, a wrongdoer can claim nothing in relation to his possession by construction.

Assuming then that the old Palmer road, as found by the jury, was unquestionably the true dividing line between the Pearson and Sherren lots, the possession would follow the title unless displaced by evidence of an exclusive, continuous and uninterrupted possession of twenty years by the defendant. As was said in *Doe d. DesBarres v. White* [1 Kerr N.B. 595], the presumption is that the owner remains in possession of that which is not actually in possession of others until proof be given of acts of possession by the defendant. It is sufficient for the plaintiff, as owner of the fee, to show the land continued in its natural state, and uninclosed, within twenty years before action.

[Emphasis added.]

Then in *Wood v. LeBlanc* (1904), 34 S.C.R. 627, the Court considered what facts must be proved by a claimant who enters and occupies land under colour of title in order that the title of the true owner be extinguished. I quote from the judgment of Davies, J., the following passages at pp. 633-4:

I agree that seisin in fee may and will be presumed from evidence of the *actual possession* of a house, field, close, farm or messuage. But I cannot find any authority for extending the application of any such presumption to large tracts of wilderness lands which may be held in *constructive possession*, nor do I think it can on principle be so held. It is the *actual possession* which justifies the presumption. The very basis from which it arises is absent in the case of constructive possession only. *When* and *while* actual possession is in a man seisin will be presumed to the extent of his actual possession or occupation. But the moment he ceases actually to possess or occupy, that moment the presumption ceases, and it does not arise at all with respect to lands of which there is no actual possession or occupation or *beyond the bounds of such actual possession or occupation*. To my mind, therefore, the question is not whether those through whom the plaintiff or defendant claimed first trespassed upon and temporarily occupied the disputed lands or a part of them, but the onus of proof being upon the plaintiff whether with respect to the lands off which the trees in question were cut (or the block of such lands contained within the colourable title deeds) he has shewn such open, notorious, continuous, exclusive possession or occupation of any part of such lands as would constructively apply to all of them, and operate to extinguish the title of the true owner and give plaintiff a statutory one. The nature of the possession necessary to do this in the absence of colourable title was fully considered by this court in the case of *Sherren v. Pearson*. It was there decided that

isolated acts of trespass committed on wild lands from year to year will not, combined, operate to give the trespasser a title under the statute.

And at pp. 635-6 he stated:

Now, in my judgment, the possession necessary under a colourable title to *oust* the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed *but only when and while there is that part occupation*. And before it can be extended it must exist and is only extended by construction while it exists. It may be that a person with colourable title engaged in lumbering on land would be held *while so engaged and in actual occupation of part* to be in the constructive possession of all not actually adversely occupied even if that embraced some thousands of acres within the bounds of his deed. But it is clear to my mind that if and when such person withdraws from the possession of the part by ceasing to carry on the acts which gave him possession there he necessarily ceases to have constructive possession of the rest. His possession in other words must be an actual continuous possession, at least of part.

When the lumbering ceased in the spring of the year and actual occupation of any part of the lands ceased, then as a necessary consequence all constructive possession ceased with it.

And at p. 639 he stated:

Evidence that a party claims land by possession either with or without colour of title is not sufficient when it merely establishes that the claimant used the lands in the same way and for the same purposes as an ordinary owner would. A true owner of lands is not bound to use them in any way. He may prefer to leave them vacant. While they are vacant he still retains the legal possession, and he only ceases to be in legal possession when and during the time that he is ousted from it by a trespasser or squatter, who has acquired and maintained what the law holds to be an actual possession. If the squatter claims to have ousted him by constructive possession he must prove a continuous, open, notorious, exclusive possession of *at least part of the lands* the whole of which he lays claim to under his colourable deed.

In *MacMillan v. Campbell et al.*, [1951] 4 D.L.R. 265, 28 M.P.R. 112, Harrison, J., with whom Richards, C.J., concurred, said at p. 272 D.L.R., p. 122 M.P.R.:

The case of *Sherren v. Pearson* (1887), 14 S.C.R. 581 approving of *Doe d. DesBarres v. White, supra*, together with *Wood v. LeBlanc* (1904), 34 S.C.R. 627, are generally regarded as settling the law in reference to adverse possession, and from these cases it is apparent that mere cutting of wood from time to time over a piece of land is not such continuous possession as is necessary in order to establish title. But when such lumbering is combined with the continual marking out of boundaries, which boundaries are brought to the attention of the owner of the land, and when, as in the case at bar, it is admitted that a portion of the disputed strip has been acquired by clear-

ing and cultivating, then there would appear to be sufficient evidence to establish adverse possession, and I would so conclude.

In the present case there was, in my opinion, an actual possession by the defendant of the disputed area during the years 1950 to 1953 when the defendant's employee Hayes lived in a camp on the property but that thereafter there was no actual possession of the property by the defendant other than while he or his work crews were cutting trees or removing gravel. This, in my opinion, is not a case where land was improved by clearing and cultivating a portion of it under the colourable title of a deed defining the boundaries of the property which might bring the case within the class of cases where seisin in fee will be presumed from evidence of "actual possession of a house, field, close, farm or messuage" referred to by Davies, J., in *Wood v. LeBlanc, supra.* Even if the opening of a gravel pit and the removal of gravel from it between 1957 and 1973 could be regarded as a continuous actual possession of the gravel pit there was a hiatus in actual possession between 1953 and 1957 when the only act of possession proved was the cutting of pulpwood and firewood.

In my opinion the evidence supports the conclusion of the learned trial Judge that the defendant failed to establish an actual possession during the whole of the statutory period sufficient to extinguish the title of the plaintiff and her deceased husband through whom she claims title.

The appeal should therefore be dismissed with costs.

Appeal dismissed.

MORGUARD MORTGAGE INVESTMENTS LTD. v. FARC DEVELOPMENT CORP. LTD. et al.

Alberta Supreme Court, Appellate Division, Sinclair, Clement and Moir, JJ.A. September 10, 1974.

Mortgages — Redemption — Reopening period for redemption — Order sought reopening period for redemption after sale order made upon receipt of successful tender under judicial sale — Whether order to reopen to be given — Judicature Act (Alta.), s. 34(18) — Land Titles Act (Alta.), ss. 109, 131.

The *Supreme Court Rules of Alberta* require the making of an order *nisi* fixing the period of redemption upon default on a mortgage. If the mortgagor fails to redeem, the property may be sold by tender to be approved by the Court. Section 34(18) of the *Judicature Act*, R.S.A. 1970, c. 193, directs provision for sale and s. 131 of the *Land Titles Act* R.S.A. 1970, c. 198, requires approval and confirmation of sale by the

" En conséquence, maintient l'action du demandeur, renvoie le plaidoyer du défendeur et condamne ce dernier à payer au demandeur ladite somme de $143.89 avec intérêt à compter de l'assignation et les dépens."

Mr. Justice Guerin.—On the 23rd of June 1918, the defendant was condemned by the Superior Court (Mercier, J.), to pay the plaintiff $143.89 for hay as per account rendered.

The defendant claims that this hay was worthless; it is his possession, and he tenders it back to the plaintiff.

I find nothing to change in the reasons given by the learned judge of the first Court, nor in the conclusions arrived at by him, and am, therefore, of opinion that the judgment should be confirmed with costs against the appellant.

D'AILLEBOUST v. BELLEFLEUR.

Sauvages— Réserve— Occupation — Construction— Surintendant-général—Injonction—C. proc. art. 957—S. rev. [1906] ch. 81, art. 33, 34.

En vertu de la "Loi des sauvages", (1) nul autre qu'un sauvage de la bande ne peut, sans l'autorisation du surintendant-général, résider dans les limites d'une réserve appartenant à cette bande ou occupée par elle. Néan-

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M. le juge Duclos.—Cour supérieure.—No 4956.—Montréal, 2 octobre 1918.—Laflamme, Mitchell et Callaghan, avocats du requérant.—Bisaillon, Bisaillon et Béique, avocats de l'intimé.—

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(1) S. rev. [1906], ch. 81, art. 33, 34.

moins. dans le cas d'une telle résidence illégale, le surintendant seul peut l'en expulser; et le maire de cette réserve, membre de la bande, n'a aucun droit de demander une injonction pour l'empêcher de construire sur son terrain.

Le requérant demande qu'une injonction soit lancée contre le défendeur sur les faits ci-après relatés. Le requérant est membre de la bande des sauvages de Caughnawaga, et le maire de l'endroit. L'intimé, un blanc marié à une sauvagesse, obtint, le 11 avril 1913 du conseil de la bande, une permission temporaire de résider dans la réserve durant la vie d'un nommé D'Ailleboust, qui maintenant est décédé. L'intimé construisit une maison qui fût détruite par un incendie durant l'été de 1917. Le 20 juillet 1917, le conseil passa une résolution lui défendant de rebâtir sa maison, et lui donnant en même temps avis que la bande prenait possession de sa propriété et était prête à lui payer ses améliorations.

L'intimé ne tint aucun compte de cet avis et travailla à reconstruire son habitation.

Le requérant nie que l'intimé ait le droit d'habiter la réserve, et d'y faire aucune construction, vu qu'il est un homme blanc. La conclusion de la requête du requérant demande l'émission d'un bref d'injonction commandant à l'intimé de cesser de construire sa maison et ses dépendances, sous peine de l'amende pourvue par la loi.

L'intimé se prévaut de la résolution du conseil du 11 avril 1913, et plaide que le requérant est sans droit et sans autorité pour demander l'injonction requise contre lui.

La Cour a soutenu les prétentions de la défense, et la requête a été renvoyée par les motifs suivants:

"Considering that by a resolution of the Council of Caughnawaga dated the 11th of April 1913, the respondent,

Wilbrod Bellefleur, a white man married to a half breed, was granted permission to reside on the reserve, subject to his good behaviour.

"Considering that said resolution was approved of by the Department of Indian Affairs;

"Considering that it is established that the respondent's conduct is beyond reproach;

"Considering that under the provisions of the Indian Act, it is the Superintendent General of Indian Affairs who determines whether any one other than an Indian of the Band shall be permitted to reside on the reserve, and that on his authority alone can such person be removed;

"Considering that the Superintendent of Indian Affairs has declined to act in this matter;

"Considering that the petitioner is without right or authority to institute the present action;

Doth dismiss the said petition with costs."

WILLEMS v. FONTAINE.

Vente—Défaut de paiement—Nullité de la vente—Assurance—Défaut d'assurance—Perte du terme, C. civ. art. 1024, 1065, 1092.

1. Une police d'assurance prise sur une maison en faveur du vendeur est pour celui-ci une sûreté; et le défaut de la maintenir en vigueur est une diminution de sûretés dans le sens de l'article 1092 C. civ.

MM. les juges Lafontaine, Panneton et Loranger.—Cour de revision.—No 2347.—Montréal, 9 novembre 1918.—Létourneau, Beaulieu et Mercier, avocats du demandeur.—Louis Boyer, C. R., avocat du défendeur.

said by Davey and Sheppard JJ.A. as to these grounds and have nothing to add.

I would dismiss the appeal.

Appeal allowed and new trial directed, ABBOTT J. *dissenting.*

Solicitors for the appellant: Oliver, Millar & Co., Vancouver.

Solicitor for the respondent: G. L. Murray, Vancouver.

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HER MAJESTY THE QUEEN .....APPELLANT;

AND

HARRY S. DEVEREUX .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Indian lands—Right of Indian Band to possession of Reserve Land—Right of lawful possessee to give by devise possession to non-Indian—Action by Crown for possession on behalf of Band—Indian Act, R.S.C. 1952, c. 149, ss. 20, 82, 31(1), 50.

The Crown claimed, under s. 31(1) of the *Indian Act*, R.S.C. 1952, c. 149, on behalf of the Six Nations Band of Indians possession of a farm which was part of the Band's Reserve Land in Ontario. In 1950, at the request of the defendant, who was not an Indian, and the widow of a member of the Band, who was lawfully in possession of the farm, a lease of the farm was granted by the Crown to the defendant for a term of ten years. Two years before the expiration of that lease, the widow died. By her will she devised her rights in the farm to the defendant who continued in possession for the balance of the term of the lease. The right in the land was then put up for sale, and the Crown, at the request of the purchaser who was a member of the Band, granted the defendant two successive permits for one year each. At the expiration of the second permit, the defendant refused to give up possession and the council of the Band moved to gain possession of the farm. The action by the Crown on behalf of the Band was dismissed by the Exchequer Court. The Crown appealed to this Court.

Held (Cartwright J. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Martland, Judson and Hall JJ.: The rights of the defendant after the expiration of his second permit were governed by s. 50 of the *Indian Act*. Under that section, where a right to possession or occupation of land in a Reserve passes by devise to a person who is not entitled to reside on a Reserve, that right shall be offered for sale to the highest bidder among the persons who are entitled to reside on the Reserve and the proceeds of the sale shall be

* PRESENT: Taschereau C.J. and Cartwright, Martland, Judson and Hall JJ.

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paid to the devisee. The procedure laid down by this section has been followed and the only rights of the defendant were to receive the proceeds of the sale of the right to possession. Section 31 does not require that an action to put a non-Indian off a Reserve can only, in respect of lands allocated to an individual Indian, be brought on behalf of that particular Indian. The action may be brought by the Crown on behalf of the Indian or the Band, depending upon who makes the allegation of wrongful possession or trespass.

An agreement entered into by the defendant and the purchaser which would have enabled the defendant to remain in possession at a rental which would have made it possible for the purchaser to make his instalment payments was void as the Department had not consented to any further lease or permit. The defendant must give up possession.

Per Cartwright, *dissenting:* The action could not succeed. Possession of the land was claimed on behalf of the Band, and on the evidence it was shown that the right to possession of the land in question was vested in an individual Indian and not in the Band. There is nothing in the *Indian Act* to alter the well-settled rule that to entitle a plaintiff to bring an action for the recovery of possession of land he must have a right of entry either legal or equitable.

Couronne—Terre appartenant aux Indiens—Droit de la Bande à la possession—Terre située sur la réserve—Droit du possesseur légal de donner par testament possession à une personne qui n'est pas un Indien—Action prise par la Couronne au nom de la Bande pour possession—Loi sur les Indiens, S.R.C. 1952, c. 149, arts. 20, 23, 31(1), 50.

Se basant sur l'art. 31(1) de la *Loi sur les Indiens*, S.R.C. 1952, c. 149, la Couronne a réclamé au nom de la Bande d'Indiens appelée Six Nations possession d'une ferme qui faisait partie de la Réserve de la Bande en Ontario. En 1950, à la demande du défendeur, qui n'était pas un Indien, et de la veuve d'un membre de la Bande, qui était en possession légale de la ferme, la Couronne a accordé au défendeur un bail de la ferme pour un terme de dix ans. La veuve décéda deux ans avant l'expiration de ce bail. Par son testament elle légua ses droits dans la ferme au défendeur qui continua en possession pour la balance du terme du bail. Le droit à cette terre fut alors offert en vente, et la Couronne, à la demande de l'acheteur qui était un membre de la Bande, accorda au défendeur deux permis successifs d'une année chacun. A l'expiration du second permis, le défendeur refusa d'abandonner la possession et le conseil de la Bande commença des démarches pour obtenir possession de la ferme. L'action par la Couronne au nom de la Bande fut rejetée par la Cour de l'Échiquier. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge Cartwright étant dissident.

Le juge en chef Taschereau et les Juges Martland, Judson et Hall: Les droits du défendeur après l'expiration de son second permis étaient régis par l'art. 50 de la *Loi sur les Indiens*. En vertu de cet article, lorsqu'un droit à la possession ou à l'occupation de terres dans une Réserve passe par legs à une personne non autorisée à y résider, ce droit doit être offert en vente au plus haut enchérisseur entre les personnes habiles à résider dans la Réserve et le produit de la vente doit être versé au légataire. La procédure imposée par cet article

a été suivie et les seuls droits du défendeur étaient de recevoir le produit de la vente du droit à la possession. L'art. 31 ne requiert pas qu'une action, pour faire expulser une personne qui n'est pas un Indien de la Réserve, peut, quant à une terre qui a été allouée à un Indien en particulier, être instituée seulement au nom de cet Indien. L'action peut être instituée par la Couronne au nom de l'Indien ou de la Bande, dépendant qui allègue la possession illégale ou la pénétration sans droit.

Une entente intervenue entre le défendeur et l'acheteur, qui aurait permis au défendeur de demeurer en possession en payant un loyer qui aurait permis à l'acheteur d'échelonner ses paiements, était nulle parce que le Département n'avait pas consenti à un autre bail ou permis. Le défendeur doit abandonner la possession.

Le Juge Cartwright, *dissident:* L'action ne peut pas réussir. La possession de la terre était réclamée au nom de la Bande, et il est en preuve que le droit à la possession de la terre en question appartenait à un Indien en particulier et non pas à la Bande. Il n'y a rien dans la *Loi sur les Indiens* pour changer la règle bien établie que pour permettre à un demandeur de prendre action pour le recouvrement de la possession d'une terre, il doit avoir un droit d'entrée soit légal soit équitable.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier de Canada[1], rejetant une action prise par la Couronne au nom d'une Bande d'Indiens pour réclamer la possession d'une terre. Appel maintenu, le Juge Cartwright étant dissident.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1] dismissing an action by the Crown on behalf of a Band of Indians to recover possession of land. Appeal allowed, Cartwright J. dissenting.

N. A. Chalmers, for the appellant.

P. A. Ballachey, Q.C., for the respondent.

The judgment of Taschereau C. J. and of Martland, Judson and Hall JJ. was delivered by

JUDSON J.:—The judgment of the Exchequer Court[1] from which this appeal is taken rejects the Crown's claim for possession of a farm of 225 acres which is part of the Six Nations Indian Reserve in the County of Brant, Ontario. The action was brought under s. 31(1) of the Indian Act, R.S.C. 1952, c. 149, which reads:

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

[1] [1965] 1 Ex. C.R. 602.

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(a) unlawfully in occupation or possession of,

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

(c) trespassing upon

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

The defendant, Harry Devereux, is not an Indian. He has assisted in the working of this farm since 1934, when he entered into a leasing agreement with Rachel Ann Davis, the widow of a member of the Six Nations Band. This private arrangement was void under s. 34(2) of the Indian Act, R.S.C. 1927, c. 98, now R.S.C. 1952, c. 149, s. 28(1), but at the request of Mrs. Davis and the defendant, the Crown granted to the defendant a lease of the farm for a term of ten years commencing December 1, 1950. This lease expired on November 30, 1960. On the expiry of the lease, two successive permits were granted to the defendant under s. 28(2) of the Indian Act, R.S.C. 1952, c. 149, allowing him to use and occupy the lands for agricultural purposes. The second of these permits expired on November 30, 1962. The defendant nevertheless still remains in possession of the lands. He claims his rights by devise under a will of Rachel Ann Davis, dated November 19, 1953, and admitted to probate in the Surrogate Court of the County of Brant on May 30, 1958. Rachel Ann Davis died on April 25, 1958.

In November 1962, the band council notified the defendant to vacate the property at the expiration of his permit, and in January, 1963, the Indian Superintendent at Brantford notified him to vacate on or before January 31, 1963.

On July 4, 1963, the band council passed a resolution alleging that the defendant was still unlawfully in possession of the lands and asking that the Attorney General of Canada bring this action.

It is clear that subsequent to November 30, 1962, the defendant can point to no applicable provision of the *Indian Act* which gives him the right to possess or use the lands in question.

When Mrs. Davis died in 1958, her title was that of locatee under s. 20, subs. (1), of the *Indian Act*, R.S.C. 1952, c. 149. She held a certificate of possession dated February 28, 1954, issued under s. 20, subs. (2) of the Act. The rights of the defendant after the expiry of his permit

on November 30, 1962, which was four years after the death of Mrs. Davis, are governed by s. 50 of the Act:

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

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

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

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

The procedure laid down by this section has been followed and the only rights of the defendant are now to receive the proceeds of the sale. This sale is not a cash transaction. The proceeds will be payable over a period of years.

The Exchequer Court, in dismissing the action, held, in effect, that in respect of land allocated to an individual Indian, an action under s. 31 above quoted would lie only at the instance of the individual Indian locatee and not at the instance of the band. In so holding I think there was error. I do not think that s. 31 requires that an action to put a non-Indian off a reserve can only, in respect of lands allocated to an individual Indian, be brought on behalf of that particular Indian. The terms of the section to me appear to be plain. The action may be brought by the Crown on behalf of the Indian or the band, depending upon who makes the allegation of wrongful possession or trespass.

The judgment under appeal involves a serious modification of the terms of s. 31(1). Instead of reading "Where an Indian or a band" alleges unlawful possession by a non-Indian, it should be understood to read "Where an Indian *in respect of land allocated to him* or a band *in respect of unallocated land*" makes the allegation of unlawful possession. I think that this interpretation is erroneous and that its acceptance would undermine the whole administration of the Act by enabling an Indian to make an unauthorized

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arrangement with a non-Indian and then, by refusing to make an individual complaint, enable the non-Indian to remain indefinitely.

The scheme of the *Indian Act* is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee. This is provided for by s. 28(1) of the Act. If s. 31 were restricted as to lands of which there is a locatee to actions brought at the instance of the locatee, agreements void under s. 28(1) by a locatee with a non-Indian in the alienation of reserve land would be effective and the whole scheme of the Act would be frustrated.

Reserve lands are set apart for and inalienable by the band and its members apart from express statutory provisions even when allocated to individual Indians. By definition (s. 2(1) (o)) "reserve" means

> a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.

By s. 2(1) (a), "band" means a body of Indians

> (i) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart . . .

By s. 18, reserves are to be held for the use and benefit of Indians. They are not subject to seizure under legal process (s. 29). By s. 37, they cannot be sold, alienated, leased or otherwise disposed of, except where the Act specially provides, until they have been surrendered to the Crown by the band for whose use and benefit in common the reserve was set apart. There is no right to possession and occupation acquired by devise or descent in a person who is not entitled to reside on the reserve (s. 50, subs. (1)).

One of the exceptions is that the Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered (s. 58(3)). It was under this section that the Minister had the power to make the ten-year lease to the defendant which expired on November 30, 1960.

Under this Act there are only two ways in which this defendant could be lawfully in possession of this farm, either under a lease made by the Minister for the benefit of any Indian under s. 58(3), or under a permit under s. 28(2).

Evidence was given of attempted arrangements between the defendant and the purchaser and the assignee of the purchaser under s. 50(2) which would have enabled the defendant to remain in possession at a rental which would have made it possible for the purchaser to make his instalment payments. The Crown took the position that these attempted arrangements were irrelevant, the Department not having consented to any further lease or permit. This objection was properly taken and the attempted arrangements do not assist in any way the defendant's claim to remain in possession. He also says that as an unpaid vendor who has not contracted to give up possession, he is entitled to remain in possession until he receives the full proceeds of the sale by the Superintendent made under s. 50 of the Act. He has no such right. He must give up possession and his right is limited by s. 50 to the receipt of the proceeds.

There should, therefore, be judgment for Her Majesty on behalf of the Six Nations Band of Indians that vacant possession of the lands be delivered with costs in this Court and in the Exchequer Court.

CARTWRIGHT J. (*dissenting*):—The facts and statutory provisions relevant to the solution of the questions raised on this appeal are set out inthe reasons of my brother Judson and in those of Thurlow J.

On the argument of the appeal we were told by counsel that the respondent is still in actual occupation of the lands in question. For the purposes of the appeal I am prepared to assume that the respondent has not shewn any right to remain in possession of these lands.

The action was commenced by an Information in which "Her Majesty the Queen on the Information of the Deputy Attorney General of Canada" is plaintiff and the respondent is defendant. The Information does not in terms allege that the Six Nations Band of Indians, hereinafter sometimes referred to as "the Band" is entitled to possession of the lands but does state that the Band has demanded vacant possession of the lands from the defendant and that he has refused to vacate the same. The prayer for relief so far as relevant reads:

> The Deputy Attorney General of Canada, on behalf of Her Majesty, claims as follows:—
>
> (a) vacant possession of the said lands on behalf of the Six Nations Band of Indians.

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It will be observed that possession is not claimed by Her Majesty in her own right but only on behalf of the Band. This is in accordance with the provisions of s. 31 of the *Indian Act* which so far as relevant reads:

> 31. (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been
>
> (*a*) unlawfully in occupation or possession of . . . . a reserve or part of a reserve, the Attorney General of Canada may exhibit an Information in the Exchequer Court of Canada claiming, on behalf of the Indian or the band, the relief or remedy sought.

I can find no ambiguity in this section. It contemplates, as do many other provisions of the Act, that the right to possession of a parcel of land in a reserve may belong to the Band or to an individual Indian. The claim for possession is to be made either on behalf of the Band if it is entitled to possession or on behalf of the individual Indian if he is so entitled.

I agree with Thurlow J. that the evidence shews that the right to possession of the lands in question is vested in Hubert Clause or in Arnold and Gladys Hill, all of whom are Indians and members of the Band, and not in the Band.

I also agree with Thurlow J. when he says:

> When a member of a band obtains lawful possession of land in a reserve the right which the band would otherwise have to possession of that land is at an end, though circumstances may arise in which the band may once again have a right of possession either by purchase of the individual members' right or on reversion of the right to the band under ss. 25(2) or 50(3). The statutory scheme accordingly in my opinion contemplates a statutory right of possession of any part of a reserve being vested in an individual member of a band, or in the band itself, but not in the band when it is vested in the individual member.

The applicable principle of law is accurately stated in the passage from Williams and Yates on Ejectment, 2nd ed., page 1 et seq, quoted and adopted by Thurlow J., and particularly the following sentences:

> To entitle a plaintiff to bring an action for the recovery of possession of land he must have a right of entry either legal or equitable. A right of entry means a right to enter and take actual possession of lands, tenaments, or hereditaments, as incident to some estate or interest therein.
>
> * * *
>
> The right of entry must be a right to the immediate possession of the property. A reversionary or other future estate is not sufficient until it has become an estate in possession.

I can find nothing in the *Indian Act* to alter these well settled rules as to actions for the possession of the land.

For the reasons briefly stated above and for those given by Thurlow J., with which I am in full agreement, I would dismiss the appeal with costs.

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Appeal allowed, CARTWRIGHT, J. *dissenting.*

Solicitor for the Appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent: Ballachey, Moore & Hart, Brantford.

HOFFMAN-LA ROCHE LIMITED .....APPELLANT;

AND

DELMAR CHEMICAL LIMITED .....RESPONDENT.

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ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Compulsory licence—Patentee requesting oral hearing or cross-examination upon affidavits before Commissioner—Whether refusal by Commissioner a denial of justice—Public safety—Patent Act, R.S.C. 1952, c. 203, s. 41(3).

The Commissioner of Patents granted to the respondent a licence under s. 41(3) of the *Patent Act*, R.S.C. 1952, c. 203, to use, for the purpose of the preparation or production of medicine, an invention patented by the appellant. The Commissioner had refused the patentee's request that it be allowed an oral hearing or to cross-examine the licensee on the supporting affidavits filed with the application. The Exchequer Court found that the Commissioner's refusal was not a denial of justice as contended by the patentee. The latter appealed to this Court.

Held: The appeal should be dismissed.

The Commissioner was correct when he said that, there being no regulations governing the practice under s. 41(3), he was entitled to set the procedures and was not bound to hold a hearing on demand by one of the parties. It was for the Commissioner to decide whether or not the circumstances required an oral hearing, cross-examination upon affidavits, or oral submissions. His decision not to require any of these things could not be considered to be a denial of natural justice. Furthermore, the patentee had failed to establish any valid ground for disturbing the Commissioner's decision. The patentee had submitted what it contended were good reasons not to grant the licence. These were considered by the Commissioner and rejected. The patentee has not established that the Commissioner had acted on a wrong principle or that, on the evidence, his decision was manifestly wrong.

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*PRESENT: Taschereau C.J. and Abbott, Martland, Ritchie and Hall JJ.

ALBERTA

SUPREME COURT APPELLATE DIVISION

Before Ford, C.J.A., Macdonald, McBride, Porter and Johnson, JJ.A.

Regina v. Gingrich

Indians — Rights of Same as Other Alberta Residents Unless Curtailed by Treaty or Statute — Indian Act, Can., S. 87 — Right of Religious Freedam — 14-15 Vict., ch. 175 (Province of Canada) — Trespassing on Reserve — Indian Act, SS. 30, 80 — Powers of Council of Band — Right of Reserve Indian to Invite Persons on Reserve.

Personal Rights — Freedom of Religion — Right to Preach and Teach and Hear Gospel Preached and Taught.

Trespass — What Is — Lawful Justification.

The rights of an Indian on a reserve are those of a resident of Alberta, except where curtailed by treaty or Act of Parliament, or regulations made thereunder. *Indian Act*, RSC, 1952, ch. 149, sec. 87, considered. One of such rights is that of religious freedom with the qualifications or restrictions attendant on the exercise thereof. Statutes of Province of Canada, 14-15 Vict., ch. 175, referred to.

The right to preach and teach the gospel, as well as to hear it preached and taught, is recognized in a free society. This includes the right of one who preaches or teaches to accept an invitation for this purpose from a person, who desires to hear and learn, to visit the latter in his residence, and to enter upon the land occupied by the latter in order to do so.

Appellant, a missionary invited by a reserve Indian to come into her home on said reserve for the purpose of holding a religious service, appealed his conviction under sec. 30 of the *Indian Act, supra,* for trespassing on said reserve. The council of the band had set up a permit system for entry on the reserve and had refused appellant a permit.

Held, quashing the conviction, sec. 80 of said Act gives the council power to remove and punish persons found trespassing on the reserve; it does not give the power to the council to decide what constitutes trespassing, and the council, by establishing a system of permits, cannot create the offence of trespass by those who enter the reserve without permit. Trespass consists in entering upon land without lawful justification; appellant's entry in response to an invitation so to do was, in this case, justified.

[Note up with 2 CED (CS) *Indians*, secs. 1, 8; 3 CED (CS) *Personal Rights; Trespass*, sec. 1.]

K. G. Pippet, for accused, appellant.

Michael Bancroft, for Crown, respondent.

November 28, 1958.

The judgment of the court was delivered by

FORD, C.J.A. — This appeal is from a conviction under sec. 30 of the *Indian Act*, RSC, 1952, ch. 149, for trespassing on the Blood Indian reserve on Sunday, March 16, 1958, and comes to this division by way of a stated case from the magistrate. The appeal was allowed and the conviction quashed at the conclusion of the hearing. Our reasons for judgment follow.

The salient facts are that the appellant, who is a missionary, and has during the period from 1952 to 1957 been permitted to go on the reserve to minister to members of the tribe, was refused a permit to do so by the council of the band after it had set up a system of permits in the autumn of 1957. He twice requested a permit but it was declined, and he was duly advised by the superintendent of each refusal. Members of the tribe or band continued to invite him to visit their homes situated on the reserve, and on the Sunday in question he was invited to the home of one Margaret Davis on the reserve, for the purpose of holding a service for various members of the band congregated there. Shortly after his arrival he was arrested, and charged as above.

The authority or powers of the council of the band, in so far as the question under consideration on this appeal is concerned, are to be found in sec. 80 of the *Indian Act*. Among the express powers to make bylaws, not insonsistent with the Act, or any regulation made by the Governor in Council, or the minister, is that contained in subsec. (*p*) which reads:

> "The removal and punishment of persons trespassing upon the reserve or frequenting the reserve for prescribed purposes."

No other subsection of sec. 80 affects the question, except as it may help to interpret this particular subsection. That is also true of several other sections of the Act, which have been considered, and which will be referred to so far only as they are of assistance in determining the question in issue.

It will be seen at once that as the Act does not define "trespassing" one must look to the common law for a definition of the term, as it is quite clear that the powers of the council are not to decide what constitutes trespassing, but are limited to removing and punishing persons who are found trespassing upon the reserve. In other words the council cannot by establishing a system of permits to be given to individual persons to go on the reserve, create the offence of trespass by those who enter the reserve without such a permit. There must first be a trespass before the power of the council to remove and punish can be exercised.

The definition of common-law trespass varies as stated by different authorities, but it clearly involves the entering upon another's land without lawful justification. See *Salmond on Torts*, 11th ed., at p. 227:

> "The wrong of trespass to land consists in the entering upon land in possession of the plaintiff without lawful justification."

Other writers of authority define it in different terms but with the same content.

The appellant in this appeal entered upon the reserve for the purpose of holding a religious meeting at the invitation of the Indian woman, a member of the band, but without the permit of the council, and the question resolves itself into one of justification that was lawful, or no justification at all.

It was said in argument by counsel for the respondent that the land constituting the reserve is held by the Crown for the use and benefit of the band in common, and that an individual member or members of the band had no right to invite the appellant to visit her or them in their homes on the reserve for any purpose, however lawful or necessary it might be; as, for example, in the case of medical services that might be necessary. Probably the question is more accurately put by stating that if the Crown is right, no person would be justified in entering upon the reserve in response to an invitation unless he held the permit of the council to do so. As I understood the argument, it was incumbent on the Crown to go that far in order tomaintain its position.

On the other hand it was argued on behalf of the appellant that an Indian, although living on the reserve, is a British subject, and subject to curtailment by statute, has all the rights of a British subject and Canadian citizen. Authority for this was cited: See *Sanderson v. Heap* (1909) 11 WLR 238, 19 Man R 122; and *Prince v. Tracey* (1913) 25 WLR 412. Indeed, this view of the law is accepted by counsel for the Crown in his factum, but he goes on to say that the *Indian Act* restricts in a variety of ways rights and privileges which those who are not subject to its jurisdiction ordinarily enjoy, and that this is particularly true of rights relating to land. He illustrates this by pointing out that an Indian on a reserve cannot deal with his land by alienation, charge or mortgage, except as provided by secs. 87-89 of the *Indian Act*. But that is not the question here.

It may help if sec. 87 dealing with the legal right of Indians on the reserve be referred to. This section expressly states that

all laws *of general application from time to time in force in any province are applicable to and in respect of Indians in the province* subject to the terms of any treaty and any other Act of the Parliament of Canada and the other exceptions therein stated. The italicizing is mine. This supports the view that the rights of an Indian on a reserve are those of a resident of Alberta, except where curtailed by treaty or Act of Parliament, or regulations made thereunder.

One of these rights is that of religious freedom with the qualifications or restrictions attendant on the exercise thereof. That an Indian on a reserve may exercise this right is further secured by 14-15 Victoria (Statutes of the Province of Canada) ch. 175, proclaimed June 9, 1852, which in referring to the then provinces of Canada enacted:

> "that the free exercise and enjoyment of religious profession and worship without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the province, is by the constitution and laws of this province allowed to all Her Majesty's subjects within the same."

By virtue of the *B.N.A. Act, 1867,* ch. 3, sec. 129, and the *Alberta Act,* 1905, ch. 3, secs. 3 and 16, the above enactment has been incorporated into the laws of Canada and Alberta.

The right to preach and teach the gospel, as well as to hear it preached and taught, is recognized in a free society. It is also clearly inferred from the last-mentioned enactment of 14-15 Victoria. In my opinion this includes the right of one who preaches or teaches to accept an invitation for this purpose from a person or persons, who desire to hear and learn, to visit him or them in their residences, and to enter upon the land occupied by their residences in order to do so. It is understood, of course, that the regularly used means of ingress and egress to the dwellings be used, as was done here, by the person who is responding to the invitation. One need go no further in deciding this case.

It is, however, of interest to note that the *Indian Act* provides for the establishment, operation and maintenance of schools for Indian children on a reserve, and every Indian child who has attained the age of seven years is required to attend school with certain exceptions. Although the minister may make regulations *inter alia* with respect to teaching, education, inspection and discipline in connection with schools, there are no provisions with respect to the right of a teacher or inspector, or other official of the school, to enter upon the reserve to carry out his

duties as such. Could it be said that without a permit of the council of the band he would be a trespasser when doing so? In my opinion the provisions in respect of the operation of schools throw considerable light on how to interpret the *Indian Act* as to who would or would not be a trespasser on the reserve.

I do not think it necessary to add any further reasons in support of the judgment quashing the conviction.

BRITISH COLUMBIA

SUPREME COURT MACFARLANE, J.

Dale Distributing (B.C.) Ltd.
v. Musicale Network Systems Ltd.

Costs — Action for Declaratory Judgment — Scale of Costs — Application of O. 65, R. 10c — Determining Factors.

Plaintiff's action for a declaration of title was dismissed.

Held, for the purpose of determining the scale of costs to be taxed by defendant, the action was to be interpreted as falling within the subject of enforcement of an agreement for sale referred to in O. 65, R. 10c. *Larson v. Harrison Mills Ltd.* (B.C. C.A.) March 4, 1958, unreported, applied. When said R. 10c applies neither the purchase-price nor the value of the goods are factors in determining the applicable scale for taxation. It was not intended in *Anderson v. Murphy and Carpentier Log* (1951) 2 WWR (NS) 239, 2 Abr Con (2nd) 767 (B.C.) to lay down any general rule that in cases where a declaration is sought taxation is properly under col. 2. The question must be determined on the facts of each case.

[Note up with 5 CED (2nd ed.) *Costs*, sec. 46.]

H. E. Hutcheon, for plaintiff.

G. A. Lauder, for defendant.

December 23, 1958.

MACFARLANE, J. — This appeal from a taxation of costs by the registrar raises the question as to the amount involved in the action. The action was dismissed with costs against the plaintiff by order of my brother Maclean, J. on September 23, 1958. It had been commenced on February 4, 1958, by a writ endorsed as follows:

> "(*a*) Damages for wrongfully denying the plaintiff's title to certain coin operated phonograph machines located on Vancouver Island, and in and about the City of Vancouver, Province of British Columbia, the property of the Plaintiff.
>
> "(*b*) Return of 7 coin operated machines, 1 set of keys, a quantity of collection receipts, 1 Volkswagen Panel Delivery,

[QUEEN'S BENCH DIVISION.]

HUNTER V. GILKISON.

Indian lands—Trespass—Indian superintendent—Jurisdiction—Conviction—Discharge on habeas corpus—Action for malicious prosecution.

Held, that the defendant, who was a Visiting Superintendent and Commissioner of Indian affairs for the Brant and Haldimand Reserve, had jurisdiction under the statutes relating to Indian affairs to act as a justice of the peace in the matter of a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian Reserve in the County of Brant.

Held, also, that the discharge of the plaintiff from custody on *habeas corpus* was not a quashing of his conviction on the above charge; and that the conviction remaining in force, and the defendant having had jurisdiction, the action, which was trespass for assault and imprisonment maliciously and without reasonable and probable cause, could not be maintained, but the action should have been so; but that even if the form of action was right, there was no evidence of want of reasonable and probable cause.

The statement of claim was, that plaintiff was a farmer, and defendant the Visiting Superintendent and Commissioner of Indian Affairs for the Brant and Haldimand Reserve: that on 12th July, 1884, at the city of Brantford, in the county of Brant, the defendant assaulted the plaintiff and gave him into the custody of a constable, and caused him to be imprisoned in the common gaol at Brantford, aforesaid, for the space of seven days: that on 12th July, 1884, at the city of Brantford, in the county of Brant, the defendant maliciously, and without reasonable and probable cause assaulted the plaintiff and gave him into the custody of a constable, and caused him to be imprisoned in the common gaol at Brantford, aforesaid, for the space of seven days, whereby, &c.

Defence: Not guilty by statute (R. S. O., ch. 73, Public Act, sec. 11; 16 Vic. ch. 180, Public Act, sec. 9; 43 Vic. ch. 28, Dom. Public Act, sec. 27; 44 Vic. ch. 17, Dom. Public Act, sec. 12; 45 Vic. ch. 30, Dom. Public Act, sec. 3.)

Issue.

The cause was tried at the last Fall Assizes at Brantford, by Rose, J., with a jury.

The plaintiff was arrested and committed to the common gaol of the county of Brant, on the 12th July, 1884, under the following warrant:

WARRANT OF COMMITMENT.

CANADA,
PROVINCE OF ONTARIO,
COUNTY OF BRANT.
TO WIT:

To all or any of the constables or other peace officers of the county of Brant, and to the keeper of the common gaol of the said county.

Whereas James Hunter, late of the township of Tuscarora, was this day convicted before the undersigned, J. P. Gilkison, Visiting Superintendent of Indian Affairs in and for the said county of Brant, for that he did on the 22nd February, 1883, in the township of Tuscarora, an Indian Reserve in said county of Brant, remove cordwood from said Reserve, contrary to the Indian Act of 1880, Wm. Wedge being the informant; and it was thereby adjudged that the said James Hunter for his offence should forfeit and pay the sum of fifteen dollars, and should also pay the sum of six dollars and seventy-five cents for costs in that behalf; and it was thereby further adjudged that if the several sums should not be paid forthwith the said James Hunter should be imprisoned in the common gaol of the county of Brant, at the city of Brantford, in the said county, and there kept at hard labour for the space of thirty days, unless the said several sums should be sooner paid; and whereas the time in and by the said conviction appointed for the payment of the said several sums hath elapsed, but the said James Hunter hath not paid the same or any part thereof, but therein hath made default. These are therefore to command you the said constables or peace officers, or any of you, to take the said James Hunter and him safely convey to the common gaol at Brantford, aforesaid, and there deliver him to the keeper thereof, together with this precept; and I do hereby command you the said keeper of the said common gaol to receive the said James Hunter into your custody in the said common gaol, there to imprison him and keep him at hard labour for the space of thirty days, unless the said several sums shall be sooner paid, and for your so doing this shall be your sufficient warrant.

Given under my hand and seal this 7th day of April, in the year of our Lord 1883, at Brantford, in the county of Brant, aforesaid.

Fine.....	$15 00
Costs per C..	6 75
Extra C	2 00
	$23 75

J. P. GILKISON,
Vis. Supt. and Comm.,
Indian Affairs.

It was admitted that the plaintiff was released on a writ of *habeas corpus*, and the following order was put in:

IN THE HIGH COURT OF JUSTICE,

QUEEN'S BENCH DIVISION.

THE QUEEN v. JAMES HUNTER.

IN CHAMBERS,

BEFORE THE HON. MR. JUSTICE ROSE.

Upon the application of the above named James Hunter, upon reading the writ of *habeas corpus* directed to the keeper of the common gaol for the county of Brant, dated 16th day of July, instant, commanding him to produce before this Court the body of the said James Hunter, and upon reading the return thereto, and the affidavit of Valentine Mackenzie, and the copy of the information annexed, and the warrant of commitment, it is ordered that the said James Hunter be forthwith discharged out of custody of the sheriff and keeper of the common gaol for the county of Brant.

(Signed) JOHN E. ROSE, J.

It did not appear for what particular cause the detention of the plaintiff was held to be illegal.

Notice of action was put in and proved, in which it was stated the plaintiff would "cause a writ of summons to be issued out of the Queen's Bench or Common Pleas Division of the High Court of Justice."

The defendant put in an exemplification of a commission, dated the 9th of March, 1864, appointing him and others commissioners under and for the purposes of the Act, Consol. Stats. of U. C., ch. 81, and he swore that this commission had never been revoked, that it was the com mission under which he had always acted, and that he was a visiting Superintendent-General and Commissioner of Indian Affairs.

The plaintiff was asked, "Could anything have been made out of your goods and chattels?" and to this he answered, "Yes." The defendant said that he did not think that he made any enquiry before he signed the warrant whether the plaintiff had any goods and chattels out of which the fine might have been levied.

Evidence was given on both sides as to whether or not the warrant was sealed at the time it was issued.

The learned Judge left two questions only to the jury: 1st, whether the warrant was sealed; and 2nd, what amount of damages the plaintiff had sustained. The

jury found that the warrant was sealed, and that the plaintiff's damages were $500.

The learned Judge gave judgment, dismissing the action, with costs.

December 11, 1884, *Mackenzie*, Q. C., moved to set aside the said judgment, and to enter judgment for the plaintiff, on the ground that the defendant in his pleadings did not bring himself within the Act R. S. O. ch. 73, and having failed to shew himself a public officer or one empowered to do the act complained of, could not therefore invoke, nor was he in any event entitled to the protection of that Act: that the obligation to quash the conviction before action, which the Act created, contemplated a cause of action arising out of an act of a Justice of the Peace, and applied only to the quashing of a conviction of a Justice of the Peace within the meaning of the Summary Convictions Act, 32-33 Vic. ch. 31, and such obligation presupposes the making or framing of an instrument that should conform substantially in its tenor to one or other of the forms in that behalf which are appended to the Act: that the so-called conviction of the plaintiff under the circumstances must be taken to have been that recited in the commitment, which being, as so recited, defective, the release of the plaintiff on the *habeas corpus* operated to quash: that the recitals in the commitment of the style and authority of the convicting justice and committing person disclosed no jurisdiction so to convict or commit, and conveyed no assurance that the locality where the offence was committed was within the jurisdiction either of the convicting justice, or of the person so committing: that it did not appear that the commitment was signed within the jurisdiction, or was executed by the constable therein, or that the plaintiff was detained in a place of confinement within the jurisdiction of the person committing: that the nature of the defendant's jurisdiction as a justice of the peace prescribed by the Indian Act, 1881, was opposed to the common law conception of the office: that the evidence shewing that at the

time the plaintiff was delivered into the custody of the gaoler the commitment bore no seal, and that the defendant was at such time made acquainted with the circumstance, he was liable to trespass: that the commission put in by the defendant at the trial, even if unrevoked, could afford him no protection in the doing of the act.

McKenzie, Q. C., supported the motion. The defendant is not protected by the Statute R. S. O. ch. 73, he not being a justice of the peace within the meaning of the *Act relating to the duties of justices of the peace out of sessions with regard to summary convictions and orders.* Defendant could not sit *in* sessions, and the office of a justice of the peace obviously demands the performance of functions *in* sessions, as well as *out of* sessions. In any event, the act was not the act of a justice of the peace, but arises out of the exercise of the power of commitment claimed to be given to the defendant under section 27 of the Indian Act of 1880. The defendant failed to show himself a public officer, or one empowered to do the act complained of. He put in at the trial a commission under the great seal vesting him with authority in respect only of transactions connected with the Act by virtue of which the commission issued. The commission became revoked by the operation of the Act of 1868 regulating the bureau of the Secretary of State, and the defendant is not helped by reference, or cannot appeal for indemnity, to any clause of the Interpretation Act, the manner of appointment having been altogether readjusted. The defendant, in any case, could not shew his authority by evidence extrinsic to the commitment, and this recites no authority which could protect him. See *McLellan* v. *McKinnon*, 1 O. R. 219; *Dickinson's* Quarter Sessions, p. 889. The office of a justice of the peace is not attached to the person The Indian Act, apparently, assigns no territorial limit to the jurisdiction of its appointees as *ex-officio* justices of the peace. Even if there were a necessity for quashing the conviction, the release of the plaintiff on a *habeas corpus*, the commitment founded on and reciting a bad conviction, operated to

quash it: *Chany* v. *Payne*, 1 Q. B. 712; *Charter* v. *Greame*, 13 Q. B. 216. The conviction is bad on many grounds: 1. Cordwood is not comprehended in the different descriptions of wood enumerated in the section under which the proceedings were had: *Regina* v. *Caswell*, 33 U. C. R. 303. 2. It does not negative the possession by the plaintiff of a license, or that the offence was not the act of an Indian of the band: *Paley* on Conv. 217. 3. It does not allege the quantity of, or value of, the wood removed: *Charter* v. *Greame*, 13 Q. B. 216; *Paley* on Conv., p. 239. In imposing a penalty of $15 the adjudication does not accord with either of the states of things which might arise under the section. It imposes imprisonment at hard labour: *Regina* v. *Washington*, 40 U. C. R. 221. The commitment is likewise bad on many of the same grounds; and besides it does not appear to have been signed within the jurisdiction, or direct a committal to the proper quarter. It does not set forth a sufficient style and authority in the defendant.

Robertson, Q.C., contra. The defendant is the Commissioner of Indian affairs at Brantford, and as such is *ex-officio* a justice of the peace, (Consol. Stat. U. C. ch. 81 sec. 9) within the county within which for the time being he may be resident or employed as such commissioner. He has also all the powers of a police magistrate. The defendant's commission, although dated in 1864, was continued under confederation: see B. N. A. Act, sec. 129. He gave evidence at the trial that his commission is still in force. He is also an Indian Agent. The warrant of commitment recites that plaintiff was convicted before defendant. This warrant was issued by defendant for the purpose of enforcing the conviction. As to jurisdiction, it is of no consequence: he acted *bonâ fide*. Plaintiff cannot bring an action against a Justice for any thing done in discharge of his duty under a conviction until the conviction is quashed: R. S. O. ch. 73, sec. 4, as amended. It is said he had no power to enforce the conviction, that it could only be enforced by the Superintendent General of

Indian Affairs; but though the Superintendent General can issue his warrant in case of default, the convicting Justice is not deprived of his undoubted right to enforce his conviction. The Summary Convictions Act, (32-33 Vic. ch. 31, D.) authorizes any justice of the peace, before whom a complaint is made "*in relation to any matter over which the Parliament of Canada has jurisdiction*," (sec. 1,) to issue his warrant, &c., and establishes the procedure for enforcing &c. This was such a matter, and defendant having been seised of the case had authority to enforce the conviction. The argument and cases cited for plaintiff might be applicable if this was a motion to quash the conviction, but not to this case. Until quashed the conviction protects the Justice for any thing done by him under it. The defendant was appointed under the old law, and no one having been appointed in his stead under the new law, he had all the powers which he had under the old law. That being so, see Consol. Stat. ch. 81, sec. 30, under which defendant had all the power to commit &c.

March 7, 1885. ARMOUR, J.—By Consolidated Statutes of Upper Canada ch. 81, under and for the purposes of which the defendant was appointed a commissioner, it is provided that "the commissioners and all acting under their authority shall respectively have the same privilege and protection in respect of any action or suit brought against them for any act by them done in the execution of their office that justices of the peace, sheriffs, gaolers, or peace officers respectively have:" sec. 17; and that "the said commissioners, and each of them, and the different superintendents of the Indian Department, either now in office or hereafter appointed, shall, by virtue of their office and appointment, and without any other qualification, be justices of the peace within the county within which, for the time being, they may be respectively resident or employed as such commissioners or superintendents:" sec 19. So much of this Act as related to Indians, or Indian lands, was repealed by the Act 39 Vic. ch. 18 sec. 99, D.; but

the provisions above quoted were preserved, and are R. S. O. ch. 27, secs. 17 and 20.

The Act 39 Vic. ch. 18 was amended by 42 Vic. ch. 34, and was repealed by 43 Vic. ch. 28, sec. 112, O.

The Act 43 Vic. ch. 28, as amended by 44 Vic. ch. 17, and by 45 Vic. ch. 30, was the law in force when the conviction in question was made.

By the Act 43 Vic. ch. 28, sec. 2, sub-sec. 11, the term "agent" includes a commissioner, superintendent, agent, or other officer acting under the instructions of the superintendent-general.

By the Act 43 Vic. ch. 28, sec. 27, as amended by 45 Vict. ch. 30, sec. 2, which is the section under which the conviction in question was meant to be made, the conviction is to be before any stipendiary magistrate, police magistrate or any two justices of the peace.

By the Act 44 Vic. ch. 17, sec. 6, D.: "Any one judge, judge of sessions of the peace, recorder, police magistrate, district magistrate, or stipendiary magistrate, sitting at a police court or other place appointed in that behalf for the exercise of the duties of his office, shall have full power to do alone whatever is authorized by the Indian Act, 1880 (43 Vict. ch. 28), to be done by a justice of the peace, or by two justices of the peace;" and by sec. 12, "Every Indian Commissoner, Assistant Indian Commissioner, Indian Superintendent, Indian Inspector, or Indian Agent, shall be *ex officio* a justice of the peace for the purposes of this Act."

By the Act 45 Vic. ch. 30, sec. 8, "Wherever in the Indian Act, 1880 (45 Vic. ch. 28), or in the Act passed in the 44th year of Her Majesty's reign chaptered 17, amending the said Act, or in this Act, power is given to any stipendiary magistrate or police magistrate to dispose of cases of infraction of the provisions of the said Acts brought before him, any Indian agent shall have the same power as a stipendiary magistrate or a police magistrate has in respect to such cases."

The term Indian agent as above used includes, as we

have seen, a commissioner and a superintendent, and the defendant was a commissioner and superintendent, and could therefore convict alone under 43 Vic. ch. 28, sec. 17.

The defendant was also, by virtue of his being a commissioner and a superintendent, *ex officio* a justice of the peace, not only by virtue of 44 Vic. ch. 17, sec. 12, but also by virtue of the R. S. O. ch. 27, sec. 20, and as such was entitled to the protection of the R. S. O. ch. 73.

The defendant, in making the conviction in question, acted in the *bonâ fide* belief that as a justice of the peace he had the power to make it (it was not contended that he acted maliciously); and whether, therefore, he acted without jurisdiction, or in excess of it, he is equally entitled to such protection.

Being entitled to such protection, this action was not maintainable against him until the said conviction had been quashed either upon appeal or upon application to one of the Superior Courts of Common Law.

But it is contended that the fact that the plaintiff was discharged upon *habeas corpus* from custody under the warrant of commitment issued upon this conviction, was *ipso facto* a quashing of the conviction, and *Chaney* v. *Payne*, 1 Q. B. 712, and *Chester* v. *Greame*, 13 Q B. 216. were cited in support of this contention; but these cases have nothing to do with it, nor could they, for the convictions in them were made before the passing of the Act 11 & 12 Vic. ch. 44, which for the first time provided that no action should be brought until the conviction had been quashed.

They decided another point altogether, fully discussed in *Regina* v. *Bennett*, 3 O. R. 45.

The Judge, upon the return to the writ of *habeas corpus*, has nothing before him but the commitment, and I think it would be going too far to hold that in such a case the conviction which was not before him would be quashed by the discharge of the prisoner from custody under the commitment.

The discharge might take place because the commitment was not warranted by the conviction which was recited in it, or because it was in itself defective, as was said to have been the case here.

In my opinion the conviction in this case was not quashed by the discharge of the plaintiff from custody under the commitment, and the judgment of the learned Judge must be affirmed, and the motion dismissed, with costs.

WILSON, C. J.—I understand the principal question to be, whether the defendant, who is a Visiting Superintendent and Commissioner of Indian Affairs for the Brant and Haldimand Reserve, had as such Superintendent and Commissioner authority to act as a justice of the peace in and for the county of Brant, or at any rate to act as a justice of the peace in and about this particular matter, a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian Reserve in Tuscarora, in the county of Brant.

The commission to the defendant was given under the authority of the Consol. Stat. U. C. ch. 81.

The offence is one which is against the terms of the second and thirtieth sections of that Act. The whole of that Act, so far as relates to Indian lands, was repealed by the 39 Vic. ch. 18, sec. 99, D. A provision at the end of that section is, "And this Act shall be construed not as a new law, but as a consolidation of those hereby repealed, in so far as they make the same provision that is made by this Act on any matter hereby provided for."

By sec. 3, sub-sec. 10, the term "Superintendent-General" means the Superintendent-General of Indian affairs.

Sub-section 11: The term "agent" means a commissioner, superintendent, agent, or other officer acting under the instructions of the superintendent-general.

By the 43 Vic. ch. 28, sec. 112, the Indian Act of 1876 is repealed. There is the like provision at the end of that section that there is at the end of the Act of 1876: "And this Act shall be construed not as a new law, &c."

And by section 2 of the Indian Act of 1880, sub-section 11, "the term "agent" includes a commissioner, &c., as in the Indian Act of 1876 sec. 3, sub-sec. 11.

The Act of 1880 is the Act still in force, but it has been amended by the 44 Vic. ch. 17, sec. 6, which authorizes among other persons police magistrates to act under the Indian Statute of 1880, and to do alone whatever is authorized by that Act to be done by one or two justices of the peace; and such police magistrate, &c., by section 7, shall have jurisdiction, under the Act of 1880, over the whole county or union of counties or judicial district in which the city or town for which he has been appointed or in which he has jurisdiction, is situate. And by section 12, "Every Indian commissioner, assistant Indian commissioner, Indian superintendent, Indian inspector, or Indian agent shall be *ex officio* a justice of the peace for the purposes of this Act."

Then the 45 Vic. ch. 30, sec. 3 enacts that, "Whenever in the Indian Act of 1880 or in the 44 Vic. ch. 17, or in this Act, power is given to any stipendiary magistrate or police magistrate to dispose of cases of infraction of the provisions of the said Acts brought before him, any Indian agent shall have the same power as a stipendiary or a police magistrate has in respect to such cases."

I think the defendant had jurisdiction as a magistrate and that he had jurisdiction over the offence; and I have no doubt the discharge of the plaintiff from custody was not a quashing nor equivalent to a quashing of the conviction in this case; in fact the plaintiff was discharged from custody upon the supposed ground which turned out not to be the fact, that the warrant of commitment was not under seal.

The conviction remaining still in full force, and the defendant having jurisdiction, the action should have been on the case, while it has been brought for a trespass, and if the form of action had been right, the allegation of malice and the want of reasonable and probable cause had not been proved; and the judgment was rightly rendered for the defendant.

I am of opinion, therefore, the order *nisi* must be discharged, with costs.

O'CONNOR, J., concurred.

Order nisi discharged, with costs.

[QUEEN'S BENCH DIVISION.]

GIBBON v. MICHAEL'S BAY LUMBER COMPANY [LIMITED].

Charter—Demurrage—Computation of Time—Sunday.

Held, reversing the judgment of ARMOUR, J., at the trial (ARMOUR, J., dissenting,) that in computing demurrage Sunday is to be reckoned as one of the days to be allowed for. "Days" mean the same as running days, or consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation they must be expressed.

ACTION to recover $700, which the defendants deducted from the plaintiff's account against them for railway ties and posts which he had delivered to them.

The defendants alleged they paid that sum to one Captain Sullivan, on account of the alleged delay of the plaintiff in loading the said ties and posts on board two barges, the "Maggie" and the "Crier," chartered by the defendants for that purpose; but the plaintiff said there was no delay for which he was answerable to the defendants, and he never authorized them to pay that sum to the said Sullivan.

The defendants said they chartered the two barges for the purpose aforesaid: that the vessels were to proceed to Manitoulin Island, and there load, and then proceed to Chicago with the ties and posts, and deliver the same there, and that three running days were to be allowed to the defendants for loading the barges: that the barges ar-

counsel seem to have been misled by the analogy supposed to exist between judgments under these acts and convictions. I remarked before, that no analogy exists, and if the observation were at all doubtful, this objection would furnish the strongest confirmation. For, however decisive the cases cited may be as regards convictions, they have clearly no bearing upon the question before us; and the express provisions of the statutes in question demonstrate that the objection is untenable. This judgment determines all that is required, namely, that the appellant was unlawfully in possession of land appropriated for the residence of Indians. The warrant of removal is in the nature of an execution upon this judgment; it may or may not be required according to circumstances; the power to issue such warrant, as well as the period at which it shall be issued, are left with the commissioners, only they are required in the first instance to issue a notice, as provided by the second section of the former act; all this is utterly inconsistent with the notion that the decision of the commissioners must adjudge the trespasser to relinquish possession within any definite period.

Upon the whole I am of opinion that no case has been made requiring us either to vary, reverse or annul the decision, and that the appeal must be dismissed with costs.

THE QUEEN V. JOHNSON.

This was also a case of appeal from the judgment of the commissioners appointed under the statute 2 Vic. ch. 15. The petition raised the same objections as are set forth in the last case, and came on for argument at the same time.

ESTEN, V. C., delivered the judgment of the court.

This is an appeal under the acts 2 Victoria, chapter 15, and 12 Victoria, chapter 9. The land in question is the north half of lot No. 6, in the 4th concession of the township of Oneida. An information was laid before the commissioners appointed under these acts, on the 17th November, 1849, by one Peter Smith, who is called an Indian interpreter; in pursuance of which the appellant

was summoned to appear before the commissioners on the 11th of December then next ensuing, to answer to the charge made against him by such information, of illegally occupying the land in question, contrary to the provisions of the acts before mentioned. The appellant did not appear in compliance with such summons; whereupon at the time and place appointed, the commissioners proceeded to investigate the charge, and upon the evidence of one witness—namely, the before-named Peter Smith—found the appellant guilty, and issued a notice calling upon him to remove from the land in question within thirty days. From this judgment of the commissioners, the present appeal is brought; and after looking at all the authorities which were cited in the course of the argument, and which I have been able to find, and after due consideration of the arguments, which were urged with much force and ingenuity by the learned counsel for the appellant, I am of opinion that the judgment must be upheld. I shall first notice the objections made to the judgment by the petition of appeal, in the order in which they are there stated, and then proceed to advert to some other points which were raised in the course of the argument.

The first objection impeaches the evidence upon which the judgment was founded, as illegal and insufficient. The only witness examined by the commissioners was, as before mentioned, Peter Smith. I suppose that the evidence of one witness is sufficient for the purposes of these acts, if it appears credible and establishes all the facts necessary to warrant the judgment. Neither the competency nor the credit of this witness has been in any way impugned, and I am not aware of any ground upon which his evidence can be considered illegal. He proves that the appellant was not one (that is, a member) of any of the tribes of Indians occupying the land in question; that he had not, to the best of his belief, any title to occupy the land; that he saw him on the land on the 14th of November previous, when he admitted to him that he was in the possession of it; and that, to the best of his belief, he continued in the occupation of it from that time to the time of his examination. This

evidence, uncontradicted, is, I think, sufficient to prove the alleged trespass, supposing the lands to be of the description specified in the acts. Upon this point, his evidence is as follows, namely:—That the land in question was, as he believed, part of the parcel or tract of land mentioned in his information; that it was then appropriated to the residence of the Six Nations Indians; that such tract was in the occupation of those tribes; and that no agreement for the cession of the tract to her Majesty had, as he believed, been made with the tribes occupying it. The facts deposed to by this witness, of appropriation, occupation and non-cession, were, I think, capable of being known to an individual. He swears to these facts to the best of his belief, and I think that such evidence, uncontradicted and unimpeached, was sufficient for the purpose for which it was addnced. The witness states that to the best of his belief the land in question was, at the time of giving his evidence, appropriated to the residence of these Indian tribes. If at this time he had been aware, or had any reason to believe, that any agreement for the cession of it had been made with her Majesty or any of her predecessors, which was in force and had been carried into effect, he would have been guilty of perjury in asserting upon his belief that it was then appropriated to the use of the Indians.

The second objection asserts that the land in question has been actually ceded to the government by the Six Nations Indians a long time ago, and demands inquiry into that fact. Supposing such to have been the case, it appears nevertheless, that the tract in question is in the occupation of these tribes—and we must suppose with the knowledge and consent of the government, as the contrary is nowhere pretended, and the government cannot be ignorant of the fact of such occupation. If, then, this tract of land is in the occupation of the Six Nations Indians with the consent of the government, it is, I think, land appropriated for their residence, and not ceded within the meaning of the acts of parliament in question, which in this respect, I agree with Mr. Wilson, are remedial, and must receive a liberal construction. The acts are intended to embrace all crown

lands whatsoever, whether in the occupation of Indians or not, provided, in the latter case, they are not under lease, purchase, location or license of occupation. These lands, if in the occupation of the Indians with the consent of the government, are precisely the lands intended to be protected by these acts; the object of which would be in a great measure defeated, if they were excluded from their operation. In short, it appears to me that if lands are in the occupation of the Indians with the consent of the government, they are not withdrawn from the operation of the acts in question by an old cession not apparently acted upon, and which for this purpose must be considered as abandoned or suspended. I think, therefore, that the inquiry which is asked for would be useless if made, and ought not to be directed.

The third objection points to the exceptions specified in the acts of 12 Victoria, chapter 9, and asserts that they ought to have been negatived by the conviction. These exceptions, however, apply to a totally different class of lands from the present—namely, lands not in the occupation of the Indian tribes. The acts in question were intended to embrace lands in the occupation of the Indian tribes, and lands not so occupied, or, in other words, all other crown lands, provided they were vacant—that is to say, not under lease, purchase, location or license of occupation. But these qualifications apply only to lands not occupied by the Indian tribes; and if it is shewn that lands are in the occupation of the Indian tribes, it is not necessary to negative the exceptions referred to, which have no application to them. These remarks dispose likewise of the fourth objection, which stands on the same ground with the third. Lands in the occupation of the Indian tribes by the permission of the government, cannot be intended to be under grant, lease, location or license of occupation.

The fifth objection I pass for the present.

The sixth objection, which asserts that the 1st section of the 2nd Victoria, chapter 15, is repealed, is unfounded in fact. The 1st section of the 2nd Victoria, chapter 15, is not repealed, but extended. The restriction which limited its

operation is repealed, and the clause itself includes not only the lands originally comprised in it, but other lands also. When the proceeding concerns lands in the occupation of the Indian tribes, it is strictly correct to found it upon the clause in question, which retains the same force that it ever had, and is only extended, not repealed, by the 12th Victoria, chapter 9.

With regard to the 7th objection, which impugns the judgment for founding itself on both acts, whereas it stands only upon one, it does not appear to be very material. The two acts constitute but one law; and if a proceeding which purports to be under both acts is sufficiently sustained by one, the reference to the other is mere surplusage, which does not vitiate.

The eighth objection suggests that the evidence of Peter Smith, who, as already mentioned, was the only witness examined in this matter, does not negative the cession of the particular piece of land in question, but only of the entire tract of which it forms a part. I take a different view of this evidence, which appears to me sufficiently to negative any cession of the land in question either to her Majesty or any of her predecessors, within the meaning of the acts.

With regard to the tenth objection, which insists that the judgment does not find that the lands in question are occupied by any tribe of Indians, or by any tribe of Indians claiming title to them, I think that the purport of the judgment in this respect is misapprehended. It appears to me that the commissioners adjudge that the land in question is in the occupation of the Six Nations Indians, under an appropriation to their use, and that they have or claim title to it under such appropriation. The objection, therefore, is without foundation.

The eleventh objection says that the judgment fixes no time for the commission of the offence to which it refers. It appears, however, that the commissioners determine that the appellant was, before the preferring of the information, the date of which appears, and thenceforward to the time of pronouncing the judgment, in the unlawful occupation

of the land; and this, I think, is quite sufficient, and obviates all just objection on this ground.

The twelfth and thirteenth objections impugn generally the sufficiency of the evidence and the regularity of the proceedings. I confess that for the reasons already detailed I think the evidence sufficient, and I have been unable to discover any material irregularity in the proceedings, and am therefore of opinion that these two last objections must be overruled also.

The cases which have been cited establish that summary convictions under a statute must negative all exceptions, and everything which, if true, would constitute a defence, and must be self-sufficient, or exhibit on their face enough to sustain them—must contain a precise adjudication or determination—must state the whole evidence on both sides, and not merely the conclusion from it—and must shew that it was given in the presence of the defendant, or that, being duly summoned, he neglected to attend—and must shew that the defendant was guilty of the offence respecting which jurisdiction is given. These rules are founded in reason and common sense, and probably apply to convictions or judgments under the acts in question; but I think that they have all been observed and complied with in this instance. For the illegal occupation of lands comprised in the acts, the commissioners are not authorised to inflict any punishment: they are simply empowered, by means of a notice, to order a removal, which has been done in the present case, in accordance with the provisions of the acts.

The fifth objection insists that the appellant actually has a license of occupation for the piece of land in question. I should be disposed, if he should desire it, upon affidavit of the fact, to direct an enquiry upon this point—at the peril, however, of costs, if he should fail in establishing the fact alleged; otherwise, I think this appeal should be dismissed, with costs.

long familiar to the bar. Mr. Honey has the best wishes not only of his own staff, which have been heartily tendered, but of everybody who during this period has been a witness of his unwearied courtesy and indefatigable attention to duty.

NOTES OF CASES.

COUR SUPÉRIEURE.

MONTRÉAL, 30 Sept., 1882.

Coram LORANGER, J.

J. LAFLEUR v. G. E. CHERRIER.

JUGÉ.—1. *Qu'un officier public qui fait arrêter une personne qui est en contravention avec la loi, n'est pas responsable des irrégularités qui se trouvent dans la conviction et dans le mandat d'emprisonnement, lorsque le prisonnier a été libéré sur un Bref d'*Habeas Corpus *et la conviction cassée sur un* Certiorari.

2.—*Qu'il incombe au demandeur de prouver que l'arrestation a été faite sans cause probable et par malice.*

3.—*Qu'une personne autre qu'un sauvage, qui travaille même temporairement, sur la réserve de Caughnawaga, après avoir reçu un avis des officiers du Département des Sauvages, à Ottawa, lui défendant de résider sur, et d'avoir à quitter la dite réserve, peut être légalement arrêté et traduit devant un magistrat, sur le mandat de l'agent du Surintendant Général des Affaires des Sauvages, conformément à la 43me Victoria, (Canada,* 1880,) *ch.* 28, *sect.* 22-23-24.

Dans le cours de l'automne dernier, le défendeur en sa qualité d'agent du Surintendant-Général des Affaires des Sauvages, fit arrêter le demandeur pour avoir illégalement résidé sur la réserve de Caughnawaga. Le demandeur est un tailleur de pierres employé aux carrières depuis dix-huit mois, et qui logeait dans une maison de pension du village. Il avait reçu du dépnté-surintendant un avis officiel d'avoir à quitter la réserve. Il fut conduit à Lachine, mais le constable qui l'avait arrêté n'ayant pu trouver aucun juge de paix, le demandeur fut remis en liberté. Il retourna à Caughnawaga où il fut de nouveau arrêté pour la même cause un mois après, et condamné à la prison.

Après avoir été incarcéré huit jours, il fut remis en liberté sur un Bref d'*Habeas Corpus* et la conviction fut cassé sur *Certiorari*, à cause de certaines irrégularités dans le mandat d'arrestation et dans la conviction.

Sur ces faits, le demandeur intenta une action en dommages contre le défendeur pour $1,000. Il allègue que toutes ces arrestations ne sont que des vengeances exercées contre lui par le défendeur, que tout a été fait à la sollicitation de ce dernier, par malice, sans cause probable et dans le seul but de lui faire du tort. Que le fait d'avoir résider temporairement sur la dite réserve, où il travaillait et prenait sa pension sans y avoir son domicile, ne constituait pas une offense punissable par la loi.

Le défendeur plaida qu'il était un officier public ; et que ce qu'il avait fait, il l'avait fait dans l'accomplissement d'un devoir à lui imposé par la loi, et par obéissance aux ordres de ses supérieurs. Que d'ailleurs, la loi eut-elel laissé au défendeur quelque discrétion, la conduite répréhensible du demandeur dans la dite réserve aurait justifié ces arrestations.

A l'argument, le demandeur prétendit que son arrestation du 6 Décembre, et sa mise en liberté avant qu'on ne lui eût fait subir aucun procès, suffisait pour lui donner droit à des dommages. Car, il y avait là une reconnaissance que son arrestation était faite sans cause probable.

Et il cita : Addison, Law of Torts, p. 571-4 ; Fisher's-Harrison's Digest, Vol. III., p. 5617.

Le défendeur soumit d'abord qu'une personne qui, dans l'exercice d'un droit ou dans l'accomplissement d'un devoir, cause des dommages à quelqu'un, n'est nullement responsable.

Il cita à l'appui de cette proposition : *David* v. *Thomas*, C. B. R., 1 L. C. J. 69 ; *Barnes* v. *Mostyn*, 4 Revue Légale p. 542 ; Sourdat, de la responsabilité, Vol. I, No. 419 ; Toullier, Vol. II, p. 151, No. 119 *in medio* ; Proudhon, Usufruit, Vol. III, p. 457, No. 1435 *in medio* ; Duranton, Vol. 13, No. 699 ; Cass. 17 Septembre 1825, (S. V. 25-1-196.)

Le défendeur était justifiable de faire arrêter le demandeur, puisque ce dernier résidait sur la réserve des sauvages à Caughnawaga contrairement au Statut 43 Vict., [Canada, 1880], ch. 28, sections 22-23-24.

Le fait que le défendeur avait son domicile à Montréal, ne l'empêchait pas de résider ailleurs s'il le voulait. Il y a une différence entre le

domicile et la résidence: Demolombe, Vol. I, p. 335: Marcadé sous l'article 102; Cass. 3 juillet 1838, (S.V. 38-1-586.) Remarques de l'avocat-général Taché et de la Cour.

Per Curiam. "Considérant que le demandeur réclame des dommages parceque le défendeur, abusant de son autorité comme agent des sauvages, par haine et par malice, l'aurait fait arrêter et condamner à un emprisonnement de vingt jours, sur l'accusation d'avoir résidé contrairement à la loi, sur la réserve des sauvages de Caughnawaga;

"Considérant qu'il est admis que le défendeur était aux époques indiquées dans la déclaration, l'agent des sauvages, et, comme tel officier public, chargé de faire exécuter la loi qui interdit la résidence sur la dite réserve de toute personne autre que les individus appartenant à la bande des sauvages de Caughnawaga;

"Considérant qu'en adressant, le premier décembre 1881, un mandat ordonnant au shérif du District de Montréal d'arrêter le demandeur et de le traduire devant un magistrat, pour avoir refusé de se soumettre à l'ordre de l'agent du surintendant-général des affaires des sauvages de cesser de résider sur la réserve de Caughnawaga, le défendeur a agi en sa qualité d'officier public et dans l'exécution de son devoir;

"Considérant que le défendeur n'est pas responsable des irrégularités et des informalités qui ont motivé l'annulation de la conviction prononcée contre le demandeur le 17ème jour de janvier dernier;

"Considérant, en outre, qu'il incombait au demandeur de prouver que l'arrestation et l'emprisonnement dont il se plaint avait eu lieu par malice et sans cause probable, et qu'il a failli dans cette preuve;

"Considérant, au contraire, vu la lettre du surintendant-général des affaires des sauvages, du 31 décembre 1881, défendant aux employés des nommés Stewart et Quinlan, au nombre desquels se trouvait le demandeur, de résider sur la réserve des sauvages de Caughnawaga; et vu aussi que le demandeur avait le 12 novembre reçu, comme susdit avis de quitter la dite réserve, le défendeur, officier chargé d'exécuter les ordres du surintendant-général des sauvages, était, sous les circonstances, justifiable de faire arrêter le demandeur, et de le traduire devant un magistrat, et que la dite arrestation n'a pas été faite par malice;

"La Cour déboute l'action du demandeur avec dépens distraits à MM. Barnard, Beauchamp & Creighton, avocats du défendeur."

Longpré & David pour le demandeur.

Barnard, Beauchamp & Creighton, pour le défendeur.

(J.J.B.)

SUPERIOR COURT.

Montreal, December 11, 1882.

Before Jetté, J.

Lanier v. Collette et al.

Infringement of Patent—Annulling of Patent—Damages.

Where the repeal of a patent is a principal object of the action, the proceeding should be by scire facias. 35 Vic. c. 26, s. 29.

Actual, and not exemplary damages will be awarded for imitating a patented invention. 35 Vic. c. 26, s. 23.

Where the essential and principal parts of a patented machine have been imitated, such imitation will be held an infringement, notwithstanding dissimilarity in other less important points.

The judgment of the Court, which is as follows, fully explains the decision:—

"La Cour, etc....

"Considérant que le demandeur est porteur d'un brevet d'invention, en date du 4 juillet 1877, pour "de nouvelles et utiles améliorations aux machines à fabriquer les cierges," et que l'invention que le dit demandeur réclame comme sa propriété, et qui lui est reconnue et assurée par le dit brevet, sous le nom de "machine à fabriquer les cierges de Jean-Baptiste Lanier," consiste:

"1o. Dans la combinaison d'un bassin ou cuve intérieure dans laquelle est placée la cire, ce bassin pendu par son bord recourbé reposant sur le bord du bassin extérieur, de manière à laisser un espace qui, rempli d'eau, fait fondre la cire par la vapeur et la chaleur de l'eau en ébullition, qui par ce moyen conserve la cire dans sa belle couleur, et l'empêche de brûler;

2o. Dans la combinaison du mouton ou chasse, avec ses barres ou traverses, et les crochets auxquels on attache les mèches, et la courroie ou chaine par laquelle le mouton est suspendu,

LITTLE ET AL. V. KEATING.

Indian lands—Form of conviction by commissioners.

Commissioners appointed under 2 Vic. ch. 15, to receive informations and inquire into complaints that may be made to them against any person for illegally possessing himself of the lands mentioned in the statute, must shew upon the face of a conviction by them under that act that the lands of which illegal possession had been taken had been actually occupied and claimed by some *tribe or tribes of Indians*, and for the cession of which no agreement had been made with the Government. A conviction alleging that the party convicted had unlawfully possessed himself of *Crown Lands* is bad, as they have no general jurisdiction over such lands.

This was an action of trespass *quare clausum fregit*, the declaration alleging an expulsion of the plaintiffs, and the spoiling of their goods, to which the defendant pleaded not guilty. On the trial it appeared that the plaintiffs were residing on Walpole Island, in the township of Sombra, in the Western District, in the house in question, and were occupying some lands held by them with it; that on the 11th of May, 1840, the sheriff of the Western District, with the defendant and others, entered and expelled them, under a writ dated 17th April, 1840, under the hands and seals of William Jones and the defendant, as commissioners, appointed by commission, under the great seal, to carry into effect the provisions of the statute 2 Vic. ch. 15, passed "for the protection of the lands of the Crown in this province from trespass and injury." The writ recited a conviction of one Shepherd Collock, upon the complaint of the Indian Chiefs, before these two commissioners, for unlawfully "possessing himself of *a portion of the Crown lands* in the township of Sombra," and that he still continued unlawfully to occupy the same: that they had adjudged that he should remove within thirty days after notice to be served upon him: that, on the 6th of March, he had been served with such notice: that the period had expired, and he had not removed, and they commanded the sheriff to eject and remove Shepherd Collock from the said lands and tenements. The date of the convention was not recited in the writ, but on its production it bore date the 29th of February, 1840, and stated that Collock, being duly summoned, was upon the complaint of the Indian Chiefs, pursuant to

an act, &c., &c., convicted before them, Commissioners duly appointed, &c., "for that he had before then lately unlawfully possessed himself of a portion of the Crown lands in said Western District, being part of Walpole Island, in the township of Sombra, and still continued unlawfully to occupy the same;" and they adjudged, ordered and directed that Shepherd Collock should remove from the occupation and possession of the said lands, &c., within thirty days after notice should be served upon him. A notice of action was proved, signed, "John Prince, Sandwich, W. D.," directed to the defendant. The plaintiffs proved that they were in possession of the premises, under a lease for a year, dated the 21st of February, 1840. from Collock to them. For the defendant it was contended that this lease was fraudulent; that the plaintiffs were the sons-in-law of Collock, residing with him, and not his tenants, and that Collock was in the house, and was removed with the others, when possession was given to the defendant in person. Mr. Jones, for the defendant, stated that Walpole Island had always been appropriated for the Indians; that he had known it since 1816; that he was a Government agent, and in that capacity leased Indian lands with the sanction of Government; that he looked upon Collock as a mere squatter, and he also stated he had heard of a surrender, and seen a deed of Walpole Island. Upon this evidence it was contended that the defendant was not a trespasser, but was justified under the conviction; but the plaintiffs urged that the statute was not applicable to their case; that they were tenants paying rent; that their possession was acknowledged and sanctioned by Government; that they could not be summarily ejected; and that at any rate, as it had not been shewn that a notice had been served either on Collock or them, according to the second section of the act, the proceedings were illegal, and that the recital by the Commissioners in their warrant to the sheriff of the notice having been given could not be received as evidence of that fact, as the defendant contended; and the judge being of opinion with the plaintiffs on this latter point, the jury found a verdict for the plaintiffs

or £17 10s. 0d., the question of the possession being in them or Collock, on 11th of May, 1840, having been left to them.

A rule *nisi* for a new trial having been granted, on the ground that the verdict was contrary to law and evidence, for misdirection and excessive damages; and counsel having been heard in Trinity term, the court now gave judgment.

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

The question arises upon the plaintiffs' case. They proved clearly an act of trespass, entitling them to considerable damages if not justified, and there is no room therefore for interposition on the ground of excessive damages, if no legal justification appeared. It remains then to inquire whether a good justification was made out. The defendant, it is clear, intended to act within the authority given by the provincial statute 2 Vic. ch. 15, being one of the commissioners appointed under that statute, the tenth section of which gives to such Commissioners the same privileges as justices of the peace have, of pleading the general issue and giving the special matter in evidence. All therefore turns upon the sufficiency of the defence, which he did in fact make out by evidence. Several objections were taken to it, but there is one ground on which it appears to us the defence must necessarily fail. It was not brought out distinctly at the trial, if at all, but it is of that nature that we cannot with any propriety overlook it, because it lies at the foundation of the whole proceeding. The defendant shews a writ made by himself and W. Jones as Commissioners, directed to the sheriff of the Western District, and commanding him to eject and remove Shepherd Collock from the occupation of certain lands and tenements. He accompanied the sheriff when he proceeded to execute this writ, was present when the plaintiffs were dispossessed, and therefore entered himself into possession as receiving it from the sheriff under the writ. I cannot but remark, in passing, that it would have been far better if the commissioners to enforce this statute

had been persons wholly unconnected with the objects of the proceeding; for though all, I dare say, was well intended, there is an apparent impropriety in the defendant acting in a double capacity, first judicially in giving the power to remove the occupant of the land, and then as a kind of trustee for other parties, taking possession under a writ which he had himself signed. It subjects the proceedings of parties so acting to injurious surmises, and is likely to enhance the damages against them, if they make a false step; and besides, it occasions confusion in applying to them the protection given by the statute. For instance, if in this case the writ should be found good upon the face of it, it cannot be a protection to this defendant, who received possession under it and acted in some measure in aid of the sheriff, unless it appears to be supported by a valid proceeding which authorized its issuing, because it was this defendant and another who made the writ, and he cannot be protected by a writ which he himself gave. Now it need hardly be said that this defendant and Mr. Jones can have no general authority to issue their writ to the sheriff, commanding him in a summary manner to dispossess any one of the land he may be living on. They assert that they have authority given to them under the statute 2 Vic. ch. 15, to act as Commissioners for the purposes of that act, in which there is an inconsistency between the title and preamble, and the enacting clause. The former indicate that the legislature meant to afford a summary remedy for dispossessing intruders upon any of the ungranted lands of the Crown, but the enacting clauses do not extend so far; they only gave power to appoint Commissioners "to receive informations, and to inquire into any complaint that may be made to them or any of them against any person for illegally possessing himself of any of the aforesaid lands, *for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto.*" It may become a question hereafter whether these words extend only to lands in which the title of the aboriginal inhabitants has never been extinguished, or whether they embrace also

lands which the Crown has acquired by purchase from the tribes first inhabiting them, and which have been afterwards reserved by the Government for the occupation of other Indians, or, as the case is in some instances, of the same tribes from whom the land had been acquired. It is clear, at least, that the provisions extend only to such lands as some tribe or tribes actually occupy or claim title to. Now it does not appear on the face of the conviction that the land of which Shepherd Collock was to be dispossessed was land of this description; it states upon "*the complaint of the Indian Chiefs*," (naming no one, and not saying whether upon oath or not) pursuant to the act, he was convicted, "for that he had before then lately unlawfully entered upon and possessed himself *of a portion of the Crown lands in said Western District, being part of Walpole Island, in the township of Sombra, and still continued unlawfully to occupy the same*," and they direct that he shall be removed within thirty days after notice served on him. But it is very clear that the Commissioners have not a general power to remove trespassers upon the Crown lands, either in the township of Sombra or anywhere else. There is a limited jurisdiction, confined to a particular object, and to be exercised only under certain circumstances, and they must shew that the case in which they have acted was within their jurisdiction. If this conviction would authorize any one to dispossess the occupant of Crown lands in the township of Sombra, it would equally have authorised the dispossessing of an occupant of a town lot in Sandwich belonging to the Crown, if it had specified such land, for there is nothing in the conviction, any more than in the writ, to shew it to be Indian land. We cannot conjecture that it is, because the complaint was made by Indian Chiefs, nor can we tell judicially whether Walpole Island be land occupied and claimed by Indians or not; so far as we might conjecture, we should conclude otherwise, for it is said to be in the township of Sombra, and generally speaking Indian lands are not surveyed and divided into townships, though in some cases they have been. But it is quite clear that in a case like this whatever is necessary to

give jurisdiction, must be certainly shewn, and not left to be taken by intendment. The proceeding is a rigorous one, and properly intended to be so in cases to which the statute applies, but we must see that the case in which it has been adopted is one of those cases,—2 Wils. 382: Stra. 261; 1 Burr. 603, 613; 1 T. R. 241; 4 Burr. 2283; 1 East, 64, 679; 10 Co. 76; Cro. Car. 395; 2 Lev. 131; Hardw. 478, 480. This is not shewn here in any way, and for want of that the conviction can afford no defence. The case in 13 East 139 is clear on this point. The court says there, "we *can* intend nothing in favor of convictions, and we *will* intend nothing against them." As the defeuce must fail on this point, it is not necessary to go into the other objectious which have been taken to the commisioners' proceedings. I will therefore only say, without meaning to be bound by any opinion that I may now express, that it is my present impression that it was necessary for this defendant to shew that the notice to remove had been given, which is required by the second clause of the act. It seems to me that the recital of such fact in the warraut was not sufficient; the defendant's right to give such a writ must appear otherwise than out of his own mouth, to use the words of the court in Rex v. Johnson (Stra. 261). Upon this ground chiefly the case weut against the defendant at the trial, and I think that upon this point also the justification failed. The plaintiffs at the trial seemed disposed to rely mainly upon the fact, that, even on the merits, Collock, against whom the writ issued, was not an intruder, for that he had entered and had been in possession by permission of a public agent of the Government, paying rent. How far they made this appear we need not examine, for if the plaintiffs' right of action had rested on that ground only, I apprehend they must have failed, because the eleventh clause of the statute gives an appeal to the Court of Chancery, and makes the decree of the Vice-Chancellor final. In 2 B. & P. 392, the court say, "It has been determined by all the judges of England, that when a statute provides that the judgment of commissioners appointed thereby shall be final, their decision is

conclusive, and cannot be questioned in any collateral way:" and such is the case clearly when an appeal lies from the conviction of justices to the quarter sessions, an inferior jurisdiction to the Court of Chancery. If the parties here were dissatisfied with the decision of the Commissioners on the facts, their course was to appeal as the act directs, and if they have done so, they are concluded by the order on that appeal.

Rule discharged.

GWYNNE V. BROCK.

Pleading—Materiality—Covenant for quiet enjoyment—Issue of title being in third party.

Where in an action on a deed in fee, for breach of covenant for quiet enjoyment without the hindrance, &c., of the defendant (the grantor) or any one claiming under her, the plaintiff declared that A. and others, who had title from her, at the time of the execution of the covenant to the plaintiff to the lands and woods conveyed, expelled the plaintiff under such title, and the defendant pleaded that A. and the others had not the title to the lands and woods under her at the time of the conveyance to the plaintiff.

Held, on special demurrer to the plea, that the allegation of the title in A. and the others at the time of the conveyance was immaterial and not traversable, and that the plea was bad in denying the title of A. *and* the others to the lands *and* woods conjunctively, and not disjunctively.

The plaintiff declared in covenant, that on the 22nd of July, 1833, by indenture made between the defendant and the plaintiff, of which he made *profert*, the defendant bargained and sold to the plaintiff, his heirs and assigns, certain lands (describing them), together with the woods, &c., and the defendant thereby covenanted "that the plaintiff, his heirs and assigns, should and might from time to time and at all times thereafter forever, peaceably and quietly enter into, have, hold, occupy, possess and enjoy all and singular the said purchased hereditaments and premises, &c., with the appurtenances, without the let, trouble, hindrance, molestation, interruption or denial of the defendant, her heirs or assigns, or any other person or persons whomsoever lawfully claiming, or to claim, by, from, or under her, them, or any or either, of them: and the rents, issues, and profits thereof, should and might from time to time, and at all times thereafter, have, take, and receive, to

McLEAN *v.* McISAAC ET AL.

Before McDONALD, C.J., and SMITH, WEATHERBE, RIGBY, and THOMPSON, J J.

(*Decided August 4th, 1885.*)

Action against Indian Commissioner for arrest of a person trespassing on Indian Reserve.—Verdict for plaintiff set aside.

PLAINTIFF having continued to tresspass upon a portion of the Indian Reserve Lands at Whycocomagh, Inverness, by cutting hay, etc., after notice to cease doing so, one of the defendants, as Indian Agent and Justice of the Peace, issued a warrant under which plaintiff was arrested by the sheriff, assisted by another defendant, who was called upon by the sheriff for that purpose, and, after trial and conviction, was committed to jail in default of the fine imposed under chapter 28 of the Dominion Acts of 1880, sec. 27. Plaintiff thereupon brought an action claiming damages for the arrest, and the jury having found a verdict in his favor against the Judges charge, the verdict was set aside with costs.

A rule was taken to set aside a verdict for plaintiff in an action claiming damages for assaulting the plaintiff and committing him to prison, and for trespass, &c. The facts appear fully in the judgment.

Graham, Q. C., in support of rule, cited *Acts of 1880*, chap. 28, sec. 7; *Revised Statutes*, (1st series,) chap. 28, sec. 3.

Pearson, contra.—The plaintiff was in possession of the land in question for a long time, and the hay carried away was the product of his labor. The part of the verdict relating to the assault cannot be sustained, but I think the verdict in relation to the trespass can be. The plaintiff was in possession of the land and the question is whether Mr. McIsaac had a right to take the hay cut by him. Mr. McIsaac's authority under the Act is only to prosecute before the magistrate. He has no right to enter unless he shows title. We have the right to consent to a verdict against us on the first and second counts. The evidence on the remaining counts is sufficient to sustain the verdict.

Graham, Q. C.—There is sufficient evidence to show title in the Crown, as whose representative Mr. McIsaac entered. Unless there is statutable authority I do not consent to a verdict on the first two counts. The case is not one for the exercise of the discretion of the court. The return which is in evidence shows that this land was reserved for the Indians under the statute of 1852. This is admitted. (WEATHERBE,

J.—There is evidence that the government were selling it.) I think not after 1852. The plaintiff admits that this land was part of the reserve, and admits the title of the government. He sought to purchase from them. The Dominion statute of 1880, chapter 28, gives the Dominion Government jurisdiction in regard to all Indian lands. McIsaac was acting under the statutes; *Acts of 1881*, chap. 17, sections 9, 11, 12; *Acts of 1882*, chap. 30, sec. 3. The Dominion Government had power to deal with these lands, and, under the Acts, Mr. McIsaac had power to lay the information. (WEATHERBE, J.—How would the fact of the plaintiff being in possession at the time of the transfer to the Dominion Government affect the question?) The plaintiff was only a trespasser. I think it would make no difference.

Pearson replied.

McDONALD, C. J., (August 4th, 1885,) delivered judgement as follows:—

The declaration in this case contained three counts:

1. That the defendants assaulted and imprisoned the plaintiff and kept him imprisoned, &c.

2. That the defendants assaulted and imprisoned the plaintiff's son, a minor, in plaintiff's employ, and kept him imprisoned, &c.

3. That the defendants broke and entered land of the plaintiff, described in the writ, and cut grass, broke down fences, &c.

The defendants pleaded separately, each denying the allegations of the plaintiff, and also special pleas justifying the commission of the acts complained of on the ground that the plaintiff and his son were trespassing on the Indian reserve at Whycocomagh, in the County of Inverness, C. B., for which county the defendant McIsaac was Indian agent for the purposes of the Indians Act of 1880. Both defendants pleaded to the third count that the plaintiff was not in possession of the locus. The cause was tried before Mr. Justice McDONALD, at Port Hood, when the jury, contrary to the instructions of the learned Judge, found a verdict for the

plaintiff. The facts as they appeared in evidence were, shortly, as follows:

The plaintiff, Donald McLean, twenty or twenty-five years ago, squatted on certain Crown lands at Whycocomagh, in the County of Inverness, reserved by the Crown for the use of the Indians of that district, under authority of Acts for that purpose passed by the Legislature of Nova Scotia. The control and management of these lands by the British North America Act were transferred, with the general management of Indian affairs, to the Dominion Government, and are now, and have, since 1867, been managed by the Indian Department of that government under the authority of statutes passed in that behalf. The defendant, Rev. Donald McIsaac, was by minute-of-council, dated 23rd May, 1878, appointed Indian agent for the County of Inverness, succeeding Joseph B. McDonald, Esquire, who had previously occupied that position. The plaintiff, it appears, had applied to the Government of Nova Scotia for a grant of the land now in dispute, but was refused; and the title is still in the Crown, and the land forms a portion of the Indian reserve above referred to. There is contradictory evidence as to the length of time the plaintiff has occupied the land, and the character of that occupation, but it appears with sufficient certainty that he and his family have partially cleared the locus, and have erected fences, and cut hay upon it for at least twelve or fifteen years, and, as the plaintiff testifies, over twenty years. This possession has never been authorized by the Crown, or by any person representing the Crown or the Indian Department, nor does it appear that the plaintiff ever asserted any right or title in himself till this action was commenced. On 1st February, 1879, the defendant McIsaac addressed a letter to the plaintiff stating that he was in receipt of instructions from the Indian Department to notify him that if he was, after that date, found trespassing upon the Indian reserve at Whycocomagh, by cutting wood, scantling, timber, &c., or removing or making hay thereon, or removing the same off the reserve, or otherwise encroaching on the vested rights of the Indians, or the Indian Department, proceedings would be taken to impose on him the penalties provided by section 16,

Indian Act, 1876. In consequence of this notice the plaintiff in the following June, addressed a communication to the Deputy Superintendent of Indian affairs claiming that he had occupied the land in question for twenty-five years, and asking for compensation for improvements.

The Indians continued to complain of the intrusion by the plaintiff upon their reserve, and the defendant McIsaac, as the Indian agent of the district, authorized and instructed the defendant Livingstone and others, members of the Indian Board of the County of Inverness, to enter upon the lands now claimed by the plaintiff, and cut and carry away the hay growing upon the same.

This is the trespass complained of in the third count. The plaintiff, however, refused to abandon his possession of the lands in question, and, in 1882, on complaint on oath made by the defendant Livingstone, and several other members of the Indian Board, at Whycocomagh, a warrant was issued by the defendant McIsaac, in his capacity of Indian Agent, and, *pro hac vice* Justice of the Peace, to apprehend the plaintiff and his son for a violation of the Act in relation to Indian affairs. The plaintiff was apprehended, and, with his son, tried before the stipendiary magistrate of the county, and duly convicted of the offence charged; and, in default of payment of the fine imposed under the statute, was committed to jail. This is the imprisonment complained of in the first and second counts of the declaration. Sec. 20, of the Act of 1880, provides that "no person or Indian, other than an Indian of the band, shall settle, reside, hunt upon, occupy or use any land or marsh," upon such reserve, and section 27 enacts "that if any person or Indian other than an Indian of the band to which the reserve belongs, without license in writing of the Superintendent-General, or of some officer deputed by him for that purpose, trespass upon any of the said lands * * * by cutting, carrying away or removing therefrom * * * timber or hay thereon, the person so trespassing shall, on conviction thereof, before any stipendiary magistrate forfeit and pay the sum of twenty dollars * * * and, if any part of it remains unpaid, the Superintendent-General * * may commit the person in default to the common jail." Chap.

17, sec. 30, Dominion Acts, 1881, enacts "all sheriffs, &c., to whom any such process is directed by the Superintendent-General or by any officer or person by him deputed * * * shall obey the same, and all other officers shall upon reasonable requisition assist in the execution thereof," and, by chap. 20, sec. 3, of the Acts of 1882, all powers given to stipendiary or police magistrates to dispose of cases of infraction of the Act of 1880 are conferred upon the Indian agents. It appears, therefore, that the plaintiff's occupation of this Indian reserved land was unauthorized and illegal, was continued after due notice and warning by the duly constituted authority, in defiance of which he carried away the hay from these lands, and, on proceedings duly taken by the defendant, as Indian agent, and, on due trial, he was convicted of the offence charged against him, and in due course committed to prison. The only evidence against the defendant Livingstone on the first and second counts, is that he assisted the sheriff in making the arrest under the warrant. The justification pleaded to that charge is fully proved, viz., that he assisted the sheriff on his requisition, and on his command, and not at the request or on the command of the Indian agent. In my opinion the justification pleaded was fully sustained by the evidence as to all the counts in the declaration, and as the charge of the learned Judge was full and comprehensive as to the facts, and entirely unobjectionable in point of law, the verdict may, in my opinion, be properly characterized as perverse, and should be set aside. It is not necessary to discuss the right of the Indian agent to enter upon and take the hay from these reserves for the benefit of the Indians entitled to the produce of the land. The plaintiff does not, or rather did not pretend to hold adversely to the Crown. He was, as he admits, leniently treated in being allowed to purchase that portion of these reserved lands which he had made valuable by his labour, and of which he received a grant from the Crown, and his attempt to appropriate what he had acquired no right or title to, has got him into the difficulty of which he complains. As against a private owner, where he had not acquired title by twenty years possession, he could not maintain this action for trespass. In *Butcher* v. *Butcher* Lord

TENTERDEN, C. J., said: "If he who has the right to land enters and takes possession he may maintain trespass. It is not necessary that the party making the entry should declare that he enters to take possession," and BAYLEY, J., in the same case, said, "*Lawton* v. *Costen*, 7 T. R., 431, is an authority to show that a party wrongfully holding possession of land cannot treat the rightful owner who enters on the land as a trespasser. I think that a party having a right to the land acquires, by entry, the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land."

The verdict will be set aside with costs.

LOGAN *v.* THE COMMERCIAL UNION ASSURANCE COMPANY.

Before McDONALD, SMITH, WEATHERBE, RIGBY and THOMPSON, J J.

(Decided August 4th, 1885.)

Action on Fire Insurance Policy.—Conditions.—Certificate of Magistrates.—Waiver.—Verdict for plaintiff set aside.—Costs.

A POLICY of insurance contained a condition requiring the insured, in case of loss, to procure a certificate, as to the matters contained in the statement of loss, under the hands of two magistrates most contiguous to the place of fire. A further condition provided that no condition should be deemed to have been waived unless the waiver was clearly expressed in writing, endorsed on the policy. The evidence was conclusive that the two magistrates most contiguous to the place of the fire were applied to for their certificate, but refused to give it, and there was no sufficient evidence of waiver. The jury having found that both conditions had been waived, and a verdict having been entered on their finding for plaintiff, the verdict was set aside with costs.

Caldwell v. *The Stadacona Fire Insurance Company* distinguished.

This was a rule to set aside a verdict for plaintiff in an action on a policy of insurance against fire, issued by the defendant company on plaintiff's goods. It was admitted that the proofs of loss were not made in accordance with the conditions of the policy, the 14th condition of which required a certificate under the hands of two magistrates most contiguous to the place of fire as to the facts set forth in the statement of loss, and the 19th condition provided that "no one of the

before us again, the legality of it may be raised and determined.

GALLIHER, J.A.—The learned trial Judge refused to withdraw the case from the jury at the end of the plaintiff's case and the jury disagreed.

I am of opinion that the course pursued by the learned Judge in refusing to enter judgment for the defendants is right and would dismiss the appeal.

McPHILLIPS and EBERTS, JJ.A. concurred in dismissing the appeal.

COURT OF APPEAL

Before Macdonald, C.J.A., Galliher and McPhillips, JJ.A.

Merriman (Plaintiff) Appellant
v. **Pacific Great Eastern Railway Company** (Defendant) Respondent

Animals — Straying on Railway — Killing of by Train — Whether "at Large"—B.C. Railway Act—Animal Pastured on Indian Reserve.

The plaintiff's cow which was pastured on the Indian Reserve held to have been a trespasser, and "at large" within the meaning of sec. 210 (4) *British Columbia Railway Act*, R.S.B.C., 1911, ch. 194.

[Note up with 1 C.E.D., *Animals*, sec. 13.]

Appeal by plaintiff from the dismissal by Cayley, C.C.J. of his action for damages for the loss of his cow which was killed on the defendant's railway track. Appeal dismissed, McPhillips, J.A. dissenting.

J. Wilson, for plaintiff, appellant.

W. C. Brown, K.C., for defendant, respondent.

January 10, 1922.

MACDONALD, C.J.A.—John Nesbit claims to have rented the land in question from Indian Joe, and to have given the plaintiff the right to pasture his cow there for a consideration. The cow got through a hole in the railway fence and was killed on the railway track by the defendant's train.

This land which Nesbit claims to have rented from Indian Joe was part of the Indian Reserve, and Joe had no authority

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MERRIAM v. P.G.E. RY.

Appeal

Macdonald, C.J.A.

to lease or deal with it in any way. The plaintiff's cow was therefore a trespasser upon this land and I do not think the railway company were bound to fence for her protection.

According to the evidence, neither Nesbit nor the plaintiff had any right to have cattle on the Indian Reserve. The cattle were therefore "at large" within the meaning of the *British Columbia Railway Act*, R.S.B.C., 1911, ch. 194, sec. 210, subsec. 4, and as they were so at large by the wilful act of the plaintiff, he cannot recover in this action.

Said sec. 210, subsec. 4, is the same in effect as sec. 294, subsec. (+) of the Dominion *Railway Act*, R.S.C., 1906, ch. 37 [1919, ch. 68, sec. 386] which was interpreted by us in *Hupp v. C.P.R.*, 20 B.C.R. 49, 6 W.W.R. 385, 27 W.L.R. 398, 17 Can. Ry. Cas. 66, where we held under similar circumstances that the plaintiff could not succeed. I would therefore dismiss the appeal.

Galliher, J.A.

GALLIHER, J.A.—I would dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A. (dissenting) would allow the appeal.

SASKATCHEWAN

COURT OF APPEAL

Before Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A.

Gnaedinger & Sons, Limited (Plaintiffs) Respondents
v. **Turtleford Grain Growers Co-Operative Association Limited** (Defendants) Appellants

Contracts—Validity—Sale of Goods on Credit to Agricultural Co-Operative Association.

Sale of Goods—Sale for Cash as Distinguished from One on Credit—Effect of Receipt of Invoice Stating Terms of Credit and Taking Possession of Goods—Meaning of "Exchange" of Possession and Price in S. 27 Sale of Goods Act.

Under sec. 5 (6) of *The Agricultural Co-operative Associations Act*, R.S.S., 1920, ch. 119, a purchase of goods on credit, unless it be one within the exceptions mentioned in said subsection, is invalid and payment of the purchase price cannot be enforced by action. But since the property in the goods therefore remains in the seller, he is entitled to their return if still in the possession of the association, or if they have been sold by the association he is entitled to recover the money so received by it (*per curiam*, except that Haultain, C.J.S. held that the

conduct of the defendant and on the parties' bank credit ratings, there are going to be some complicated trials.

I think also that it is anomalous to presume that every defendant has money out at interest. There are still some people who do not believe in usury and who count all interest as usury.

For the purposes of the present case, it is sufficient to say that interest is not payable in these circumstances where an agent has failed in the claim for contractual commission but has established a quantum meruit.

I cannot be sure what direction the law will take on interest. Speaking for myself, I would regret imposing on the debtor classes of society a liability for interest of large amounts in discretionary situations when creditors already have ample protection in their right to contract for interest at any rate or to issue a demand for interest.

BRITISH COLUMBIA SUPREME COURT

Andrews J.

Moses et al. v. Her Majesty the Queen in Right of Canada et al.

Indians — Provincial Department of Highways attempting to widen road across reserve — Not a trespass as right to resume 1/20 of land for public works reserved to province — Privy Council O. 280 (1930) — Order in council 1036 (1938) — The Indian Affairs Settlement Act, 1919 (B.C.), c. 32 — The British Columbia Indian Lands Settlement Act, 1920 (Can.), c. 51 — The Indian Act, R.S.C. 1970, c. I-6, ss. 35(1), 37.

The plaintiffs were the chief and councillors of the Lower Nicola Indian Band, which occupied two reserves. The provincial Department of Highways attempted to enter the reserves to widen a road, and the band claimed the entry was a trespass. The plaintiffs claimed that Indian lands were subject only to federal legislation. The province claimed that according to Privy Council O. 208, passed by the Dominion in 1930, and order in council 1036, passed by the province in 1938, the province had the right to resume up to 1/20 of each reserve for road building purposes.

Held, the right of the province to resume land was valid and was a sufficient defence to an action for trespass. Privy Council O. 208 and order in council 1036 were the result of negotiation and agreements between both provincial and federal governments and were made pursuant to the authorities established by the British Columbia Indian Lands Settlement Act and The Indian Affairs Settlement Act. Consequently, the exercise of the right to resume did not constitute a taking or alienation of land as provided for in ss. 48 and 50 of the Indian Act, R.S.C. 1927, c. 98, now ss. 35(1) and 37 of the present Act.

[Note up with 13 C.E.D. (West. 2nd) *Indians*, ss. 6, 7.]

L. P. Paye and *W. J. Worrall,* for plaintiffs.

S. J. Hardinge, Q.C., for Dominion of Canada.

C. C. Locke, Q.C., and *G. M. Somjen,* for province of British Columbia.

(Vancouver No. 43319/75)

5th May 1977. ANDREWS J.:—This is an action in trespass. The plaintiffs are the chief and councillors of the Lower Nicola Indian Band (hereafter called "the band"). The band occupies land located in the Nicola Valley of the province of British Columbia, known as the Nicola-Mameet Indian Reserve No. 1, and the Pipseul Indian Reserve No. 3 (hereafter called "the reserves"). The plaintiffs allege that Her Majesty the Queen in Right of the Province (hereafter called "the province") has trespassed on these reserves for the purpose of widening the road, generally known as the Merritt-Savona Road, which runs through the reserves. The issue is whether the province has the authority to enter upon the reserves for the purpose of widening this road, without the consent of the Indian band or Her Majesty the Queen in Right of Canada (hereafter called "the Dominion"). In my view, the province has this authority.

The Claim

The band claims that the province, through its agent the Department of Highways, has trespassed upon the reserves and continues to trespass for the express purpose of realigning the existing road thereon, widening the existing road thereon, applying gravel to the existing road thereon and the widening portions thereof, and conducting surveying work on the reserves preparatory to paving the reconstructed road.

The Issue

The issues raised by counsel in this case are many and complex. Counsel have agreed, however, that the sole issue I am to determine is whether the province has trespassed upon the lands in question. I am not required to consider the remaining claims as set out in the endorsement.

The evidence was brief and established that for some years prior to September 1975 the province had discussed with the band the matter of widening and improving the road. The band indicated that they were opposed to any major development of the road and did not want the province to do anything within the reserves. At the end of September 1975 the province marshalled men and machinery and entered the reserve. The band assembled at the site of the machinery and indicated

that they were not prepared to allow any work to proceed. The province left the reserve and has not since re-entered.

I propose, first, because of the complexity of the case, to summarize briefly the positions of the parties. It should be noted that while the Dominion was originally a co-plaintiff, subsequently on the application of the band the Dominion was substituted as a co-defendant.

The Argument

There is no question that the province, through its agent the Department of Highways, has engaged in making certain improvements to the road running through the reserves.

The province says, in its defence, that all such activities have taken place upon land to which the province has a legal right. The province says further that, if there have been any trespasses, such trespasses took place with the consent and acquiescence of the plaintiffs.

The argument with respect to the question of legal right to the land divided itself into two principal issues:

(i) When this action was originally commenced in October 1975 the main issue was whether the province had established any right to any road allowance in excess of the existing 14-foot road.

(ii) In May 1976 the province passed two orders in council purporting to resume a portion of the reserves for road building purposes. Thus a second issue arose as to whether the province had a right to resume up to 1/20 of each reserve and, if so, whether such right had been validly exercised.

1. Establishment of right to road allowance

With respect to the first issue, it is the position of the plaintiffs and the Dominion that the province had no legislative competence to establish any such right as the lands in question were, at the time of the relevant legislation, "lands reserved for the Indians" within s. 91(24) of the B.N.A. Act, 1867, and therefore subject only to federal legislative competence.

The position of the province is that it has a 66-foot right-of-way in respect of the road through both reserves, (a) by virtue of a provincial declaration regarding the width of the public highways, made in 1911 (with respect to the Nicola-Mameet Reserve) and, (b) by virtue of the various statutes and federal regulations (with respect to the Pipseul Reserve).

(a) *Nicola-Mameet Reserve No. 1*

Title to the Nicola-Mameet Reserve remained vested in the province until 1938, when it was conveyed to the Dominion by order in council 1036. The principal issue that arises in respect of this reserve is at what date the lands became "lands reserved for the Indians".

The position of the plaintiffs and the Dominion with respect to the Nicola-Mameet Reserve is that, although title remained vested in the province until 1938, Nicola-Mameet became "lands reserved for the Indians" in 1878 when Indian Reserve Commissioner Sproat allotted those lands to the Lower Nicola Indian Band. These lands, they say, were subject only to federal legislative competence and the provincial legislature does not now — and did not in 1911 — have jurisdiction to enact legislation in derogation of the Indian title. They say that the allotment of these lands by Commissioner Sproat on 5th September 1878 was final. This is so either because the provincial cabinet approved his allotments in advance or because the only limitation on his authority to establish reserves was that his decision would be subject to approval by the commissioner of lands and works, who was to refer the matter to a Supreme Court Judge in the case of dispute, and this matter was never so referred. An alternative submission made by the Dominion is that, whatever the legal width of the road was prior to 1938, as a result of the order in council by which this land was conveyed to the Dominion the road became a 14-foot road because the province conveyed everything to the Dominion except "all travelled roads . . . existing over or through said lands", and this had the effect of reserving to the province only the 14-foot road.

The province submits that the Nicola-Mameet Reserve did not become "lands reserved for the Indians" until it was conveyed to the Dominion in 1938 and that until that date there was constant dispute between the federal and provincial governments in respect of what land would be reserved for the Indians and what title would pass to the Dominion. The allotment by Commissioner Sproat was always subject to approval by the Commissioner of Lands and Works of British Columbia and such allotment was never approved but was, in effect, rejected. The province says that the 1911 declaration of a 66-foot right-of-way in the province was an exercise of a proprietary right. This would apply to the land in question regardless of whether the land had been set aside as land reserved for the Indians prior to 1911, as the province can legislate as to the

proprietary rights of such lands if the lands are not vested in the federal Crown, but are still provincial Crown lands.

(*b*) *Pipseul Reserve No. 3*

Pipseul Reserve No. 3 formed part of the lands in the province (known as the "railway belt") which were granted to the Dominion by means of several statutes between 1880 and 1888 for the purpose of constructing a portion of the Canadian Pacific Railway (see An Act to grant public lands on the Mainland to the Dominion in aid of the Canadian Pacific Railway, 1880 (B.C.), c. 11, s. 2, amended in 1883 and 1884).

The issues which arise in respect of this reserve revolve around the provisions of various statutes and regulations regarding lands within the railway belt. Briefly, these provisions are as follows:

The legislation by which these lands were conveyed to the Dominion provided that it "shall not affect or prejudice the rights of the public with respect to common and public highways existing" at the date of the conveyance within the limits of the land to be conveyed.

In 1886 the Dominion passed a statute allowing for regulations by order in council of lands within the railway belt (the Public Lands in British Columbia Act, c. 56.) In 1887 the Dominion passed a regulation providing for the survey of public highways, in the meantime reserving to settlers and landholders a 66-foot right of way:

"9.(1) The Governor in Council may order the survey by a Dominion Land Surveyor of such public highways as he may deem expedient, through any lands subject to these Regulations.

"(2) On the approval of a survey of a public highway, the fact shall be notified to the Lieutenant-Governor of British Columbia by the Minister of the Interior, and by virtue of such notification, such public highway shall become the property of the said Province, the legal title thereto remaining in the Crown for the public use of the Province: but no such road shall be closed up or its direction varied, or any part of the land occupied by it sold or otherwise alienated, without the consent of the Governor General in Council:

"(3) The Governor in Council may authorize any person to locate and build public highways or to build public highways located in accordance with clause nine of these Regulations.

"(4) In the meantime, and until such road shall have been located and constructed, a convenient right of way not exceed-

ing 66 feet in width over any such land is hereby reserved for the use and convenience of settlers and land holders in passing, from time to time, to and from their locations or lands to and from any now existing public road or trail: Provided always that such settler or land owner making use of the aforesaid privilege shall not damage the fences or crops of the occupier of any such located, sold or leased land."

Further regulations were adopted in 1889; however, the terms of s. 9 of the 1889 regulations were identical to the above provisions.

There was, in 1918, an amendment to the regulations empowering the province to make and establish public highways through or over Dominion lands in the railway belt as if the provincial Highway Act, R.S.B.C. 1911, c. 99, were applicable to Dominion lands:

"9. (1) The word 'highway' as used in this section shall mean all public wagon roads, streets, roads, trails, lanes, bridges and trestles, but shall not include canals, towing-paths or other like public highways.

"(2) The authorities of the Province of British Columbia shall, during the pleasure of the Governor in Council and subject to the provisions of these regulations, be authorized and empowered to make and establish such public highways through or over Dominion lands in the railway belt, exclusive of areas set apart as Dominion forest reserves and parks, but, including lands held under homestead entry, contract of sale, lease, licence or any other form of occupancy, and also including foreshores and lands covered with water, as if the British Columbia Highway Act, Chap. 99 of the Revised Statutes of British Columbia, 1911, as amended by chap. 29 of the Statutes of 1913, were applicable to the said Dominion lands."

However, prior to this amendment in 1913 certain Indian reserves, including the Pipseul Reserve No. 3, had been withdrawn from the operation of the regulations in force for the administration and disposal of lands within the railway belt.

The railway belt lands were transferred by the Dominion back to the province in 1930, with a reservation back to itself of the Indian reserves in the railway belt (the Railway Belt and Peace River Block Act, 1930 (Can.), c. 37.)

The plaintiffs and the Dominion say that the width of the road within the Pipseul reserve could be widened, after the conveyance to the Dominion of lands within the railway belt, only by federal legislation, and that there was no such legis-

lation. They say that the federal regulations merely created a right-of-way for settlers until roads were located and could not have the effect of widening an existing road which predated the regulations. Furthermore, because Indian reserves were withdrawn from the operation of the railway belt regulations in 1913, the 1918 federal regulation empowering the province to establish highways through the railway belt lands would not apply to Indian reserves.

The province says that it has a 66-foot right-of-way with respect to the road running through the Pipseul reserve by one of four methods:

(i) By the 1887 to 1889 federal regulations, a 66-foot right-of-way was created in favour of the Dominion, which it conveyed in 1930 to the province at the time of the reconveyance of the railway belt;

(ii) The 1918 regulation gave the province power to make highways on Dominion lands and therefore the British Columbia Highway Act, as referred to in the 1918 regulation, and the 1911 declaration made pursuant to that Act applied;

(iii) The 1887 to 1889 regulation created a 66-foot right-of-way in favour of settlers and this is a public right which still remains;

(iv) The Railway Lands Act, 1880, provided that the Act shall not affect rights of the public with respect to existing highways, and this recognized the right of the province to continue its powers in respect of roads over the lands conveyed to the Dominion for railway purposes.

2. *Resumption*

The second issue involves two questions: (a) Whether the province has a right to resume up to 1/20 of each reserve for road building purposes; and (b) Whether such right has been validly exercised.

The position of the plaintiffs is that the right to resume up to 1/20 is void, but if the court holds that it is valid, then the right has not been validly exercised.

The position of the province is that the province has a right-of-way of at least 50 feet on either side of the existing median line by virtue of the exercise of its right of resumption.

The position of the Dominion is that the province has the right to resume 1/20 of each reserve, but this resumption power has not been validly exercised.

(a) *Right of Resumption*

The question of whether the province has the right to resume up to 1/20 of each reserve for road building purposes revolves around the provisions of two orders in council, Privy Council O. 208, passed by the Dominion in 1930, and order in council 1036, enacted by the province in 1938.

Privy Council O. 208 approved an agreement entered into by representatives of the Dominion and the province, which recommended a form of conveyance by which Indian reserves in the province were to be conveyed by the province to the Dominion.

The draft form of conveyance, which formed Sched. 4 to Privy Council O. 208, provided, in part, as follows:

"PROVIDED NEVERTHELESS that it shall at all times be lawful for Us, Our heirs and successors, or for any person or persons acting in that behalf by Our or their authority, to resume any part of the said lands which it may be deemed necessary to resume for making roads, canals, bridges, towing paths, or other works of public utility or convenience; so, nevertheless that the lands so to be resumed shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such resumption shall be made of any lands on which any buildings may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings:

"PROVIDED also that it shall be lawful for any person duly authorized in that behalf by Us, Our heirs and successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through or under any parts of the hereditaments hereby granted, as may be reasonably required for mining or agricultural purposes in the vicinity of the said hereditaments, paying therefor a reasonable compensation:

"PROVIDED also that the Department of Indian Affairs shall through its proper officers be advised of any work contemplated under the preceding provisos that plans of the location of such work shall be furnished for the information of the Department of Indian Affairs, and that a reasonable time shall be allowed for consideration of the said plans and for any necessary adjustments or arrangements in connection with the proposed work:

"PROVIDED also that it shall be at all times lawful for any person duly authorized in that behalf by Us, Our heirs and successors, to take from or upon any part of the hereditaments

hereby granted, any gravel, sand, stone, lime, timber or other material which may be required in the construction, maintenance, or repair of any roads, ferries, bridges, or other public works. But nevertheless paying therefor reasonable compensation for such material as may be taken for use outside the boundaries of the hereditaments hereby granted:

"PROVIDED also that all travelled streets, roads, trails, and other highways existing over or through said lands at the date hereof shall be excepted from this grant."

The Nicola-Mameet reserve was conveyed by the province to the Dominion in 1938 by order in council 1036. That conveyance was made subject to the provisions outlined in the above-mentioned draft form of conveyance.

The terms and conditions set out in Privy Council O. 208 were made to apply to Indian reserves in the railway belt, which included the Pipseul reserve, by s. 13 of the Railway Belt and Peace River Block Act:

"1. Subject as hereinafter provided, all and every interest of Canada in the lands granted by the Province to Canada as hereinbefore recited are hereby re-transferred by Canada to the Province and shall, from and after the date of the coming into force of this agreement, be subject to the laws of the Province then in force relating to the administration of Crown lands therein . . .

"13. Nothing in this agreement shall extend to the lands included within Indian reserves in the Railway Belt and the Peace River Block, but the said reserves shall continue to be vested in Canada in trust for the Indians on the terms and conditions set out in certain order of the Governor General of Canada in Council approved on the 3rd day of February, 1930 (P.C. 208)."

The plaintiffs say that the provincial legislature is not competent to take Indian lands without the Dominion's legislative approval and that no federal statute ever approved the reservation of a right to retake 1/20 of the lands. A mere executive act, i.e., Privy Council O. 208, could not, they submit, go contrary to the Indian Act, R.S.C. 1970, c. I-6, requiring the surrender of the lands by the Indian band and the consent of the Governor in Council. The plaintiffs say further that the Governor in Council did not have sufficient legislative authority to pass Privy Council O. 208.

The position of the province and the Dominion is that Privy Council O. 208 and order in council 1036 were validly made.

They say that legislative authority for Privy Council O. 208 is found in The Indian Affairs Settlement Act, 1919 (B.C.), c. 32, and the British Columbia Indian Lands Settlement Act, 1920 (Can.), c. 51. Furthermore, no consent pursuant to s. 35(1) of the Indian Act is necessary since the right of resumption is not a "taking" of lands but rather a reservation back to the grantor of a certain right. Alternatively, the Dominion submits that the provincial executive is entitled by virtue of its prerogative power to transfer its allodial title to the Dominion subject to a defeasance condition, i.e., a right to resume if required for public purposes, and no federal legislation is necessary. The province and Dominion say further that, if consent pursuant to s. 35(1) of the Indian Act is required, then by making Privy Council O. 208 and accepting and registering order in council 1036, the Governor in Council is deemed to have consented to the exercise by the province of its power of compulsory taking.

(b) Exercise of Right of Resumption

In May 1976 the province passed two orders in council purporting to exercise its right of resumption; order in council 1487, with respect to the Pipseul reserve, and order in council 1488, with respect to the Nicola-Mameet reserve. These orders in council provided for the resumption of lands in each reserve "which are deemed necessary for the making of a road known as the Merritt to Savona Road, designated Road No. 46 of the Merritt Highway District, of a width of at least fifty feet (50') on each side of the median of the said road", except for those portions of the lands to which the province already has the right, including travelled streets, roads, trails, or highways existing over or through the said lands. The following additional terms are provided in each order in council:

"AND THAT the Minister of Highways for the Province of British Columbia be authorized to act on behalf of Her Majesty the Queen in Right of the Province of British Columbia to take all such steps and measures as necessary . . . to advise the Department of Indian Affairs and Northern Development through its proper officers of the work contemplated as soon as plans of the location of such work have been completed;

"AND THAT the Minister furnish copies of the plans for the information of the Department of Indian Affairs and Northern Development;

"AND THAT a reasonable time be allowed for consideration of the said plans and for any necessary adjustments or arrangements in connection with the proposed work."

The plaintiffs say that if the province is granted any competence to resume by Privy Council O. 208 and order in council 1036, the passage of orders in council 1487 and 1488 was not a valid exercise of such a right of resumption. The executive did not act in a reasonable manner, as it had no information before it on which to base its decision. Necessary consents were not obtained. They are not in accordance with the provisions of Sched. 4 to Privy Council O. 208 and order in council 1036 with respect to the obligations to provide the Department of Indian Affairs with plans, and the orders in council are vague and uncertain; it is impossible to conclude how much land is in fact going to be resumed.

The Dominion adopts the submissions of the plaintiffs on this point and, in addition, argues that principles similar to those applicable in cases of expropriation are applicable to the right of the Crown to resume an interest in land; thus the "taking authority" must comply strictly with the procedural requirements of the enabling legislation, i.e., the conditions provided by Privy Council O. 208 and order in council 1036. The Dominion says that orders in council 1487 and 1488 should be declared void for uncertainty because they lack a substantial degree of clarity in that they purport to resume an indefinite amount of land, do not exclude land which cannot be resumed (i.e., land occupied by buildings or gardens) and, on their face, reflect non-compliance with the conditions precedent to any resumption taking place. Furthermore, the statement of intention contained in the last three paragraphs of each order in council (referred to above) is meaningless, as the whole tenor of the resumption provisions of Privy Council O. 208 and order in council 1036 is that minimal procedures must be complied with before, not after, a resumption.

The position of the province is that the resumption was properly done and, alternatively, that the resumption should be allowed to be properly done by allowing the province to make proper surveys and delineate the resumption according to the terms of Privy Council O. 208 and order in council 1036. The province testified that there is no ambiguity as to where the road is; that no survey plan was presented to the plaintiffs because the plaintiffs would not allow the province on the land for the purpose of surveying, and that the resumption of 50 feet on either side of the existing median would not result in a resumption of more than 1/20 of each reserve. The province submitted that if the road goes near some buildings or gardens this ought not to impair the general right of the province to operate within the road allowance, dodging buildings and

gardens if no other arrangement can be made. The province testified further that the right to resume is a sufficient defence to an action for trespass and that, if certain provisions have not been complied with, then the court should simply declare that the province has the right to resume.

Conclusion

In my view, the province has not trespassed upon the reserves. I come to this conclusion on the basis that the province has a right to resume up to 1/20 of each reserve for the purpose of making roads or other works of public utility by virtue of Privy Council O. 208 and order in council 1036.

I have no doubt that Privy Council O. 208 and order in council 1036 were validly made. Privy Council O. 208 was the culmination of many years of negotiations and agreements entered into between representatives of the government of the Dominion and the government of the province with respect to Indian lands within the province.

In 1912 the following agreement, known as the McKenna-McBride Agreement, was arrived at, subject to the approval of the governments of the Dominion and the province:

"WHEREAS it is desirable to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia, therefore the parties above named, have, subject to the approval of the Governments of the Dominion and of the Province, agreed upon the following proposals as a final adjustment of all matters relating to Indian Affairs in the Province of British Columbia —

"1. A Commission shall be appointed as follows: Two Commissioners shall be named by the Dominion and two by the Province. The four Commissioners so named shall select a fifth Commissioner, who shall be the Chairman of the Board.

"2. The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:—

"(a) At such places as the Commissioners are satisfied that more land is included in any particular reserve as now defined, than is reasonably required for the use of the Indians of that tribe or locality, the Reserve shall, with the consent of the Indians, as required by the Indian Act, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians.

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"(b) At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved.

"3. The Province shall take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians in pursuance of the powers above set out.

"4. The lands which the Commissioners shall determine are not necessary for the use of the Indians shall be subdivided and sold by the Province at public auction.

"5. The net proceeds of all such sales shall be divided equally between the Province and the Dominion, and all monies received by the Dominion under this Clause shall be held or used by the Dominion for the benefit of the Indians of British Columbia.

"6. All expenses in connection with the Commission shall be shared by the Province and Dominion in equal proportions.

"7. The lands comprised in the Reserves as finally fixed by the Commissioners aforesaid shall be conveyed by the Province to the Dominion with full power to the Dominion to deal with the said lands in such manner as they may deem best suited for the purposes of the Indians, including a right to sell the said lands and fund, or use the proceeds for the benefit of the Indians, subject only to a condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct, then any lands within the territorial boundaries of the Province which have been conveyed to the Dominion as aforesaid for such tribe or band, and not sold or disposed of as hereinbefore mentioned, or any unexpended funds being the proceeds of any Indian Reserve in the Province of British Columbia, shall be conveyed or repaid to the Province.

"8. Until the final report of the Commission is made, the Province shall withhold from pre-emption or sale any lands over which they have a disposing power and which have been heretofore applied for by the Dominion as additional Indian Reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians. If during the period prior to the Commissioners making their final report it shall be ascertained by either Government that any lands being part of an Indian Re-

serve are required for right-of-way or other railway purposes, or for any Dominion or Provincial or Municipal Public Work or purpose, the matter shall be referred to the Commissioners who shall thereupon dispose of the question by an Interim Report, and each Government shall thereupon do everything necessary to carry the recommendations of the Commissioners into effect."

Subsequently, the Governor in Council of Canada and the Lieutenant-Governor in Council of British Columbia were respectively authorized to take such action as might be necessary to carry out this agreement. The British Columbia Indian Lands Settlement Act provided as follows:

"WHEREAS by Memorandum of Agreement bearing date the twenty-fourth day of September, one thousand nine hundred and twelve, made between J.A.J. McKenna, Special Commissioner appointed by the Governor in Council to investigate the condition of Indian Affairs in British Columbia, and the Honourable Sir Richard McBride as Premier of the Province of British Columbia, an Agreement was arrived at, subject to the approval of the Governments of the Dominion and of the Province, for the purpose of settling all differences between the said Governments respecting Indian lands and Indian Affairs generally in the Province of British Columbia, and for the final adjustment of all matters relating thereto by the appointment of a Royal Commission for the purpose set out in the Agreement; and whereas by orders in council subsequently made by the respective Governments of the Dominion and the Province the said Agreement was approved, subject to the further provision that, notwithstanding anything in the said Agreement contained, the acts and proceedings of the Royal Commission shall be subject to the approval of the two Governments, and that the Governments agree to consider favourably the reports, whether final or interim, of the Royal Commission, with a view to give effect as far as reasonably may be to the acts, proceedings and recommendations of the Royal Commission, and to take all such steps and proceedings as may be reasonably necessary with the object of carrying into execution the settlement provided for by the Agreement in accordance with its true intent and purpose; and whereas a Royal Commission on Indian affairs for the Province of British Columbia was duly appointed for the purpose of carrying out the said Agreement; and whereas the said Royal Commission has since reported its recommendations as to lands reserved and to be reserved for Indians in the Province of British Columbia, and otherwise for the settling of all differences between the said Govern-

ments respecting Indian lands and Indian affairs generally in the said Province: Now, therefore, His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

"1. This Act may be cited as *The British Columbia Indian Lands Settlement Act.*

"2. To the full extent to which the Governor in Council may consider it reasonable and expedient the Governor in Council may do, execute, and fulfil every act, deed, matter or thing necessary for the carrying out of the said Agreement between the Governments of the Dominion of Canada and the Province of British Columbia according to its true intent, and for giving effect to the report of the said Royal Commission, either in whole or in part, and for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province.

"3. For the purpose of adjusting, readjusting or confirming the reduction or cutoffs from reserves in accordance with the recommendations of the Royal Commission, the Governor in Council may order such reductions or cutoffs to be effected without surrenders of the same by the Indians, notwithstanding any provisions of the *Indian Act* to the contrary, and may carry on such further negotiations and enter into such further agreements with the Government of the Province of British Columbia as may be found necessary for a full and final adjustment of the differences between the said Governments."

The Indian Affairs Settlement Act contains almost identical provisions regarding powers of the Lieutenant-Governor in Council of British Columbia.

In 1929 a further agreement, known as the Scott-Cathcart Agreement, was entered into with respect to Indian lands in the province. That agreement provided, in part, as follows:

"The undersigned having been designated by their respective Governments to consider the interest of the Indians of British Columbia, the Department of Indian Affairs and the Province of British Columbia arising out of the proposed transfer to the Province of the lands in the Railway Belt and the Peace River Block and to recommend conditions under which the transfer may be made with due regard to the interests affected beg to report as follows:

"As the tenure and mode of administration of the Indian Reserves in the Railway Belt and the Peace River Block would, we thought, be governed by the terms of the conveyance by the

Province to the Dominion of the Indian Reserves outside those areas it was thought advisable to agree if possible upon a form of conveyance particularly as that question had been before the Governments for some time and remained undecided and furthermore to consider a few important matters germane to Indian affairs in the Province with the hope of making recommendations which would promote the ease and harmony of future administration.

"1. We have agreed to recommend the form of conveyance from the Province to the Dominion of the Indian reserves outside the Railway Belt and the Peace River Block hereunto annexed marked 'A'."

That agreement and the draft form of conveyance in the agreement were approved by the Dominion in Privy Council O. 208, as follows:

"The Committee of the Privy Council have had before them a Report, dated 24th January, 1930, from the Superintendent General of Indian Affairs, submitting that, pursuant to certain Statutes of Canada and of the Province of British Columbia (Can. 1920, Chapter 51; B.C. 1919, Ch. 32) Your Excellency in Council and His Honour the Lieutenant-Governor of British Columbia in Council were respectively authorized to take such action as might be necessary to carry out a certain agreement made on the 24th day of September, 1912, with respect to the administration of Indian lands in the said Province, a copy of which said agreement is attached as Schedule One hereto.

"The Minister states that in pursuance of the said agreement a Royal Commission was constituted to report on the matters aforesaid, and duly reported on the 30th of June, 1916, whereupon the Lieutenant-Governor in Council, on the 26th day of July, 1923, made an Order (No. 911) approving of the said report, and Your Excellency in Council, on the 19th day of July, 1924, (P.C. 1265) made an Order approving thereof except as to cut-offs in the Railway Belt.

"The Minister further states that on the 22nd day of March, 1929, a further agreement with respect to Indian lands in the Province of British Columbia was entered into between representatives of the Governments of Canada and of the Province of British Columbia respectively, a copy of which said agreement with schedules containing a list of the reserves in the Railway Belt and Peace River Block and a draft of the form of conveyance in the said agreement referred to are hereto attached as schedules Two, Three and Four.

"The Minister accordingly recommends that the said last mentioned agreement and the schedules aforesaid be approved and the agreement directed to be carried out according to its terms upon the approval thereof by the Lieutenant-Governor of British Columbia in Council.

"The Minister further recommends that the Superintendent General of Indian Affairs be authorized, pursuant to Section 48 of the Indian Act (R.S.C. 1927, Ch. 98), to agree to the taking for any such public work as is mentioned in the draft form of conveyance attached hereto as schedule Four an area in excess of the one-twentieth therein provided for on payment by the Province of British Columbia for the benefit of the Indians of such sum by way of compensation for the land so taken as the Superintendent General of Indian Affairs may determine.

"The Committee concur in the foregoing recommendations and submit the same for your Excellency's approval."

The British Columbia Indian Lands Settlement Act (Canada) and the Indian Affairs Settlement Act (British Columbia) gave the Governor in Council and the Lieutenant-Governor of British Columbia in Council, respectively, broad powers for the purpose of settling all differences between the governments of the Dominion and the province respecting Indian lands and Indian affairs in the province. Privy Council O. 208 and order in council 1036 were validly made pursuant to the authority established by these two statutes.

In my view, the sections of the Indian Act then in force regarding taking lands for public purposes and alienating lands had no application to the provisions of Privy Council O. 208. The draft form of conveyance approved by Privy Council O. 208 established the terms on which Indian lands in the province were to be held by the Dominion and in this regard provided for a reservation to the province of a right to resume possession of a portion of each reserve for purposes of public works. The reservation of such a right to the province did not constitute a taking of lands or an alienation of lands, as provided for in the Indian Act (R.S.C. 1927, c. 98, ss. 48 and 50).

Neither does the present exercise of this right come within s. 35(1) of the Indian Act now in force, regarding the taking of lands for public purposes pursuant to statutory powers, or s. 37 of the Act, requiring a surrender of lands before they may be alienated or otherwise disposed of.

In my view, the province must be allowed, pursuant to its right of resumption, to enter upon the reserves in order to

ascertain what land is required to accommodate the building of highways or the improvement of existing highways and to conduct proper surveys. This is necessary to enable the province to advise the Department of Indian Affairs of work contemplated and to furnish plans of the location of such work for the information of the Department of Indian Affairs. Only then can the department consider such plans and make representations regarding adjustments in connection with the proposed work.

On this view of the case, it is not necessary for me to consider the validity of orders in council 1487 and 1488.

The plaintiffs' action is accordingly dismissed.

SUPREME COURT OF CANADA

Laskin C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

Vergata v. Manitoba Public Insurance Corporation

Automobiles — Owner of automobile killed while passenger in own car — Provincial insurance scheme contracting with both owners and drivers — Driver entitled to coverage separate from owner — The Manitoba Public Insurance Corporation Act, 1970 (Man.), c. 102 (also C.S.M., c. A180) — The Manitoba automobile insurance regulations, Reg. 33/74 (as amended by M.R.R. 19/75, 17/75 and 32/76), ss. 30, 31(1), (2), (3)(h).

APPEAL from the Manitoba Court of Appeal, [1976] 4 W.W.R. 373, 67 D.L.R. (3d) 527, which reversed the judgment of Dewar C.J.Q.B., [1976] 3 W.W.R. 544.

The appellant, a holder of a valid driver's certificate, was driving his brother's car with his brother as a passenger when he was involved in a collision. The brother was killed and his widow sued the appellant both personally and as administratrix. The respondent denied liability to indemnify the appellant on the ground of an exclusion contained in s. 31(3)(h) which read, "The corporation shall not pay insurance moneys . . . for loss or damage resulting from bodily injury to, or the death of, an insured."

Held, the respondent was liable. The legislation clearly provided for separate contracts under owners' and drivers' certificates as evidenced by provisions for increased premiums based on each driver's record. Thus, while the appellant could not be indemnified under his brother's owner's contract, he could be under his own owner's contract.

Murray Bay Motor Co. Ltd. v. Belair Insur. Co., [1975] 1 S.C.R. 68, 42 D.L.R. (3d) 588 distinguished.

Digby v. General Accident Fire & Life Assur. Corpn., [1943] A.C. 121, [1942] 2 All E.R. 319 referred to.

[Note up with 1 C.E.D. (West. 2nd) *Automobiles*, s. 93.]

Joseph Myran, James Meeches, Dorene Meeches and Ruth Myran *Appellants*;

and

Her Majesty The Queen *Respondent*.

1975: May 21; 1975: June 26.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Indians—Hunting rights—Accused hunting without due regard for safety of others in vicinity—Whether immune from prosecution by terms of para. 13 of Memorandum of Agreement approved under The Manitoba Natural Resources Act, R.S.M. 1970, c. N30—The Wildlife Act, R.S.M. 1970, c. W140, s. 10(1).

Trespass—Hunters entering private property without owner's permission—Question of right of access.

The appellants, Treaty Indians, were each convicted on the charge of hunting without due regard for the safety of others in the vicinity, contrary to the provisions of s. 10(1) of *The Wildlife Act*, R.S.M. 1970, c. W140, and the convictions were affirmed on appeal by trial *de novo* in the County Court and by the Court of Appeal for Manitoba. With leave, the appellants appealed to this Court.

It was common ground that the accused were hunting for food and there was no doubt that they were doing so without due regard for the safety of others in the vicinity. They were deer hunting shortly before midnight in an alfalfa field belonging to a farmer who was awakened by the sound of rifle shots and by a light flashing through the window of his bedroom. The range of the weapon was close to two miles; within range were farm houses, highways, railways, pastureland, a town and a breeding station. The convictions were, therefore, properly entered unless it could be said that the accused were immune from prosecution by the terms of para. 13 of the Memorandum of Agreement dated December 14, 1929, set out in the Schedule of *The Manitoba Natural Resources Act*, R.S.M. 1970, c. N30.

Held: The appeals should be dismissed.

There is no irreconcilable conflict or inconsistency in principle between the right to hunt for food assured under para. 13 of the Memorandum of Agreement

Joseph Myran, James Meeches, Dorene Meeches et Ruth Myran *Appelants*;

et

Sa Majesté La Reine *Intimée*.

1975: le 21 mai; 1975: le 26 juin.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Indiens—Droits de chasse—Les accusés chassaient sans égard à la sécurité d'autrui dans le voisinage—Jouissaient-ils de l'immunité en vertu de la cl. 13 de la Convention approuvée par le Manitoba Natural Resources Act, R.S.M. 1970, c. N30?—The Wildlife Act, R.S.M. 1970, c. W140, art. 10(1).

Violation de propriété—Chasseurs circulant sur une propriété privée sans la permission du propriétaire—Question de droit d'accès.

Les appelants, Indiens assujettis à un traité, ont tous été trouvés coupables d'avoir chassé sans égard à la sécurité des autres dans le voisinage, contrairement aux dispositions du par. (1) de l'art. 10 du *Wildlife Act*, R.S.M. 1970, c. W140, et les condamnations ont été confirmées en appel par nouveau procès devant la Cour de comté, et ensuite par la Cour d'appel du Manitoba. Sur autorisation, les appelants se sont pourvus devant cette Cour.

Il est reconnu que les accusés chassaient pour se nourrir et il ne fait pas de doute qu'ils le faisaient sans égard à la sécurité des autres dans le voisinage. Peu avant minuit, ils chassaient le chevreuil dans le champ de luzerne d'un fermier qui fut réveillé par le bruit des coups de carabine et une lumière brillant à travers la fenêtre de sa chambre à coucher. L'arme avait une portée de près de deux milles; dans ce rayon se trouvaient des fermes, des routes, des voies ferrées, des pâturages, un village et une station génétique. Par conséquent, les condamnations sont légitimes à moins que les accusés jouissent de l'immunité en vertu de la cl. 13 de la Convention du 14 décembre 1929, reproduite en annexe du *Manitoba Natural Resources Act*, R.S.M. 1970, c. N30.

Arrêt: Les pourvois doivent être rejetés.

En principe, il n'y a ni conflit ni contradiction entre le droit de chasser pour se nourrir, droit assuré par la cl. 13 de la Convention approuvée par le *Manitoba Natural*

approved under *The Manitoba Natural Resources Act* and the requirement of s. 10(1) of *The Wildlife Act* that such right be exercised in a manner so as not to endanger the lives of others. The first is concerned with conservation of game to secure a continuing supply of food for the Indians of the Province and protect the right of Indians to hunt for food at all seasons of the year; the second is concerned with risk of death or serious injury omnipresent when hunters fail to have due regard for the presence of others in the vicinity. Thus, s. 10(1) does not restrict the type of game, nor the time or method of hunting, but simply imposes on every person a duty of hunting with due regard for the safety of others.

On the question concerning the phrase "right of access" in para. 13, although the point did not fall squarely for decision in this appeal, there was considerable support for the view that in Manitoba at the present time hunters enter private property with no greater rights than other trespassers; that they have no right of access except with the owner's permission; and, lacking permission, are subject to civil action for trespass and prosecution under s. 2 of *The Petty Trespasses Act*, R.S.M. 1970, c. P50.

Prince and Myron v. The Queen, [1975] S.C.R. 81, applied; *Daniels v. The Queen*, [1968] S.C.R. 517; *R. v. Wesley*, [1932] 2 W.W.R. 337, referred to.

APPEALS from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Kerr Co. Ct. J. Appeals dismissed.

M. F. Garfinkel and *A. J. Conner*, for the appellants.

A. G. Bowering, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—The appellants, Treaty Indians from the Long Plain Indian Reserve in the Province of Manitoba, were each convicted on the charge of hunting without due regard for the safety of other persons in the vicinity, contrary to the provisions of s. 10(1) of *The Wildlife Act*, R.S.M. 1970, c. W140, and the convictions were affirmed on appeal by trial *de novo* in the County Court and by the Court of Appeal for Manitoba.

[1] [1973] 4 W.W.R. 512, 35 D.L.R. (3d) 473.

Resources Act, et la prescription du par. (1) de l'art. 10 du *Wildlife Act*, en vertu duquel l'exercice de ce droit ne doit pas mettre la vie d'autrui en danger. La première disposition vise la protection du gibier pour assurer aux Indiens de la province un approvisionnement continu en vivres et protéger leur droit de chasser pour se nourrir en toute saison de l'année; la seconde concerne le risque omniprésent de mort ou de blessure grave qui existe lorsque des chasseurs ne tiennent pas compte de la présence d'autres personnes dans le voisinage. Ainsi, le par. (1) de l'art. 10 ne restreint pas le type de gibier, le temps ou la méthode de chasse, il impose seulement à chaque individu l'obligation de chasser en ayant égard à la sécurité d'autrui.

Au regard de la question portant sur l'expression «un droit d'accès» contenue dans la cl. 13, même si cette Cour n'a pas à trancher définitivement cette question dans la présente affaire, il y a beaucoup à dire en faveur de la thèse que, au Manitoba, les chasseurs n'ont pas plus de droits que les citoyens ordinaires à l'égard de ce qui est propriété privée; ils n'ont aucun droit d'accès à une terre sans la permission du propriétaire et, sans cette permission, ils s'exposent à une poursuite pour violation de propriété en vertu de l'art. 2. du *Petty Trespasses Act*, R.S.M. 1970, c. P50.

Arrêt appliqué: *Prince et Myron c. La Reine*, [1975] R.C.S. 81; arrêts mentionnés: *Daniels c. La Reine*, [1968] R.C.S. 517; *R. v. Wesley*, [1932] 2 W.W.R. 337.

POURVOIS interjetés à l'encontre d'un arrêt de la Cour d'appel du Manitoba[1], qui a confirmé un jugement du juge Kerr de la Cour de comté. Pourvois rejetés.

M. F. Garfinkel et *A. J. Conner*, pour les appelants.

A. G. Bowering, pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE DICKSON—Les appelants, Indiens assujettis au traité de la réserve indienne *Long Plain* du Manitoba, ont tous été trouvés coupables d'avoir chassé sans égard à la sécurité des autres dans le voisinage, contrairement aux dispositions de l'art. 10(1) du *Wildlife Act*, R.S.M. 1970, c. W140, et les condamnations ont été confirmées en appel par nouveau procès devant la cour de comté et ensuite par la Cour d'appel du Manitoba. L'au-

[1] [1973] 4 W.W.R. 512, 35 D.L.R. (3d) 473.

[1976] 2 R.C.S.

Leave to appeal t
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[2] [1968] S.C.R. 5
[3] [1932] 2 W.W.

Leave to appeal to this Court was granted on June 4, 1973.

There can be no doubt the accused were hunting without due regard for the safety of others in the vicinity. They were deer hunting shortly before midnight in an alfalfa field belonging to a farmer who was awakened by the sound of rifle shots and by a light flashing through the window of his bedroom. The range of the weapon was close to two miles; within range were farm houses, highways, railways, pastureland, a town and a breeding station. The convictions were, therefore, properly entered unless it can be said that the accused are immune from prosecution by the terms of para. 13 of the Memorandum of Agreement dated December 14, 1929, set out in the Schedule of *The Manitoba Natural Resources Act*, R.S.M. 1970, c. N30, which reads:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Section 46(1) of *The Wildlife Act*, *supra*, reads:

> Nothing in this Act reduces, or deprives any person of, or detracts from, the rights and privileges bestowed upon him under paragraph 13 of the Memorandum of Agreement approved under The Manitoba Natural Resources Act.

The history of para. 13 quoted above and of its Alberta counterpart will be found respectively in the judgment of Mr. Justice Judson in this Court in *Daniels v. White and The Queen*[2], and in the judgment of Mr. Justice McGillivray in the Appellate Division of the Supreme Court of Alberta in *Rex v. Wesley*[3]. The case, however, which bears

[2] [1968] S.C.R. 517.
[3] [1932] 2 W.W.R. 337.

torisation de se pourvoir devant cette Cour a été accordée le 4 juin 1973.

Il ne fait pas de doute que les accusés chassaient sans égard à la sécurité des autres dans le voisinage. Peu avant minuit ils chassaient le chevreuil dans le champ de luzerne d'un fermier qui fut réveillé par le bruit des coups de carabine et une lumière brillant à travers la fenêtre de sa chambre à coucher. L'arme avait une portée de près de deux milles; dans ce rayon, se trouvaient des fermes, des routes, des voies ferrées, des pâturages, un village et une station génétique. Les condamnations sont, par conséquent, légitimes, à moins que les accusés jouissent de l'immunité en vertu de la cl. 13 de la Convention du 14 décembre 1929, reproduite en annexe du *Manitoba Natural Resources Act*, R.S.M. 1970, c. N30, où il est dit:

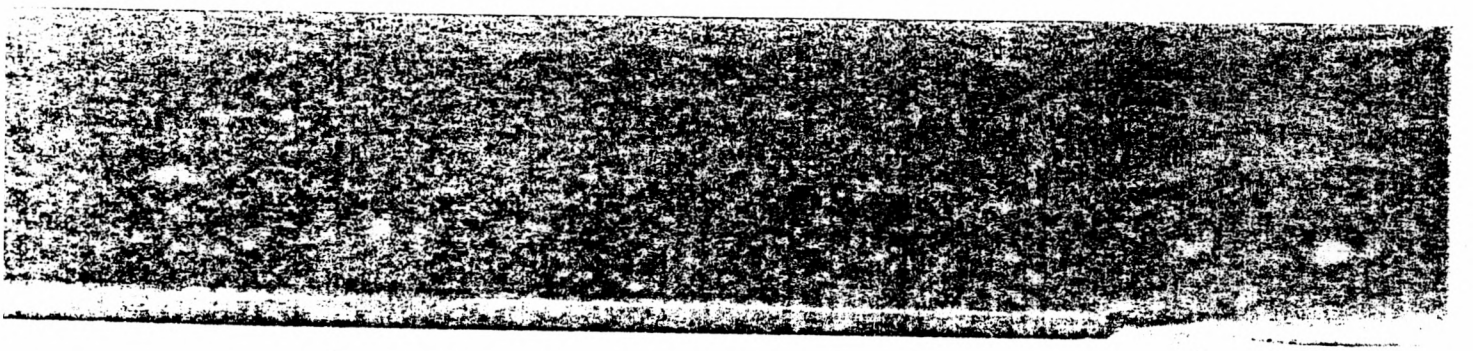
> [TRADUCTION] Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.

L'article 46(1) du *Wildlife Act*, précité, se lit comme suit:

> [TRADUCTION] Rien dans la présente loi ne restreint, ni ne supprime les droits et privilèges conférés par la clause 13 de la Convention approuvée par le *Manitoba Natural Resources Act*.

Dans *Daniels c. White et la Reine*[2], le juge Judson a fait l'historique de la cl. 13 précitée et dans *Rex c. Wesley*[3], le juge McGillivray de la Division d'appel de la Cour suprême d'Alberta a fait l'historique de sa contrepartie albertaine. Toutefois l'affaire qui porte plus directement sur le présent

[2] [1968] R.C.S. 517.
[3] [1932] 2 W.W.R. 337.



more directly upon the issue raised in the present appeal is *Prince and Myron v. The Queen*[4]. In *Prince and Myron* the appellants, Treaty Indians, were charged with unlawfully hunting big game by means of night lights, contrary to *The Game and Fisheries Act* of Manitoba, R.S.M. 1954, c. 94, and it fell to the Court to consider what was meant by "... the right ... of hunting ... game ... for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access". It was common ground in that case, as in the instant case, that the accused were hunting for food. The majority position in the Manitoba Court of Appeal was expressed by Miller C.J.M.[5], who said in the course of his judgment, pp. 238-9:

The point is: Just what restrictions in *The Game and Fisheries Act* do apply to Indians? It seems to me that the manner in which they may hunt and the methods pursued by them in hunting must, of necessity, be restricted by the said Act. Mr. Pollock, counsel for the Indians, argued that they were only restricted by the provisions of *The Game and Fisheries Act* when hunting for sport or commercial purposes. I can only say that I am unable to read any such provision into sec. 13 of *The Manitoba Natural Resources Act*. I do not think Indians are debarred from hunting for food during any one of the 365 days of any year, and can hunt for food on all unoccupied crown lands and on any land to which Indians have a right of access. I am of the opinion, though, that they have no right to adopt a method or *manner* of hunting that is contrary to *The Game and Fisheries Act*, because sec. 13 of *The Natural Resources Act* specifically provides that the *Game Act* of the province *shall* apply to Indians in some respects.

Freedman J.A., as he then was, giving the reasons for the minority, stated, p. 242:

The fundamental fact of this case, as I see it, is that the accused Indians at the time of the alleged offence were hunting for food. It was not a case of hunting for sport or for commercial purposes. By sec. 72(1) of *The Game and Fisheries Act*, RSM, 1954, ch. 94, and by sec. 13 of *The Manitoba Natural Resources Act*, RSM, 1954, ch. 180, the special position of the Indian when hunting for food is acknowledged and recognized. The clear purpose of those sections is to secure to the Indi-

[4] [1964] S.C.R. 81.
[5] (1964), 40 W.W.R. 234.

litige est *Prince et Myron c. La Reine*[4]. Les appelants, Indiens assujettis à un traité, étaient accusés d'avoir chassé illicitement le gros gibier en utilisant des lanternes, contrairement aux prescriptions du *Game and Fisheries Act* du Manitoba, R.S.M. 1954, c. 94; la Cour s'est penchée sur le sens de la phrase [TRADUCTION] «... le droit ... de chasser ... le gibier ... pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès». Comme ici on s'accordait à dire que les accusés chassaient afin de pourvoir à leur subsistance. L'opinion de la majorité à la Cour d'appel du Manitoba a été exprimée par le juge en chef Miller du Manitoba[5], qui y a dit, aux pp. 238-9:

[TRADUCTION] Voici la question qui se pose: quelles restrictions du *Game and Fisheries Act* s'appliquent aux Indiens? Il me semble que leur façon de chasser et les méthodes qu'ils utilisent à cette fin doivent inévitablement être restreintes par la loi. Me Pollock, l'avocat des Indiens, a fait valoir que ceux-ci n'étaient astreints aux dispositions du *Game and Fisheries Act* que lorsqu'ils chassaient à des fins sportives ou commerciales. Je ne trouve pas cela dans la cl. 13 du *Manitoba Natural Resources Act*. Je ne pense pas qu'il soit défendu aux Indiens de chasser pour leur nourriture les 365 jours de l'année et ils peuvent chasser pour se nourrir sur toutes les terres inoccupées de la Couronne et sur toute terre à laquelle ils ont un droit d'accès. J'estime, toutefois, qu'ils n'ont aucun droit d'adopter une méthode ou une *façon* de chasser qui est contraire au *Game and Fisheries Act*, parce que la cl. 13 du *Natural Resources Act* stipule bien que le *Game Act* de la province *s'applique* aux Indiens à certains égards.

Le juge d'appel Freedman, comme il était alors, exposant les motifs de la minorité, dit à la p. 242:

[TRADUCTION] A mon avis, le point fondamental de cette affaire c'est que, lors de la présumée infraction, les Indiens accusés chassaient pour se nourrir et non à des fins sportives ou commerciales. En vertu de l'art. 72(1) du *Game and Fisheries Act*, R.S.M. 1954, ch. 94, et de la cl. 13 du *Manitoba Natural Resources Act*, R.S.M., 1954, ch. 180, la situation particulière de l'Indien est reconnue lorsqu'il chasse en vue de se nourrir. Le but évident de ces dispositions est d'assurer aux Indiens, à

[4] [1964] R.C.S. 81.
[5] (1964), 40 W.W.R. 234.

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ns, within certain given territories the unrestricted right to hunt for game and fish for their support and sustenance. The statement in sec. 13 of *The Manitoba Natural Resources Act* that the law of the province respecting game and fish shall apply to the Indians is, in my view, subordinate in character. Its operation is limited to imposing upon the Indian the same obligation as is normally imposed upon every other citizen, namely, that when he is hunting for sport or commerce he must hunt only in the manner and at the times prescribed by the Act. But the ordinary citizen does not hunt for food for sustenance purposes. The Indian does, and the statute, recognizing his right to sustenance, exempts him from the ordinary game laws when he is hunting for food in areas where he is so permitted.

The judgment of this Court was delivered by Hall J., *supra*, who adopted the reasons of Freedman J.A. in his dissenting judgment in the Court of Appeal, and also adopted the following statement by McGillivray J.A. in *Rex v. Wesley*, *supra*:

"If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food "out of season" and they are otherwise subject to the game laws of the province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to sec. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

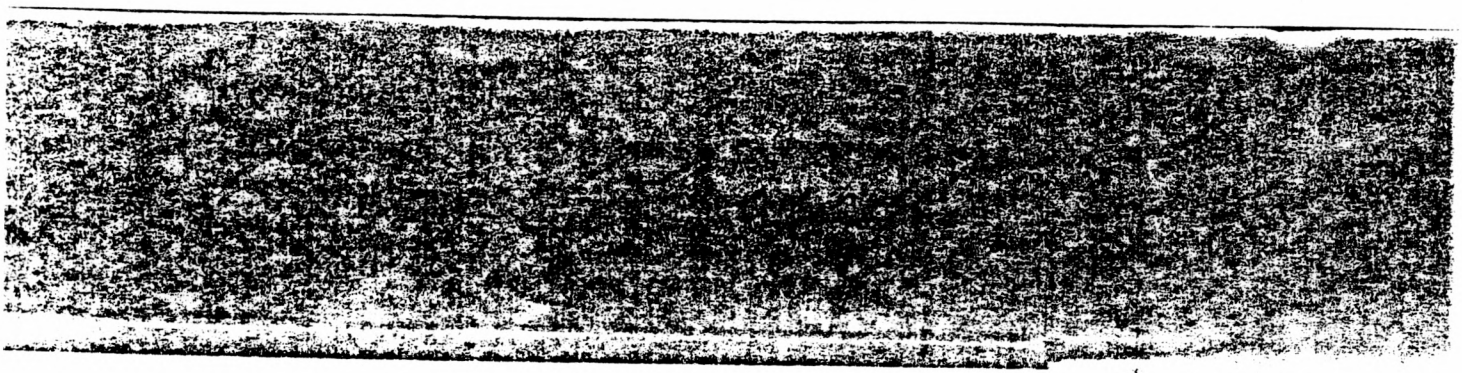
I think it is clear from *Prince and Myron* that an Indian of the Province is free to hunt or trap game in such numbers, at such times of the year, by such means or methods and with such contrivances, as he may wish, provided he is doing so in order to obtain food for his own use and on unoccupied Crown lands or other lands to which he may have a right of access. But that is not to say that he has the right to hunt dangerously and without regard for the safety of other persons in

l'intérieur de certains territoires, le droit absolu de chasser le gibier et de pêcher le poisson afin de pourvoir à leur subsistance. La disposition de la cl. 13 du *Manitoba Natural Resources Act* énonçant que la loi de la province sur le gibier et le poisson s'applique aux Indiens a, à mon avis, un caractère secondaire. Son effet se limite à imposer à l'Indien la même obligation qu'aux autres citoyens, c'est-à-dire que lorsqu'il chasse à des fins sportives ou commerciales, il ne doit chasser que de la façon et au temps prescrits par la loi. Le citoyen ordinaire, toutefois, ne chasse pas pour s'alimenter ou survivre. Mais l'Indien le fait, et la loi écrite, qui reconnaît son droit de subsistance, l'exempte des lois ordinaires relatives au gibier lorsqu'il chasse pour se nourrir dans des endroits où il a la permission de le faire.

L'arrêt de cette Cour fut rendu par le juge Hall, *supra*. Il adopta les motifs du juge d'appel Freedman dans sa dissidence à la Cour d'appel et fit sien l'énoncé suivant du juge d'appel McGillivray dans *Rex v. Wesley*, précité:

[TRADUCTION] «Si l'effet de la disposition n'est que de donner aux Indiens l'avantage supplémentaire de chasser pour leur nourriture «en dehors de la saison», et que, par ailleurs, ils sont assujettis aux lois de la province sur la chasse, il s'ensuit que le nombre d'animaux d'une espèce donnée qu'ils peuvent tuer en une année peut être limité même si ce nombre n'est pas suffisant pour assurer leur subsistance, et même si aucun autre gibier ne leur est accessible. Je ne crois pas que le texte de la clause indique que c'était l'intention des législateurs. Le but poursuivi, à mon sens, c'était que, lorsque l'Indien, comme l'homme blanc, chasse dans un but sportif ou commercial, il soit assujetti aux lois touchant la préservation du gibier mais que, lorsqu'il chasse les animaux sauvages pour la nourriture essentielle à sa subsistance, il soit considéré d'un point de vue tout à fait différent de l'homme blanc qui, en général, ne chasse pas pour se nourrir; et il est, par l'exception stipulée à la cl. 12, assuré de la continuité de l'exercice d'un droit dont il jouit depuis un temps immémorial.»

L'arrêt *Prince et Myron* montre bien qu'un Indien est libre de chasser ou de piéger le gibier autant qu'il le désire, quand il le désire et par les moyens qu'il choisit à condition que ce soit pour se nourrir personnellement et sur des terres inoccupées de la Couronne ou auxquelles il a un droit d'accès. Toutefois, il n'a pas le droit de chasser dangereusement au mépris de la sécurité des gens du voisinage. L'arrêt *Prince et Myron* traite des moyens permis. Ni cet arrêt ni ceux qui l'ont



vicinity. *Prince and Myron* deals with "meth-
. Neither that case nor those which preceded it
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.t was said in the present case by Mr. Justice
l in the Court of Appeal for Manitoba:

i the present case the governing statute is *The
Jlife Act, supra*, and in particular Sec. 41(1) there-
Section 10(1) under which the accused were charged
s not restrict the type of game, nor the time or
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ght of access? If one regards that right in absolute
ns the answer is clearly in the affirmative; but is that
case? Surely the right to hunt for food as conferred
bestowed by the agreement and affirmed by the
ute cannot be so regarded. Inherent in the right is
quality of restraint, that is to say that the right will
exercised reasonably. Section 10(1) is only a statu-
y expression of that concept, namely that the right
l be exercised with due regard for the safety of
ers, including Indians.

In my opinion there is no irreconcilable conflict
inconsistency in principle between the right to
nt for food assured under para. 13 of the Memo-
adum of Agreement approved under *The
anitoba Natural Resources Act* and the require-
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ght be exercised in a manner so as not to endan-
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nservation of game to secure a continuing supply
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il to have due regard for the presence of others in
e vicinity. In my view the Court of Appeal for
lanitoba properly answered in the negative the
iestion upon which leave to appeal to that Court
as granted, namely:

id the learned trial judge err in holding that paragraph
3 of the Schedule of *The Manitoba Natural Resources
greement Act*, 1930, did not provide immunity to the
:cused from the restrictions on hunting set out in *The
Vildlife Act*, and specifically section 10(1) thereof.

précédé n'ont traité de la protection de la vie humaine. Je suis d'accord avec ce qu'a dit le juge Hall à la Cour d'appel du Manitoba dans la présente cause:

[TRADUCTION] La loi applicable est le *Wildlife Act, supra*, notamment l'art. 41(1). L'art. 10(1), en vertu duquel les accusés ont été inculpés ne restreint pas le type de gibier, le temps ou la méthode de chasse, il impose seulement l'obligation de chasser en ayant égard à la sécurité d'autrui. Cette prescription est-elle une restriction ou une atteinte au droit des Indiens de chasser pour leur nourriture sur les terres auxquelles ils ont un droit d'accès? Si l'on prend ce droit en termes absolus, la réponse est clairement affirmative; mais est-ce le cas? Non, le droit de chasser pour se nourrir, conféré ou attribué par l'accord et ratifié par la loi, ne peut pas être vu de cette façon. Il y a une restriction inhérente au droit, il faut l'exercer raisonnablement. L'article 10(1) n'est que l'énoncé législatif de ce concept, à savoir que le droit sera exercé en ayant égard à la sécurité d'autrui, y compris celle des Indiens.

A mon avis, il n'y a, en principe, ni conflit ni contradiction entre le droit de chasser pour se nourrir, droit assuré par la cl. 13 de la Convention approuvée par le *Manitoba Natural Resources Act*, et la prescription de l'art. 10(1) du *Wildlife Act*, en vertu duquel l'exercice de ce droit ne doit pas mettre la vie d'autrui en danger. La première disposition vise la protection du gibier pour assurer aux Indiens de la province un approvisionnement continu en vivres et protéger leur droit de chasser pour se nourrir en toute saison de l'année; la seconde concerne le risque omniprésent de mort ou de blessure grave qui existe lorsque des chasseurs ne tiennent pas compte de la présence d'autres personnes dans le voisinage. A mon avis, la Cour d'appel du Manitoba a eu raison de répondre négativement à la question sur laquelle l'autorisation d'en appeler à cette Cour a été accordée, à savoir:

[TRADUCTION] Le juge du procès a-t-il fait erreur en décidant que la clause 13 de l'annexe du *Manitoba Natural Resources Agreement Act*, 1930, ne donne pas d'immunité aux accusés contre les restrictions de chasse édictées par le *Wildlife Act* et, plus particulièrement, l'art. 10(1)?

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Another question which arose during argument of this appeal concerns the words "any other lands to which the said Indians may have a right of access", found in para. 13. There may be differing opinions on whether the finding of the trial judge that the accused had a right of access to the lands upon which they were hunting when apprehended can be impeached in this Court, but the leave to appeal was not limited to the single question before the Court of Appeal and, having regard to the concern among farmers to which, we were told, the majority judgment of the Manitoba Court of Appeal in the earlier case of *Prince and Myron* has given rise, I think it may be opportune and appropriate to make some observations upon the phrase "right of access" on the occasion of, though not as a ground of decision of, the present appeal. The complainant in the present case, Mr. Baron, had not given the accused permission to be on his land for hunting or any other purpose; they were not known to him. His lands were not posted. Subsections (1) and (2) of s. 40 of *The Wildlife Act* of Manitoba read as follows:

40(1). The owner or lawful occupant of any land other than Crown land may give notice that the hunting and killing of wildlife or exotic animals is forbidden on or over the land or any part thereof by posting and maintaining signs of at least one square foot in area on or along the boundary of the land facing away from the land at intervals of not more than two hundred and twenty yards with the words "Hunting by Permission Only" or "Hunting Not Allowed" or words to the like effect.

40(2). A person who hunts wildlife or exotic animals upon or over any land in respect of which notice is given as prescribed in Subsection (1) without the consent of the owner or lawful occupant thereof, is guilty of an offence and is liable, on summary conviction on private prosecution, to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding one month, or to both such a fine and such imprisonment.

When the charges against the present accused were heard in the first instance, the Magistrate said:

In the instant case there is no evidence before me of any prohibition from hunting upon the land of the complainant and it is my respectful opinion that the four accused persons had a right of access for the purpose of hunting.

Une autre question a été soulevée au cours des plaidoiries, c'est le sens qu'il faut donner aux mots «toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès», à la fin de la cl. 13. Il n'est pas clair que l'on puisse attaquer en cette Cour la conclusion du juge de première instance selon qui les accusés avaient droit d'accès aux terres où ils chassaient lorsqu'ils ont été arrêtés. Toutefois, l'autorisation d'appel ne se limite pas à la seule question soumise à la Cour d'appel et, considérant l'inquiétude des fermiers soulevée, nous a-t-on affirmé, par l'arrêt majoritaire de la Cour d'appel du Manitoba dans *Prince et Myron* précité, j'estime qu'il peut être opportun et à propos de faire quelques observations sur l'expression «droit d'accès», sans en faire un motif décisif. Baron, le plaignant, n'a pas donné aux accusés la permission d'aller sur sa terre pour chasser ou à toute autre fin; il ne les connaissait pas. Il n'avait pas mis d'écriteaux sur ses terres. Les paragraphes (1) et (2) de l'art. 40 du *Wildlife Act* du Manitoba disent ceci:

[TRADUCTION] 40(1). Le propriétaire ou l'occupant légal de toute terre autre qu'une terre de la Couronne peut donner avis qu'il est défendu de chasser ou de tirer le gibier ou des animaux exotiques sur sa terre, en apposant et maintenant alentour des écriteaux d'au moins un pied carré faisant face à l'extérieur, à intervalle de deux cent vingts verges au plus, portant l'inscription «Chasse par autorisation seulement» ou «Chasse interdite» ou toute autre inscription au même effet.

[TRADUCTION] 40(2). Quiconque, sans le consentement du propriétaire ou occupant légal, chasse le gibier ou des animaux exotiques sur une terre où des écriteaux sont apposés conformément au par. (1), est coupable d'une infraction et passible sur poursuite sommaire intentée par un particulier d'une amende de deux cents dollars au plus et d'emprisonnement pour un mois au plus ou de l'une de ces peines.

Au premier procès, le magistrat a dit:

[TRADUCTION] En l'espèce, je n'ai aucune preuve qu'il était défendu de chasser sur la terre du plaignant, et suis d'avis que les quatre accusés avaient un droit d'accès pour chasser.

On the trial *de novo* the County Court judge made no reference to right of access. He considered there were two issues only, first, hunting, and second, hunting dangerously; and he held against the accused on both issues. In the Court of Appeal, Mr. Justice Hall, on behalf of the Court, said:

> Having regard to the limited nature of the appeal we feel bound to accept the implicit findings of the trial Judge that the accused were Treaty Indians and that, at the time, they were hunting for food on lands to which they had a right of access.

It would seem that the Magistrate, as a matter of law, found the accused had a right of access to the farm lands upon which they were hunting and that this finding was accepted by the Court of Appeal. The law which supports this position is said to derive from the statement of Miller C.J.M. in *Regina v. Prince and Myron, supra*; the learned Chief Justice, after quoting subss. 76(1) and (2) of *The Game and Fisheries Act*, the earlier counterpart of subss. 40(1) and (2) of *The Wildlife Act*, continued, p. 238:

> I am satisfied that unless notices are posted on the land pursuant to sec. 76(2) a person has access thereto for shooting purposes. It is true that the owner or occupant might specifically warn people off the land and, if this were done, the person intending to shoot, whether he be Indian or not, would be prohibited from going on that land to shoot and would not be deemed to have access thereto, but in the absence of a prohibition, either by notice or otherwise, the Indians would have access to the land upon which they were found hunting. The fact that the land was cultivated does not make any difference. The fact that the common-law rights as to trespass are preserved does not make any difference to the right of access above mentioned.

In this Court there was an admission that the accused Prince and Myron had a right of access to the land in question. Hall J., for the Court, stated at p. 83, [1964] S.C.R.:

> It was admitted in this Court that at the time in question in the charge the appellants were Indians; that they were hunting deer for food for their own use and that they were hunting on lands to which they had the right of access. These admissions are fundamental to the determination of this appeal.

Au second procès, le juge de la cour de comté n'a rien dit du droit d'accès. Il a considéré qu'il n'y avait que deux points en litige: d'abord, la chasse, ensuite, le danger; il a statué contre les accusés sur ces deux points. En Cour d'appel, le juge Hall, au nom du tribunal, a dit:

> [TRADUCTION] Vu que le droit d'appel est restreint, nous nous sentons obligés d'accepter les conclusions implicites du juge du procès que les accusés sont des Indiens assujettis à un traité qui chassaient pour se nourrir sur des terres auxquelles ils avaient un droit d'accès.

Apparemment, le magistrat avait conclu, comme question de droit, que les accusés avaient un droit d'accès aux terres où ils chassaient et cette conclusion a été acceptée par la Cour d'appel. On prétend fonder cette thèse sur l'énoncé du juge en chef Miller du Manitoba dans *La Reine c. Prince et Myron, supra*; après avoir cité les par. (1) et (2) de l'art. 76 du *Game and Fisheries Act* (aujourd'hui les par. (1) et (2) de l'art. 40 du *Wildlife Act*, il poursuivit (p. 238):

> [TRADUCTION] Je crois qu'à moins que des écriteaux soient apposés sur la terre, conformément à l'art. 76(2), tout le monde a le droit d'y pénétrer pour chasser. Il est vrai que le propriétaire ou l'occupant peuvent signifier aux gens de s'en aller et, s'ils le font, personne, même un Indien, n'a le droit de chasser sur cette terre et y a droit d'accès; mais, en l'absence d'une interdiction, par écriteau ou autrement, les Indiens avaient un droit d'accès à la terre où ils ont été trouvés en train de chasser. Le fait que la terre était cultivée ne fait aucune différence. Le fait que les droits de *common law* relatifs à l'entrée sans autorisation sur une propriété privée sont sauvegardés ne fait aucune différence non plus.

Devant la présente Cour, il fut admis que les accusés *Prince et Myron* avaient droit d'accès à la terre en question. Le juge Hall, au nom de la Cour, dit á la p. 83, R.C.S. [1964]:

> [TRADUCTION] Dans cette Cour, il fut admis que les appelants étaient des Indiens, qu'ils chassaient le chevreuil en vue de se procurer de la nourriture pour leur usage personnel et qu'ils chassaient sur des terres où ils avaient un droit d'accès. Ce sont là des éléments essentiels pour l'issue de ce pourvoi.

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Thus the issue was not argued in this Court and the point was not decided.

It is unnecessary in the present case to express any concluded view on the point, but I must say that if the quoted words of Miller C.J.M. are a correct statement of the law, the results are far-reaching; any person can enter any land in Manitoba which is not posted and hunt thereon without permission of the owner, at least until ordered off; the carrying of a fire-arm immunizes an act which would otherwise be trespass. I would have grave doubt that this can be the law. Section 40 of *The Wildlife Act* does not deal with interests in property. It is intended, I would have thought, to create a separate offence under the provincial statute in respect of posted lands and not to confer entry rights in respect of unposted lands. Posting of land and maintaining signs is a tiresome and costly business the purpose of which is to identify the land as private property, to discourage hunters and to underpin a s. 40(2) charge against those who enter without permission. A Manitoba farmer is surely not to be faced, by reason of the enactment of s. 40(1) of *The Wildlife Act*, with the choice of either posting his land or suffering the entry of those who would hunt his land without permission. With great respect, in my opinion the majority of the Manitoba Court of Appeal in *Prince and Myron v. The Queen* may have erred in their view of the import of s. 76 of *The Game and Fisheries Act*, the antecedent of s. 40, in failing to appreciate the importance of s. 76(4) reading:

> 76. (4) Nothing in this section limits or affects the remedy at common law of any such owner or occupant for trespass.

strengthened in s. 40(4) of *The Wildlife Act* to include statutory remedies:

> 40(4). Nothing in this section limits or affects any rights or remedies that any person has at common law or by statute for trespass in respect of land.

La question n'a donc pas été débattue en cette Cour et elle n'a pas fait l'objet de la décision.

Dans la présente affaire, il n'est pas nécessaire d'exprimer une opinion décisive sur ce point, mais je dois dire que si l'énoncé précité du juge en chef Miller du Manitoba est un exposé fidèle de la loi, les conséquences en sont bien étendues. A ce compte, au Manitoba, n'importe qui peut pénétrer sur n'importe quelle terre où il n'y a pas d'écriteau et y chasser sans la permission du propriétaire, du moins jusqu'à ce qu'on l'expulse; le port d'une arme à feu justifie un acte qui, autrement serait une intrusion. Je doute sérieusement que la loi soit ainsi. L'article 40 du *Wildlife Act* ne traite pas du droit de propriété immobilière. L'objectif en est plutôt, me semble-t-il, d'établir une infraction distincte en vertu de la loi provinciale à l'égard des terres munies d'écriteaux et non pas de conférer un droit d'accès à celles où il n'y en a pas. Tout le travail et les dépenses de la pose et l'entretien des écriteaux sont un travail fastidieux et onéreux qui ont pour objet d'indiquer qu'il s'agit d'une propriété privée, d'en détourner les chasseurs et de donner lieu à une infraction en vertu de l'art. 40(2) à l'égard de ceux qui y pénètrent sans permission. Un fermier manitobain ne doit pas se voir contraint, par l'art. 40(1) du *Wildlife Act*, à poser des écriteaux sur sa terre sous peine de devoir tolérer l'intrusion de chasseurs sans permission. Avec grand respect, j'estime que dans *Prince et Myron c. La Reine*, la majorité de la Cour d'appel du Manitoba peut avoir fait erreur dans son opinion sur l'art. 76 du *Game and Fisheries Act*, aujourd'hui l'art. 40, en omettant de reconnaître l'importance du par. (4) qui se lit comme suit:

> [TRADUCTION] 76. (4) Rien dans cet article ne limite ni n'atteint le recours en *common law* d'un tel propriétaire ou occupant pour intrusion sur le fonds d'autrui.

Le paragraphe (4) de l'art. 40 du *Wildlife Act*, a renforcé cette disposition en ajoutant la mention des recours prévus par loi écrite:

> [TRADUCTION] 40(4). Rien dans cet article ne limite ni n'atteint les droits ou recours qu'une personne a, en vertu de la *common law* ou de la loi écrite, pour intrusion sur le fonds d'autrui.

Miller C.J.M. did recognize that an owner could demand that hunters leave his property. In this way, he acknowledged that the "right of access" was a qualified right, however he would accord to hunters a special status and access rights above and beyond the ordinary trespasser. Although the point does not fall squarely before us for decision in this appeal, I think it can properly be said that there is considerable support for the view that in Manitoba at the present time hunters enter private property with no greater rights than other trespassers; that they have no right of access except with the owner's permission; and, lacking permission, are subject to civil action for trespass and prosecution under s. 2 of *The Petty Trespasses Act*, R.S.M. 1970, c. P50. The question of right of access will normally have to be decided in each particular case, as a question of fact and not one of law, on the totality of the evidence in the case.

Le juge en chef Miller du Manitoba reconnaissait le droit du propriétaire d'obliger des chasseurs à quitter sa propriété. Il admettait aussi que le «droit d'accès» est un droit limité; il accordait tout de même aux chasseurs un statut spécial et un droit d'accès que n'a pas en général celui qui se rend coupable de violation du droit de propriété. Même si nous n'avons pas à trancher définitivement cette question dans la présente affaire, je crois pouvoir affirmer qu'il y a beaucoup à dire en faveur de la thèse que, au Manitoba, les chasseurs n'ont pas plus de droits que les citoyens ordinaires à l'égard de ce qui est propriété privée; ils n'ont aucun droit d'accès à une terre sans la permission du propriétaire et, sans cette permission, ils s'exposent à une poursuite pour intrusion sur le fonds d'autrui en vertu de l'art. 2 du *Petty Trespasses Act*, R.S.M. 1970, c. P50. La question du droit d'accès doit normalement être tranchée dans chaque cas particulier, comme une question de fait et non comme une question de droit, sur l'ensemble de la preuve dans l'affaire.

I would dismiss the present appeals.

Je suis d'avis de rejeter les présents pourvois.

Appeals dismissed.

Appels rejetés.

Solicitors for the appellants: Pollock & Conner, Winnipeg.

Procureurs des appelants: Pollock & Conner, Winnipeg.

Solicitor for the respondent: Attorney General for Manitoba, Winnipeg.

Procureur de l'intimée: Procureur général du Manitoba, Winnipeg.

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Defendant is, however, entitled to the benefit of actual state of account between the plaintiff and T. A. Walsh Co. It was stated during the course of the trial that a further credit than that appearing in the account rendered should be allowed, and it was agreed by plaintiff that any proper credit would be given. If the amount which should be deducted from the value of the steel bands cannot be settled between counsel, then it may be determined, when settling the formal order for judgment. Judgment will be for the plaintiff for such amount, with costs.

Judgment for plaintiff.

THE KING v. THE NEW ENGLAND Co.

Exchequer Court of Canada, Audette, J. January 14, 1922.

CROWN LANDS (§IB—8)—LICENSE OF OCCUPATION—1849 (CAN.) CH. 9, SEC. 1—1853 (CAN.) CH. 159, SEC. 6—INTERPRETATION POWERS OF COMMISSIONER OF CROWN LANDS EXERCISED BY GOVERNOR IN COUNCIL—VALIDITY.

By sec. 1, 1849 (Can.), ch. 9, sec. 1 and 1853 (Can.), ch. 159, sec. 6, the Commissioner of Crown Lands was empowered to issue, under his hand and seal, a license of occupation to any person wishing to purchase and become a settler on any public land, such settler upon the fulfilment of the terms and conditions of the license to be entitled to a deed in fee of the land. By sec. 15 of the last mentioned Act the Governor in Council was authorized to extend the provisions of this Act to the Indian lands under the management of the Chief Superintendent of Indian Affairs and when such lands were so declared to be under the operation of the Act the Chief Superintendent was entitled to exercise the same powers as the Commissioner of Crown Lands had in respect of the Crown Lands. The Governor General, on April 7, 1859, purported to grant a license of occupation in respect of certain Crown lands to N. "for and on behalf of" the defendant company, under his hand and seal at arms.

Held, that inasmuch as the license in question was granted by the Governor General under his hand and seal at arms instead of by the Commissioner of Crown lands, such license did not comply with the provisions of the statutes in that behalf and was therefore invalid and conveyed no legal right or interest in the lands to the defendant company.

INFORMATION of Intrusion exhibited by the Attorney-General of Canada seeking to recover possession of lands granted to the defendants under license of occupation.

R. V. Sinclair, K.C., and *A. G. Chisholm*, K.C., for plaintiff.

W. S. Brewster, K.C., for The New England Company.

AUDETTE, J.:—This is an Information of Intrusion exhibited by the Attorney-General of Canada, whereby the Crown, *inter alia*, seeks to recover possession of the lands mentioned in the said Information, and which have been in the possession of the defendants for upwards of 60 years, under the license of occupation hereinafter referred to.

Counsel at Bar waived and abandoned the claim of $10,000

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Ex. C.

THE KING v. THE NEW ENGLAND CO.

Audette, J.

for issnes and profits from April 7, 1859, and further declared and expressed their willingness that the defendants be at liberty to remove, at their expense, all buildings erected upon the said premises.

In consideration of the yeoman services rendered to Great Britain by the Six Nations Indians during the war of the Revolution, the British Crown felt, when the war was over and when these Indians had thereby been thus deprived of the lands of their habitat—in what is now the United States—that these loyalists (so to speak) Indians should be given some lands within the Canadian Territory and 6 miles on each side of the Grand River was granted them, after having obtained a surrender of the same by the Mississagua Indians.

On the qnestion of title, it suffices to say that the origin of the same goes as far back as 1784 and 1792 and that the title,—the license of occupation of part of the lands above mentioned upon which the whole case turns, bears date April 7, 1859,—long before Confederation.

The whole case rests npon the validity of the license of occupation, and it is found unnecessary to go beyond the date of the same for the disposal of the present issues under controversy and as set out in the pleadings,—and if I were,—a consideration which would carry us far afield—I would again be led to find in favour of the plaintiff under the titles produced and filed.

The license reads as follows, namely:—

" Province of Canada.

By His Excellency the Right Honourable Sir Edmund Walker Head, Baronet, one of Her Majesty's Most Honourable Privy Council, Governor of British North America and Captain General and Governor in Chief in and over the Provinces of Canada, Nova Scotia, New Brunswick, and the Island of Prince Edward and Vice Admiral of the same etc., etc., etc.

To All to whom the presents shall come.

Greeting.

Know ye that *I* have granted and do hereby grant unto the Reverend Abraham Nelles, of the Town of Brantford in the County of Brant, for and on behalf of the New England Company for all that parcel of land . . ."

Here comes the description of the premises and then the habendum clause, which reads as follows:—

"The said License of Occupation being granted on the express condition that the New England Company shall hold possession of the same so long as they keep np Manual Labour School for the use of the Six Nations Indians, and no longer.

Given under my hand and seal at arms at Toronto, this

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Ex. C.

THE KING
v.
THE NEW ENGLAND Co.

Audette, J.

seventh day of April, in the year of Our Lord one thousand eight hundred and fifty-nine and in the twenty-second year of Her Majesty's Reign.

By Command, (Sgd.) Edmund Head; (Sgd.) C. Alleyn, Secretary."

The defendant Sweet, trustee under the last will of the Rev. Abraham Nelles, in the said license mentioned, having filed no defence to the Information, judgment by default was entered against him on March 15, 1921.

Under the provisions 12 Vict., ch. 9, sec. 1 (1849), and 16 Vict., ch. 159, ss. 6, 15 (1853)* it is, among other things, enacted that a license of occupation shall be issued by the Commissioner of Crown lands. Therefore, the issue of a license by the Governor General "under his hand and seal at arms" is in direct contravention to the statute and it must, therefore, be found that the license was *ab initio* invalid and that nothing passed thereunder. This license of occupation, which the Governor General assumed to issue under his seal at arms, could not, in violation of the statute, constitute a legal and binding document. *Doe ex. Dem. Jackson* v. *Wilkes* (1835), 4 U.C.R. (O.S.) 142; *Doe Dem. Sheldon* v. *Ramsay* (1852), 9 U.C. Q.B. 105; *The Queen* v. *Clarke* (1851), 7 Moo. P.C. 77, 13 E.R. 808.

By this license of occupation the lands in question, as was contended at Bar, became practically tied up in perpetuity and it being found to be detrimental to the Indians, the present Information of Intrusion has been resorted to with the object of using these lands to a better advantage for the Indians. *The Queen* v. *Hughes* (1865), L.R. 1 P.C. 81.

On the other hand, during the whole period that the defendants have been in occupation, that is for over 60 years, there is not a tittle of evidence establishing they ever failed to discharge their part of the obligation arising out of the license.

Have not, however, the Indians the right to represent to their trustees that their land could be used to better advantage to them? Should a trustee be allowed to tie up lands for an indefinite period to the detriment of the *cestui que trust* when the law would afford a remedy to cure such detriment?

It would seem that land vested in the Crown can only be dealt with by a patent under great seal or under statutory authority.

*REPORTER'S NOTE:—By sec. 15 of the last mentioned Act the Governor in Council was authorized to extend the provisions of the Act to the Indian lands under the management of the Chief Superintendent of Indian Affairs; and when such lands were so declared to be under the operation of the Act the Chief Superintendent was entitled to exercise the same powers as the Commissioner of Crown Lands had in respect of the Crown lands.

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There will be judgment ordering and adjudging that nothing passed under the said license of occupation and that the plaintiff recover possession of the lands in question.

No costs are asked by the prayer of this information, and this is, however, a case where there should be no costs to either party.

It having appeared at trial that some of the lands covered by the license of occupation had been since its issue, about 63 years ago, disposed of and sold under expropriation for railway purposes and otherwise, the judgment will apply only to such part now in the hands of the defendants. If the parties fail to agree as to the metes and bounds of the said lands, leave is hereby reserved to either party to apply, upon notice, for further direction in respect of the same.

The judgment by default obtained against the trustee, Sweet, will go no further than the condemnation against the defendant company.

The defendants are furthermore at liberty, at their expense, to remove from the premises in question all buildings thereon erected. *Judgment accordingly.*

STANBRIDGE v. TENNING.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. December 23, 1921.

COURTS (§ II A—151)—COUNTY JUDGE—APPLICATION FOR POSSESSION OF LANDS UNDER LANDLORDS AND TENANTS ACT (MAN.)—TAXATION OF COSTS—JURISDICTION OF JUDGE—DELEGATION OF POWER TO FIX REASONABLE COSTS.

A County Court Judge in Manitoba has no jurisdiction on an application under the summary proceedings clauses in the Landlords and Tenants Act R.S.M. 1913, ch. 109, secs. 11-22, to recover possession of the lands described in a lease, to award costs on the King's Bench scale, nor can the Judge on such an application delegate to the registrar of the Court of King's Bench his discretion as to allowing reasonable costs.

APPEAL by a landlord from the dismissal by Metcalfe, J., of an appeal from an order made by a County Court Judge, in an action to recover possession of lands described in a certain lease. Reversed.

C. W. Jackson, for appellant.

J. A. McAulay, for respondent.

The judgment of the Court was delivered by

PERDUE, C.J.M.:—Stanbridge, the appellant in this matter, in April, 1921, made an application to the Judge of the County Court of Stonewall to recover possession of the lands described in a lease made between Stanbridge, as landlord, and Tenning, as tenant. The application was made under the "summary proceedings" clauses in the Landlords and Tenants Act, R.S.M.,

SASKATCHEWAN

KING'S BENCH MACLEAN, J.

Pap-wee-in et al v. Beaudry et al

Indians—Action for Trespass Upon Reserve—Indian Act, S. 51—Whether Consent of Band Given.

[Note up with 4 C.E.D., *Indians*, sec. 8.]

R. Mulcaster, K.C., for plaintiffs.
J. H. Lindsay, K.C., for defendants.

December 23, 1932.

Maclean, J. MACLEAN, J.—The plaintiff, who is chief of a band of Indians residing on the Big River Indian Reserve, No. 118, brings this action for himself and the majority of his band. The action is properly brought. The defendants, on the invitation or encouragement of a number of the Indians of this band, entered upon the reserve occupied lawfully by the plaintiffs, and erected a building to be used as a church.

The defendants had the permission of the Superintendent-General of Indian Affairs to do this, and the Indians who were favourable to this project did the work of cutting logs and erecting the building under the supervision of a carpenter who was not a member of the band and who was employed by the defendants. Although the work was largely done by some of the Indians on their own reserve, I find on the evidence that it was done for the defendants at their request and under the supervision of their employee and at their expense.

This action is for a declaration that the defendants were trespassers; for damages, and for an injunction restraining the defendants from any repetition of the acts complained of, and for other relief.

Meetings of the band had been called to consider whether or not permission should be given to the defendants to come upon the reserve and erect this building. No vote was actually taken at the meetings. The chief and his council were opposed, and no decision to permit the defendants to enter upon the land was arrived at. No consent of the band in conformity with the rules of the band for the internal regulation of their affairs was given.

A reading of the *Indian Act*, R.S.C., 1927, ch. 98, particularly sec. 51, and of the decision of *Rex v. McMaster* [1926] Ex. C.R. 68, seems to me to make it clear beyond dispute that no portion of an Indian reserve can be alienated, leased, surrendered, or released in any way, as the site of this church was, to any person or corporation outside the band, except with the concurrent consent of the band, and of the Superintendent-General. The consent of the band must be signified 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 any officer duly authorized to attend such council; and such consent must be by a majority of the male members of the full age of 21 years present at the meeting. This was not done. As the defendants had only the consent of the Superintendent-General, their entry upon the reserve, even for the laudable purpose of erecting a place of worship, was not justified. They were therefore trespassers, and they are so declared.

There will be an injunction restraining defendants from any repetition of the acts complained of and from using or occupying the building.

The damages suffered by the plaintiffs consists mainly in the cutting down of trees. The building is on the reserve and can be used for some suitable purpose in the interests of the band. The damages therefore are nominal, and I fix $100 as a sufficient amount. The plaintiffs will have costs.

BRITISH COLUMBIA

SUPREME COURT — D. A. MCDONALD, J.

Evans v. Nyland

Boundaries—Mutual Mistake as to—House Built on Wrong Property — Rectification of Conveyance — Effect of Execution of Conveyance.

[Note up with 1 C.E.D., *Boundaries*, secs. 3, 4; 6 C.E.D., *Mistake*, secs. 9, 18.]

H. Castillou, for plaintiff.

E. J. Grant, for defendant.

January 10, 1933.

the appellant would unquestionably want to specifically answer or, at least, request a hearing where the various people involved could give evidence and their credibility considered. To my mind the content of the undisclosed reply was vital to the issue that had been the subject of the submissions made by the two parties.

I have concluded that the result of the non-disclosure was that, to use the expression of Lord, J., in the *Loomis Armored Car Service Ltd.* case, *supra*, at p. 55 D.L.R., p. 356 W.W.R.:

> The . . . representations of the union [in its letter of September 14, 1973] were prejudicial to the view of the company and they had no opportunity of correcting them or contradicting them.

I wish to emphasize that my opinion is limited to the particular facts of this case, and it is on those facts that I am satisfied that the appellant was so prejudiced by its lack of knowledge of the material details provided to the Board by the Union that the failure of the Board to allow the appellant to see and answer them constituted a violation or denial of the rules of natural justice by not acting judicially in its determinations. In referring to "rules of natural justice", I have in mind the words of Lord Morris of Borth-y-Gest in *Wiseman et al. v. Borneman et al.*, [1971] A.C. 297, [1969] 3 All E.R. 275, where at pp. 308-9 he said:

> We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them.... The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action".

I would allow the appeal and direct the certification in question quashed without the necessity of the writ of *certiorari* being issued.

Appeal allowed.

THE PAS MERCHANTS LTD. v. THE QUEEN

Federal Court, Trial Division, Bastin, J. September 9, 1974.

Practice — Status to sue — Corporation representing residents and businessmen of town — Whether corporation has status to object to construction of shopping centre on Indian reserve.

Indians — Reserves — Corporation representing residents and businessmen of town — Whether corporation has status to object to construction of shopping centre on Indian reserve.

A corporation whose shareholders and officers are residents and businessmen of a town has no status to prevent the Government of Canada from constructing a shopping centre on an Indian reserve. Such a corporation cannot complain of the breach of a treaty between the Government of Canada and certain Indian tribes, not being a party

thereto. Nor has it any status under the *Indian Act*, R.S.C. 1970, c. I-6. Moreover, the corporation itself (as distinct from its shareholders) would suffer no damage by the construction of the shopping centre. A different plaintiff or class of plaintiffs in another action might, however, raise the question whether such a shopping centre would be exempt from provincial taxing statutes and other regulatory laws.

APPLICATION to strike out a statement of claim.

Donald MacIver, for plaintiff.
S. Froomkin and *B. Meroneck*, for defendant.

BASTIN, J.:—This is an application to strike out the statement of claim on the ground that it discloses no cause of action. For the purpose of such a motion the allegations in the statement of claim are assumed to be true. Briefly, these are that the defendant has announced its intention to finance the construction of a shopping centre on the Indian Reserve at The Pas and has offered to lease space in the shopping centre to a number of businesses. The plaintiff alleges that the existing shopping facilities at The Pas are adequate and that its construction would not be in the public interest. The plaintiff also submits that Treaty No. 5 between the Government of Canada and certain Saulteaux and Swampy Cree Indians concluded in 1875 restricts the use of such reserve land to farming and that reserve land may not be sold, alienated, leased or otherwise disposed of until they have been surrendered to the Crown by the Indian band.

The plaintiff, which is a Manitoba corporation whose officers and shareholders are alleged to be residents and businessmen of the Town of The Pas, seeks declarations by the Court that the alleged actions of the defendant in promoting and financing the construction of a shopping centre on lands forming part of the Indian Reserve are contrary to Treaty No. 5; that they are contrary to the provisions of the *Indian Act*, R.S.C. 1970, c. I-6, and that they are contrary to the public interest.

In my opinion the action of the defendant in creating a shopping centre on this Indian Reserve does raise a legal issue but not one of those set out in the statement of claim. These can readily be disposed of.

With respect to Treaty No. 5, this was an agreement between the Canadian Government and the Indian tribes in question. On the principle of privity such an agreement confers no rights and imposes no obligations arising under it on any person not a party to it. It follows that its interpretation and performance concern only the parties to it and the plaintiff has no status to enforce its provisions.

With respect to the *Indian Act* this was passed to carry out the obligations of the Canadian Government towards the original inhabitants of the country. It is not a public Act for the benefit of all citizens and gives no rights to Canadian citizens other than Indians. Since this Act gave no private right to the plaintiff, was not passed for its protection and establishes no public right, it follows that the plaintiff cannot maintain an action with respect to a departure from its provisions. I should add that s. 18(2) of the *Indian Act* gives the Minister of Indian and Northern Affairs the authority to use land in a reserve with the consent of the council of the band for any purpose for the general welfare of the band. This, presumably, is considered the authority for such a proposal.

With respect to the claim that the actions of the defendant in relation to the shopping centre are contrary to the public interest, this is a matter of executive discretion which the Court has no power to review.

The statement of claim has another shortcoming in that the plaintiff is not alleged to be threatened with any damage by the actions of the defendant and in fact it is impossible to see how such a corporation could be affected in any way by the construction of the shopping centre. No doubt merchants carrying on business at The Pas may be harmed by this development but the fact that they are shareholders of the plaintiff cannot affect the interest of this corporation.

The legal issue which is raised by the actions of the defendant is whether the Canadian Government, under its power to legislate with respect to "Indians" contained in the *British North America Act, 1867*, has the right to use lands reserved for the use of Indians to carry on a commercial venture such as a shopping centre exempt from the regulatory and taxing powers granted by s. 92 to the Province of Manitoba. In a motion such as this the Court has power to permit a plaintiff to cure a defect in the statement of claim by an amendment but in this case this is not possible because the plaintiff has no interest in the matter and no status to sue. The issue might be raised in a class action brought by a plaintiff or plaintiffs who could claim to be adversely affected by such a development. Whether this issue could be raised successfully is, of course, another question. Under the circumstances I direct that the statement of claim be struck out with costs. The persons who were represented by the nominal plaintiff in this statement of claim are at liberty to bring another action if so advised.

Application granted.

favour the amendment of the judgment by striking out the paragraph referred to.

Appeal allowed in part.

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POINT v. DIBBLEE CONSTRUCTION Co. et al.

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Ontario Supreme Court, Armour, J. January 30, 1934.

Indians—Licence of occupation for constructing highway—Right of Crown to grant—Distinction between licence and lease—Royal Prerogative—Election of council of band—Life chief—Indians' tenure—Action for trespass or ejectment—Statutory remedies—Jurisdiction of Exchequer Court and of Supreme Court of Ontario—Damages in lieu of injunction.

Neither the provisions of s. 50 of the Indian Act, R.S.C. 1927, c. 98, that no portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown, nor of s. 51 as to method of surrender or release, nor any other provisions, prevent the Crown from granting to a company a licence, not exclusive, to use, occupy and enjoy reserve lands for the purpose of constructing a highway. The legal title of such lands is in the Crown. The Indians' tenure is personal and usufructuary and not sufficient to found an action for trespass or ejectment.

Factors which the Court may consider in awarding damages in lieu of an injunction are delay in claiming the injunction and the fact that the injury complained of results in actual benefit to the plaintiff.

R. Danis, for plaintiff; *D. R. Kennedy*, K.C., for Dibblee Construction Co.; *W. L. Scott*, K.C., for Cornwall-Northern New York Internat'l Bridge Corp.

ARMOUR, J.:—This action raises interesting questions as to the rights of Indians living on a reserve with respect to the land in occupation by them. The plaintiff is a member of the St. Regis Band of Indians who occupy, as part of their reserve, Cornwall Island, situated in the River St. Lawrence opposite the Town of Cornwall. The island is about 5 miles long and about ¾ of a mile in width. The Indians in this band number slightly over 1,700, of whom about 100 live on the island, the remainder on other reserves. The band is presided over by a council elected pursuant to the provisions of ss. 96 and 97 of the Indian Act, R.S.C. 1927, c. 98. It is said that there is no record in the Department of Indian Affairs of any treaty with the St. Regis Band but that, I think, is of no importance in this action, as I assume that this band has had treaty relations with the Crown.

The Ottawa & New York R. Co. and its lessee, the New York Central R. Co., cross the River St. Lawrence at this point and their line runs through the Indian Reserve, their tracks being carried over the Cornwall Canal and the north and south chan-

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nels of the river by railway bridges. This is the only bridge between Montreal on the east and Niagara Falls on the west, which crosses the St. Lawrence River or any water forming part of the international boundary. For some years past the plan has been discussed in Cornwall and vicinity of converting the railway bridges into bridges for vehicular and pedestrian traffic and linking both the bridges over the north and south channels of the river with a roadway across the Indian Reserve.

This proposal has gained force with the increase in motor vehicle traffic in view of the fact that such an international roadway would connect the King's Highway No. 2 in the Province of Ontario and the Roosevelt Highway in the State of New York. Until recently the railway companies were opposed to the plan but since traffic on this railway line has fallen off they finally agreed to the proposal and by 1932 (Can.), c. 60, the Ottawa & New York R. Co. and its lessee were given power to enter into an agreement with any toll bridge company incorporated either under the laws of the State of New York or under the laws of the Dominion of Canada giving to such toll bridge company the right (subject to the provisions of s. 248 of the Railway Act) to construct a passage floor or way for horses, carriages and automobiles and foot passengers on that part of the bridge within the Dominion of Canada and to make alterations therein, and to construct such approaches thereto as might be necessary. The toll bridge company (subject to s. 41A of the Railway Act) was, by the same Act, given the right to charge and collect tolls or fares from persons using the bridge. The defendant, the Cornwall-Northern New York International Bridge Corp. (which I shall call the Bridge Corp.) was incorporated under the laws of the State of New York, and on November 19, 1932, entered into an agreement by way of a lease with the railway companies as authorized by the above statute.

On December 7, 1932, the Governor in Council approved of the work under s. 248 of the Railway Act (ex. 7) and on December 10, 1932, by two separate orders, the Board of Railway Com'rs for Canada authorized the construction of a passageway for vehicular traffic on the bridge and approved of the tariff covering the tolls to be charged (exs. 8 and 9). The proposed roadway crossing the reserve is shown by the plan dated December 27, 1932 (ex. 1), on which appears the land in occupation by the plaintiff and the areas covered by the roadway. Of course the Act, the lease, the order-in-council and the orders of the Board of Railway Com'rs above mentioned do not apply to the roadway across the reserve but to

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the railway bridges only. The roadway across Cornwall Island is a link but an essential link between the railway bridges over the River St. Lawrence.

It is obvious that such a highway would be of great benefit to the Indians living on Cornwall Island, and was so regarded by the council of the band. It affords a convenient and permanent means of access to the mainland on either side of the river instead of a precarious crossing on the ice during the winter or by means of boats or canoes during the other seasons of the year.

The official approval of the scheme by the St. Regis Band of Indians was given at a meeting of the council of the band on December 5, 1932. A resolution requesting the Superintendent-General of Indian Affairs to have set apart a road allowance paralleling the railway right-of-way through the reserve on Cornwall Island subject to certain conditions was duly passed on that date and was forwarded to the Department of Indian Affairs (ex. 5). The conditions which are set forth in the resolution forwarded to the department may be briefly summarized as follows:—

1. The title to the roadway was to remain in the Indians.

2. The Indians whose improvements or lands were taken for this road allowance were to be compensated in such sums as might appear to the Superintendent-General of Indian Affairs to be fair and reasonable.

3. The roadway was to be 18 ft. in width and was to be constructed according to the specifications set out.

4. The road allowance was to be suitably fenced, and the two existing crossings over the railway right-of-way preserved.

5. All Indians of the St. Regis Band were to have free use of the bridge for themselves and their vehicles, etc. without the payment of any fare or tolls.

6. All trees or timber cut down during the process of the construction of the road were to become the property of the locatee.

7. Indian labour and teams were to be employed on the road construction where they render satisfactory service.

In consequence of this resolution which was accepted and acted upon by the department as legally expressing the wishes of the band (s. 158), on August 14, 1933, His Majesty the King therein represented and acting by the Superintendent-General of Indian Affairs, granted to the Bridge Corp. a licence of occupation for the purpose of constructing the highway across the lands comprising part of the St. Regis Indian Reserve (ex. 11). The plan therein referred to is the plan on file in

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the department, of which ex. 1 is a copy. That licence of occupation embodied as part of its terms, the conditions, which the council of the band had set forth in its resolution including the right to the Indians of free passage at all times for themselves and their vehicles across the bridges over the River St. Lawrence, without payment of any charge or tolls. But the licence, differing in this from the resolution of the council of the band, stipulated that the title to the lands described therein and shown on the plan should remain in His Majesty the King.

Accordingly the Bridge Corp. entered into contracts for the construction of the roadway and the Dibblee Construction Co. Ltd. became one of its sub-contractors. The work of construction commenced on August 18, 1933, and on the date of the trial, about 85% of the road work had been completed, in fact all the work of construction that could be done prior to the winter months had been finished.

Before the work commenced on the land occupied by the plaintiff, the Indian Agent brought him a quit claim deed to sign and a Government cheque for $78.30, the sum that the Superintendent-General deemed to be a fair and reasonable compensation for his land, but the plaintiff refused to sign the deed and to accept the cheque. On August 22, 1933, or a day or so later, the letter (ex. 2) was delivered by the Indian Agent to the plaintiff.

A few days after the work had started on the land he occupies, the plaintiff who claims to be "a life chief," called a meeting of the other life chiefs on the island. At this meeting which was held on August 30, 1933, at the plaintiff's house, about 8 persons were present including a solicitor who was there to advise them. It was then unanimously decided to oppose the road project because those present thought that "it was not brought about regularly." A second meeting was held about a week later when the life chiefs decided upon definite action. These meetings of the life chiefs, so called, have no legal significance. The department in no way recognizes a life chief who is selected by the oldest woman in his own particular clan. Because the elective system of chiefs and councillors has been introduced, the life chiefs by s. 97 of the Act cannot exercise any powers.

It seems that the plaintiff had a grievance because the steam shovel started work on his property first and that the roadway was widened there. There is nothing in either of these suggestions. That the steam shovel commenced work on his property first was due solely to the exigencies of the contract, and

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the road was necessarily widened to accommodate the traffic which would be halted at the custom house to the south.

On September 12, 1933, the writ in this action was issued and served the next day. The plaintiff then moved, on October 5, for an interim injunction to prevent the defendants proceeding further with the construction of the roadway but the learned Judge who heard the motion refused to grant one and referred the matter to the trial Judge.

The roadway cost some $60,000 and it has been completed so far in accordance with the plans and specifications. All the terms and conditions in the licence have been observed and fulfilled. I am also satisfied by the evidence that there was no other way to complete the road, that the railway right-of-way across the reserve could not have been used; and that it would not have been practical to lay out the road so as not to cross the land occupied by the plaintiff.

All the Indians on the reserve whose lands were affected by the roadway have accepted compensation awarded them by the Superintendent-General except the plaintiff, and although he was offered a Government cheque covering what I find is an adequate compensation for the land in his occupation affected by the roadway, he refused to accept it and brings this action to assert his rights. He asks for an injunction restraining the defendants from trespassing on the lands in his occupation, damages for illegal trespass, a mandatory order compelling the defendants to put the land in the condition in which it was prior to the time the defendants trespassed upon the same and for further and other relief.

The plaintiff maintains that there was no authority under the Indian Act or otherwise to give the Bridge Corp. the licence of occupation, which, he says, virtually amounts to an expropriation of the lands occupied by him; that the council of the chiefs exceeded their powers under the Act, in forwarding the resolution above referred to; and that the Crown having acquiesced for some time past in the plaintiff's occupation of the lands in question, cannot now say that he has no right thereto. He also says that the compensation offered to him for the land covered by the roadway is quite inadequate, and suggests that figure should be at least $625 based on 25 years' rent at $25 per annum.

The defendants assert that the action of the Crown in issuing the licence of occupation was quite within its general powers, and that the road was established by the Superintendent-General and specifically authorized by s. 47 of the Act as amended. They also question the right of the plaintiff to bring this action

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which, it is argued, is in effect an action of ejectment, and they aver that the plaintiff's possession of the lands in question was not such as to enable him to bring any action, in respect thereof, since he has never had issued to him a location ticket for the land under the Indian Act; and that the right to bring this action would, if, at all, be the right of the Superintendent-General alone. The defendants also dispute the jurisdiction of this Court to try the action and they say that the Exchequer Court of Canada alone can hear it.

That part of the land in occupation by the plaintiff which is now covered by the road amounts to 1.305 acres. For this the plaintiff was offered $78.30 by the Superintendent-General. It is true that this offer is in the form of a Government cheque and was therefore not a legal tender of the amount, but in view of the plaintiff's definite refusal to accept that amount of compensation, it would have been useless, I find, to have made the tender in legal form. I find on the evidence that the value of the land in the occupation of the plaintiff and covered by the roadway was $35 an acre. Indeed, this valuation was fixed by the plaintiff himself in an agreement as to the distribution of the estate of his deceased father, entered into by him with other members of the family on May 13, 1932. The amount offered him by the Superintendent-General I find was a fair and full compensation, not only for the land covered by the roadway, but also for all other claims for damages the plaintiff may have had.

Assuming that this Court has jurisdiction, is the plaintiff entitled to an injunction? The defendants resist this part of the plaintiff's claim on the ground of his delay in taking action to assert his rights and to prevent the building of the road because, as he stated in his examination for discovery, he had known for several years of the proposal to build this road, and notwithstanding this fact that he had, more than once, been officially notified that it had been definitely decided to proceed with the work, he waited until the construction was well under way before issuing his writ. This delay, alone, the defendants say, disentitles the plaintiff to an injunction even if he should be entitled to damages.

In *Shelfer* v. *London Electric Lighting Co.*, [1895] 1 Ch. 287, Smith, L.J., at p. 322, stated, as a good working rule, that damages may be given in substitution for an injunction in cases where there are found in combination the four following requirements, namely, where the injury to the plaintiff's legal rights is:—(1) Small; (2) capable of being estimated in money; (3) can be adequately compensated by a small money

payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction.

That case was approved in *Leeds Industrial Co-op. Soc.* v. *Slack*, [1924] A.C. 851 (H.L.), where it was held that the Court had jurisdiction to award damages in lieu of an injunction, and applied in *Duchman* v. *Oakland Dairy Co.*, [1928] 1 D.L.R. 9, 63 O.L.R. 111. *Tolton* v. *C.P.R.* (1892), 22 O.R. 204, may also be referred to.

The delay on the part of a plaintiff in applying for an injunction is a ground for refusing to exercise the Court's power to issue one. *Folkestone Corp.* v. *Woodward* (1872), L.R. 15 Eq. 159; *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212, 44 E.R. 1250; *Attorney-General* v. *Sheffield Gas Consumers Co.*, 3 De G. M. & G. 304, 43 E.R. 119. This is a case in which I think both on principle and by reason of his delay, the plaintiff is not entitled to an injunction.

Although the Court cannot hold an injury compensated for by a benefit which results from it, yet the fact that a benefit does result to the plaintiff from the act complained of is an element to be considered in deciding whether an injunction should be granted or damages given. I have no difficulty in coming to the conclusion that this roadway will be a great benefit not only to the Indians on Cornwall Island in general but also to this plaintiff in particular.

In short I think that this is a case where damages should be given in lieu of an injunction, that is, assuming that the plaintiff is entitled to succeed at all in this action. It is true that he has refused to accept the compensation, adequate for his damages, which the Superintendent-General offered, but no doubt, and notwithstanding any adverse termination of his suit, the department will pay the plaintiff the sum of $78.30 which it received for him and was included in the amount paid by the Bridge Corp. as the consideration for its licence of occupation (ex. 12).

It was argued for the plaintiff that the council of the band had no authority to forward the resolution to the Superintendent-General requesting him to have set apart a road allowance through the reserve. His statement of claim was amended at the trial to permit him to sue on behalf of himself and all other Indians of the St. Regis Indian Reservation. As all other Indians whose lands were affected by this road have approved of it by accepting the compensation awarded them, the amendment does not extend his claims any further. The plaintiff, it is true, questions the proper constitution of the council of the band, but that is not a matter with which I can deal. The

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elective system by which chiefs and councillors are chosen was, many years ago, introduced as far as this band is concerned (ex. 10) and the plaintiff, although he may be a life chief, cannot exercise any powers as he has not been elected under the provisions of the Act. Section 98 of the statute affords the only means by which the election of the chiefs and councillors can be set aside.

There was much argument as to whether the licence of occupation (ex. 11) granted by the Crown to the Bridge Corp. was, in fact, a lease. For the plaintiff it was strenuously maintained that the document in question was a lease of the land to the Bridge Corp. and that no such power could be exercised by the Crown in respect of land in an Indian Reserve. With this contention I do not agree.

It is true that the Bridge Corp. is thereby granted the right, privilege and easement (for the purpose of constructing a highway thereon) to use, occupy and enjoy the lands and premises lying to the east of the railway right-of-way crossing the island and being part of the reserve as shown on the plan (ex. 1), but such use, occupation and enjoyment is not exclusive but subject to the rights of the public, including the Indians, at all times to use and to pass over the road and bridges. The Bridge Corp. pays no rent for the licence and the consideration $798.46 therein mentioned is the sum total of the amounts the Superintendent-General had fixed as fair and reasonable compensation payable to the Indians who were in occupation of the lands affected by the roadway. The Bridge Corp. has no exclusive use, occupation or enjoyment of the property, and that fact makes, I think, the distinction between a licence and a lease.

Moreover the licence does not purport to withdraw from the reserve the land covered by the roadway; the title to the land remains in the Crown and the ownership thereof does not pass to the Bridge Corp. All the licence amounts to is this. The Crown grants the Bridge Corp. the right to enter upon its lands and to construct a highway thereon and for that purpose to use and occupy the land covered by the highway. The Bridge Co. has no power to charge fares or tolls for the use of the roadway. It can only collect tolls for use of the bridges. Of course no persons other than those living on the island could use the road without first crossing one or other of the bridges, but the Indians are excepted from the payment of any fares or tolls when using either road or bridges. Therefore neither s. 50 of the Act which provides that no reserve or portion of a reserve shall be sold alienated or leased until it has been released or surrendered to the Crown nor s. 51, which enacts that no release or surrender

of a reserve or a portion of a reserve shall be valid or binding unless assented to by the band in the way provided, applies to the licence granted the Bridge Corp.

The legal title to the land set apart by treaty or otherwise for the use or benefit of a particular band of Indians is in the Crown. The tenure of the Indians is a personal and usufructuary right, dependent upon the good will of the Sovereign. They have no equitable estate in the lands *A-G. Que.* v. *A-G. Can.* (1921), 56 D.L.R. 373; *Reg.* v. *St. Catharines Mllg. & Lbr. Co.* (1885), 10 O.R. 196; affd 13 A.R. (Ont.) 148; affd 13 S.C.R. 577; affd 14 App. Cas. 46. For the history of the public lands of Ontario and the Canadian policy upon Indian questions see the classic judgment of Boyd, C., in 10 O.R., at p. 203, and the Report on the Affairs of the Indians in Canada (1842) Appendix EEE of the Journals of the Legislative Assembly of the Province of Canada, vol 4. The land comprising Cornwall Island is the property of His Majesty the King in the right of the Dominion of Canada (B. N. A. Act, s. 91(24); *The King* v. *Easterbrook*, [1929] Ex. C.R. 28, affd [1931], 1 D.L.R. 628, S.C.R. 210). And that is the reason why no release or surrender by the Indians of any reserve or portion of a reserve to any person other than His Majesty is valid (ss. 50 to 54). This being so, how can the prerogative right of the Crown to deal with its own property be fettered? "No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby:" Interpretation Act, R.S.C. 1927, c. 1, s. 16.

There is, in my reading of the Indian Act no limitation upon this prerogative right. The provisions of s. 48, whereby "no portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council" and the compulsory taking by any company or municipal or local authority, having the statutory power is regulated, refer obviously to the case where land is taken away or withdrawn from the reserve and the title to the land so taken passes from the Crown to the company, municipal or local authority concerned. Even in such instances the compensation paid is for the use of the band of Indians for whose benefit the reserve is held and for the benefit of any Indian who has *improvements* (not land) taken or injured.

From a reading of ss. 34 and 35 it is apparent that it is contemplated by the Act that persons other than Indians might occupy or use any land occupied by the band provided the

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authority or licence of the Superintendent-General so to do was first obtained.

That Indian Reserves such as Cornwall Island must have roads in or through them is apparent. This necessity is recognized by the Act by giving in s. 101 the chief or chiefs of any band or council the power, subject to confirmation by the Governor in Council, to make rules and regulations as to "(e) the construction and maintenance of water courses, roads, bridges, ditches and fences." By s. 47 the duty of keeping roads in order in accordance with the instructions received from the Superintendent-General is placed upon the band and by s-s. 3 which was added by 1933 (Can.), c. 42, s. 5, "The Superintendent General shall have the authority to determine where roads shall be established on a reserve." I conclude, therefore, that both by virtue of his prerogative and under the Act itself His Majesty had the power to grant the licence of occupation to the Bridge Corp.

The plaintiff's interest in the land for which he asks damages may now be considered. The title to it is in the Crown subject to his occupational right as regulated and defined by the Act. It will be remembered that he had never been located under s. 21, nor had any location ticket been issued to him under s. 22; indeed none had been issued to any Indian on Cornwall Island. Therefore by s. 21 the plaintiff is not to be deemed to be lawfully in possession of any land in the reserve. It is true that for its own purposes the Department of Indian Affairs recognized whatever interest the plaintiff as an individual Indian had in the parcel of land he occupied and for the purposes of this roadway even treated the land as being his. The department approved of the Point family agreement (ex. 3) previously referred to and thereby recognized the plaintiff's occupational rights in the land which he had acquired from his father. No doubt had the plaintiff wished to transfer his land to another member of the band the department would have given its approval. Indeed this was a sensible attitude for the department to take because it is much better that the Indians on the reserve should settle amicably among themselves the boundaries of the properties they occupy and achieve some permanency of land holding rather than be subject to continual departmental interference.

The statute, ss. 25 to 33, permits Indians to devise or bequeath property of any kind in the same manner as other persons subject generally to the approval of the Superintendent-General, but by s. 31 a claimant of land in a reserve or of any interest therein as devisee or legatee or heir of a deceased In-

dian (as the plaintiff is) shall not be held to be lawfully in possession thereof or to be the recognized owner thereof until he shall have obtained a location ticket therefor from the Superintendent-General.

From the foregoing facts and statutory provisions it is clear that the plaintiff had no possessory title to the land he occupied in the reserve. He could acquire none against the Crown, nor can the acts or attitude of the department or the servants of the Crown create an estoppel since the doctrine of estoppel does not apply to or operate against the Crown. Nor could the doctrine of acquiescence be invoked by him from the behaviour of the officers of the Crown: *The King* v. *Easterbrook, supra.* What right, then, has the plaintiff to maintain this action? Clearly, I think, none. Nor does it matter whether this action is really an action for ejectment as the defendants claim, or an action for trespass, as the plaintiff says it is. The former is an action for the recovery of land; the latter, *quare clausum fregit*, is an action for the wrong committed in respect of the plaintiff's land by entry on the same without lawful authority.

Trespass constitutes a tort. He could not successfully bring an action of ejectment against the Crown in respect of the land he occupies, nor sue the Crown for a trespass to it. How then can he successfully sue the licensees of the Crown, acting under its authority for an entry on the Crown's lands? In neither case has the plaintiff the requisite possession to maintain the action against the defendants. Were this not enough to dispose of the plaintiff's right to bring this action the provisions of the Indian Act provide another reason. Sections 34, 35, 115 and 116 afford summary methods of dealing with persons who trespass on or occupy or use land in a reserve. The appropriate action is taken by the Superintendent-General and not by the Indians or the band. The Superintendent-General has, by s. 4, the control and management of the lands and the property of Indians in Canada. Again if possession of any lands reserved for the Indians is withheld or adversely occupied or claimed by any person, or if trespass is committed thereon, by s. 39, the possession may be recovered for the Indians or damages may be recovered in an action at the suit of His Majesty on behalf of the Indians entitled to possession or the relief or damages. Such action may be instituted by information of the Attorney-General for Canada upon the instructions of the Superintendent-General of Indian Affairs. The Exchequer Court of Canada shall have jurisdiction to hear and determine any such action.

I think that s-s. 4 of s. 39 merely preserves the existing remedies or modes of procedure available to the Superintendent-

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General such, for example, as are afforded by ss. 34, 35, 65, 115 or 116. Section 65 which was mentioned during the course of the argument refers only to Indian lands, that is, a reserve or portion of a reserve which has been surrendered to the Crown and is not applicable here. The statute having provided the remedies for the recovery of land in a reserve unlawfully taken, occupied or used by any person, which remedies are to be put in motion by the Superintendent-General and no one else, a suit or action for that purpose by an Indian must necessarily be excluded. The right of the Crown to recover possession of lands is one incident to the control and management of lands reserved for Indians, given it by the B. N. A. Act, *The King* v. *McMaster*, [1926] Ex. C.R. 68.

It is true that s. 106 gives Indians and non-treaty Indians "the right to sue for debts due to them or in respect of any tort or wrong inflicted upon them or to compel the performance of obligations contracted with them." While a trespass to land is a tort or wrong inflicted upon the person entitled to the possession of the land, the section when read with the whole Act refers, I think, to a personal tort such as an assault. Anyhow an action such as the present one must, in view of the plaintiff's limited right of occupation and of the statutory provisions for the recovery of land and the removal of trespassers therefrom above mentioned, be excepted from the rights of action given to Indians by this section.

Finally, I am of the opinion that the plaintiff's action, if he has one at all, should have been brought in the Exchequer Court of Canada. His claim arises out of a contract entered into on behalf of the Crown. The issues raised by the plaintiff and his claims in this action are by s. 18 of the Exchequer Court Act, R.S.C. 1927, c. 34, in the exclusive original jurisdiction of that Court. This Court, therefore, has no jurisdiction to entertain this action.

For these reasons the plaintiff's action will be dismissed without costs.

Action dismissed.

BRITISH COLUMBIA PROVINCIAL COURT

Barnett Prov. J.

Regina v. Sellars

Criminal law — Charge of having rifle for purpose dangerous to public peace — Accused, an Indian, having authority to remove trespassers from reservation — No criminal intent — The Criminal Code, R.S.C. 1970, c. C-34, ss. 41, 83 — The Indian Act, R.S.C. 1970, c. I-6, ss. 18(1), (2), 20, 30, 81(p).

The accused, one S., was charged with having a rifle in his possession for a purpose dangerous to the public peace. S., a member of an Indian band, was on his way home when he saw a trailer wrongly parked for the night on reservation lands. He told the occupants to move and, when they closed the trailer door, took an unloaded rifle from his truck to scare them away.

On the question of whether the possession of the rifle was for a dangerous purpose, *held*, it was not. The accused properly had the rifle in his possession as he was returning from hunting and, as a member of the band, had an interest in the land and was entitled to use necessary force to remove trespassers.

Regina v. Knudsen, [1971] 1 W.W.R. 345, 1 C.C.C. (2d) 576 (B.C. C.A.); *Sorlie v. McKee*, [1927] 1 W.W.R. 56, 21 Sask. L.R. 330, [1927] 1 D.L.R. 249 (C.A.); *Rex v. Kinman*, 16 B.C.R. 148, 18 C.C.C. 139, 17 W.L.R. 439 (C.A.); *Regina v Baxter* (1975), 33 C.R.N.S. 22, 27 C.C.C. (2d) 96 (Ont. C.A.); *Regina v. Bushman*, 63 W.W.R. 346, 4 C.R.N.S. 13, [1968] 4 C.C.C. 17 (B.C. C.A.); *Regina v. Taylor* (1970), 73 W.W.R. 636 (Y.T.); *Regina v. Badenoch*, 65 W.W.R. 124, 4 C.R.N.S. 293, [1969] 1 C.C.C. 78 (B.C. C.A.); *Regina v. Nelson*, 19 C.R.N.S. 88, [1972] 3 O.R. 174, 8 C.C.C. (2d) 29 (C.A.); *Regina v. Chalifoux*, [1974] 1 W.W.R. 82, 24 C.R.N.S. 314, 14 C.C.C. (2d) 526 (B.C. C.A.) referred to.

Regina v. Flack, 65 W.W.R. 35, 4 C.R.N.S. 120, [1969] 1 C.C.C. 55 (B.C. C.A.); *Regina v. Gingrich* (1958), 29 W.W.R. 471, 31 C.R. 306, 122 C.C.C. 279 (Alta. C.A.) applied.

[Note up with 6 CE.D. (West. 2nd) *Criminal Law (Offences)*, s. 132.]

D. N. Best, for the Crown.

A. D. P. MacAdams, for accused.

(Williams Lake No. 0097)

18th February 1977. BARNETT Prov. J.:—Gilbert Sellars is charged under s. 83 of the Criminal Code, R.S.C. 1970, c. C-34, with having had a rifle in his possession for a purpose dangerous to the public peace. As in the *Knudsen* case, the factor at issue here is whether or not it has been proven that Sellars' possession of the rifle was for a purpose dangerous to the public peace: see *Regina v. Knudsen*, [1971] 1 W.W.R. 345, 1 C.C.C. (2d) 576 at 578 (B.C. C.A.).

The facts of this case give rise to some intriguing legal questions, and those questions have been well presented by counsel.

The incident which gave rise to the charge took place at the site of an old burned down service station located about 20 miles north of Williams Lake alongside the Cariboo Highway. The site is open and readily accessible from the highway. It is not fenced off or posted to specifically designate it as private property. Nevertheless, in my opinion, it would be obvious to any reasonable person that the site was owned in some fashion — the remains of the old service station would indicate that.

In fact, the site comprises part of the Soda Creek Indian Reserve. At the material time the site was simply part of the general band lands (see s. 18(1) of the Indian Act, R.S.C. 1970, c. I-6) — if the land had once been alienated (see ss. 18(2) and 20 of the Indian Act), such alienation had apparently terminated.

Mr. Douglas Green and his family were travelling on the Cariboo Highway. Mr. Green had made inquiries about a spot to park his truck and trailer for the night. A service station attendant had directed him to the old gas station site, and he had in fact parked there, intending to stay the night.

About 11:00 p.m. Mr. Sellars arrived on the scene. Mr. Sellars is a member of the Soda Creek Band. He was on his way to a friend's house for a party. Upon seeing the Greens' truck and trailer, however, Mr. Sellars decided that the occupants should be told that they were on Indian land and must leave. Mr. Sellars was apparently annoyed because passing travellers who stopped at the site often left litter behind when they departed. And, although Mr. Sellars did not hold any office within the band at the time, he was obviously well aware that it is an offence to trespass on an Indian reserve (see s. 30 of the Indian Act).

The Sellars' truck was stopped, Mr. Sellars exited and knocked on the door of the trailer. The Greens had not retired for the night and presumably there were lights on in the trailer. Mr. Green "cracked" the door open — he did not open it wide.

Mr. Sellars says that he told Mr. Green — in a loud voice but without employing profanity — "You are on an Indian reservation and you are to move off." He says that Mr. Green looked at him, did not say anything, and shut the door. Mr.

Sellars says that his companions did not participate or say anything.

Mr. Green recalls that he was informed they were on Indian land and would have to move. He recalls seeing two men and that they seemed quite belligerent. He says that he was scared and that he closed the door as quickly as he could. Somehow this resulted in the door handle being broken.

Mrs. Green recalls that she was alarmed by pounding on the door and that when her husband went to the door he was told to move the truck and trailer because they had no right to be on Indian land. She recalls that her husband responded by saying that they would move and he then closed the door whereupon the handle broke.

After closing the door the Greens discussed the situation. Mr. Green had left the truck engine running to charge the batteries. That concerned him. He put on a pair of shoes and obtained a flashlight. He then went outside.

I have no doubt that when Mr. Green exited from the trailer, he had determined to depart as quickly as he thought possible. However, I am unable to conclude that Mr. Green conveyed that impression to Mr. Sellars when Mr. Sellars first knocked on the trailer door.

After Mr. Green had summarily shut the door upon him, one of Mr. Sellars' companions made a comment to the effect that Green had something in his hand. At least that is what Mr. Sellars recalls. In any event Mr. Sellars reached in the cab of his truck where, like a great many Cariboo residents, he kept a rifle, it being hunting season at the time. Mr. Sellars explains his action in getting the rifle in this manner:

"I thought the gun would scare him off; that's what I intended. It didn't look to me like he was going to move. They shut the door, eh."

When Mr. Green exited from the trailer, he quickly observed that Mr. Sellars was now carrying a rifle. Mr. Green says that Mr. Sellars pointed the gun at him "for a brief moment". However, upon a consideration of all the evidence, including Mr. Sellars' denial of that assertion, I am unable to conclude that Mr. Sellars did in fact deliberately point the rifle at Mr. Green.

Mr. Green says that he was "damn scared". Undoubtedly. But the test in a case such as this is not the alarm or fear in the minds of the Greens, but the purpose and intention of Mr.

Sellars: see *Regina v. Flack*, 65 W.W.R. 35, 4 C.R.N.S. 120, [1969] 1 C.C.C. 55 at 61 (B.C. C.A.).

It seems clear that Mr. Green told Mr. Sellars that he had obtained the licence number of the Sellars' truck and was going to call the police on his CB radio. Mr. Sellars responded by saying that Mr. Green should "go ahead" and report the incident to the police and that they would wait in his mother's driveway nearby. Mr. Sellars and his companions then departed without further incident and, after making the trailer ready for travel, the Greens also left.

Mr. Sellars says that his rifle was not loaded. I have no reason to disbelieve him. Further there is no evidence that Mr. Sellars ever used threatening words and, apart from the fact that Mr. Sellars was carrying the rifle, I am unable to find that the manner of Mr. Sellars or any of his companions was threatening. None of the Greens suffered any injury and none of their property suffered any damage.

Mr. Sellars was interviewed by Constable Atkins of the Williams Lake R.C.M.P. about an hour and a half after the incident. After being advised of the Greens' complaint by Constable Atkins, Mr. Sellars said, "Can I tell you my story." A statement followed and while it was not a very satisfactory one nothing that Mr. Sellars then said was inconsistent with his testimony in court.

In my opinion although the site was open and inviting, the Greens were nevertheless trespassing when they entered upon it. There is no definition of the term "trespass" contained in the Indian Act and, in the absence of such, I believe that the principles of the common law apply: see *Regina v. Gingrich* (1958), 29 W.W.R. 471, 31 C.R. 306, 122 C.C.C. 279 (Alta. C.A.) (a case which escaped Mr. MacAdams' attention despite obvious diligence). It is clear beyond any doubt that the Greens' entry onto the reserve lands was a common law trespass: see *Sorlie v. McKee*, [1927] 1 W.W.R. 56, 21 Sask. L.R. 330, [1927] 1 D.L.R. 249 (C.A.), and also Salmond on Torts, 16th ed. (1973), at p. 38 et seq.

Crown counsel submits that even if the Greens were trespassing upon the lands of the Soda Creek Indian Band, Mr. Sellars, having no specific authority, had no justification for taking it upon himself to decide that the Greens, being trespassers, should be caused to depart.

Defence counsel submits that s. 41 of the Criminal Code provides justification for Mr. Sellars' actions.

I note in passing that there is nothing before me to indicate that the band council had enacted any bylaw under s. 81(*p*) of the Indian Act. If Mr. Sellars had any authority to remove the Greens from the reserve lands as trespassers, he derived that authority only from the fact that he was an adult member of the band.

In my opinion it would be quite unrealistic to say that Mr. Sellars, an adult member of the Soda Creek Indian Band, residing on the reserve lands, should be denied the right afforded other citizens of Canada to remove trespassers from property in which, in my opinion, he holds a very real interest. And, having the right to remove trespassers from the band lands, Mr. Sellars had the accompanying right to use force provided he used no more force than was necessary in the circumstances.

On that issue defence counsel has referred me to a number of authorities which I have considered. Those authorities are: *Rex v. Kinman* (1911), 16 B.C.R. 148, 18 C.C.C. 139 at 145, 17 W.L.R. 439 (C.A.); Dicey's Law of the Constitution, note 4, at p. 489 et seq.; *Regina v. Baxter* (1975), 33 C.R.N.S. 22, 27 C.C.C. (2d) 96 at 113 (Ont. C.A.); *Regina v. Bushman*, 63 W.W.R. 346, 4 C.R.N.S. 13, [1968] 4 C.C.C. 17 (B.C. C.A.), and *Regina v. Taylor* (1970), 73 W.W.R. 636 (Y.T.).

If Mr. Sellars' use of force in obtaining and displaying his rifle did not amount to more force than was necessary in the circumstances, then his actions were justified and, in my opinion, it could not be said that he possessed the rifle for a purpose dangerous to the public peace.

If, however, as Crown counsel submits, Mr. Sellars' actions were extreme and irrational — an excessive use of force — then the Crown has established a basis for a finding that Mr. Sellars was in possession of the rifle for a purpose dangerous to the public peace.

In attempting to decide this issue, I have reread the basic authorities dealing with s. 83 charges. They are: *Regina v. Flack*, supra; *Regina v. Badenoch*, 65 W.W.R. 124, 4 C.R.N.S. 293, [1969] 1 C.C.C. 78 (B.C. C.A.); *Regina v. Nelson*, 19 C.R.N.S. 88, [1972] 3 O.R. 174, 8 C.C.C. (2d) 29 (C.A.); *Regina v. Chalifoux*, [1974] 1 W.W.R. 82, 24 C.R.N.S. 314, 14 C.C.C. (2d) 526 (B.C. C.A.), and *Regina v. Knudsen*, supra.

On the day in question Mr. Sellars had his rifle in his truck for a proper purpose. He had been hunting. When he encountered Mr. Green, who did not quickly express an intention

to leave the reserve lands, Mr. Sellars secured his rifle, admittedly intending to create some fear in the minds of the Greens. It must, however, be recalled that Mr. Sellars was himself apprehensive at that stage. Mr. Green had shut the trailer door upon him. Somebody had remarked that Mr. Green had something in his hand. Mr. Sellars testified "I didn't know what he might have." And so, prompted by his own apprehensions in part but primarily by his wish to scare the Greens into an early departure, Mr. Sellars got out his rifle.

I have no hesitation in saying that that was a foolish thing for Mr. Sellars to do. But that is the wisdom of hindsight.

I have a great deal of doubt about the wisdom of my condemning Mr. Sellars as a criminal for his actions that night. In short, I believe I must acquit him on the charge under s. 83 of the Criminal Code.

As indicated earlier in these reasons count 1 must also be dismissed.

MANITOBA COURT OF APPEAL

Guy, Monnin, Hall, Matas and O'Sullivan JJ.A.

Regina v. Hicks

Criminal law — Importing of narcotic — Aircraft seized by peace officer — Restoration refused as possible conflict with future order for forfeiture — Certiorari granted to rehear application to restore — Restoration and future forfeiture not necessarily conflicting — Clear words needed to deprive person of property — The Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 5(1), 10(1)(c), (6), (8), (9).

Certiorari — Court of Appeal having original concurrent jurisdiction.

An aircraft belonging to the applicant was seized under s. 10(1)(*c*) of the Narcotic Control Act. He applied to have it restored under s. 10(6). The judge refused on the grounds that, although the applicant met the conditions for having the aircraft restored, s. 10(6) was subservient to s. 10(8), (9), which provided that the Crown might apply to have the aircraft forfeited; if forfeiture was applied for, there might then be two conflicting court orders respecting the aircraft.

On an application for an order of certiorari quashing the refusal to restore, *held*, the order was quashed. Clear terms were needed before a person could be deprived of property and, as s. 10(8), (9) did not say that an item should remain seized or that no order of restoration could be made and as an order of restoration was not necessarily inconsistent with an order of forfeiture, certiorari was granted.

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THE QUEEN v. STRONG.

Indian lands—Statutes 2nd Vic., ch. 15, s. 1, and 12 Vic., ch. 9. s. 1., construction of—Evidence.

Under the statute of 2nd Victoria, chapter 15, section 1, parol testimony by one witness deposing, to the best of his belief only, to the appropriation of the lands in question to the residence of Indian tribes, and to the non-cession of such lands to her Majesty, is sufficient *prima facie* evidence of those facts.

In regard to lands in the occupation of the Indians, it is unnecessary, in the proceedings of the commissioners, under the statutes 2 Victoria, ch. 15, and 12 Victoria, ch. 9, or by express evidence to negative the exceptions specified in the latter of those statutes.

The finding of the commissioners under those statutes, is not bad for not adjudging that possession should be relinquished by the trespasser.

This was one of several appeals from the judgment of commissioners under the statutes 2 Victoria, chapter 15, and 12 Victoria, ch. 9.

The petition filed in this matter stated that the petitioner was by a summons served in October, 1849, called upon by *David Thorburn* and *Charles Bain*, Esquires, to appear before them on the 26th of the same month, to answer to a charge contained in such summons, a copy of which was set forth, and was as follows:—

Statement.

"*Province of Canada, Gore District: to wit. To James Strong, presently residing on the Indian Reservation in the township of Tuscarora, in the said district, yeoman.*

"Whereas you have this day been charged before us, *David Thorburn* and *Charles Bain*, Esquires, two of the commissioners appointed to carry into effect the provisions of the statute of Upper Canada, 2nd Victoria, chapter 15, intituled 'An act for the protection of the lands of the Crown in this province from trespass and injury,' and also an act of the provincial parliament of Canada, passed in the 12th year of her Majesty's reign, chapter 9, intituled 'An act to explain and amend an act of the parliament of the late province of Upper Canada, passed in the 2nd year of Her Majesty's reign, intituled 'An act for the protection of the lands of the Crown in this province from trespass, and injury, and to make further provision for that purpose;' on the oath of one credible witness that you, the said *James Strong*, have unlawfully entered upon and possessed yourself of a portion of the Indian lands, being the south half of lot No. 35, in the 3rd concession in the said township of

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Tuscarora and district aforesaid, and still continue unlawfully to occupy the same, these lands being a part of the reserved lands of, and belonging to, the Six Nations of Indians in the township and district aforesaid, and reserved for their especial use and benefit, such possession being illegal and contrary to the provisions of the aforesaid statute for the protection of such Indian lands. These are therefore to require you, by the authority vested in us as commissioners, to appear before us at Newport in the township of Brantford, in said district, on Friday, the 26th day of October, at the hour of eleven o'clock, a. m., of the same day, within the inn of Matthias Wilson, to answer the said charge, and to be dealt with according to law. Herein fail you not.

"Given under our hands and seals the twenty-third day of October, in the thirteenth year of Her Majesty's reign, and in the year of our Lord, 1849."

That the petitioner duly appeared to such summons on the day named, when Messrs. Thorburn, Bain and Clench, (the commissioners,) after hearing the evidence, in the judgment or conviction of the commissioners set forth, decided and adjudged, that the petitioner was illegally occupying, or in possession of, the south half of lot No. 35, in the 3rd concession of the township of Tuscarora, in the district of Gore; and in pursuance of such decision, the said commissioners afterwards drew up a judgment or conviction in the words following: Statement.

"*Province of Canada—Gore District, to wit.*—Be it remembered that on the 23rd day of October, 1849, at Newport, in the township of Brantford, in the district of Gore, *Peter Smith*, of the township of Onondaga, in the said district, Indian interpreter, personally came before us, *David Thorburn* and *Charles Bain*, Esquires, two of the commissioners under and by virtue of that certain statute of that part of the province of Canada formerly called Upper Canada, passed in the second year of the reign of Her Majesty Queen Victoria, intituled 'An Act for the protection of the lands of the Crown in this province from trespass and injury,' and also of a certain other statute of the province

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of Canada, passed in the twelfth year of the reign of Her said Majesty, intituled 'An act to explain and amend an act of the parliament of the late province of Upper Canada, passed in the second year of Her Majesty's reign, intituled 'An act for the protection of the lands of the Crown in this province from trespass and injury, and to make further provision for that purpose;' and informed us that *James Strong*, of the township of Tuscarora, in the said district of Gore, in the said province, not being one of the tribes of Indians hereinafter mentioned, had possessed himself of, and was at the time of the said information still occupying and in possession of that certain piece or parcel of land, being the south half of lot No. 35, in the 3rd concession of the said township of Tuscarora, in the said district of Gore, the same being part of a parcel or tract of land appropriated for the residence of certain Indian tribes in that part of this province heretofore constituting the province of Upper Canada,—that is to say, the Six Nations Indians, and for the cession of which to Her Majesty no agreement had been made with the tribes occupying the same; and that he, the said *James Strong*, refused to remove from the occupation thereof, whereupon the said *James Strong*, after being duly summoned to answer the said information and complaint, duly appeared before us pursuant to the said summons, and having heard the matters in the said information, declared he was not guilty of the said matters. Whereupon we, the said commissioners, did proceed to enquire into the truth of the matter in the said information contained, and then, on the day and at the place in the said summons mentioned, that is to say on the 26th day of October, A.D. 1849, at Newport, in the township of Brantford, in the said district, one credible witness, to wit, *Peter Smith* aforesaid, upon his oath deposeth and saith in the presence of the said *James Strong*, that the said *James Strong* is not one of the Indian tribes aforesaid, and that he, the said *James Strong*, as the deponent verily believes, at and before the time of making the said complaint, was in the possession and occupation of the same parcel of land from that time to and until the examination of this deponent; he, the said *James*

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Strong, as this defendant verily believes. having no right or title whatever to the said land or to occupy or possess the same, the said land being a part of the parcel or tract of land aforesaid, as he, this deponent, verily believes, and appropriated for the residence of the said Indian tribes, and that the said tract was and is in the occupation of the said tribes, and that no agreement for the cession of the same tract to Her Majesty hath, as this deponent verily believes, been made with the tribes occupying the same; and that the said *James Strong*, being called upon, admits that he was then on the said south half of lot No. 35, in the 3rd concession of the said township of Tuscarora, and stated that he would continue to work upon the same, and that he was working the said land for his father; and one *Frederick John Cheshire* having been called as a witness, by and on behalf of the said *James Strong*, the said *Frederick John Cheshire* upon his oath deposeth, and saith that the said *James Strong* requested him, this deponent, to produce a letter from the civil secretary, of date Oct. 1845, which this deponent hath not now at the time of his examination in his possession; that deponent will have to hunt for the same among his papers; that there are other papers bearing upon this case which deponent cannot particularise, and which he cannot at present produce. Therefore it manifestly appearing to us, commissioners as aforesaid, that the said south half of lot No. 35, in the 3rd concession of the said township of Tuscarora, was and is land appropriated for the residence of the said Indian tribes, and for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same; and that the said *James Strong*, not being one of the Indian tribes as aforesaid, before the making of the said information as above stated, and from thenceforward continually to and until this time, has illegally possessed himself of and is in unlawful possession and unlawful occupation of the same land, contrary to the form of the statutes aforesaid; we do hereby find and determine that the said *James Strong* did illegally possess himself as aforesaid of the land aforesaid, and that he hath continued from thence hitherto, and still is in the unlawful

Judgment.

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possession and occupation of the same land contrary to the form of the statutes aforesaid. Given under our hands and seals the 26th day of October, A.D. 1849."

That after the 26th October, and before the service of the notice of appeal thereinafter mentioned, the petitioner was served with a notice of such judgment or conviction, signed by the said three commissioners, in the words and figures following, that is to say:

"*Province of Canada, Gore District, to wit.* To *James Strong*, residing in the township of Tuscarora, in said district: you are hereby required to take notice that we have, on the evidence produced before us this day, found and determined that you are illegally occupying, or otherwise in illegal possession of, the south half of lot No. 35, in the 3rd concession of the township of Tuscarora, in the district of Gore, in the said Province, the same being and forming a part or portion of the lands appropriated for the residence of certain Indian tribes in that part of this province heretofore constituting the province of Upper Canada—that is to say, the Six Nations Indians—and for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same: we, *David Thorburn*, *Joseph B. Clench*, and *Charles Bain*, Esquires, three of the commissioners appointed in pursuance and under the provisions contained in a certain act of the provincial parliament of that part of this province heretofore constituting the province of Upper Canada, made and passed in the second year of the reign of her present Majesty, intituled 'An act for the protection of the lands of the Crown in this province from tresspass and injury,' and also an act of the provincial parliament of Canada, passed in the 12th year of Her Majesty's reign, chapter 9, intituled 'An act to explain and amend an act of the parliament of the late province of Upper Canada, passed in the 2nd year of Her Majesty's reign, intituled 'An act for the protection of the lands of the Crown in this province from trespass and injury, and to make further provision for that purpose,' do hereby require you to remove from the occupation or possession of the above mentioned land, within the space of thirty days from the day of the

Statement.

service of this notice. Given under our hands, this twenty-sixth day of October, in the year of our Lord, 1849."

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That the said notice was the only notice of such conviction or judgment which the petitioner received until after the service of the notice of appeal, but after the service of such notice, the said conviction or judgment in the form hereinbefore set forth, was by the said commissioners placed on the files of this honourable court.

That the petitioner, on the twenty-second day of November, 1849, served the said commissioners with a notice of appeal from the said judgment, decision and conviction, to this court, pursuant to the said statutes in the said summons, conviction and notice mentioned.

That the petitioner was advised that the said judgment and conviction of the said commissioners were erroneous, and appealed therefrom to this court: for the following reasons:—

1. Because the evidence adduced before the said commissioners, as appears by the said judgment or conviction hereinbefore set forth, was and is insufficient to sustain the said judgment or conviction, and in particular the alleged trespass was not proved against the petitioner by legal evidence, and also it was not proved by any legal or sufficient evidence that the said premises formed a part or portion of the lands appropriated for the residence of certain Indian tribes in that part of the province heretofore constituting the province of Upper Canada; that is to say, the Six Nations Indians, and for the cession of which to her Majesty no agreement hath been made with the tribes occupying the same, as stated in the said notice of the 26th of October, 1849.

Statement.

2. Because in fact the said land has been long ago ceded and surrendered by the Six Nations Indians to the government of this province, as will appear if this honourable court will cause the fact to be enquired into, under, and by virtue of the said act of 2nd Vic., ch. 15; but the evidence of such surrender your petitioner did not, and could not adduce before the said commissioners, the same being in the possession of the said court themselves or the Indian depart-

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ment, or some public department office of the government of this province.

3. Because it was not proved on the occasion aforesaid that no grant, lease, ticket of location, or purchase or letter or license of occupation had been issued for the said premises, so as to give the said commissioners power to act in the said matter under and according to the said first section of the said act of 12 Vic., ch. 9.

4. Because the said conviction is bad; for that the said premises are not described, either in the said summons, notice, or judgment, or conviction, as land for which no grant, lease, ticket, either of location or purchase, or letter or license of occupation hath been issued, and from all that appears from the said summons, notice, and judgment or conviction, some such lease, ticket or letter of license may have issued.

5. That in fact the petitioner, and those under whom he claims, have held and occupied the said premises under

Statement.

license and permission of the government of this province, and so it would appear if this honourable court would cause an enquiry to be made into the matter, and permit evidence thereof to be given, but the petitioner was unable to prove such fact before the said commissioners, because all the documents relating to the said premises and other lands in the same township were long ago given up by the settlers on the said lands to the commissioners at their request, with a view to a settlement and adjustment of the claims of the said settlers to the said lands, and the question of their title thereto, but which settlement or adjustment has never taken place.

6. That the said summons and conviction are bad in form, for following and being according to the words of the first section of the said act of 2 Vic., ch. 15, which section is in part repealed, and not according to the words of the first section of the said act of 12 Vic., ch. 9.

7. That the said summons, notice, and conviction, purport to be made in pursuance of both the said acts of parliament, but do not shew that the said commissioners had, or if so, how they professed to have any jurisdiction in the matter under the said act of 12 Vic., chap. 9, and are

for that reason bad in form, and because the said summons, notice and conviction, are for many other good and sufficient reasons bad in form. 1850. The Queen v. Strong.

8. Because the evidence of the said *Peter Smith* in the said judgment or conviction mentioned, does not establish that there was no agreement to cede any part of the said lands in Tuscarora to Her Majesty, but he the said *Peter Smith* states on his belief only, that there was no agreement to cede the whole of the said lands; and, therefore, upon the said deposition of the said *Peter Smith* the said commissioners were not warranted in determining that there was no agreement to cede the land in question in this matter to Her Majesty.

9. Because for any thing that appears in the said judgment or conviction of the said commissioners, the said land in question may have been ceded or agreed to be ceded to the Crown before the commencement of the reign of Her present Majesty.

10. Because the said commissioners have not found or determined that there were or are any tribes of Indians occupying the said lands and claiming title thereto, and because occupancy alone by any such tribe or tribes, without any claim of title, is not sufficient to give the said commissioners jurisdiction under the said statutes or either of them. Statement.

11. Because there is no time stated in the said judgment or conviction, as the time when the petitioner did take or was in such alleged illegal possession of the said premises.

12. Because there is no sufficient evidence to bring the said case within the jurisdiction of the said commissioners or either of them, and because there was no sufficient evidence to sustain the said judgment and conviction.

13. Because the proceedings of the said commissioners are otherwise illegal, informal and incorrect.

The prayer of the petition was, that this court might annul the said decision of the said commissioners, or order such further enquiry to be made, or direct such issue at law to be tried, as to the court might seem meet, and that the said commissioners might be ordered to pay the costs of the

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petition in the matter aforesaid, and in the matter of the appeal, or make such order and direction in respect of the said costs as to the court might seem meet.

Mr. *Cameron*, Q. C., and Mr. *R. Cooper* for the appellant.

The act of 2nd Victoria, chapter 15, empowers the commissioners to receive information, &c., as to the lands, for the cession of which to Her Majesty no agreement has been made; and the 12th Victoria, chapter 9, extends the jurisdiction to all lands for which no grant, letter or license of occupation, &c., has been issued, repealing for that purpose the provisions of the former statute. So much of the former statute as restricts the jurisdiction is repealed by the latter, and the two acts must be taken together—indeed the commissioners profess to have acted under both.*

Argument.

*By sec. 1, of 21 Vic., chap. 15, after reciting that the lands appropriated for the residence of certain Indian tribes in this province, as well as the unsurveyed lands, and lands of the Crown ungranted, and not under location or sold, or held by virtue of any lease or license of occupation, have, from time to time, been taken possession of by persons having no lawful right or authority so to do; and that the said lands have also been from time to time unlawfully entered upon, and the timber, trees, stone, and soil, removed therefrom, and other injuries have been committed thereon; and that it is necessary to provide by law for the summary removal of persons unlawfully occupying the said lands, as also to protect the same from future trespass and injury; it is enacted, "That it shall and may be lawful for the "Lieutenant-Governor of the province, from time to time, as he shall deem "necessary, to appoint two or more commissioners under the great seal of "this province, to receive information, and to enquire into any complaint "that may be made to them or any of them against any person, for illegally "possessing himself of any of the aforesaid lands, for the cession of which "to Her Majesty no agreement has been made with the tribes occupying "the same, and who may claim title thereto, and also to enquire into any "complaint that may be made to them or any one of them, against any person "for having unlawfully cut down or removed any timber, trees, stone, or soil, "on such lands, or having done any other wilful and unlawful injury thereon."

The 1st section of 12th Vic., chap. 9, after reciting that it is expedient to explain and amend the 2nd Victoria, chap. 15, enacts, "that so much of the "first section of the said act as doth or may in anywise limit or restrain the "provisions thereof, or the jurisdiction of the commissioners appointed, or "to be appointed, under the authority of the same, to lands, for the ces-"sion of which to Her Majesty no agreement hath been made with the tribes "occupying the same, and who may claim title thereto, shall be, and the "same is hereby repealed, and that the said act and all the provisions "thereof shall extend, and shall be construed to extend to all lands in that "part of this province called Upper Canada, whether such lands be sur-"veyed or unsurveyed, for which no grant, lease, ticket, either of location "or purchase, or letter or license of occupation hath been, or shall have "issued, either under the great seal or by or from the proper department "of the provincial government to which the issuing of the same at the time "belonged, and whether such lands be part of those usually known as "crown reserves, clergy reserves, school lands or Indian lands, or by, or "under any other denomination whatsoever, and whether the same be held "in trust, or in the nature of a trust for the use of the Indians, or of any "other parties whomsoever."

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The convictions should have used the words of the recent act, whereas they speak of lands which have not been ceded; but say nothing of the lands being lands for which no grant, location ticket, &c., have been issued. The exception of the clause which is in part repealed, is negatived, but the exception of the recent act—the law now in force—is not negatived. A conviction under a statute must negative the exceptions contained in it. (*a*) It was also necessary to use the words of the statute as to the claim of title. The lands are spoken of in the statutes as lands occupied by tribes who *claim title thereto*, but the conviction speaks of occupancy only.

Another exception, which it was equally necessary for the conviction to negative, is that respecting the cession to the Crown. The lands are to be those for which no agreement for cession has been made on the part of the Crown with the tribes occupying them. The conviction says there has been no agreement with Her Majesty; but for all that, they may have been ceeded to any of Her Majesty's predecessors. The act itself shows the necessity for negativing this exception, for in the form given for the writ of removal, the words, "our predecessors," are inserted, and the same words are used in the form B., for the writ of *fieri facias*. The recitals in these forms describe the land as "not ceded to us or our predecessors." But in the conviction it is not stated but that the lands have been ceded to Her Majesty's predecessors, and it seems in fact that they have.

Argument.

But the evidence on which the convictions purport to be made is clearly insufficient. It is the mere information and belief of one witness. He believes the fact for no reason that he gives us; and his information he may have got any where; it is no evidence on which a court should proceed to evict settlers from their homes. The evidence on which to found such a conviction should be, as in all other like cases, the best evidence, and the documentary evidence as to the title to these lands, the officers of the Crown could produce, but the settlers could not.

The statute is a penal one, for it empowers the commis-

(*a*) The King v. Jukes, 8 Term Reports 542.

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sioners to issue warrants, not only for the ejectment of the parties convicted, but also to commit them to gaol; it enables them also to impose a fine, not exceeding £20. Under such an act it is clear that the utmost strictness should be observed in the framing of the summons and convictions, and that no conviction should be made except on the best and on conclusive evidence. The onus of proof is purely on the accuser, not on the accused. Here this witness calls the land in question part of a certain tract, &c., and says the whole of that tract has not been ceded. How do we know then, but that part of it has been ceded, and that the part ceded is the very land now in question? Were only one acre ceded, it should appear which it is; so that we may all see whether the part in question is or is not ceded, which is left quite undetermined by this evidence. Another defect in the conviction is, that it does not state what punishment is ordered by the commissioners. They are to impose a fine, and in the conviction they should state that they had done so, and its amount.

Argument.

There cannot be a conviction on the ground that the lands were never ceded; because, although no evidence was given of it, yet it is a well known historical fact that they have been ceded. They were ceded by the Mississagua Indians in 1792, and again by the Six Nations on the 18th day of January, 1841. True, this last was a surrender in trust for sale, but still a surrender, and sufficient to take the case out of 2 Vic., chap. 15. But, admitting that the settlers did not (not having the documents) prove their titles, there could be no proper conviction without evidence to support it. An accused party cannot be legally convicted, merely because he cannot prove his innocence.

It is said on the other side that this is not a penal statute. Now "a penal act is one whereby a forfeiture is inflicted for transgressing the provisions therein contained." This act creates a crime and inflicts various penalties. An act which does this must receive the very strictest construction in favour of the accused. (a) "No man incurs a penalty unless the act which subjects him to it is clearly both within

(a) Dwarris on Statutes, 642, 750; Looker v. Halcomb, 4 Bing., 183.

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the spirit and the letter of the statute, imposing such penalty." —Dwarris 763. The danger arising from the violation of those rules is, that then, as was said by Chief Justice *Best*, in *Fletcher* v. Lord *Sondes*: (a) "The fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws."

The evidence of *Smith* is clearly insufficient, if for no other reason, because it is not such as, if false, would support an indictment for perjury. For that purpose the oath must be positive and absolute. If one only swears as he believes, thinks or remembers, he cannot be convicted of perjury, except in a case where he must have known that the fact was contrary to what he stated to be his belief; (b) and *Smith* is safe enough in that view, for he perhaps knew nothing about the matter, one way or the other. There is a failure then of proof of a material fact, and the accused must have the benefit of the doubt. (c) There is no precedent for prosecuting a man for trespass against the Crown, and convicting him merely because he cannot prove his own innocence. For these reasons, therefore, they submitted the conviction was bad, and should be quashed. Amongst the authorities cited, were—*Rex* v. *Lloyd*; (d) *The King* v. *Thompson*; (e) *The King* v. *Benwell*; (f) *The King* v. *Clarke*; (g) *The King* v. *Lammas*; (h) *The King* v. *Harris*. (i)

Argument.

Mr. *Wilson* and Mr. *L. W. Smith* for the Crown.—The second act only extends the jurisdiction, which the former one gives to the commissioners—it does not repeal it, and a conviction may be founded upon the first one alone. It need not negative the exceptions not contained in both acts.

It is quite clear that the parties were in possession. It is also evident enough that these are lands over which the statutes give the commissioners jurisdiction. This is sufficiently proved by *Smith*. If the appellant had any right, or relied upon any facts which were a sufficient answer to the complaint, he should have produced and

(a) 3 Bing. 580.
(b) Hawk. P. C. 483.
(c) Best on Ev. 92, 93, 99; 1 Stark. Ev. 500.
(d) Strange, 996.
(e) 2 T. R. 18.
(f) 6 T. R. 75.
(g) 8 T. R. 220.
(h) Skinner, 562.
(i) 7 T. R. 238.

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proved them before the commissioners. The commissioners are to find whether the party is a trespasser, and they state that they have so found. *Smith* proves, and we contend sufficiently, that the appellant has no title. If this evidence be untrue there was an opportunity to contradict it by other evidence; but it does not seem that this was attempted. It is alleged, that there have in fact been cessions and surrenders of these lands; but if so, why was not evidence of this given, so as to rebut the testimony of *Smith?* Under the evidence which was given, the commissioners have come to the only conclusion which they properly could arrive at.

The words in the conviction "for the cession of which to Her Majesty," &c., are sufficiently within the meaning of the statute. It is not necessary in the convictions to use the precise words of the statutes; we find, that the lands are the lands of the Indians; that they are in the occupation of the Indians, and that no cession of them has been made. Of course, then, the Indians must be "claiming title" to the lands, but that need not be stated in so many words. If they are still Indian lands unceded, who can be claiming title to them properly but the Indians?

Argument.

The jurisdiction under these acts was intended to be summary, and it would be injurious to permit appeals on such grounds as are here advanced. The conviction is in fact regular enough; it states all that it is necessary to show that the power of the commissioners was properly exercised. The cases referred to were—*Tarry* v. *Newman;* (*a*) *The Queen* v. *Stock;* (*b*) *Lee* v. *Clarke.* (*c*)

The judgment of the court was delivered by—

THE CHANCELLOR.—This is one of several appeals from the decision of certain commissioners, appointed under a statute of the parliament of Upper Canada, passed in the 2nd year of Her Majesty's reign. The grounds of appeal, stated in the petition, are very numerous; but upon the argument, the learned counsel for the appellant rested his case upon the following points: first, that the evidence is insufficient to support the "conviction," (as the judg-

(*a*) 15 M. & W. 645; Stra. 1066. (*b*) 8 Ad. & E. 405. (*c*) 2 East. 338.

ment of the commissioners was termed throughout the argument.) Secondly, it was argued that the conviction is bad, for the following defects: first, because it does not negative the exceptions contained in the first section of the 12th Vic., ch. 9; secondly, because the allegation in the conviction is, that the entire tract named in the township of Tuscarora had not been ceded to Her Majesty, whereas it should have been; that the particular parcel on which the trespass is said to have been committed had not been ceded; thirdly, because the allegation is, that the tract had not been ceded to Her Majesty; whereas a cession to any of Her Majesty's predecessors should have been negatived; fourthly, because it is not alleged that the Indian tribes claimed title to the land in question; and lastly, it was argued that the conviction is defective, in not having adjudged that the appellant should relinquish possession.

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As regards the evidence, I am of opinion that no case has been made requiring our interference. *Smith* was no doubt a competent witness. His evidence satisfied the commissioners. And I am of opinion that it is *prima facie* sufficient to warrant their judgment. So far as that evidence is affirmative, establishing the fact of trespass upon lands appropriated for the residence of Indian tribes, I am unable to perceive why the testimony of this witness should not be regarded as affording sufficient ground for the commissioners to proceed upon. So far as the evidence is of a negative character, the complainant must, from the nature of the thing, be permitted to proceed in the first instance upon a *prima facie* case. It is obvious that conclusive proof could not have been adduced of those negative allegations; and had all the officers of government been summoned to give evidence upon the hearing of the complaint, still the evidence would have been open to the same sort of objection as is made to the testimony of *Smith*. On the contrary, had the *prima facie* case, made by the complainant, been unfounded, it was open to the appellant to have established the affirmative by positive proof; but neither before the commissioners, nor in this court, has any such evidence been adduced. I am of opinion, therefore, that the

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evidence below was sufficient to warrant the judgment; and that no case has been made in this court to justify us in disturbing it.

But on proceeding to consider the other grounds of objection to this judgment, I must observe, that I cannot concur in the principle upon which this case has been argued. Throughout the discussion the judgment was treated as a conviction—properly so called; and the arguments used, and the cases cited, were such as would have been used and cited, had this been a proceeding to quash such conviction. But it is obvious that this judgment cannot be regarded in the same light as a conviction; and the petition of appeal is in no respect analogous to a proceeding to quash a conviction. The 11th section of the 2nd Victoria gives an appeal to this court, and empowers the Vice-Chancellor to "revise, alter, affirm, and annul the decision, and to make such orders as to costs and otherwise, as to him may seem meet." The bare recital of the jurisdiction conferred upon us, is sufficient to establish the inapplicability of the decisions which were cited. Possibly the clearest refutation of many, if not all the arguments adduced, would be found in a careful perusal of the clause granting the appeal. One thing is apparent; that the legislature did not intend that the judgments of the commissioners should be annulled or reversed on merely technical grounds. We are authorised to alter and amend.

Judgment.

But considering the case in the light in which it was viewed upon the hearing of the petition, I am of opinion that the arguments addressed to us, were based upon an erroneous view of the statutes. It was contended in the first place, that the 12th Victoria, chapter 9, had repealed altogether the first section of the 2nd Victoria, ch. 15; inasmuch as the latter act, it was argued, repeals so much of the first clause of the former as restricts the powers of the commissioners to lands, for the cession of which to Her Majesty no agreement had been made; and it was argued that inasmuch as that clause is exclusively conversant about such lands, therefore the clause must be treated as entirely repealed. I do not feel the force of this argu-

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ment. The former statute recites in the preamble the different circumstances under which the public lands had been subjected to trespasses of various kinds, and in regard to which it would be expedient to arm commissioners with summary jurisdiction. Of the lands thus enumerated, the first class consists of lands appropriated for the residence of certain Indian tribes; and this class is treated throughout as a distinct denomination. The enacting clause, however, after authorising the appointment of commissioners, and empowering them to enquire respecting trespasses to "any of the aforesaid lands," (not confining it to Indian lands,) adds this curious qualification—"for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto." It is not easy to conjecture the object with which such a qualification was introduced. It would seem in effect almost to nullify the statute. But it is quite obvious, that the qualification is by no means exclusively applicable to the first class of land (those appropriated for the residence of Indian tribes) as was argued, but affects equally all the denominations mentioned in the preamble. The 15th chapter of the 2nd Victoria, therefore, was not confined in its operation to "lands appropriated for the residence of Indians," in the sense in which those terms are used in the preamble, but extended to all unceded lands; and when the 12th Victoria, chapter 9, repealed so much of the former act, as limited the operation thereof to "lands, for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto," (using the very terms employed in the former act,) the effect of that provision was, to leave the former act applicable to all the lands enumerated in the preamble without qualification, and amongst the number, to lands appropriated for the residence of certain Indian tribes. If this be the proper construction of the acts, then upon the grounds on which the case was argued, and assuming the restrictions in the latter act to extend to all the denominations of land enumerated in the former, it would still seem that the exceptions in the latter act cannot have any *greater* effect than if they had

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been contained in a subsequent clause of the former act; in which case it would not have been necessary to have negatived them even in a conviction. I am inclined to think, however, that upon the true construction of both acts the legislature must be intended to have meant the exceptions contained in the latter act to apply to those denominations of land only which are enumerated after the first class, (namely, the lands appropriated for the residence of Indians,) treating that class as sufficiently distinct, requiring no exception; as indeed it would seem to be. For land appropriated for the residence of Indians, cannot, while so appropriated, fall within any of the enumerated exceptions; the moment it becomes the subject of either grant, lease, or letter of license, it ceases to be land appropriated for the residence of Indians; the affirmation that it is land so appropriated, involves in it the negative of all the exceptions, and to negative them expressly would be useless tantology. If this construction be sound, all the objections must fail; because there is no exception to be negatived. but whether this be the true construction or not, it seems to me that the objections most relied on, as well as to the evidence as to the form of the judgment, cannot be sustained. If that portion of the former act which restricted the jurisdiction of the commissioners to lands for the cession of which no agreement had been made, has been repealed, then both the allegations and proof upon that subject were superfluous; the precise effect of the statements in the judgment in relation to that matter, whether sufficiently certain, or open to the objections taken to them, need not be determined; and the silence of the judgment as to the Indian tribes claiming title to the lands is immaterial.

Judgment.

Upon this view the 2nd, 3rd, and 4th objections entirely fail; and the arguments as to the deficiency of the evidence lose much of their weight. But it was urged in the last place that the finding of the commissioners is defective, in not having adjudged that the appellant should relinquish possession within the time allowed by the law. Here, however, as in the other branches of the case, the learned

counsel seem to have been misled by the analogy supposed to exist between judgments under these acts and convictions. I remarked before, that no analogy exists, and if the observation were at all doubtful, this objection would furnish the strongest confirmation. For, however decisive the cases cited may be as regards convictions, they have clearly no bearing upon the question before us; and the express provisions of the statutes in question demonstrate that the objection is untenable. This judgment determines all that is required, namely, that the appellant was unlawfully in possession of land appropriated for the residence of Indians. The warrant of removal is in the nature of an execution upon this judgment; it may or may not be required according to circumstances; the power to issue such warrant, as well as the period at which it shall be issued, are left with the commissioners, only they are required in the first instance to issue a notice, as provided by the second section of the former act; all this is utterly inconsistent with the notion that the decision of the commissioners must adjudge the trespasser to relinquish possession within any definite period.

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Judgment.

Upon the whole I am of opinion that no case has been made requiring us either to vary, reverse, or annul the decision, and that the appeal must be dismissed with costs.

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This was also a case of appeal from the judgment of the commissioners appointed under the statute 2 Vic., ch. 15. The petition raised the same objections as are set forth in the last case, and came on for argument at the same time.

ESTEN, V. C., delivered the judgment of the court.

This is an appeal under the acts 2 Victoria, chapter 15, and 12 Victoria, chapter 9. The land in question is the north half of lot No. 6, in the 4th concession of the township of Oneida. An information was laid before the commissioners appointed under these acts, on the 17th November, 1849, by one *Peter Smith*, who is called an Indian interpreter; in pursuance of which the appellant

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claim to support it; but as the proof appears to have been admitted without objection at the trial, I do not think it should be rejected now, and would grant him leave to make the amendment now under the powers of this Court in such behalf.

The defendant also submits that the damages awarded were excessive and should be reduced. I cannot find any sufficient ground for so holding. Strong precedents to the contrary are found in *Staats v. C.P.R.* (1914) 6 W.W.R. 401, 27 W.L.R. 627, 7 Sask. L.R. 184; *C.P.R. v. Jackson* (1915) 52 S.C.R. 281, at 282, 9 W.W.R. 649; *Bateman v. Middlesex County* (1911) 24 O.L.R. 84; 25 O.L.R. 137.

In my opinion, therefore, the appeal should be dismissed with costs, and the judgment below affirmed.

BRITISH COLUMBIA

COUNTY COURT — SWANSON, C.C.J.

Rex v. Tronson

Criminal Law — Summary Conviction — Appeal From—Sittings of Court for Which Notice of Appeal Should be Given — S. 750, Cr. Code — Whether Adjournment of Sittings Should be Considered — Notice of Appeal to Wrong Sittings—Effect of.

An adjourned sittings is not to be considered in determining whether a conviction was made "more than fourteen days before a sittings of the court to which an appeal is taken," within the meaning of sec. 750 (*a*) of the *Criminal Code*. "Sittings of the court" refers to the opening day of a sittings.

If a notice of appeal under said sec. 750 is to a wrong sittings of the Court the appeal must be dismissed.

[Note up with 2 C.E.D., *Criminal Law*, sec. 80.]

Criminal Law — Indian Act, S. 115 — Residing Without Authority on Indian Reserve.

A conviction for a violation of sec. 115 of the *Indian Act*, R.S.C., 1927, ch. 98, affirmed.

[Note up with 4 C.E.D., *Indians*, sec. 8 and sec. 24A. as new section.]

Costs—Right of Crown to—Crown Costs Act, R.S.B.C., 1924, Ch. 62.

The *Crown Costs Act*, R.S.B.C., 1924, ch. 62, does not apply to a prosecution under a Dominion Act. On dismissing an appeal from a conviction under such an Act, costs were, therefore, given to the Crown.

[Note up with 2 C.E.D., *Costs*, sec. 7.]

A. D. Macintyre, for appellant.
E. C. Weddell, for Crown.

December 31, 1931.

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SWANSON, C.C.J.—This is an appeal from a summary conviction under sec. 115 of the *Indian Act*, R.S.C., 1927, ch. 98, made by Mr. H. A .Heggie, stipendiary magistrate, dated October 22, 1931, whereby the appellant, George Tronson, was convicted for that he did on October 2, 1931, at Okanagan Indian Reserve No. 1 in the county of Yale, B.C., without the authority of the Superintendent-General of Indian Affairs reside upon said Okanagan Indian Reserve No. 1.

A preliminary objection to the jurisdiction of this Court was raised by counsel for the Crown on the opening of the hearing of this appeal on November 25 last and consideration of the point was reserved, the further hearing at request of counsel for appellant being adjourned to December 17 inst. at 2 P.M. The conviction is dated October 22. On October 28 notice of appeal was served on the magistrate and on the informant, Corporal O'Reilly of the Royal Canadian Mounted Police, on October 29, and on October 28 notice of appeal was filed in the County Court Registry at Vernon. On October 21 this Court opened its sittings for October at Vernon, the sittings continuing until October 24 when the next sittings of the Court at Vernon were fixed for November 25. The December sittings opened on December 16.

The notice of appeal states that:

> The appellant intends to appeal to the County Court at Vernon at the second sittings thereof to be held next after the said conviction.

The prosecution being a federal one, the provisions regulating the appeal are defined in the *Criminal Code*, R.S.C., 1927, ch. 36. Sec. 750 states:

> Unless it is otherwise provided in the special Act,
>
> (*a*) if a conviction or order is made more than fourteen days before a sittings of the court to which an appeal is given, such appeal shall be made to that sittings, but if the conviction or order is made within fourteen days of a sittings the appeal shall be made to the second sittings next after such conviction or order.

It is contended by the counsel for the Crown that the "second sittings [of the Court] to be held next after the said conviction" would mean the sittings opening December 16 which is the wrong sittings at which to hear this appeal. It is argued that the sittings in October which began October 21 should have been disregarded, the date of the sittings of a Court being always theoretically the opening day of the sittings, and that that date had already expired at the date of the conviction; that each succeeding day of a sittings is to be regarded as an adjournment from day to day of the original sittings and that the proper notice of appeal should read that the appeal was lodged to be heard at the sittings of the Court to be held next

after the said conviction, which would have meant the sittings opening November 25. The notice of appeal bears date of October 27. As a matter of fact before that date, on October 24, the next sittings of the Court were formally fixed by the Court for November 25. His Honour Judge O'Connell held in *Rex v. Korman* (1928) 49 C.C.C. 405, that strict compliance with sec. 750 is necessary to give the Court jurisdiction and that if the notice of appeal is to the wrong sittings of the Court the appeal must be dismissed. He refers to an old Upper Canada case, *Reg. v. Caswell* (1873) 33 U.C.Q.B. 303. See also my ruling in the recent case of *Ogilvie v. Finley* [unreported] in this Court, given December 17, 1931, quoting *Rex v. Johnston* (1908) 13 C.C.C. 179, at 183 and 186; also judgment of Mr. Justice Lynch of the Court of King's Bench (Quebec) in *Rex v. Bombardier* (1905) 11 C.C.C. 216. In the latter case the learned Judge held that the "sittings of the Court" refers to the opening day of the sittings, and not to the day to which same were adjourned. See also *Seager's Magistrate's Manual*, 3rd. ed., pp. 404 and 409. See also *Trotter on Appeals from Summary Convictions*, 2nd. ed., at p. 15:

> As to adjourned sessions the rule is that the "next Sessions" must be ascertained by reference to the date of the original Sessions, and not of any adjournment thereof, as the Sessions are always considered in law as one day to whatever length they may be extended by accidental causes [quoting *Reg. v. Sussex Justices* (1865) 4 B. & S. 966, 122 E.R. 721].

This is a unanimous decision of the Exchequer Chamber, the judgment being given by Erle, C.J. It was there held that the "next Sessions" after service of an order for removal of a pauper and his family having jurisdiction over an appeal against it must be ascertained by reference to the date of the "original sessions" for the Court and not to any "adjournment." At the request of the counsel for appellant I did on November 25 adjourn hearing of the appeal, subject to consideration of this preliminary objection, the order of adjournment being endorsed on the conviction as required by sec. 751, subsec. 3. The strict practice is set out by *Paley on Convictions*, 7th ed., p. 303:

> The Sessions are to judge of the proper occasions for adjourning the hearing. But though the power of adjournment is inherent in the Sessions for their own convenience in hearing the appeal, or for any other good cause, as the absence of a witness etc., that power can only be exercised on appeals regularly brought before them, that is to say, where all the conditions as to notice etc., which are the acts of the party appealing, have been observed.

On the above authorities I am of the opinion that this appeal has been launched by the notice of appeal to the wrong sittings and accordingly this Court is without jurisdiction to hear the appeal. Following the strict practice outlined by *Paley, supra*,

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this appeal should therefore have been dismissed on November 25 and not adjourned. However, as I reserved consideration of the above point until the close of the hearing of the evidence taken on December 17, I think I should now give my judgment on the merits of the case, as another Court might take a view on the above preliminary objection different from the view I have above expressed.

Dealing with the whole case on its merits, I am clearly satisfied that the Crown has made out its case and that it has been clearly proved that the appellant has no legal right to reside on the Indian reserve in question and that he is a trespasser thereon.

It will be observed that sec. 115 of the *Indian Act*, under which the conviction herein was made, makes it illegal for "every person, or Indian other than an Indian of the band," etc. without the authority of the Superintendent-General to reside upon any Indian reserve belonging to such band, etc. The word "Indian" is defined in the interpretation clause of the Act as follows:

(*d*) "Indian" means

(i) any male person of Indian blood reputed to belong to a particular band,

(ii) any child of such person,

(iii) any woman who is or was lawfully married to such person.

I was referred to a decision in the Territories Law Reports, *Reg. v. Howson* (1894) 1 Terr. L.R. 492, to which I have not been able to have access. There is a short résumé of the points decided reported in *Digest of Canadian Case Law*, 1900-1911, at p. 2029. It is there stated that it was

held, * * * against the contention that the defendant having been shown to have actually belonged to a particular band, this disproved, or was insufficient to prove, that he was reputed to belong thereto—that the intention of the Act is to make proof of mere repute sufficient evidence of actual membership in the band.

The informant, Corporal O'Reilly of the R.C.M.P., on October 2 last in company with Constables Roy and Williams patrolled the Indian reserve in question which is within the county of Yale and found appellant residing on said reserve. He was questioned as to his reason for staying there and stated that he was staying there on the advice of Indians, who told him not to leave, that he was willing to go, but that they stopped him. He was warned by O'Reilly a month before in presence of Indian Agent Jas. Coleman that he must remove from the reserve. This he then promised to do.

Mr. J. C. Ball, former Indian agent for Okanagan agency, now Indian agent for the Vancouver agency, stated that he was appointed agent for the Okanagan Indian Agency on April 15, 1919, within which lies the Indian reserve in question. Mr. Ball first knew appellant in 1913 and 1914. He was then living at Sunnywold on the east side of Okanagan Lake in this county (the district being called Carr's Landing). It is not part of any reserve. He was living there with his family farming. On May 19, 1920, Louis Berchier died. The appellant's wife, Mrs. Tronson, then came to the Indian agent, and asked permission to come onto the Indian reserve to take care of her mother, Mrs. Louis Berchier, who was quite feeble. She was given permission by the agent. See Ex. 1. After the termination of this agreement as the mother was getting more frail Mrs. Tronson asked for permission to stay on there to take care of her mother until she died. Mrs. Berchier died on February 9, 1926. On March 2, 1926, Mr. Ball notified Mrs. Tronson to remove from the reserve. Ball saw Mrs. Tronson and appellant living on the reserve after that. Ball notified the R.C.M.P., and on June 5, 1929, in company with Sergeant Birch he met Tronson on the reserve and notified him in presence of Birch to remove from the reserve, which he promised to do. As Tronson did not remove as he promised to do proceedings were taken against him under sec. 115 of the *Indian Act*, and on February 14, 1930, Tronson pleaded guilty to residing on the reserve without authority. I admitted this evidence as to appellant's admission at that trial as part of the Crown's proof of the appellant's lack of legal status to lawfully reside on the reserve. The fact of the conviction is of no further significance to me. His plea of guilty on that occasion was admitted solely as an admission of his lack of legal status under the Act. Previously in 1926 Tronson had been charged under said section of the Act before Mr. Ball as Indian agent, and had then also pleaded guilty. *Taylor on Evidence* 9th ed., p. 529, quotes Bayley, J. [in *Heane v. Rogers* (1829) 9 B. & C. 577, 109 E.R. 215]:

"There is no doubt but that the express admissions of a party to a suit, or admissions implied from his conduct, are evidence, and strong evidence, against him."

Phipson on Evidence, 5th ed., p. 214:

The true ground of reception appears to be simply this that a party's declarations may always be taken to be true as against himself; [and quoting Baron Parke]—"Whatever a party says is evidence against himself; what a party admits to be true may reasonably be presumed to be true;" [and Lord Abinger]—"A party's own statements are in all cases admissible against himself;" [and per Pollock, C.B.]—"If a party has chosen to talk about a particular matter his statement is evidence against himself."

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Also *Phipson* at p. 220:

The form of the admission is, so far as its admissibility goes, generally immaterial. Thus admissions are receivable which are contained in Affidavits, Answers to Interrogatories in the same or former proceedings without proof of signature or putting in the questions; [and per Jessel, M.R.]—"Any statement made by a man on oath may be used against him as an admission."

Mr. Ball also took an official census of all the Indians in his agency. This census was taken under instructions from the Superintendent-General of Indian Affairs at Ottawa. Ex. 2 is the book (census) which contains the names of all Indians who have authority to reside on an Indian reserve within the confines of the Okanagan Indian Agency. A similar census of all Indians residing in B.C. was made under similar instructions. The name of the appellant, Tronson, does not appear on this official census or on any subsequent census. No permission or consent was given by the Superintendent-General for appellant to reside on the reserve in question. His status as an Indian was not recognized by the Superintendent-General. Ball states that the appellant never suggested to him at any time that he was a member of the band in question and never at any time during his (Ball's) agency did appellant make application to become a member of the band of Indians in question; that his wife did but that she was not admitted as a member of the band. Tronson's father was a white man, who was one of the old-time large cattle ranchers of the Okanagan district.

Indian Agent Coleman stated that he succeeded Ball as agent; that he has known appellant since 1924 and 1925. He has in his custody the official census of Indians in his agency, Ex. 2 and Ex. 3, and that appellant's name does not appear as an Indian on either census roll. He states that on two or three occasions he notified Tronson to remove from the reserve, that he would not take active measures to remove him if he would quietly remove, and that Tronson promised to remove, stating that he had no particular desire to stay there but that his wife desired to stay. About July 22, 1931, Mr. Coleman presided as Indian agent at the trial of a similar charge of trespass under sec. 115; the appellant pleaded guilty to the charge and was given the minimum fine on appellant's promising to remove from reserve. He states that appellant and his wife made application in October, 1930, for admission to the band and that the vote and all proceedings were taken under his supervision: that the application was forwarded to Ottawa, and was refused by the Superintendent-General at Ottawa.

Mr. R. M. McGusty, the Government agent at Vernon, testified that he is also provincial registrar of voters for N. Okanagan and commissioner of lands for the district. He states that the appellant Tronson filed an application under the *Land Act*, 1908, ch. 30, to take up a provincial pre-emption on November 3, 1908, for the south-east quarter of sec. 21, tp. 74, Osoyoos Division of Yale District, B.C., and that a pre-emption record, No. 5485, was issued to George Tronson on November 13, 1908, and later a certificate of improvement, No. 1561, and that the land was eventually Crown-granted in the name of appellant. No Indian is permitted to take up any pre-emption of Crown lands without having first obtained permission in writing to so record by a special order of the Lieutenant-Governor in Council, which permission was never granted to appellant. This is now provided by sec. 12 of the *Land Act*, R.S.B.C., 1924, ch. 131. A similar Act was in force when Tronson made his application, viz., sec. 5 of the *Land Act*, ch. 30, passed March 7, 1908. Tronson cannot blow hot and blow cold. He cannot in one breath say in effect that he is a white man and in the next say that he is an Indian. Similarly Mr. McGusty produced the original application of the appellant to be registered as a provincial voter for N. Okanagan Electoral District. No Indian is permitted to so apply. Tronson had his name placed on the voters' list on an application witnessed by Mr. Price Ellison on February 20, 1921. His name has been ever since on the provincial voters' list and is still on the list as No. 1173. This is absolutely fatal to the position Tronson now takes before this Court, that he is entitled to the rights and privileges of an Indian under the *Indian Act*.

As against all this evidence for the Crown the only evidence adduced on behalf of the appellant was that of an old Indian woman, Madelene Skomasket, who says that she is 82 years of age; that she remembers the time of the birth of Tronson, which she says occurred at his uncle's (Antoine Enoch's) house at Dry Creek on an Indian reserve, Okanagan Indian Reserve. There is no evidence as to when Okanagan Indian Reserve was so made and declared to be an Indian reserve and no evidence that it was such at time of Tronson's birth. He is admittedly a man now of about 50 years of age. The fact of birth on an Indian reserve is not at all conclusive to establish the status of an Indian. A white child might be born there or an Indian child of parents who did not belong to that particular band.

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Mr. Ellison's evidence taken at the trial before the magistrate was by consent taken as his evidence on the hearing of the appeal herein, it being alleged that Mr. Ellison was too ill to attend Court. Mr. Ellison stated that he has resided 56 years in the district; that he has known Tronson very well; that he also knew his father and mother and grandmother; that the grandmother was an Indian; that George Tronson was supposed to belong to the Head of the Lake Indian Reserve; that he lived on and off the reserve; that he believed that Tronson enjoyed the privileges of both a white man and of an Indian.

In the light of all the evidence in this case it is abundantly clear to me that Tronson has not the status of "an Indian of the band in question," that he is a trespasser on the said reserve. In the face of every legal effort to remove him on the part of the Indian Department of Canada from the Superintendent-General down to the local Indian agents, Tronson has persisted in residing on this reserve, unlawfully in my opinion.

I accordingly find the appellant Tronson guilty of the offence charged against him under sec. 115 of the Act. Under sec. 754 of the *Code* the Court may notwithstanding any defect in the conviction hear and determine the charge upon the merits and "may confirm, reverse or modify the decision of such justice." There appears to be an irregularity in the form of the conviction returned to this Court. The appellant was by the magistrate adjudged for his "said offence to be imprisoned in the Provincial Jail and there kept at hard labour for the term of one month, or to a penalty of ten dollars together with costs amounting to $32.50 in all the sum of $42.50." I have no doubt that what the learned magistrate intended to do was to sentence accused to payment of a penalty or fine and in default of payment to imprisonment. As the amount of the penalty, $10, and the costs imposed by the magistrate, $32.50, have been paid into this Court together with the costs of appeal, $50, I will make the sentence to run in this manner. The appellant, Tronson, is sentenced to forfeit and pay a penalty of $10 and costs in the magistrate's Court, $32.50. As this amount is now in Court there is no necessity to make any adjudication of imprisonment in default of payment. This appeal is therefore dismissed with costs to the Crown, fixed in the sum of $50.

The provincial *Crown Costs Act*, R.S.B.C., 1924. ch. 62. has no application to a Dominion prosecution. If this were a provincial prosecution no costs could be legally awarded either in favour of or against the Crown.

case is to be found in the Code and that we need not pass upon the question whether the definitions in ss. 252, 259 and 260 are exhaustive.

The appeal, therefore, from the judgment of the Court of Appeal, as it affects the conviction of Hughes should be dismissed; and it follows necessarily that the appeal in respect of the other respondents must also be dismissed.

Appeals dismissed.

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THE KING v. WEREMY.

Exchequer Court of Canada, Robson J.A., Deputy Judge, November 12, 1942.

Can. Ex. Ct. 1942.

Crown Lands IV—Purchase of fractional section from Crown—Acreage less than stated on government plan.

The indication on a government plan of the acreage of a fractional quarter section is not a warranty by the Crown to the purchaser or his successors in title. There cannot be an estoppel against the Crown, and it is the purchaser's or successors' risk to be satisfied as to the area and exact limits of the ground.

Statutes Considered: *Dominion Lands Surveys Act*, R.S.C. 1927, c. 117, s. 62.

Boundaries II A—Rules for fixing—Survey monuments govern.

By s. 62 of the Dominion Lands Surveys Act, R.S.C. 1927, c. 117, in ascertaining the boundaries of adjoining acreages it is the monuments which govern.

Cases Judicially Noted: *Cain* v. *Copeland* (C.A.), 67 D.L.R. 531, 15 S.L.R. 529, [1922] 2 W.W.R. 1025; *Kristiansen* v. *Silverson* (C.A.), [1929], 4 D.L.R. 252, 3 W.W.R. 322, 24 S.L.R. 106, refd to.

Statutes Considered: *Dominion Lands Surveys Act*, R.S.C. 1927, c. 117, ss. 56, 62.

Indians—Proceedings for recovery of possession of reserves—Validity of s. 39 of Indian Act.

Section 39 of the Indian Act, R.S.C. 1927, c. 98, authorizing proceedings by the Attorney-General on instructions of the Superintendent General of Indian Affairs for recovery of possession of Indian Reserves is *intra vires* the Parliament of Canada. This section is applicable to proceedings taken to recover possession of a small portion of a reserve wrongfully occupied by an adjoining land owner.

Cases Judicially Noted: *The King* v. *McMaster*, [1926] Ex. C.R. 68, apld.

Statutes Considered: *Indian Act*, R.S.C. 1927, c. 98, s. 39; *Manitoba Natural Resources Act*, 1930 (Can.), c. 29, para. 11 of Agreement.

ACTION brought by the King on information of Attorney-General of Canada on behalf of a band of Indians to recover from defendant possession of portion of reserve occupied by defendant. Judgment for plaintiff.

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C. V. McArthur, K.C. and *Frank R. Evans*, K.C., for the Crown.

M. A. Molloy, for Weremy.

ROBSON J.A., DEPUTY JUDGE:—This action was brought in the name of His Majesty the King on the information of the Attorney-General of Canada, and on behalf of the Brokenhead band of Indians. It is alleged that the defendant, a farmer and adjoining proprietor wrongfully entered upon and occupied and still occupies a portion of the reserve allotted to the band. The land in question is hay land and is of comparatively small acreage, namely 42.4 acres. The defences raised will appear as I proceed to discuss the case. One issue was to the location of the line between the Reserve and defendant's land. There was a trial with witnesses at Winnipeg, on the 29th and 30th of October, 1942, when judgment was reserved.

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

The original survey of the reserve took place before the township and range and sectional survey preparatory to settlement. The original survey of the reserve was made in 1873, but owing to uncertainty as to the boundary on the north-west, confirmation of the Reserve by Order in Council did not take place till 1916. When the township surveys were undertaken the northerly limit of sect. 25, tp. 15, rge. 6, east of the principal Meridian coincided with the southerly limit of the reserve (subject to a road allowance in between). But because of the proximity of the Reserve the north half of sect. 25 was fractional, meaning in this case that it did not contain the normal 320 acres; that the north-west quarter was accordingly fractional and did not contain 160 acres. "Fractional," of course, may mean that the normal figure is either reduced or exceeded; here it means re-

duced. This is all due to surveyor's problems on the ground which need no further elaboration.

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

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

Defendant admits that at the time of this agreement he had his mind directed to the question of acreage. He said he inquired of a Provincial Government surveyor and was shown a plan of survey (evidently a copy of a Dominion township plan) in which the acreage of the north-west quarter of sect. 25 was given at 127.28 acres; that he could not afford a survey or other means of verification, and was satisfied with what he saw on the plan. He says that he made certain measurements and thought that his acreage extended to the 42.4 acres which it is now alleged are part of this Reserve, and on which it is alleged defendant is a trespasser. Defendant says he bought the land by the acre, that he worked himself and employed men to work in making a ditch to drain the land, and that he has paid taxes in respect of the disputed area. It is testified by Mr. Donnelly, the Dominion Land Surveyor, that the road allowance was not opened between sect. 25 and the Reserve. Mr. Donnelly said there was no occupation within some miles to the north.

According to one of the departmental township plans, dated December 23, 1896, compiled from surveys in 1874, 1884, and 1888, the north-west quarter of sect. 25 contains 127.28 acres. It is said that the acreage is actually only 65.4 acres, but that was not explained and for the present purpose is immaterial. It will do the defendant no harm if I accept for the present purpose defendant's contention that when he bought from McLean he was to get 127.28 acres. I infer that the 127.28 acre content marked on the plan was calculated by the surveyor as the area of the abbreviated quarter section less the road allowance between the Reserve and the north-west quarter of sect. 25.

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Mr. Donnelly, D.L.S., was called as a witness by the Crown. He testified that from actual examination he found that defendant had fenced and occupied the 42.4 acres. There was no relevant impeachment of the surveys from which the plans produced were made, or of the testimony of Mr. Donnelly, and I must find that he located the southern boundary of the Reserve as originally laid out and as confirmed by the Order in Council by means of original monuments and his own accurate survey, and found that it was south of the 42.4 acres and that therefore defendant had no title to that portion and was in fact a trespasser.

It is unnecessary to go into a discussion of the various plans and field notes that were adduced in evidence. Suffice it to say that all these, aided by Mr. Donnelly's testimony as to discovery of the monuments, convince me as above stated. According to s. 62 of the *Dominion Lands Surveys Act*, R.S.C. 1927, c. 117 it is the monuments that count. See *Cain* v. *Copeland* (1922), 67 D.L.R. 581, 15 S.L.R. 529, and *Kristiansen* v. *Silverson*, [1929] 4 D.L.R. 252, 24 S.L.R. 106. I see no possibility in view of the evidence of the application of s. 56 of the *Dominion Lands Surveys Act*, (for the correction of errors) referred to by Mr. Molloy.

I must hold that the indication on the plan of an acreage of 127.28 acres in the north-west quarter of sect. 25 was not a warranty by the Crown to Fillmore or his successors in title, nor could there possibly be estoppel. It was at defendant's own risk to be satisfied as to the area and as to its exact limits on the ground. (See s. 62 of the *Dominion Lands Surveys Act*.) It is unfortunate that owing to his lack of skill he did not look for the monuments, or at least the monuments indicating the south-west corner of this Reserve contiguous to his own land, and which Mr. Donnelly found on his ascertainment of the lines. It can only be said as a matter of law that defendant had no right to enter upon the 42.4 acres which he occupied and which was in fact part of the Reserve. While not wishing to find the defendant untruthful but rather suppose him to be ignorant, on the evidence it would be hard to find as a fact that defendant was actually misled by the plan he saw into believing that his land extended so far as the north limit of the fence he erected —as it turns out on the Reserve.

Defendant's counsel raised the objection in point of law that s. 39 of the *Indian Act* (R.S.C. 1927, c. 98) was *ultra vires* of Parliament. That section authorizes proceedings by the Attorney-General on instructions of the Superintendent General

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of Indian Affairs for recovery of possession of Reserves. The instructions of the Superintendent General of Indian Affairs were given in this case. I gave close attention to the earnest argument of counsel for the defendant on this point, but I must say there is in my mind no room for the slightest doubt that the section was thoroughly well founded (*The King* v. *McMaster*, [1926] Ex. C.R. 68). Aside from that, however, the title here was in the Dominion Crown, subject to its treaty obligations to the Indians. In addition there was the right to protect the property of the Crown held for its wards. See para. 11 of the Manitoba Natural Resources Agreement (*Manitoba Natural Resources Act*, 1930 (Can.) c. 29) which preserved the title for the Dominion Crown.

I think there must be judgment for the Crown for possession of the 42.4 acres. The Crown does not ask for profits. In *R.* v. *McMaster* (*supra*) the late President of this Court did not award costs. I think the circumstances here equally justify me in following that course, so there will be no costs. I would recommend that defendant be given a reasonable time to remove his fence and anything else he may have on the disputed land.

Judgment for plaintiff.

WYNANT v. WELCH.

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Ontario Court of Appeal, Robertson C.J.O., Henderson and Gillanders JJ.A. November 24, 1942.

Animals I D—Negligence I A—Municipal by-law forbidding animals running at large—Damage caused by horse—Statutory negligence.

In the absence of negligence an owner of a horse is not liable for the damage caused a motor car by colliding with such horse while on a highway in breach of a county by-law, passed under the authority of s. 21(2) of the Highway Improvement Act, R.S.O. 1914, c. 40, which provides that "it shall be and is unlawful for any person to suffer or permit any horses . . . of which he is the owner . . . to run at large on any highway." Neither the Highway Improvement Act nor the Municipal Act, R.S.O. 1937, c. 266, discloses an intention to give a right of action to an individual for a breach of the by-law or to make a breach statntory negligence. Moreover, considering the limited authority of municipal corporations the by-law was not passed for the benefit of a particular class of persons as distinguished from the public at large.

Cases Judicially Noted: *Tompkins* v. *Brockville Rink Co.*, 31 O.R. 124; *Orpen* v. *Roberts*, [1925], 1 D.L.R. 1101, S.C.R. 364; *Taylor* v. *People's Loan & Savings Corp.* (C.A.), [1929] 1 D.L.R. 160, 63 O.L.R. 202 apld; *Direct Transport Co.* v. *Cornell* (C.A.), [1938], 3 D.L.R. 456, O.R. 365; *Hall* v. *Toronto Guelph Express Co.*, [1929], 1 D.L.R. 375, S.C.R. 92, 63 O.L.R. 355, distd.

"The decision of this Court in *Sywack* v. *Hrubeniuk*, [1937] 1 D.L.R. 785, 67 Can. C.C. 395, 44 Man. R. 507, is also a direct authority against this contention.

"This objection is, therefore, overruled."

In *R.* v. *Quong Wong* referred to above, the Can. C.C. and D.L.R. headnotes read as follows: "The mere misnomer of a statute will not vitiate a conviction where the offence was an offence both under the statute in force at the time and the statute named and the only change made is the carrying of the provision from one consolidation to another."

In the light of these decisions and similar cases, I am satisfied that the objection should have been taken before the accused pleaded, but having regard to the provisions of the *Revised Statutes 1955 Act* quoted, I am unable to find that there was any defect in the form of the charge, since the statutes operate retrospectively and prospectively. Further, it seems to me that it would have been proper for the Magistrate to have permitted the Crown to amend at the end of its case if an application was made.

Counsel for the Crown argues also that the defect if any is cured by ss. 492 and 493 of the new *Code* (see s. 701) but in the view I take it is not necessary for the Crown to rely on these sections.

The appeal will be allowed and accordingly the Magistrate's decision is reversed and there will be a fine of $300, being the penalty computed in accordance with the penalty section under the old Act rather than the increased penalty provided under the new Act, and costs of the trial in the Magistrate's Court.

Appeal allowed; conviction ordered.

REGINA v. WILLIAMS

Simcoe Magistrate's Court, Ontario, F.K. Jasperson, Q.C., Magistrate. January 16, 1958.

Indians —

Enforcement by municipal police officers of provisions of Highway Traffic Act (Ont.) on Indian Reservation — By s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, provincial laws of general application, in this case the *Highway Traffic Act*, R.S.O. 1950, c. 167, and the *Police Act*, R.S.O. 1950, c. 279, are applicable to Indians and Indian Reservations unless inconsistent with that Act or any other federal Act or with the terms of any treaty. In the instant case two municipal policemen discovered an Indian, the accused herein, speeding on a provincial highway and follow-

ed him into the Reservation to which he belonged and demanded production of his driver's licence. The accused ran away and was charged with obstructing police contrary to s. 110(*a*) of the *Cr. Code*. *Held*, that the police officers were acting in the course of their duties under the statutes above mentioned and, there being no inconsistency with any rights conferred on Indians by any federal Act or treaty, were therefore not trespassers on the Reservation. Accordingly the accused, in the event of proof of wilful obstruction, can properly be convicted under s. 110(*a*) of the *Code*. A clause in an 1827 treaty made with accused's tribe which reserved the Reservation for "their own exclusive use and enjoyment" certainly does not give sanctuary to Indians from the operation of the general law of the Province. [*R.* v. *Shade*, 102 Can. C.C. 316, 4 W.W.R. (N.S.) 430, 14 C.R. 56, refd to]

TRIAL OF A PRELIMINARY ISSUE on a charge of obstructing police officers contrary to s. 110(*a*) of *Cr. Code*.

S.A.K. Logan, Q.C., for the Crown.

Hugh Garrett, for accused.

F.K. JASPERSON, Q.C., MAGISTRATE:—The accused is charged as follows: On or about November 23, 1957, at the City of Sarnia, County of Lambton, at about 3.45 p.m. did unlawfully and wilfully obstruct Constable I.E. Fairbairn, of the Sarnia Police Department, Sarnia, while engaged in the lawful execution of his duty as a Peace Officer, contrary to s. 110 (*a*) of the *Criminal Code*.

At the close of the Crown's case, counsel for the accused moved for dismissal on two grounds, the main one being that the Peace Officer in the execution of his duties was a trespasser and that therefore any act of the accused alleged to be an obstruction was not an obstruction to the Peace Officer in the legal execution of his duties.

The facts adduced by the Crown are briefly these:

Constables Fairbairn and Stewart of the City of Sarnia Police had, at approximately 3:45 p.m., November 23, 1957, completed service of a summons on the Chippewa Indian Reservation which borders No. 40 Highway, a public highway. Both the Reservation and the highway are within the corporate limits of the City of Sarnia.

Constables Fairbairn and Stewart were in a police cruiser. Constable Fairbairn was driving. The cruiser had just left the Reservation and was back on No. 40 Highway when Constable Fairbairn noticed a car proceeding in the same direction come up behind him at what he believed to be an excessive speed. This car was driven by the accused and passed the cruiser and Constable Fairbairn followed for the purpose of determining its speed.

The maximum speed permitted on the highway in this area is 40 m.p.h. Constable Fairbairn stated that he paced the accused at slightly more than 50 m.p.h. for 6-tenths of a mile. The accused then slowed to a complete stop and turned into the driveway leading to a house on the Reservation. The cruiser followed. Both cars came to a stop close to the house and before either of the constables got out of their car the accused left his car and walked directly over to the cruiser, whereupon Constable Fairbairn indicated to the accused he had been driving too fast and asked him to produce his operator's licence. Certain events followed which need not be detailed now other than to say that the accused did not produce his licence and ran inside the house. It so happened that the accused is the Chief of the Band of Chippewa Indians living on the Reservation.

From evidence adduced so far, it appears that one of the outstanding points at issue in the instant case, *viz.* the right of police officers other than the R.C.M.P. to go on the Indian Reservation in question in the execution of their duties, has been a matter of contention for some time between the police of the City of Sarnia and the Indian occupants of the Reservation. A decision in the instant case, therefore, becomes a matter of considerable importance with reference to future conduct and the maintenance of law and order generally. While no broad ruling can or will be given in the instant case on what is, in effect, alleged to be the right of sanctuary to an Indian when once on his Reservation from pursuit by a police officer (other than the R.C.M.P.) for an offence, it is hoped that the decision I will give in this case will be of assistance to all concerned with reference to future attitudes and conduct.

Mr. Garrett, counsel for the accused alleges that the constables had no lawful right to follow the accused onto the Reservation and having done so, they were trespassers. In support of this he cited an agreement (referred to as a treaty) dated July 10, 1827 between His Majesty George IV and the Chiefs and Principal Men of the Chippewa Nation of Indians wherein the Reservation in question was created which, in the words of the agreement, reserved the said lands "to the said Nation of Indians and their posterity at all times hereafter for their own exclusive use and enjoyment". It was argued further that under the *Indian Act*, R.S.C. 1952, c. 149, s. 30 the constables were actually committing a statutory offence. Section 30 provides: "A person who tres-

passes on a reserve is guilty of an offence and is liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month or to both fine and imprisonment."

It seems clear to me that the agreement or treaty entered into in 1827 and s. 30 of the *Indian Act* must be read in conjunction with s. 87 of that Act which provides: "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

This section has been before the Courts for consideration.

In *Rex* v. *Shade* (1952), 102 Can. C.C. 316, Feir D.C.J. of the Alberta District Court states at p. 317: "Section 87 is a new section, not appearing in any of the prior legislation affecting Indians. It seems to be a clarification and restatement of previous case law which, in so far as offences against provincial statutes are concerned" and at p. 318: "Parliament has elected to legislate for the Indian in those fields particularly affecting his welfare, such as intoxicants and property rights, and to leave him subject to the laws of the Province within which he resides, and to the general laws of Canada, in all other areas."

In *Campbell* v. *Sandy*, 4 D.L.R. (2d) 754 at p. 756, [1956] O.W.N. 441 at p. 443 Kinnear Co.Ct.J. refers to the application of s. 87 in these words: "As set out above, s. 87 makes Indians subject to any provincial law of general application except in so far as they are inconsistent with Dominion enactment or regulation."

There can be no doubt that the *Highway Traffic Act*, R.S.O. 1950, c. 167 and amendments thereto is a provincial law of general application and as such is applicable to Indians unless it is inconsistent with the terms of any treaty, the *Indian Act* or any Regulation under it or any other Dominion enactment or Regulation. No inconsistency relative to the points at issue in the instant case has been cited to me nor have I, after considerable search, been able to find any. And certainly it cannot be said that the words "exclusive use and enjoyment" with reference to the Reservation as set forth in the agreement or treaty of 1827

give sanctuary to Indians from the operation of the general law of the Province.

In view of this, the problem of whether or not there has been a trespass by the constables resolves itself then into the rights of police constables in carrying out the provisions of the *Highway Traffic Act*.

Section 44 of the *Police Act*, R.S.O. 1950, c. 279 provides: "Every chief constable, constable and other police officer.... shall have authority to act as a constable throughout Ontario." Section 45 provides: "The members of police forces.... shall be charged with the duty of preserving the peace, preventing robberies and *other crimes and offences*, (the italics are mine) including offences against the by-laws of the municipality, and apprehending offenders, and laying informations before the proper tribunal, and prosecuting and aiding in the prosecution of offenders, and shall have generally all the powers and privileges and be liable to all the duties and responsibilities that belong to constables." It would seem also that the above sections are provincial law of general application.

Section 76(1) of the *Highway Traffic Act* provides: "Every operator of a motor vehicle shall carry his licence with him at all times while he is in charge of a motor vehicle and shall produce it when demanded by a constable or by an officer appointed for carrying out the provisions of this Act." The obligation imposed on the accused, therefore, is that while in charge of a motor vehicle he shall carry his operator's licence and shall produce it on demand by a constable. The facts establish clearly that the accused was in charge of a motor vehicle not only on the highway in question but when he drove onto the Reservation and because of the right of a constable to demand production of the operator's licence under these conditions, Constable Fairbairn had authority in law to follow the accused onto the Reservation as he did and to demand production of the licence. It is a right he would have under similar circumstances with reference to private property generally.

I find that the constables were not trespassing in the circumstances of the instant case and the motion for dismissal on this ground is therefore denied.

On the second ground for dismissal *viz.* assuming the constables had a right to be on the Reservation, that there was no evidence adduced by the Crown to support the offence of wilful

obstruction, I must deny the motion on this ground also. There is evidence upon which a conviction might be made if left to a jury; and so far as reasonable doubt is concerned, this cannot arise until after all the evidence is in.

REGINA v. DENNIS

British Columbia Court of Appeal, Sidney Smith, Bird and Davey JJ.A. September 27, 1957.

Appeal IC—

Service of notice of appeal upon "respondent" required by s. 722(1)(b)(ii), Cr. Code — Condition precedent to jurisdiction to hear appeal from summary conviction — Who is "respondent" — Whether superior officer of informant policeman deemed respondent — The requirement of s. 722(1)(*b*)(ii) of the *Cr. Code* that notice of appeal be served on the "respondent" is a condition precedent to the entertaining of an appeal brought by an accused from a summary conviction. The word "respondent" means the informant and unless an order has been made under s. 722(3) for alternative service the notice of appeal must be served upon that person. In the instant case the notice was not served upon the informant, a police officer, but upon the latter's superior officer. *Held*, that as no order for such alternative service had been made the service was improper and there was no jurisdiction to entertain the appeal. [*R.* v. *McIllree*, 97 Can. C.C. 89, [1950] 1 W.W.R. 894, 9 C.R. 447; *R. ex rel. Payne* v. *Feron*, 112 Can. C.C. 337, [1955] O.R. 686, 22 C.R. 52, expld & distd]

APPEAL by accused from the dismissal of his appeal from a conviction for impaired driving. Affirmed.

T. Griffiths, for appellant.

A.M. Nottingham, for respondent.

The judgment of the Court was delivered by

BIRD J.A.:—The appellant was convicted on July 31, 1956, at Haney, B.C. before T.W. Krell, Esq., Police Magistrate in and for the Municipality of Maple Ridge, of an offence under *Cr. Code*, s. 223 punishable on summary conviction, *i.e.* for that he "did unlawfully drive a motor vehicle on a portion of a highway to wit, the intersection of 2nd Avenue and the Lougheed Highway while his ability to drive was impaired by alcohol". He was sentenced to 14 days imprisonment.

An appeal from the conviction under *Code* ss. 720 *et seq.* to the County Court of Westminster holden at New Westminster was dismissed by His Honour Judge Fraser for the reason that the appellant failed to comply with the provisions of s. 722(1)

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Campbell v. Sandy (1956) 4 D.L.R. (2d) 754

Henry v. The King, (1905) Ex. Ct. Reports, 417

Dreaver v. The King, unreported, Ex. Ct., 1935

Chisholm v. The King (1948) Ex. Ct. Reports, 370

Miller v. The King (1950) 1 D.L.R. 513 (Supreme Ct. Can.)

St. Ann's Shooting and Fishing Club v. The King (1950), S.C.R. 211

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*Feb. 2.
*May 2.

THE ATTORNEY-GENERAL FOR CANADA (PLAINTIFF)..... APPELLANT;

AND

PIERRE GIROUX (DEFENDANT)..... RESPONDENT;

AND

ONÉSIME BOUCHARD..... MIS-EN-CAUSE.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Crown lands—Lands vesting in Crown—Constitutional law—"B.N.A. Act, 1867" ss. 91 (24), 109–117—Title to "Indian lands"—Surrender—Sale by Commissioner—Property of Canada and provinces—Construction of statute—"Indian Act," 39 V. c. 18—R.S.C. 1886, c. 43, s. 42—Words and phrases—"Reserve"—"Person"—"Located Indian"—Evidence—Public document—Legal maxim.

Per curiam.—The "Indian Act," 39 Vict., chap. 18, does not prohibit the sale by the Crown to an "Indian" of public lands which have, on surrender to the Crown, ceased to be part of an Indian "reserve," nor prevent an individual of Indian blood, who is a member of a band or tribe of Indians, from acquiring title in such lands. The use of the word "person" in the provisions of the "Indian Act" (39 Vict., chap. 18, s. 31; R.S.C., 1886, chap. 43, sec. 42), relating to sales of Indian lands, has not the effect of excluding Indians from the class entitled to become purchasers of such lands on account of the definition of that word in the interpretation clauses of the statutes in question.

Per Idington J.—Crown lands of the Province of Canada, situate in Lower Canada, which had not (as provided by the statute 14 and 15 Vict., chap. 106), been surveyed and set apart, as intended to be vested in the Commissioner of Indian Lands for Lower Canada, and appropriated to the use of Indians prior to the 1st July, 1867, do not fall within the definition of "Lands reserved for the Indians" in the 24th item enumerated in section 91 of the "British North America Act, 1867" and, consequently, did not pass under the control of the Government of the Dominion of Canada at the time of Confederation. In regard, therefore, to

* PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff Anglin and Brodeur JJ.

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the lands in question the presumption is that they then became vested in the Crown in the right of the Province of Quebec, and, in the absence of evidence to the contrary, the Attorney-General for Canada cannot now enforce any claim of title to such lands in the right of the Dominion.

Per Duff and Anglin JJ.—The order-in-council of 1869, authorizing the acceptance of a surrender, and the surrender pursuant thereto by the Indians of the "reserve" within which the lands in question are situate are public documents the recitals in which are *primâ facie* evidence of the facts stated therein (*Sturla* v. *Freccia* (5 App. Cas. 623), at pp. 643-4, referred to). Evidence is thereby afforded that the band of Indians occupied the tract of land in question as a "reserve" and the principle "*omnia præsumuntur rite esse acta*" is sufficient to justify, *primâ facie*, the conclusion that the order-in-council of 1853, respecting the constitution of the reserve, was carried out and that the occupation thereof by the Indians was legal. Consequently, the rights acquired by the Indians constituted ownership, the surrender by them to the Crown was validly made and the lands passed under the control of the Government of Canada, at the time of Confederation, in virtue of the provisions as to "Lands reserved for the Indians" in section 91 of the "British North America Act, 1867." *St. Catherine's Milling and Lumber Co.* v. *The Queen* (14 App. Cas. 46), distinguished.

Judgment appealed from (Q.R. 24 K.B. 433), affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side (1) affirming the judgment of Letellier J., in the Superior Court, District of Chicoutimi, dismissing the action.

The circumstances of the case are stated in the judgments now reported.

G. G. Stuart K.C. and *L. P. Girard* for the appellant.

L. G. Belley K.C., for the respondent.

THE CHIEF JUSTICE.—The appellant, the Attorney-General for the Dominion of Canada, claims in this suit to have it declared that the Crown is the owner of a certain half-lot of land, being lot No. 3 of the first range, Canton Ouiatchouan, in the Parish of St. Prime and County of Lake St. John.

(1) Q.R. 24 K.B. 433, *sub nom. Doherty* v. *Giroux.*

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In the first paragraph of the amended declaration it is stated that the Crown has always been and still is the owner of the lot No. 3. This, however, is only inaccurate drafting of which there is much in the record. There is no doubt that the claim of the Crown is only to the south-east half of lot No. 3, and it is not disputed that the respondent has a good title to the north-west half of lot No. 3. The respondent has been in possession of the whole of lot No. 3 for upwards of a quarter of a century during which time the Government has taken no effective steps to question his right to any part of the lot.

By an order-in-council, dated August 9-11, 1853, approval was given to a schedule shewing the distribution of land set apart under the statute 14 & 15 Vict., ch. 106, for the benefit of the Indian Tribes in Lower Canada. Included in this schedule was a reservation in favour of the Montagnais of Lake St. John. The half-lot in question was comprised in this reservation.

On the 25th of June, 1869, the Montagnais Band of Indians surrendered to the Crown, for sale, a portion of the reservation including lot No. 3. This land so surrendered was put up for sale and it would appear that on the 21st June, 1873, the north-west half-lot No. 3 was sold to the respondent and, on the 7th May, 1878, the south-east half-lot was sold to one David Philippe.

Under a judgment obtained by the mis-en-cause, O. Bouchard, against D. Philippe the latter's half of lot No. 3 was sold at a sheriff's sale to the respondent on the 7th March, 1889.

The Crown alleges that David Philippe was an Indian, that he was, at the time of the sheriff's sale, in possession of the land on which he had been located

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by the Crown and that, consequently, the Crown still held the half-lot as "Indian Lands" and as such liable neither to taxation nor to execution.

The fallacy in this argument is in the statement that David Philippe had been located on the land; it involves the proposition that, whilst all the other lots into which the reserve had been divided were sold outright to their purchasers, this particular half-lot was not sold to the purchaser David Philippe, but that, being an Indian, he was only "located" on the land in the meaning of that term in the "Indian Act."

To shew the impossibility of supporting such a contention it is only necessary to turn to the sections in point in the statute. The Act in force on the 7th May, 1878, the date of the sale to David Philippe, was the "Indian Act, 1876" (39 Vict., ch. 18). Section 3 is as follows:—

3. The following terms contained in this Act shall be held to have the meaning hereinafter assigned to them unless such meaning be repugnant to the subject or inconsistent with the context.

(3) The term "Indian" means:

First, any male person of Indian blood reputed to belong to a particular band * * *

(6) The term "Reserve" 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 legal title is in the Crown, but which is unsurrendered. * * *

(8) The term "Indian Lands" means any reserve or portion of a reserve which has been surrendered to the Crown. * * *

(12) The term "person" means an individual other than an Indian, unless the context clearly requires another construction.

By Section 5, the Superintendent-General

may authorize that the whole or any portion of a reserve be subdivided into lots.

Section 6:

6. In a *reserve* or *portion of a reserve* subdivided by survey into lots, no Indian shall be deemed to be lawfully in possession of one or more of such lots, or part of a lot unless he or she has been or shall be located for the same by the band, with the approval of the Superintendent-General.

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Section 7:

7. On the Superintendent-General approving of any location as aforesaid he shall issue in triplicate a ticket granting a location to such Indian.

Section 8:

The conferring of any such location-title as aforesaid shall not have the effect of rendering the land covered thereby subject to seizure under legal process or transferable except to an Indian of the same band.

The statute, it will be observed, makes provision for the conferring of a location-title *only on a reserve*, that is on unsurrendered lands and then by the band, not by the Crown.

Then after sections 25 and following, dealing with surrenders of reserves to the Crown, we have sections 29 and following under the caption "Management and Sale of Indian Lands." There is no suggestion in these sections, or anywhere else in the Act, that Indian lands may not be sold to an Indian.

I suppose it may well be that it would not be a common occurrence for an Indian to be a purchaser at a sale of Indian lands, but it is one thing to say the statute did not contemplate this and quite another to say that it intended to forbid it. I can imagine no reason why an Indian should not purchase such lands; there is no doubt as to his capacity to hold real estate. This is recognized by section 64, which provides that:

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.

This really disposes of the appellant's case but, out of respect for the learned judge of the Court of King's Bench who dissented from the majority of the court and one of whose points is taken up in the appellants' factum, a few words may be added.

The whole ground of the dissenting opinion is really in the following paragraph:

> Les Indiens d'une tribu localisée sur une réserve pourraient se réunir en conseil d'une manière solennelle et décider (si la majorité de la bande le voulait) de remettre tout ou partie de cette réserve à la Couronne et alors la Couronne vendrait ou disposerait de ce qu'elle recevrait ainsi, dans l'intérêt de la tribu indienne et pour son bénéfice exclusif, mais à la condition—dont la nécessité se voit très bien—de ne jamais vendre une partie quelconque de ces réserves à des sauvages. On a même pris le soin de dire que toute "personne" pourrait devenir acquéreur de ces propriétés mais qu'un sauvage ne pourrait pas être une de ces personnes.

I am myself quite unable to appreciate the necessity or occasion for any such condition as the learned judge suggests but it is unnecessary to discuss this because, as far as I have been able to ascertain, it is purely imaginary. The judge says further on:

> Ce nommé Phillippe était un sauvage, et la loi défendait positivement qu'un sauvage pût acquérir cette propriété.

No reference is given and I know of no such prohibition, positive or otherwise.

The point taken in appellant's factum that a "person," as defined by the "Indian Act," does not include an Indian has reference to the section dealing with certificates of sale which is section 31 of 39 Vict., ch. 18 and section 42 of chapter 43, Revised Statutes of Canada. There seems to be some obscurity about this section because the marginal note which has been carried through all the amendments and revisions of the Act is "Effect of *former* certificates of sale or receipts." The section, however, seems to look to future certificates and, as I apprehend, is designed to meet the inconvenience of delay in the issue of patents. Be that as it may, the section does not provide that any "person" may purchase these lands but that an Indian may not be one of these "persons": all that it does provide is that a certificate of sale or

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receipt for money, duly registered as therein mentioned, shall give the purchaser the same rights as he would have under a patent from the Crown.

The definition of terms is, at the commencement of section 3, said to apply only when not inconsistent with the context and this is emphasized by its special repetition in the 12th item in which the word "person" is defined. I cannot think that such an accidental use of the word "person" for "purchaser" or any other word to indicate him could possibly be held to involve by inference a positive law against an Indian becoming a purchaser for which prohibition there is no other warrant. I think in such case the context would clearly require another construction.

But this is not all; the appellant has assumed that the case is governed by the "Indian Act," chapter 43 of the Revised Statutes of 1886, but this is not so, and when we look at the "Indian Act" of 1876 we find that the word "person" does not occur at all in the extract quoted by the appellant which sets forth what the certificate of sale or receipt for money shall entitle the purchaser to. The word used is "party" shewing conclusively that the legislature had no intention, even by an inference through the interpretation section, to prevent the acquisition by an Indian of Indian lands put up for sale.

The word "party" is several times used when distinctly intended to include both "persons" and "Indians." See sections 12 and 14.

This substitution in the revised statute of the word "person" for the word "party" is an instance of the danger attending such changes in the revision of the statutes. Obviously the revisers had no idea of enacting an important law by the change they made but regarded it simply as a linguistic embellishment;

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it has, however, misled two of the judges of the Court of King's Bench into finding a positive law against the sale of Indian lands to an Indian.

At the hearing I was considerably impressed with the argument that, even if there had never been a valid sale to David Philippe, the transactions between Euchère Otis, the local agent of the Superintendent-General, and the respondent constituted a sale to the latter which was also confirmed by the Department of Indian Affairs. If, however, the views that I have previously expressed are correct it is unnecessary to consider this point further. If the sale to David Philippe, in 1878, was good, the Crown had nothing left to grant to Giroux in 1889.

Judge Pelletier, delivering the dissenting judgment in the Court of King's Bench, says that he has endeavoured to find in the record the necessary grounds for confirming the judgment, since such confirmation (if it could be legally given) would seem to him more in accordance with equity. With this view I agree and it is therefore satisfactory to be able to conclude that the judgment is in conformity not only with equity in its most general meaning but also with the law.

The appeal should be dismissed with costs.

IDINGTON J.—The appellant seeks to have the Crown declared the proprietor of part of a lot of land in Quebec and respondent removed therefrom and ordered to account for the fruits thereof for the past twenty-six years.

The circumstances under which the claim is made are peculiar and some novel questions of law are raised. Much diversity of judicial opinion in the courts below seems to exist relative to some of these questions.

To put the matter briefly, the appellant claims that the land in question is part of a tract of land known

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as an "Indian Reserve," which had become vested by virtue of certain legislation in the Crown, in trust for a tribe of Indians; that part of it was thereafter surrendered by the tribe to the Crown for purposes of sale for the benefit of said tribe; that this part of the lot now in question was in course of time sold to an Indian of said tribe; that he paid five 25/100 dollars on account of the purchase; that thereafter, under a judgment got against him, the land was sold by the sheriff to respondent for $500; that thereupon he paid to the Indian Department $164 as the balance of the purchase-money due the Crown, and procured the receipt therefor, which appears hereinafter, from the local sales agent of the Indian Department; that he then went into possession and improved the land and has remained so possessed ever since till, according to assessed values, it has risen from being worth only $500 in 1889, when respondent entered, to be worth $3,200, in 1913, when this litigation was pending; that the Indian purchaser was incapacitated by statute from buying lands in a "Reserve"; and that the sheriff's sale was, as part of the result, null and void and hence that respondent got nothing by his purchase.

To realize the force and effect of these several allegations we must examine the statutes upon which the rights of the Indians rested, their powers of surrender thereunder, and the effect of the "British North America Act" under and by virtue of which the claim of the appellant is asserted.

The Parliament of Old Canada, by 14 & 15 Vict. ch. 106, enacted:

> That tracts of land in Lower Canada, not exceeding in the whole two hundred and thirty thousand acres, may, under orders-in-council to be made in that behalf, be described, surveyed and set out by the Commissioner of Crown Lands, and such tracts of land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian Tribes in Lower Canada, for which they shall be

respectively directed to be set apart in any order-in-council, to be made as aforesaid, and the said tracts of land shall accordingly, by virtue of this Act, and without any price or payment being required therefor, be vested in and managed by the Commissioner of Indian Lands for Lower Canada, under the Act passed in the session held in the thirteenth and fourteenth years of Her Majesty's Reign, and intituled, *An "Act for the better protection of the Lands and Property of the Indians in Lower Canada."*

In the last mentioned Act, chapter 42 of 13 & 14 Vict., there is enacted:

It shall be lawful for the Governor to appoint from time to time a Commissioner of Indian Lands for Lower Canada in whom and in whose successors by the name aforesaid all the lands or property in Lower Canada which are or shall be set apart, or appropriated to or for the use of any tribe or body of Indians, shall be and are hereby 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 property, and shall and may, in and by the name aforesaid, be subject to the provisions hereinafter made, exercise and defend all or any of the rights lawfully appertaining to the proprietor, possessor or occupant of such land or property.

In the evidence in the case there is a certified copy of an order-in-council of August, 1853, which reads as follows:—

On the letter from the Honourable Commissioner of Crown Lands, dated 8th June, 1853, submitting for approval a schedule shewing the distribution of the area of land set apart and appropriated under the statute 14 & 15 Vict., ch. 106, for the benefit of the Indian Tribes in Lower Canada.

The Committee humbly advise that the said schedule be approved and that the lands referred to be distributed and appropriated as therein proposed.

This is vouched for by a certificate of the Assistant-Commissioner of Crown Lands, in 1889.

The schedule referred to in the said order-in-council does not appear in evidence. Neither does the letter.

There does, however, appear a schedule in the case, certified by the same Assistant-Commissioner of Crown Lands and of same date as last mentioned certificate. This on its face cannot be the schedule referred to in said order-in-council. It is as follows:—

SCHEDULE

Shewing the distribution of the area of land set apart and appropriated under the Statute 13th and 15th Vict., Ch. 106, for the benefit of Indian Tribes in Lower Canada.

County	Township or Locality.	No. of Acres.	Description of Boundaries.	Names of the Indian Tribes.	Remarks.	
	Peribonca River.	16,000	A tract five miles on the River Peribonca, north of Lake St. John.	Montagnais of Lake St. John and Tadoussac.	Indians having their hunting grounds along the Saguenay and its tributaries.	Surveyed. Exchanged for a tract on the west shore of Lake St. John. Surveyed.
Saguenay	Metabetchouan	4,000	The ranges 1st and C. south of Lake St. John. (And other lands)			

Certified a true copy of the original of record in this Department.

(Sgd.) E. E. Taché,
Assist.-Commissioner,
Department of Crown Lands, Quebec, 30th April, 1889.

Crown Land Department, Toronto, 23rd February, 1858, Ind.
(Sgd.) Joseph Wauhope, P.L.

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I may remark that the marginal note

Surveyed. Exchanged for a tract on the west shore of Lake St. John. Surveyed.

cannot have formed part of an order-in-council in 1853. That note is something evidently written in after the date of the order-in-council and I infer has been a note made by someone in reference to an exchange proposed on 4th September, 1856, to which I am about to refer.

Who wrote it? When was it written? By what authority?

The certificate seems as presented in the case to be placed higher up than the note at left hand side and signed by Mr. Wauhebe. It is probable, however, the certificate was intended to present this note as part of the original record purported to be certified to.

What then does the date signify in this note? It is of February, 1858. Who was Mr. Wauhebe? What office did he fill? What was the purpose of the extract as it left his hands? Was the marginal note part of what he seems to be certifying to?

The importance of a definite answer to these queries and all implied therein becomes apparent when we find that the title of the Crown, as represented by appellant, depends upon the effect to be given the most indefinite terms of an order-in-council of the 4th September, 1856, which is as follows:—

On the application of the Montagnais Tribe of Indians of the Saguenay, thro' David E. Price, Esq'r, M. P. P. for the appointment of Mr. Georges McKenzie as interpreter and to distribute all moneys or goods given to the Tribe; and for the grant of a tract of land on Lake St. John, commencing at the River Ouiatchouanish, to form a township of six miles square; also, that the grant of £50 per annum, may be increased to £100, and continue annually.

The report from the Crown Land Department dated 25th July, 1856, states that the tract of land set apart for the Montagnais Indians, lies in the Township of Metabetchouan, west side of the river of that name and that this land, together with the tract at Peribonca, north

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side of Lake St. John, are still reserved for those Indians, but that as they appear desirous of obtaining a grant of the land at Pointe Bleue, on the western border of Lake St. John, there appears no objection to an exchange.

The Committee recommend that the exchange be effected and the grant made accordingly.

Certified,

(Sgd.) WM. H. LEE,
C. E. C.

To the Supt.-Gen'l Indian Affairs,
etc., etc., etc.

Certified a true copy.
DUNCAN SCOTT.
Deputy Superintendent-General of Indian Affairs

There is nothing in the case to explain what was done pursuant to this order, and when, if anything ever was done. There is nothing in the printed case shewing any definite survey ever was made of the lands thus recommended to be given in exchange for the lands which had been allotted to some Indians.

The Act of 14 & 15 Vict., ch. 106, makes it clear by the above quotation therefrom that orders-in-council setting apart land for the use of Indians should be described, surveyed and set out by the Commissioner of Crown Lands, and that only in such event can such tracts of land be considered as set apart and appropriated for the use of the Indians.

Again, it is clearly intended by the earlier enactment of 13 & 14 Vict. that the lands intended to be vested in the Commissioner of Indian Lands are such as have been set apart or appropriated to the use of Indians. When we consider that the lands to be so vested by virtue of those Acts are to be only lands which have been surveyed and set apart by the Commissioner of Crown Lands, it is very clear that something more than an order-in-council, such as that produced, merely approving of the proposed scheme of exchange, was needed to vest lands at Point Bleue in the Commissioner of Indian Lands.

Yet, strange to say, there is nothing of the kind in the case or anything from which it can be fairly inferred that the necessary steps ever had been taken.

Counsel for the appellant referred to a blue print in the record; and I understood him to suggest it was made in 1866.

Examining it, I can find no date upon it; but I do find another plan purporting to be a survey made by one Dumais, P. L. S., in 1866. Probably it is by reference thereto he fixed the date of the blue print, if I understood him correctly.

This latter plan has stamped upon it the words "Department of Indian Affairs, Ottawa, Canada"; and inside these, set in a circle, are the words "Survey Branch, True, Reduced Copy, W. A. Austin, 18.6.00." I infer that probably the latter plan is but a reduced copy of the former and that both refer to some survey made in 1866.

So far as I can find from the case, or the record from which the case is taken, the foregoing presents all there is entitling appellant to assert a title in the Crown on behalf of the Dominion.

Clearly the order-in-council recommending an exchange, without more, furnishes no evidence of title.

It might be said with some force, but for the constitutional history of Canada involved in the inquiry, that what we do find later on furnishes something from which after such lapse of years some inferences might be drawn. There are two difficulties in the way. All that transpired after the 1st of July, 1867, when the "British North America Act" came into force, can be of no effect unless and until we have established a state of facts, preceding that date, which would enable the "British North America Act" by its operation to

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give control of the said lands to the Crown on behalf of the Dominion.

By section 91, sub-section 24 of said Act, one of the subject matters over which the Dominion Parliament was given exclusive legislative authority was "Indians and Lands reserved for Indians."

The question is thus raised whether or not the lands in question herein fall definitely within the term "Lands reserved for Indians."

The Dominion Parliament, immediately after Confederation, by 31 Vict., ch. 42, asserted its legislative authority over such lands as reserved for Indians.

All that took place afterwards relative to the lands in question can be of no effect in law unless the alleged reserve had been duly constituted on or before the 1st July, 1867.

It seems impossible on such evidence as thus presented to find anything bringing the lands in question within the scope of and under the operation of the "British North America Act."

But there is another difficulty created by the enactment, in 1860, by the Parliament of Old Canada of 23 Vict., ch. 151, sec. 4, which provides as follows:—

> 4. No release or surrender of lands reserved for the use of Indians, or of any tribe or band of Indians, shall be valid or binding except on the following conditions.

This is followed by two sub-sections which specify the steps which must be taken to enable a surrender to be made. It is to be observed that this was passed within three years and ten months from the order-in-council recommending the exchange made of the lands on the Peribonca and Metabetchouan rivers held as reserves for the Indians in question.

If the survey and setting apart contemplated by the proposed exchange was not made and fully com-

pleted by the 30th June, 1860, when the bill, which had been reserved by the Governor in May, was assented to, the completion of that exchange would require the due observance by the Indians of the form of surrender imperatively required by the last mentioned Act.

There is nothing to indicate this ever was complied with. Hence surveys made in 1866, or any time after 30th June, 1860, cannot help without evidence of such compliance.

There is no evidence of any Indians in fact having been found on the Pointe Bleue reservation before the year 1869.

If one had to speculate he might infer something took place between 1866 and 1869. But we are not at liberty do do so, or found a judgment herein for appellant, without evidence or only upon the merest scintilla thereof.

The appeal therefore fails in my opinion. I think the distinction claimed by Mr. Stewart to exist between reserves duly constituted under the Acts above referred to, whereby the land became vested in commissioners in trust, and such reserves as involved in the case of *St. Catherine's Milling and Lumber Company* v. *The Queen*(1), and some other cases referred to, was well taken.

But, as this case stands, there being no evidence of the land having been duly vested before 1st July, 1867, in commissioners in trust, or otherwise falling within the operation of the "British North America Act," section 91, sub-section 24, the presumption is in favour of the land being vested in the Crown on behalf of Quebec.

(1) 14 App. Cas. 46.

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Assuming, for argument's sake, that there is any evidence upon which to find the land vested in the Crown on behalf of the Dominion and that there is evidence of a sale by the Crown to David Phillippe, upon which he paid only five 25/100 dollars, how does that help the appellant?

Admitting the invalidity of the sale and nullity of the sheriff's sale, and discarding both as null, there is evidence which goes far to establish the recognition by the Crown of the respondent as the purchaser. The local agent gave respondent the following receipt:—

Roberval, Pointe Bleue,
22 juin, 1889.

$164.32.

Reçu de M. Pierre Giroux la somme de cent soixant et quatre piastres et 32 cents, en payement du ½ lot S. E. No. Rang 1er. du Township Ouiatchouan suivant instruction de Dep. et avec contrat de Vente pour le dit ½ lot.

L. E. OTIS, A.S.

And the Department of Indian Affairs, at Ottawa, set down in its books a recognition of respondent as purchaser.

It would have been, I incline to think, quite competent for the Crown under all the circumstances, and without any detriment either to the trust or anything else, to have taken the position in 1889, as may be inferred was done, that the said receipt and entry in the books should stand forever as a final disposition of the affair.

The reasons against such a course of action being taken by the Crown were of rather a technical character; even assuming Phillippe was debarred from buying, upon which I pass no opinion.

Under the law as it has long existed there was the possibility of recognizing any Indian qualified to be enfranchised and thereby beyond doubt entitled to

become a buyer. It may be inferred even at this distance of time that if the questions now raised had, at the time when respondent was set down in the books of the department as purchaser of the lands in question, been viewed in light thereof and the foregoing circumstances and especially having regard to the fact that, in any event, Phillippe alone was to blame, and had no more substantial grievance at least none worth more than $5.25 to set up, and seeing respondent had contributed $500 to pay his debts and paid practically the whole purchase money to the Crown, no harm would have been done by letting the recognition of respondent stand.

I must not be understood as holding that there cannot be discovered abundant evidence to cover the very palpable defects I point out in the proof of title adduced herein.

This is not one of the many cases wherein probabilities must be weighed.

It is upon the record as it presents the title to the lot in question that we must pass. Fortunately the result does justice herein even if the result of blunders in failing to produce evidence which may exist.

The appeal must be dismissed with costs.

DUFF J.—The action out of which this appeal arises was brought in the Superior Court for the District of Chicoutimi, in the Province of Quebec, by the Attorney-General of the Dominion on behalf of the Crown claiming a declaration that a certain lot of land was the property of the Crown and possession of the same.

The three questions which it will be necessary to discuss are:—

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First.—Was the lot in question within the limits of an Indian Reserve constituted under the authority of 14 & 15 Vict., ch. 106?

Second.—If so, is the title vested in His Majesty in right of the Dominion of Canada or has the Attorney-General of Canada, on other grounds, a title to maintain the action?

Third.—Was a professed sale of the lot made in 1878 to one David Philipe, member of the Montagnais tribe by an agent of the Department of Indian Affairs, a valid sale?

I shall first state the facts bearing upon the first and second of these questions. On the 9th of August, 1853, an order-in-council was passed by which certain tracts of land were severally appropriated for the benefit of the Indian tribes in Lower Canada under the authority of the statute above mentioned. Two tracts were set apart for the benefit of the Montagnais Band, one on the Metabetchouan and one on the Peribonca river in the Saguenay district. A few years afterwards, on the request of the tribe, the Governor in Council sanctioned an exchange of the Peribonca tract for a tract at Pointe Bleue, Ouiatchouan, on the western border of Lake St. John. In August, 1869, the Governor-General in Council, by order, accepted what professed to be a surrender by the Montagnais Indians of the reserve constituting the Township of Ouiatchouan which admittedly is the tract of land that the order-in-council of 1851 authorized to be substituted for the Peribonca Reserve. In view of the contention that the exchange was never effected it is desirable to set out this order-in-council and the surrender in full. They are as follows:—

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Copy of a Report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor-General in Council on the 17th August, 1869.

The Committee have had under consideration a memorandum dated 3rd August, 1869, from the Hon. the Secretary of State submitting for acceptance by Your Excellency in Council under the provisions of the 8th section of the Act, 31 Vict., Chap. 42, a surrender bearing date the 25th of June, 1869, executed at Metabetchouan, in the District of Chicoutimi, by Basil Usisorina, Luke Usisorina, Mark Pise Thewamerin and others, parties thereto as chiefs and principal men of the Band of Montagnais Indians, claiming to be those for whose benefit the reserve at Lake St. John, known as the Township of Ouiatchouan, was set apart, executed in the presence of Rev'd Dominique Racine, authorized by the Hon. the Secretary of State to receive said surrender and in that of the Hon. Mr. Justice Roy, Judge of the Superior Court in the District of Chicoutimi, such surrender conveying their interest and right in certain lands on the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th ranges of the said Township of Ouiatchouan, indicated on the copy of a map by provincial surveyor P. H. Dumais, dated A.D. 1866, attached to the said surrender and vesting the lands so surrendered in the Crown in trust to sell and convey the same for the benefit of the said Indians, and their descendants, and on condition that the moneys received in payment for the same shall be placed at interest in order to such interest being periodically divided among the said Montagnais Indians.

The Committee advise that the surrender be accepted and enrolled in the usual manner in the office of the Registrar-General.

Certified,

(Sgd.) Wm. H. Lee, Clk. P. C.

Certified a true copy.

DUNCAN SCOTT,
Deputy Superintendent-General of Indian Affairs.

Surrender by the Band of Montagnais Indians for whom was set apart the Reserve of the Township of Ouiatchouan, in the Province of Quebec, to Her Majesty Queen Victoria, of their lands in the Indian Reserve there, as described below, to be sold for their benefit.

KNOW ALL MEN that the undersigned Chief and Principal Men of the above mentioned band living on the above mentioned reserve, for and acting on behalf of our people, do hereby remise, release, surrender, quit-claim and yield up to our Sovereign Lady the Queen, Her Heirs and Successors forever, all and singular those certain parcels or tracts of land situated in the Dominion of Canada and in that part of the said Province of Quebec, being composed of concessions one, two, three, parts of four, five, six and the whole of seven and eight, in the said Township of Ouiatchouan, as described and set forth in the map or plan hereunto annexed.

To have and to hold the same unto Her said Majesty the Queen, Her Heirs and Successors forever, in trust, to sell and convey the same to such person or persons and upon such terms as the Government of the said Dominion of Canada shall or may deem most conducive to

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the interest of us, the said Chief and Principal Men and our people in all the time to come and upon the further condition that the moneys received from the sale thereof shall, after deducting the usual proportion for expense of management, be placed at interest, and that the interest money so accruing from such investment shall be paid annually, or semi-annually to us and our descendants. And we the said Chiefs and principal men of the band aforesaid do, on behalf of our people and for ourselves, hereby ratify and confirm and promise to ratify and confirm whatever the Government of this Dominion of Canada may do or cause to be lawfully done in connection with the disposal and sale of the said lands.

In WITNESS THEREOF, the said Chiefs and principal men have set our hands and affixed our seal unto this instrument in the said Province of Quebec, at Post Metabetchouan. Done at our Council-House this twenty-fifth day of June, in the year of our Lord one thousand eight hundred and sixty-nine.

Signed, sealed and delivered in the presence of:

D. Roy,

Judge of the Superior Court and of the District of Chicoutimi.

Signed by the Chief and thirty-six other Indians, members of the Band.

Since the acceptance of this surrender the lands have been dealt with by the Department of Indian Affairs as lands surrendered under the provisions of the "Indian Act" and held by the Crown under that Act.

First, then, of the contention that the Ouiatchouan Reserve was never lawfully constituted. The order-in-council and the surrender registered pursuant to the order-in-council constitute, in my judgment, together, a public document within the meaning of the rule stated in Taylor on Evidence, 1769*a*, and the recitals in this document are, therefore, *primâ facie* evidence of the facts stated. (See *Sturla* v. *Freccia, et al.* (1) at 643-4). Evidence is thereby afforded that the Montagnais Band of Indians did occupy this tract of land as a reserve and the principle *omnia præsumuntur rite esse acta* is sufficient to justify, *primâ facie*, the conclusion that the order-

(1) 5 App. Cas. 623.

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in-council was carried out and that their occupation was a legal one.

The second question depends upon the character of the Indian title to this reserve at the time the "British North America Act" came into force. If at that time there was vested in the Crown in right of the Province of Canada an interest in these lands which properly falls within the description "land," as that word is used in section 109 of the "British North America Act," or within the word "property" within the meaning of section 117, then that interest (as it is not suggested that section 108 has any application), passed to the Province of Quebec. It is necessary, therefore, to consider the nature of the Indian title and, as that depends upon the meaning and effect of certain parts of chapter 14, C.S.L.C., it will be convenient to set out these provisions in full. They are as follows:—

7. Le gouverneur pourra nommer, au besoin, un Commissaire des terres des Sauvages pour le Bas-Canada, qui, ainsi que ses successeurs, sous le nom susdit, sera mis en possession, pour et au nom de toute tribu ou peuplade de sauvages, de toutes les terres ou propriétés dans le Bas-Canada, affectées a l'usage d'aucune tribu ou peuplade de Sauvages, et sera censé en loi occuper et posseder aucune des terres dans le Bas-Canada, actuellement possedées ou occupées par toute telle tribu ou peuplade, ou par tout chef ou membre d'icelle, ou autre personne, pour l'usage ou profit de tells tribu ou peuplade: et il aura droit de recevoir et recouvrer les rentes, redevances et profits, provenant de telles terres et propriétés, et sous le nom susdit; mais eu egard aux dispositions ci-dessous établies, il exercera et maintiendra tous et chacun les droits qui appartiennent légitimement aux propriétaires, possesseurs ou occupants de telles terres ou propriétés.

* * * * *

8. Toutes les poursuites, actions ou procédures portées par ou contre le dit commissaire, seront intentées et conduites par ou contre lui, sous le nom susdit seulement, et ne seront pas périmées or discontinuées par son décès, sa destitution ou sa resignation, mais seront continuées par ou contre son successeur en office.

2. Tel commissaire aura, dans chaque district civil du Bas-Canada, un bureau qui sera son domicile légal, et où tout ordre, avis ou autre procédure pourra lui être légalement signifié; et il pourra nommer des

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députés, et leur déléguer tels pouvoir qu'il jugera expédient de leur déléguer de temps à autre, ou qu'il recevra ordre du gouverneur de leur déléguer. 13 & 14 V., c. 42, s. 2, moins le proviso.

9. Le dit commissaire pourra concéder ou louer, ou grever toute telle terre ou propriété, comme susdit, et reçevoir ou 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 soumis, en toute chose, aux instructions qu'il pourra reçevoir de temps à autre du gouverneur, et il sera personnellement responsable à la couronne de tous ses actes et plus particulièrement de tout acte fait contrairement à ces instructions, et il rendra compte de tous les deniers par lui reçus, et les emploiera de telle manière, en tel temps, et les paiera à telle personne ou officier qui pourra être nommé par le gouverneur, et il fera rapport, de temps à autre, de toutes les matières relatives à sa charge, en telle manière et forme, et donnera tel cautionnement que le gouverneur prescrira et éxigera; et tous les deniers et effets mobiliers qu'il reçevra ou qui viendront en sa possession, en sa qualité de commissaire, s'il n'en a pas rendu compte, et s'ils ne sont pas employés et payés comme susdit, ou s'ils ne sont pas remis par toute personne qui aura été commissaire à son successeur en charge, pourront être recouvrés de toute personne qui aura été commissaire, et de ses cautions, conjointement et soüdairement, par la couronne, ou par tel successeur en charge dans aucune cour ayant juridiction civile, jusqu'a concurrence du montant ou de la valeur. 13 & 14 V., c. 42, s. 3.

12. Des étendues de terre, dans le Bas-Canada, n'excédant pas en totalité deux cent trente mille acres, pourront (en autant que la chose n'a pas encore été faite sous l'autorité de l'acte 14 & 15, V., c. 106), en vertu des ordres-en-conseil emanés à cet égard, être désignées, arpentées et reservées par le commissaire des terres de la couronne; et ces étendues de terre seront respectivement reservées et affectées à l'usage des diverses tribus sauvages du Bas-Canada, pour lesquelles, respectivement, il est ordonné qu'elles soient reservées par tout ordre-en-conseil emané comme susdit; et les dites étendues de terre seront, en conséquence, en vertu du présent acte, et sans condition de prix ni de paiement, transferées au Commissaire des terres des Sauvages pour le Bas-Canada, et par lui administrées conformement au présent acte. 14 & 15 V., c. 106, s. 1.

The tract in question was set apart under the authority of section 12. Our inquiry concerns the effect of sections 7, 8 and 9 as touching the nature of the Indian interest.

First. It may be observed that the Commissioner is to hold the Indian lands "pur et au nom" of the tribe or band and that he is deemed in law to occupy

and to possess them "pour l'usage et au profit de telle tribu ou peuplade." These appear to be the dominating provisions and they express the intention that any ownership, possession or right vested in the Commissioner is vested in him for the benefit of the Indians. Therefore, the rights which are expressly given him are rights which are to be exercised by him for them as by tutor for pupil.

Looking at the *ensemble* of the rights and powers expressly given I can entertain no doubt that in the sum they amount to ownership. By paragraph 7 he is given a right to receive and to recover the rents and profits

et il exercera et maintiendra tous et chacun les droits qui appartiennent légitimement aux propriétaires.

By section 9:—

Le dit commissaire pourra concéder ou louer, ou grever toute telle terre ou propriété, comme susdit, et recevoir et recouvrer les rentes relevances et profits en provenant, de même que tout propriétaire, possesseur ou occupant légitime de telle terre pourra le faire.

This in the sum, I repeat, is ownership; and none the less so that in the administration of the property the Commissioner is accountable to the Governor. The Governor in this respect does not represent the Crown as proprietor but as *parens patriæ*.

It seems to follow that, on the passing of the "British North America Act," this ownership passed under the legislative jurisdiction of the Dominion as falling within the subject "Indian Lands," and I see no reason to doubt that the provisions of the Act of 1868 (sec. 26, ch. 42), by which the Secretary of State, as Superintendent-General of Indian Affairs, was substituted for the Commissioner provided for by the enactments just cited as the trustee of the Indian title were well within the authority of the Parliament of Canada; nor can I see on what ground it

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could be contended that the provisions of the "Indian Act" (ch. 43, R.S.C.), providing for the surrender of Indian lands or the provisions relating to the sale of the same after the surrender are not within the ambit of that authority.

But it is argued that, on the surrender being made, the lands, under the authority of *St. Catherine's Milling and Lumber Co.* v. *The Queen*(1), became vested in the Crown and fell under the control of the province. There are two answers. First: The Indian interest being, as I have pointed out, ownership is by the terms of the surrender a surrender to Her Majesty in trust to be dealt with in a certain manner for the benefit of the Indians. The Dominion Parliament, having plenary authority to deal with the subject of "Indian Lands" and having authorized such a transfer of the Indian title, it is difficult to see on what ground the transfer could be held not to take effect according to its terms or on what ground the trusts, upon which the transfer was accepted, can be treated as non-operative.

Secondly. If I am right in my view as to the character of the Indian title, it is obvious that any interest of the Crown was a contingent interest to become vested only in the event of the disappearance of the Indians while the lands remained unsold. If that event had taken place, it may be that there would have been a resulting trust in favour of the Crown and if the lands in such an eventuality remained unsold in the hands of the Dominion the question might arise whether as a "royalty" the Crown in the right of the province would not be entitled to the benefit of them. But all this has no application here. So long as the band exists the band is the beneficial owner of the land in question or of the monies arising out of the sale of them.

(1) 14 App. Cas. 46.

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The distinction between this case and the case of the *St. Catherine's Milling Company*(1), is not difficult to perceive. The Privy Council held in that case that the right of the Indians, resting on the proclamation of 1873, was a "personal and unsufructuary right" depending entirely upon the bounty of the Crown. The Crown had a paramount and substantial interest at the time of Confederation, which interest remained within the province. The surrender of the Indian right to the Crown (which was not, it may be observed, a surrender to the Dominion Government), left the interest of the province unincumbered. There is no analogy between that case and this, if I am right in my view that the Indian interest amounted to beneficial ownership, the rights of ownership, in some respects, being exercisable not by the Indians but by their statutory tutor, the Commissioner. The surrender of that ownership in trust under the terms of the instrument of 1868 cannot be held, without entirely defeating the intention of it, to have the effect of destroying the beneficial interest of the Indians.

The third question arises in this way. Professing to act under the authority of the "Indian Act" (ch. 18 of 1876), the Indian agent, in May, 1878, sold the lot in question to one David Philippe, a member of the Montagnais Band. On the 7th March, 1889, this land was sold by the sheriff under a judgment against Philippe, and adjudged to the respondent Giroux. The appellant alleged that Philippe was not a competent purchaser and that, by certain provisions of the statutes relating to Indians, the sale to Philippe was forbidden and that the sale was contrary to law.

Two distinct points are made by Mr. Stuart.

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First, he says that the effect of section 42 of the "Indian Act" (ch. 43, R.S.C., 1886), taken with section 2, sub-secs. *c* and *h*, precludes an Indian, within the meaning of the Act, from becoming the purchaser of any part of a surrendered reserve. Section 42, on the literal construction of it might, no doubt, be held to confine the benefits of the certificate of the sale or receipt for the money received on the sale of Indian lands to a "person" within the meaning of section 2 (*c*), that is, to some individual other than an Indian. But the conclusive objection to this line of argument is to be found in the Act of 1876 (ch. 18), which was in force when Phillipe purchased. Section 31 of that Act dealt with the effect of a certificate of sale or a receipt for money received on the sale of Indian lands. It is to the "party to whom the same was or shall be made or granted" that the section refers and the definition of "person" in the interpretation section is without effect.

The second point made rests upon sub-section 3 of section 77 of the Act, R.S.C. 1886, ch. 43, as amended by 51 Vict., ch. 22, sec. 3. It will be convenient to set out sections 77 and 78 incorporating that amendment. They are as follows—

Sec. 77. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds, in his individual right, real estate under a 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:

2. No taxes shall be levied on the real property of any Indian, acquired under the enfranchisement clauses of this Act, until the same has been declared liable to taxation by proclamation of the Governor in Council, published in the Canada Gazette:

3. All land vested in the Crown or in any person, in trust for or for the use of any Indian or non-treaty Indian or any band or irregular band of Indians or non-treaty Indians, shall be exempt from taxation, except those lands which, having been surrendered by the bands owning them, though unpatented, have been located by or sold or

agreed to be sold to any person: and, except as against the Crown and any Indian located on the land, the same shall be liable to taxation in like manner as other lands in the same locality; but nothing herein contained shall interfere with the right of the Superintendent-General to cancel the original sale or location of any land, or shall render such land liable to taxation until it is again sold or located.

Sec. 78. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the next preceding section; but any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid. 43 V., c. 28, s. 77.

The argument is that "any Indian located on the land" excludes an Indian purchaser under section 31 of the Act of 1876. I think that argument fails. The meaning of "located Indian," I think, is made sufficiently clear by reference to sections 16, 17, 18 and 20 of the Act of 1886 and, in my judgment, clearly refers to an Indian located under those provisions, that is to say, an Indian who has been permitted to occupy part of the reserve in respect of which he has a location ticket and continues to occupy it notwithstanding the surrender of the reserve. The scheme of these sections appears to be that real estate held by an Indian within the reserve where he resides shall not be subject to taxation or to be charged by mortgage or judgment, but it does not appear to be within the scheme to exempt property purchased by an Indian as purchaser outside of the reserve on which he is living. "Reserve," it may be observed, by reference to the interpretation clause, does not apply to a surrendered reserve.

I may add that the Act does not appear to contemplate the disabling of the Indians from acquiring property and engaging in transactions outside the reserve. See section 67, for example, in addition to sections 64, 65 and 66.

ANGLIN J. concurred with DUFF J.

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BRODEUR J.—Il s'agit d'une action pétitoire instituée par le Procureur-Général de la Puissance du Canada demandant que la Couronne soit déclarée propriétaire de la moitié sud-est du lot No. 3 dans la première concession du canton de Ouiatchouan.

Les faits qui ont donné lieu au présent litige sont les suivants:

Le terrain en question faisait partie d'une réserve sauvage établie en vertu de l'acte 14 & 15 Vict. c. 106. En 1869, la Bande des Sauvages Montagnais qui possédait la réserve a décidé de céder et abandonner entr'autres la première concession du canton de Ouiatchouan. Plus tard, le 7 mai, 1878, le surintendant-général des affaires des sauvages a vendu à un nommé David Philippe, pour la somme de $26.25, la propriété en question dans cette cause, qui faisait partie originairement de la réserve des sauvages mais qui était tombée dans le domaine de la Couronne à la suite de la cession faite par la bande.

David Philippe, ayant encouru certaines dettes, jugement fut rendu contre lui et la propriété fut vendue par le shérif. Le terrain fut adjugé au défendeur-intimé, Giroux, qui en prit possession, le défricha complètement et en fit une propriété de bonne valeur.

Des doutes ayant été soulevés par la Couronne sur la validité du décret, l'acquérerur Giroux, pour éviter un procès avec le Gouvernement, préféra prendre un titre de ce dernier et obtint de l'agent un reçu qui se lit comme suit:

Roberval, Pointe-Bleue, 22 juin, 1889.

$164.32.

Reçu de M. Pierre Giroux la somme de cent soixante-et-quatre piastres et 32 cents, en paiement du ½ lot S.E. No. Rang 1er. du Township Ouiatchouan suivant instruction de Département et avec contrat de vente pour le dit ½ lot.

L. E. OTIS, A.S.

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Cette nouvelle vente fut confirmée et approuvée par le Ministère des Sauvages; elle fut également approuvée par le Département de la Justice. Plus tard, cependant, nous voyons par la correspondance au dossier que le Département des Sauvages ayant demandé l'opinion du Département de la Justice sur la validité de la vente, en alléguant que le nommé Philippe était un sauvage localisé sur la réserve et qu'il y avait lieu de s'enquérir si ce fait n'affectait pas la validité de la vente judiciare, le Département de la Justice a répondu que dans les circonstances, en vertu de la section 79 de "l'Acte des Sauvages," telle que amendée par 51 Victoria, ch. 12, sec. 75, la terre ne pouvait pas être hypothéquée légalement et que la propriété ne pouvait pas être vendue par autorité de justice.

Malgré cette opinion du Ministère de la Justice aucune action ne parait avoir été prise par le Département que vingt-deux ans après la vente judiciaire.

La première question qui se soulève est de savoir si un sauvage peut acheter du Gouvernement un terrain qui était originairement dans une réserve mais qui a été abandonné.

Lorsque les réserves sont abandonnées ainsi par les sauvages, la Couronne voit à administrer, à vendre ou à louer ces terrains pour le bénéfice et avantage des sauvages. En vertu de la loi, elle est obligée de vendre ces terrains aux personnes qui se présentent les première et suivant les prix qu'elle détermine.

Il y avait du doute de savoir si le nommé David Philippe était un sauvage ou non. Un certain doute a même été exprimé sur la bande à laquelle il pouvait appartenir. Les uns prétendent qu'il était Abénaquis, les autres Montagnais.

Mais en supposant même qu'il était un sauvage de

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la tribu des Montagnais, qu'il eût le droit comme tel de vivre sur la réserve sauvage de la Pointe Bleue, il n'en est pas moins vrai que du moment que cette réserve ou une partie de cette réserve était abandonnée à la Couronne, rien n'empêchait un sauvage d'acheter un de ces terrains ainsi abandonnés.

Les sauvages ont, relativement aux réserves, des droits et des obligations restreintes; mais, du moment que ces réserves sont abandonnées à la Couronne, il me semble qu'un sauvage pourrait avoir le droit d'acheter un de ces terrains, de le cultiver, d'en faire les fruits siens et de jouir sous ce rapport des mêmes droits et des mêmes privilèges que les blancs. Prétendre le contraire serait, suivant moi, nier à ces sauvages le droit de se développer et de faire partie d'une civilisation plus avancée.

L'appelant allégue qu'il n'y a que les blancs cependant qui peuvent acheter ces terrains de la Couronne.

Il n'y a pas de doute, je crois, qu'un sauvage pourrait acheter, comme n'importe quel autre colon, des terres de la Couronne; et il faudrait, suivant moi, un texte bien plus formel que celui de la section 42 qui nous a été cité pour prétendre que dans le cas d'une réserve qui a appartenu jadis aux sauvages ces derniers seraient empêchés de pouvoir s'y établir comme colons.

La section 42 de "l'Acte des Sauvages" de 1886, citée par M. Stuart, ne peut pas être interprétée comme excluant les sauvages du droit de pouvoir acheter.

Je considère donc que Philippe avait le droit d'acheter ce terrain de la Couronne et que la vente judiciaire qui a été faite est valable et que Giroux est devenu acquéreur par bon titre de la propriété réclamée par l'appelant.

Mais il y a plus. En supposant que la Couronne

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n'avait pas le droit de vendre la propriété à Philippe il n'y a pas de doute qu'elle pouvait et qu'elle devait la vendre à Giroux. Or, en 1889, la Couronne elle-même s'est fait payer par Giroux une somme de $164.32 pour prix d'achat de la propriété en question et le département a lui-même confirmé cette vente qui avait été faite par son agent.

Je considère donc que, dans les circonstances, il ne peut pas y avoir de doute sur le droit de propriété de Giroux au terrain en question et, par conséquent, le jugement des cours inférieures qui a renvoyé l'action doit être confirmé avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *L. P. Girard.*
Solicitor for the respondent: *L. G. Belley.*

L'hon. C. J. DOHERTY, demandeur-ès qualité appelant *v.* GIROUX, défendeur-intimé.

Québec
1915
20 juin.

Action pétitoire — Terres indiennes et réserves des Sauvages — Abandon par la tribu — Domaine fédéral et domaine provincial. Concession par l'agent des Sauvages — Interprétation des mots Indian located — *Vente par le shérif — C. proc., art. 778 — Acte de l'Amérique britannique du Nord, art. 91 et 109 —14-15 Vict, ch. 106 — 16 Vict., ch. 159, art. 24, et ch. 182, art. 58 —23 Vict., ch. 151— 51 Vict. ch. 22, art. 3 — S. ref., (1888) ch. 43, art. 77— S. rev. (1906), ch. 81, art. 21, 18, 52, 101.*

1. Les terres des sauvages (*Indian Lands*) ne sont pas possédées par la Couronne en fidéicommis ou *in trust* pour les sauvages qui lui en ont fait l'abandon ; elles lui appartiennent en toute propriété comme les autres terres publiques,à charge de distribuer tous les ans, entre les membres de la tribu qui en a consenti l'abandon, les intérêts provenant du placement de leur prix de vente. *Church* v. *Fenton* suivi[1].

2. Lorsqu'une tribu sauvage fait l'abandon d'une réserve à la Couronne, l'intérêt bénéficiaire de la tribu dans les terres de cette réserve échoit aux provinces, et non au pouvoir fédéral.

3. Les terres des sauvages (*Indian Lands*) deviennent taxatives,du moment qu'elles sont vendues par le gouvernement, ne fût-ce que par simple billet de location ou permis d'occupation.

4. Un sauvage peut, comme toute autre personne, se porter acquéreur d'un lot de terre, qui a fait partie d'une réserve, lorsque cette réserve a été régulièrement abandonnée à la Couronne ; mais il ne bénéficie,quant à cet immeuble,d'aucun privilège d'exemption de taxes ou d'insaisissabilité.

5. Aux termes des articles 21 et 101, de l'acte des Sauvages' un sauvage localisé (*Indian located*)—bénéficiant des privilèges d'exemption de taxes et d'insaisissabilité,—est un sauvage à qui un terrain a été attribué par la tribu pendant l'existence de la réserve (*i. e.*, avant que cette réserve n'ait été abandonnée à la Couronne), et qui a continué à l'occuper[2].

Sir Horace Archambeault, juge en chef, et MM. les juges Lavergne, Cross, Carroll, dissident, et Pelletier, suppléant, dissident.—Cour du banc du roi.—No 32.—L.-P. Girard, avocat de l'appelant.—L.-G. Belley, avocat de l'intimé.

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1. 5. R. C. supr. 239.

2. Cette cause est portée devant la Cour suprême.

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Les faits essentiels de la cause sont pleinement exposés dans les notes de M. le juge en chef.

Sir HORACE ARCHAMBEAULT, juge en chef. L'appelant en cette cause est ministre de la Justice dans le gouvernement du Canada. Il poursuit l'intimé pour faire déclarer la Couronne propriétaire de certains biens immobiliers, et faire condamner l'intimé à en abandonner la possession et à payer les frais et revenus qu'il en a perçus pendant sa détention.

Il s'agit d'un lot de terre situé dans le canton Ouiatchouan, paroisse de St-Prime, comté du Lac St-Jean. Ce lot de terre a été vendu en justice, en 1889, et adjugé à l'intimé, qui a alors obtenu un titre du shérif. La Couronne prétend que cette vente est nulle, parce que la terre en question était occupée par un sauvage du nom de David Philippe, qui y avait été localisé ; qu'elle formait partie des terres des Sauvages ; et qu'elle était en conséquence insaisissable.

Comme on le sait, on appelle «terre des Sauvages», des terres qui faisaient autrefois partie d'une réserve, et que la tribu qui les possédait a abandonnées à la Couronne.

Les réserves sont des étendues de terre qui ont été mises à part par le gouvernement, pour l'usage des diverses tribus sauvages du pays. Après la cession du Canada à la Grande-Bretagne, le 7 octobre 1763, une proclamation royale fut émise pour établir quatre différentes colonies en Canada, et il fut déclaré dans cette proclamation qu'il était juste et raisonnable de ne pas molester les diverses tribus indiennes du Canada dans la possession de leurs territoires de chasse, et de leur réserver ces territoires. Il était, en conséquence, défendu aux gouverneurs des différentes colonies de faire arpenter les terres stuées dans ces réserves, et d'en disposer par lettres patentes. La proclamation ajoute, que personne ne pourra acquérir des sauvages ces terres qui leur sont ré-

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servées, et qu'elles ne pourront être cédées qu'à la Couronne par les sauvages réunis en assemblée publique.

En 1851, une loi fut adoptée pour mettre à part certaines terres pour l'usage de certaines tribus sauvages du Bas-Canada, et il fut statué que des étendues de terre, n'excédant pas en totalité 230,000 acres, pourraient être désignées, arpentées et mises à part par le commissaire des terres de la Couronne, et appropriées, par arrêté en conseil, pour l'usage des diverses tribus sauvages du Bas-Canada (14—15 Vict., ch. 106.)

En vertu de cette loi un arrêté en conseil fut adopté, en 1856, accordant à la Bande Montagnaise du Saguenay, une réserve de 20,000 acres de terre, à l'ouest du lac St-Jean, dans la région du Saguenay, à un endroit appelé la «Pointe Bleue».

En 1868, à la première session de la Confédération, une autre loi fut adoptée pour établir les conditions et les formalités qui seraient requises à l'avenir pour l'abandon, à la Couronne, par une tribu de sauvages, d'une réserve ou d'une partie de réserve attribuée à cette tribu. Il serait sans utilité de mentionner ces conditions et ces formalités.

En 1869, la Bande des sauvages Montagnais fit abandon à la Couronne de la réserve qui lui avait été attribuée en 1856.

A partir de ce moment, les terres de cette réserve sont devenues des Terres des Sauvages. Ces terres devaient être administrées par la Couronne pour le bénéfice des sauvages de la Bande Montagnaise. La Couronne pouvait en disposer comme de toute autre terre publique.

On a prétendu, devant cette Cour, que les Terres des Sauvages sont possédées par la Couronne en fidéicommis ou *in trust* pour les Sauvages qui en ont fait l'abandon. C'est là une erreur. Ces terres sont possédées par la Couronne comme toutes les autres terres publiques, comme les terres des écoles, les terres du clergé, et les autres terres de la Couronne. La seule chose qui les distingue, c'est que les sommes d'argent provenant de leur vente doivent être placées à intérêt, et que les intérêts en provenant doivent être distribués tous les ans entre les membres de la bande qui en a fait l'abandon.

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Cette question a été décidée, dans le sens que je viens d'indiquer, dans une cause de *Church* v. *Fenton*, qui a été décidé d'abord en 1878, par la Cour des plaidoyers communs d'Ontario, et ensuite par la Cour d'appel d'Ontario, et enfin, par la Cour suprême du Canada. [Citation[1].]

Dans une autre cause de *St. Catherine Milling and Lumber Co.* v. *the Queen*, aussi une cause de la province d'Ontario, le Comité judiciaire du Conseil privé, en 1888, a également, sanctionné le même principe. [Citation.][2]

Le fait est que, dans la proclamation du 7 octobre 1763, le roi Georges III, parle des réserves des Sauvages comme de terres formant partie du domaine et des territoires de la Couronne «parts of Our dominions and territories» ; et il réserve ces terres aux Sauvages pour leur territoire de chasse : «as their hunting grounds,» jusqu'à ce que Sa Majesté en décide autrement : «until Our further pleasure be known.»

Aussi, dans cette cause de *St. Catherine Milling and Lumber Co.* v. *the Queen*, le Conseil privé a-t-il décidé que la tenure des Sauvages était un simple droit personnel et d'usufruit dépendant du bon vouloir de la Couronne.

Une autre question beaucoup plus intéressante et plus difficile, qui a été décidée dans cette cause, c'est que cet intérêt bénéficiaire des Sauvages dans les terres des réserves est transmis aux provinces, et non au pouvoir central, lorsque les Sauvages font abandon d'une réserve à la Couronne. Le pouvoir de législation qui est accordé au parlement du Canada sur les terres des Sauvages, par le paragraphe 24 de l'art. 91 de l'Acte de l'Amérique britannique du Nord, n'est pas incompatible avec l'intérêt bénéficiaire des provinces dans ces terres. [Citation de lord Watson dans la cause de *St. Catherine Milling.*]

Le point que je viens d'exposer est soulevé formellement, par l'intimé en la présente cause, dans la défense qu'il a produite à l'encontre de l'action de l'appelant. Le treizième paragraphe de cette défense se lit comme suit :

1. 28 U. C. C. P. Rep. 388; 4. O. App. Rep. 162; 5 Supr. C. Rep. 239.
2. L. R. 14 App. Cas. 46.

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«13. Si ce lot appartient encore à la Couronne,—ce que le défendeur nie,—il est tombé dans le domaine de la Couronne, représentée par le gouvernement de la province de Québec et non pas par le gouvernement d'Ottawa.»

La Cour de première instance a refusé d'admettre cette prétention, en se basant sur le paragraphe 24 de l'art. 91 de l'Acte de l'Amérique britannique du Nord, qui mentionne «les Sauvages et les terres réservées pour les Sauvages» dans l'énumération des matières qui sont de la juridiction du parlement fédéral.

Comme nous l'avons vu, le Conseil privé a décidé que cette disposition de l'Acte de l'Amérique britannique du Nord n'a pas pour effet d'enlever aux provinces leur droit de propriété dans les terres d'une réserve des Sauvages lorsqu'une bande fait abandon de ces terres à la Couronne.

Le paragraphe 24 a simplement pour objet de mettre l'administration des terres réservées pour les sauvages sous le contrôle législatif du pouvoir fédéral. [Citation de lord Watson dans la même cause.]

Je conclus de ce qui précède, que l'appelant n'a pas le droit de demander que le titre que l'intimé tient du shérif soit déclaré nul et mis de côté, et d'être déclaré lui-même ès qualité propriétaire du lot de terre dont il s'agit. Je ne dis pas que l'appelant n'aurait pas le droit de faire mettre de côté une vente qui aurait été faite par le surintendant des Sauvages, ou son agent, pour cause d'erreur ou de toute autre cause suffisante ; car, dans ce cas, il ne ferait que demander de mettre de côté un titre accordé par lui-même ; mais nous sommes en présence d'un défendeur qui ne tient pas son titre du pouvoir fédéral, mais d'un shérif, sur poursuite et vente en justice, et je suis d'avis que le pouvoir fédéral n'a pas qualité pour contester ce titre.

Je pourrais m'en tenir à ce point, et laisser de côté les autres moyens soulevés par l'intimé contre la demande de l'appelant. Mais, comme il s'agit ici d'une question d'intérêt public, il vaut peut-être mieux que ces autres moyens soient examinés et discutés.

L'intimé dit, contrairement à la prétention de l'appe-

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lant, que le lot de terre en question était saisissable, et que la vente qui en a été faite par le shérif est valide.

La Cour de première instance a donné raison à l'intimé sur ce point.

Il n'y a pas de doute que les terres qui sont comprises dans une réserve sont exemptes de taxes. Il en est de même de ces terres, lorsqu'une bande en a fait l'abandon à la Couronne, aussi longtemps qu'elles sont possédées par celle-ci. Mais, du moment qu'elles sont vendues par le gouvernement, même par simple billet de location ou permis d'occupation, et avant l'émission des lettres patentes, elles deviennent taxatives.

Il n'en a pas toujours été ainsi. Autrefois, les terres vendues par la Couronne ne devenaient taxatives qu'après l'émission des lettres patentes. C'est en 1853 que la loi est venue permettre au commissaire des Terres de la Couronne d'accorder des permis d'occupation aux personnes qui désireraient acheter des terres publiques, et déclarer que ces terres seraient sujettes aux taxes municipales[1]. Dans la cause de *Church* v. *Fenton*, dont j'ai déjà parlé, le juge Gwynne dit à ce sujet : [Citation.]

Mais cette législation de 1853 ne s'appliquait pas aux terres des Sauvages. Elle s'appliquait seulement aux autres terres publiques, terres de la Couronne, terres du clergé, et terres des écoles. Le juge Gwynne dit à ce sujet : [Citation.]

Mais un statut adopté en 1860[2] renferme une disposition autorisant le gouverneur en conseil à déclarer que les dispositions de l'acte des Terres publiques, adopté à la même session, s'appliqueraient à l'avenir aux terres des Sauvages, et, le 7 août 1861, un arrêté en conseil fut adopté assimilant les Terres des Sauvages aux autres terres publiques. C'est depuis cette date qu'elles sont taxatives, à partir du moment où elles sont occupées par une personne, en vertu d'un billet de location ou d'un permis d'occupation.

L'appelant prétend que le lot de terre, dont il est ques-

1. 15 Vict., ch. 159, art. 24, ch. 182, art. 58.
2. 23 Vict., ch. 151.

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tion dans cette cause-ci, était exempt de taxes, et ne pouvait être vendu en justice, pour deux raisons :

1. Parce que ce lot ne pouvait être vendu à un sauvage, et qu'il n'est virtuellement jamais sorti du domaine de la Couronne ;

2. Parce que David Philippe était établi sur ce lot, et qu'une terre ne peut être saisie sur un sauvage qui y est ainsi établi.

Examinons ces deux questions. Comme je l'ai déjà dit, le terrain en question a été vendu par le Gouvernement en 1878, à un sauvage du nom de David Philippe, et il a été ensuite saisi sur ce dernier en 1889, et vendu en justice à l'intimé en la présente cause. Cette vente à David Philippe, en 1878, n'a aucune valeur, dit l'appelant ; elle est absolument nulle, parce qu'un sauvage est incapable de devenir acquéreur d'un terrain compris dans les limites d'une ancienne réserve. Il en résulte que le terrain n'est jamais sorti légalement du domaine de la Couronne, et les terres de la Couronne sont insaisissables.

On ne niera pas, je présume, qu'en thèse générale, un sauvage, comme tout autre individu, est une personne capable d'acquérir des biens, de les posséder et de les aliéner. L'article 99 de la loi des Sauvages déclare expressément qu'un sauvage peut être taxé pour les biens meubles ou immeubles qu'il possède en son propre nom, soit à bail ou en pleine propriété, en dehors de la réserve Ainsi, même si une réserve n'a pas été abandonnée à la Couronne par la bande à laquelle elle a été attribuée, un sauvage de cette bande peut posséder des biens en dehors de la réserve, et ces biens sont sujets aux taxes comme les autres biens de la localité.

Il a même été décidé, par cette Cour, en 1859, dans une cause de *Nianentsiasa* v. *Akwirente et al.*[1], qu'un sauvage peut se porter caution en appel pour garantir les frais, s'il est en possession, comme propriétaire, d'après la loi coutumière des Sauvages, de biens immeubles situés dans les limites de la réserve attribuée à la bande à laquelle il appartient.

1. 3 Jurist, 316.

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L'article 25 de la loi des Sauvages déclare, qu'un sauvage peut donner par testament ou léguer toute espèce de biens, de la même manière qu'une autre personne.

Seulement, s'il s'agit d'un terrain situé dans une réserve, il ne peut être légué à une personne qui n'a pas droit de résider sur cette réserve, et même s'il est légué à un sauvage qui a le droit d'y résider, il faut que le testament soit approuvé par le surintendant général.

Il n'y a pas de doute que les Sauvages sont régis par la loi des Sauvages, et non par le droit commun, lorsqu'il s'agit des terres d'une réserve, et des droits des sauvages de la bande relatifs à ces terres. Ces terres sont exemptes de taxes et de saisie ; elles ne peuvent être attribuées qu'à un sauvage de la bande, et avec l'approbation du surintendant ; les actions relatives à ces terres ne peuvent être intentées par un sauvage en son nom particulier, elles doivent l'être par le surintendant ; un tuteur à un enfant mineur ne peut être nommé en la manière ordinaire ; il ne peut l'être que par le surintendant, etc. Mais lorsqu'une réserve a été abandonnée à la Couronne, elle n'existe plus. L'article 2 de la loi dit expressément qu'une réserve est toute l'étendue de terre mise à part pour l'usage ou le profit d'une bande de Sauvages, *et qui fait encore partie de la réserve.* Ainsi, si une partie d'une réserve a été abandonnée à la Couronne, cette partie n'est plus une réserve. Si toute une réserve est abandonnée, cette réserve cesse d'exister comme telle. Comme nous l'avons vu plus haut, les terres d'une réserve abandonnée deviennent des terres publiques, comme toutes les autres terres de la Couronne, et le gouvernement peut en disposer en faveur de toute personne quelconque, même d'un sauvage, à moins qu'il n'existe quelque disposition dans une loi qui ne permette pas à un Sauvage de les acquérir.

L'appelant prétend qu'une telle disposition existe dans la loi des Sauvages.

Cette loi déclare que le Gouvernement peut vendre les terres des Sauvages à des personnes ou à des individus, et l'article 2 dit que les expressions «personne » et

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«individu» signifient un individu autre qu'un sauvage. Il en résulte, dit l'appelant, que la Couronne ne peut disposer des terres des Sauvages qu'en faveur de personnes autres que des sauvages.

Ce raisonnement ne m'a pas convaincu. Du moment que les Sauvages, en thèse générale, ne sont pas incapables d'acquérir des biens, excepté dans les réserves, pourquoi la Couronne ne pourrait-elle pas leur vendre des terres comme à tout autre individu ? Il ne me paraît pas exister de raison valable pour nier ce droit à la Couronne, et il faudrait une disposition bien formelle de la loi à cet effet pour déclarer un Sauvage incapable d'acquérir une terre publique dans ce cas spécial. Aussi, du moment que la loi peut être interprétée autrement, je ne suis pas disposé à lui donner l'effet de créer une incapacité.

Or, il me semble qu'il existe une autre interprétation beaucoup plus conforme à l'économie générale de cette loi. Comme nous l'avons déjà vu, lorsqu'une réserve existe, les terres de cette réserve ne peuvent être attribuées qu'aux Sauvages de cette réserve. Mais du moment que la réserve cesse d'exister, les terres peuvent être vendues à n'importe qui, et, par conséquent, à d'autres individus que les Sauvages. C'est là, dans mon opinion, le sens qu'il faut donner à la loi. Son objet n'est pas de déclarer que les Sauvages ne pourront pas acquérir les terres de l'ancienne réserve, mais d'édicter que les blancs pourront les acquérir.

Ainsi, je suis d'avis qu'un Sauvage peut acheter un lot de terre qui a fait partie d'une réserve, lorsque cette réserve a été régulièrement abandonnée à la Couronne. Par conséquent, la vente qui a été faite à David Philippe, en 1878, était valide, et le lot de terre dont il s'agit est alors véritablement sorti du domaine de la Couronne.

L'appelant dit, en deuxième lieu, que le lot de terre ne pouvait être vendu en justice, parce qu'un Sauvage y était établi. Ici encore, il s'agit d'interpréter une disposition de la loi des Sauvages. Cette fois, c'est l'article 101 de la loi qu'il faut interpréter. Cet article se lit comme suit : [Citation.]

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L'appelant dit que David Philippe était un sauvage localisé ou établi (*an Indian located*) sur le lot de terre dont il s'agit ; et que, par conséquent, ce lot de terre ne pouvait pas être taxé, et par suite, était insaisissable, en vertu de l'article 102, qui déclare qu'on ne peut saisir que les terres sujettes aux taxes.

Cette prétention de l'appelant est celle qui a été exprimée par le département de la Justice, en 1889.

Si David Philippe était un Sauvage localisé (*Indian located*) sur le lot de terre dont il s'agit, je serais d'opinion que l'appelant a raison sur ce point. Le lot de terre aurait été alors insaisissable.

Mais, l'appelant assume comme établi un fait qui n'existe pas, et c'est cette erreur qui a donné lieu au présent litige. David Philippe n'était pas, lors de la saisie et de la vente en justice du terrain acheté par l'intimé, un Sauvage localisé (*Indian located*) sur ce lot de terre.

Comme nous l'avons vu, David Philippe a acheté ce lot de terre du Gouvernement en 1878. L'appelant lui-même en a fait la preuve, en produisant une copie du registre du département certifiée par le sous-surintendant général des Affaires des Sauvages.

Ce document établit que le lot a été vendu à David Philippe, en 1878, et ensuite cédé à l'intimé, en 1889, après la vente du shérif.

Or, un Sauvage localisé (*Indian located*) est un Sauvage qui a été établi sur une terre d'une réserve avant l'abandon de cette réserve à la Couronne, et qui y est resté établi après cet abandon. Jusqu'à ce que le lot de terre soit vendu par le Gouvernement, il continue à être considéré comme un Sauvage localisé, mais du moment que le lot est vendu, il est obligé de déguerpir. Il suffit de lire l'article 21 de la loi, pour se rendre compte de la chose. Je cite la version anglaise «No Indian shall be deemed to be lawfully in possession of any land in a reserve, unless he has been or *is located* for the same by the band.»

Un «*Indian located*», est donc un Sauvage à qui un terrain a été attribué par la bande pendant l'existence de la réserve. C'est l'interprétation que la Cour de pre-

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nière instance a donnée aux mots «*Indian located*», et je partage absolument son opinion. C'est d'ailleurs celle que le législateur lui-même a donnée à la disposition de l'article 101 de la loi.

Je dois dire d'abord que c'est en 1888, par le statut 51 Vict. ch. 22. s. 3, que cette disposition a été introduite dans la loi. Jusqu'en 1888, on s'était contenté de dire (c'était l'art. 77 du ch. 43 des S. rev., 1886) que les terres tenues par la Couronne pour les Sauvages étaient exemptes de taxes. C'est le statut de 1888 qui a introduit la disposition exceptionnelle, qu'il s'agit d'interpréter, pour les terres occupées, vendues, ou qu'il a été convenu de vendre, c'est-à-dire les terres pour lesquelles la Couronne a accordé un permis d'occupation ou un billet de location. Cette disposition a donné lieu à un débat. On a demandé et on a obtenu des explications. Ces explications établissent clairement la signification qu'il faut attacher à cette partie de la loi. Ouvrons le Hansard de 1888. Voici ce qu'on lit, à la page 1037 : [Citation.]

Il me semble qu'après la lecture de ce débat, il ne saurait y avoir de doute sur la signification de la loi. Les terres abandonnées à la Couronne par une bande de Sauvages sont exemptes de taxes tant qu'elles restent en la possession de la Couronne, ou d'un Sauvage qui y a été localisé pendant l'existence de la réserve et qui a continué à l'occuper. Mais, du moment que la Couronne aliène ou vend un lot de terre, l'occupant est obligé de déguerpir, et la terre devient taxative.

Dans l'espèce actuelle, la Couronne a aliéné le lot en litige en 1878. Ce lot est donc devenu alors sujet aux taxes, et par conséquent saisissable.

Il est évident qu'on ignorait au département que cette vente avait eu lieu, et c'est parce qu'on a cru, erronément, que David Philippe était un «*Indian located*» qu'on a institué la présente action. La lettre de Power le dit expressément : «The land being located by an Indian and not held by lease or in fee simple by him, would be exempt from taxation, and therefor not liable to any lien or charge by mortgage, judgment or otherwise.» Il est certain qu'une opinion différente eût été

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exprimée, si l'on eût su que le lot était occupé par Philippe en vertu d'un bail, et non «*as being located.*»

Je conclus de ce qui précède que, pour cette deuxième raison, à savoir que le lot était sujet aux taxes et saisissable, lorsqu'il a été saisi et vendu, la présente action est mal fondée, et que le jugement qui l'a rejetée doit être confirmé.

Il y a un autre moyen invoqué par l'intimé à l'encontre de l'action, c'est qu'après son acquisition du shérif, il a payé au gouvernement la balance due sur le lot par David Philippe, et qu'il a ainsi, en sus de son titre du shérif, un titre du Gouvernement lui-même. Il est inutile d'examiner ce moyen, du moment que je suis arrivé à la conclusion que le titre du shérif est valide.

On pourrait aussi prétendre que l'appelant aurait dû demander l'annulation du titre du shérif ;et encore, que l'intimé était un possesseur de bonne foi qui a fait les fruits siens ; que, par conséquent, la Couronne n'a pas le droit de compenser les améliorations faites sur le lot par l'intimé avec les fruits qu'il en a perçus pendant sa possession ; et que l'intimé a le droit de retenir la possession du lot jusqu'à ce qu'il soit remboursé de la valeur de ces améliorations ; ou que, du moins, l'appelant aurait dû offrir de payer cette valeur. Mais la décision de ces questions n'est pas nécessaire, du moment que le jugement est confirmé pour d'autres motifs, et je n'en dirai rien.

J.-A.-P.

The judgment must be set aside, and the defendants allowed to file their statement of defence within such time as if statement of claim served on this date, with costs to the defendants to be paid forthwith after taxation, and, failing payment by the plaintiff, such costs to be paid by the solicitor who acted for the plaintiff at the time final judgment (now set aside) was entered.

MANITOBA.

MATHERS, J. JUNE 24TH, 1909.

CHAMBERS.

SANDERSON v. HEAP.

Indian—Sale of Land by—Prohibition of Indian Act, secs. 99-102—Deed Executed before Issue of Crown Patent—Subsequent Deed after Patent—Rights and Obligations of Indians—Estoppel—Application of Estoppel Act to Indians—Real Property Act—Caveat—Certificate of Title—Vendor's Lien—Enforcement.

Application by the caveator for an order for an issue to try the matters alleged in the petition presented by him to enforce his caveat.

H. W. H. Knott, for the petitioner, caveator.

R. M. Dennistoun, K.C., and R. D. Stratton, for the caveatee.

MATHERS, J.:—This is a petition in support of a caveat under the Real Property Act. The petitioner is a Treaty Indian and a member of St. Peter's band. Under an agreement made between this band of Indians and the Dominion government, the band surrendered to the Crown their rights to the land within St. Peter's reserve, in consideration, inter alia, of their receiving a grant of land within the said reserve approximating 16 acres to each of the members of the band.

The caveator was entitled under this agreement to 64 acres of river lot 35 of the parish of St. Peter's, particularly described in the petition. The petition alleges that in July

the caveator verbally agreed with one Frederick Pook, of the town of Selkirk, for the sale to him of this land for $7 per acre, payable $175 cash and a waggon at the agreed price of $85, the balance of the purchase money to be paid on the issue and delivery of the Crown patent for the land.

It further alleges that on 5th July the caveator, at the request of Pook, went with him to the law office of the caveatee, who is a practising solicitor, and that he was there requested to and did execute a deed prepared by the caveatee, and upon the execution of it received $175 and the same day received the waggon.

It further alleges that the deed was not read over to the caveator before it was executed, and that he was wholly unaware that the grantee in the deed was the caveatee Heap, and not Pook, and that he did not learn the contrary until in the month of January last.

It further alleges that the caveator had no legal adviser during any of the negotiations, nor at the time of the execution of the deed, and relied upon the caveatee to protect his interest, as he had previously, and during the negotiation of the agreement with the Indians, acted as counsel for the band. This latter allegation, however, was abandoned at the hearing by counsel for the petitioner.

It further alleges that the caveatee has applied for a certificate of title under the Real Property Act, and that the caveator has filed a caveat.

It then alleges that the sale of the land and the execution of the deed therefor to the caveatee, being prior to the date of the Crown patent, and before the land was lawfully taxable or subject to taxes or alienable by the caveator, is contrary to the Indian Act, R. S. C. 1906 ch. 81, secs. 99, 100, 101, 102, and said deed is void at law.

The petition prays that the deed may be declared void and of no effect and may be ordered to be delivered up and the registration thereof cancelled.

The caveatee, upon the return of the petition, filed evidence that subsequent to the issue of the patent, to wit, on 20th April last, and after the filing of the petition, the caveator executed and delivered a deed of the land to him.

It is quite apparent that a mere declaration (if the caveator was entitled to it) that the deed of 25th July was void under the Indian Act, because it was executed prior to the issue of the patent, would serve no purpose unless the subsequent deed executed in April can also be got rid of.

The attack upon the deed of 25th July in the petition is based entirely upon the provisions of the Indian Act, ch. 81, secs. 99-102. None of those sections seek to impose any restriction upon an Indian's right to alienate his property, except sec. 102. The part of the Act beginning with sec. 102 is headed "Legal rights of Indians." The section is as follows: "No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment, or otherwise, upon real or personal property of an Indian or non-treaty Indian, except on real or personal property subject to taxes under the last 3 preceding sections, providing that any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid."

That section restricts the right of any person to take security upon the real property of an Indian, but does not impose any restriction on the Indian's right of selling outright any of his individual property, and I cannot find in the Act any provision that says that an Indian may not sell his property if he chooses to do so.

Unlike the Indians of the United States, who are aliens, the Indians of Canada are British subjects and entitled to all the rights and privileges of subjects, except in so far as these rights are restricted by statute. The statute of Upper Canada 13 & 14 Vict. ch. 74, secs. 1 and 2, stated that "no purchase or contract for the sale of land in Upper Canada which may be made of or with the Indians or any of them shall be valid," unless made with the consent of Her Majesty; yet the full Court of King's Bench held that the prohibition only applied to reserve lands, and not to lands of which an individual Indian had acquired a title. In delivering the judgment of the Court, Robinson, C.J., said: "From the earliest period the government has always endeavoured, by proclamation and otherwise, to deter the white inhabitants from settling upon Indian lands or from pretending to acquire them by purchase or lease: but it has never attempted to interfere with the disposition which any individual Indian has desired to make of land that had been granted to him in free and common soccage by the Crown."

In Regina ex rel. Gibb v. White, 5 P. R. 315, it was held that an Indian, having the necessary property qualification, had an equal right with any other British subject to hold the position of reeve of a municipality: and in Rex v. Hill, 15 O. L. R. 406, at p. 410, 11 O. W. R. 20, 22, Osler,

J.A., says: "The Indian Act does not profess to deal with all the rights and obligations of an Indian. Nothing forbids him to acquire real and personal property outside of a reserve or special reserve, or to dispose of it, inter vivos at all events, as freely as persons who are not Indians."

The land in question had been allotted to the petitioner as his own individual property before he entered into the verbal agreement of sale to Pook set out in the 6th paragraph of the petition. He had then the same right to sell or dispose of it that any other British subject has. It is not alleged that the deed was procured by fraud, but the petitioner puts his right to relief on the ground that it is void as prohibited by the Indian Act. I cannot agree with that contention.

At the time this deed was given, the Crown patent for the land had not issued to the petitioner. He had then no title to convey, and whether or not the after-acquired title would pass by the deed depends upon the law of estoppel. I have not the deed before me, and am not therefore in a position to say whether it does or does not contain the necessary recitals or averments to raise a common law estoppel.

The caveatee in his affidavit says that the deed "purported to be made pursuant to the Act respecting Short Forms of Indentures, and contained the usual covenants for title. Counsel for the petitioner did not object that this was not sufficient evidence that the deed contained the covenants for title necessary to bring it within the terms of the Estoppel Act, but, assuming that it did, argued that the Estoppel Act does not apply to an Indian. I think I must assume, therefore, that the deed is sufficient, and that the only question for me to decide is the applicability of that Act to the petitioner.

The objection is founded on sec. 91 of the B. N. A. Act, sub-sec. 24, which mentions Indians and lands reserved for the Indians as subjects concerning which the Parliament of Canada is to exercise exclusive legislative authority. It is said that the Estoppel Act, being an enactment of the provincial legislature, does not therefore apply to the petitioner or his deed. By sec. 92, sub-sec. 13, property and civil rights in the province are subjects concerning which the province has exclusive jurisdiction. The law of estoppel would fall under this heading. The Estoppel Act cannot be said to be legislation concerning Indians. It relates to the property and civil rights of those who execute deeds

containing certain covenants. That Indians are subject to all provincial laws which the province has power to enact is well established by such cases as Regina ex rel. Gibb v. White and Rex v. Hill, supra.

In my opinion, the Estoppel Act applies, and, by virtue of its provisions, the title granted to the petitioner by the Crown patent passed to the caveatee.

What I have said disposes of the case specifically made by the petitioner, and yet it appears from the facts alleged that the petitioner may be entitled to some relief on grounds not raised by counsel during the argument. The petitioner alleges that he sold the land at $7 per acre, which would amount to $448. It is admitted that he has only been paid $260, leaving a balance of $188, for which he should be entitled to a vendor's lien. This right he would probably lose, if he has not already lost it, by the issue of a certificate of title to the caveatee. Relief on this ground is not specifically prayed by the petitioner, but there is a prayer for general relief under which it might be granted: Johannesson v. Galbraith, 16 Man. L. R. 138, 3 W. L. R. 275.

It is a matter of common knowledge that Indians in their dealings with white men generally get the worst of the bargain. Indeed, a much stronger expression might be used to describe the ordinary transaction of this kind. It is much to be regretted that the caveatee, a solicitor of this Court, in his dealing with this Indian, did not take the precaution necessary to surround the transaction with more independent evidence that it does not belong to the ordinary class.

The petitioner may within one month begin an action in this Court to establish a vendor's lien for his unpaid purchase money and for such other relief as he may be advised. In that event the costs of this petition will be reserved until such action is disposed of. In default, the petition will be dismissed with costs.

Tito and others v Waddell and others (No 2) Tito and others v Attorney-General

CHANCERY DIVISION
MEGARRY V-C

8th-11th, 14th-18th, 21st-25th, 28th-30th APRIL, 1st, 2nd, 5th-8th, 12th-16th, 19th-23rd MAY, 3rd-5th, 9th-13th, 16th-20th, 23rd-27th, 30th JUNE, 1st-4th, 7th-11th, 14th-18th, 21st-25th, 28th-31st JULY, 22nd-24th, 27th-31st OCTOBER, 3rd-7th, 10th-14th, 17th-20th, 24th-28th NOVEMBER, 1st-5th, 15th-19th DECEMBER 1975, 12th-16th, 19th-23rd, 26th-30th JANUARY, 2nd-6th, 9th-13th, 20th, 23rd-27th FEBRUARY, 1st-5th, 8th-12th, 15th, 18th, 19th, 22nd-26th, 29th-31st MARCH, 1st, 2nd, 5th-9th, 13th, 14th, 27th-30th APRIL, 3rd-7th, 10th-14th, 17th-21st, 24th-28th MAY, 8th-11th, 14th-18th JUNE, 29th, 30th NOVEMBER, 1st-3rd DECEMBER 1976

Trust and trustee – Nature of trust justiciable in court – Governmental abligation – Enforcement of obligation – Criteria on which distinction drawn between trust and governmental obligation – Crown colony – Lease by colonial official to mining commissioners – Royalties to be held 'in trust' for islanders – Absence of intention to create a true trust or fiduciary obligation – Whether 'trust' justiciable in courts.

Contract – Stranger to contract – Benefit and burden – Connection between defendant and contract – Mining lease conferring benefit on government appointees – Lease containing an obligation to replant – Change in appointees – New appointees taking benefits of lease – Whether obligation to replant enforceable against new appointees.

Specific performance – Parties – Interested parties not all before court – Form of order – Attempt to cure defect – Form of order leaving views of absent parties to be ascertained – Whether damages a more appropriate remedy.

Contract – Damages for breach – Injury to land – Compensation for work which might not be performed – Alternative basis of assessment of damages – Mining lease containing replanting obligation – Failure to carry out obligation – Damages based on cost of carrying out replanting work if plaintiff established work would be done – Alternative damages based on diminution in market value.

Boundary – Seashore – Beach – Area of beach – Area from low-water mark to high-water mark and area to landward of high-water mark in apparent continuity with beach at high-water mark – Extraction of sand – Agreement permitting extraction of sand from 'beach'.

Ocean Island was located just south of the equator in the Western Pacific. It had a surface area of 1,500 acres and consisted of a coral limestone base overlaid with phosphate. The coral appeared mainly in the form of 'pinnacles' of up to 80 feet high dotted about the landscape. There was little topsoil; most of the vegetation grew originally directly out of the alluvial phosphate. The rainfall was so small as to make even coconuts a marginal crop.

In 1900 the island was inhabited by some 500 Banabans. Phosphate was discovered that year and operations for its recovery were commenced by the PI Co Ltd. The PI Co Ltd applied for a licence from the Crown and a licence granted in 1902 (replacing earlier licences) conferred on a subsidiary company of the PI Co Ltd an exclusive right to occupy the island and to work phosphate. Meanwhile the island had been declared a British protectorate and became part of the Gilbert and Ellice Islands; subsequently,

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those islands were given colonial status. At all material times, English law applied to Ocean Island subject to local statute law.

The company made a number of freehold purchases of land on the island, but the King's Regulations 1908 severely restricted such transactions and, in order to protect the inhabitants from exploitation, required the approval of the resident commissioner for any sale or lease of native lands. The impact of the legislation was chiefly avoided by the company by transactions relating specifically to the phosphate and trees under 'P and T' deeds. At this time when land was worked out, it presented a picture of coral pinnacles adjacent to pits in which small quantities of phosphate were left. In some of the pits young coconuts had been planted, with some prospect of their growth. A proposal to level the pinnacles was considered, as was the problem of access to the newly-planted coconuts, without it being suggested that access was impossible without the construction of roadways. It was, however, becoming clear that the progress of the mining raised doubts as to the survival of the Banabans on the island. Various discussions were held between the company, the resident commissioner, the High Commissioner and the Colonial Office. By early 1913, the company and the Colonial Office had agreed that the company's future mining activities should be restricted in specific ways; effect was given to that in negotiations between the company and the Banaban landowners. Following the negotiations, the company signed an agreement with 258 Banaban landowners in the presence of the resident commissioner. The agreement provided that the land to be acquired by the company in the future was to be restricted to certain areas; a Banaban Fund was to be set up from the proceeds of a royalty payable on each ton of phosphate by the company to the government; the fund was to be administered in the first instance for the benefit of the Banaban community; an annuity scheme was also set up for all landowners thereafter leasing land to the company; no indication was given as to how long those arrangements were to be continued; and the company was required to replant worked-out lands whenever possible with coconuts and other food-bearing trees. This became known as 'the 1913 agreement'. The Colonial Office drafted deeds for the use of the company in acquiring land under the agreement. These were known as 'the A and C deeds'. The A deeds were used where the company already had a licence (i e a P and T deed) and was exchanging that for a deed under the 1913 agreement. The C deeds were used where the company was acquiring rights de novo. The parties to the A and C deeds were the company, the respective landowner and the resident commissioner. Both the A and the C deeds stated that the company would replant the land as nearly as possible to the extent to which it was planted at the date of commencement of operations, with trees and shrubs as prescribed by the resident commissioner for the time being in the island. (In fact, no such prescription was ever made.)

In 1920 the company's undertakings, rights, assets and liabilities were purchased by the British Phosphate Commissioners, an unincorporated body consisting of three individuals appointed respectively by the governments of the United Kingdom, Australia and New Zealand. The commissioners changed subsequently without any assignment of rights etc. (The company eventually went into liquidation.) In the year of the first appointments, the resident commissioner, acting on instructions from the Colonial Office, informed the Banabans that the commissioners would work the phosphate in future and that there would be no change in their own relations with the local administration. The company's local manager also informed his labourers that no changes detrimental to their interests would be made. Nothing was said to the landowners of the change from an incorporated company to unincorporated individuals. Over the years, further discussions were held with a view to the commissioners' acquiring more land for mining; but terms could not be agreed with the Banabans. The resident commissioner of the day, who had in effect been negotiating with the Banabans on behalf of the commissioners, wrote a threatening letter to the Banabans advising them to accept the terms offered. Meanwhile the 1928 Mining Ordinance was

drafted and enacted. This provided machinery whereby, in effect, the resident commissioner could take possession of land needed for mining in respect of which the commissioners and the Banaban landowners had been unable to agree terms (provided that the resident commissioner regarded the terms offered as reasonable) and could lease it to the commissioners. Under the lease, compensation for the land would be assessed on a market value basis by arbitration, but the rate of royalty payable for the phosphate would be fixed by the resident commissioner. Moneys paid by way of compensation or royalties were to be paid to the resident commissioner and were to be held by him in trust for the former owners. Similarly, moneys to be paid under agreements reached between the landowners and the commissioners were to be paid to the resident commissioner and held by him in trust for those entitled. In 1931 the resident commissioner (who had earlier written the threatening letter) finally fixed the rate of royalties to be paid under the 1928 Ordinance, stating in his proclamation that part of the royalty would be held in trust for the Banaban community generally (the 1931 transaction). The words of the lease reiterated the words of trust. The 1928 Ordinance was modified by a 1937 Ordinance which, inter alia, omitted the reference to holding the moneys in trust and required the resident commissioner to pay the moneys received as royalties for the benefit of the natives of the island and to pay the moneys received as compensation to the former owners of the land.

In 1942 Ocean Island was occupied by the Japanese. The resident commissioner left, and thereafter there was no resident commissioner established on the island. During the occupation all land records, all the Banabans' houses and many trees were destroyed. After the war the island was uninhabitable and the Banabans were resettled on Rabi late in 1945; this island, some 1,600 miles from Ocean Island, was part of the Fiji Colony and had providentially been bought as a second home for the Banabans in 1942. A Rabi Island Council was formed with some legislative powers and after a ballot the Banabans decided to make Rabi their permanent home.

In 1947 an agreement was made between the commissioners and the Banaban landowners of Ocean Island. It provided for the commissioners to acquire further parcels of land on Ocean Island and for payments to be made to the landowners. No provision was made to review the scale of the payments and the agreement was generally disadvantageous to the Banabans. Although the agreement was signed in the presence of the administrative officer responsible for Rabi, all negotiations had been conducted by the manager of the commissioners. In 1948 the commissioners negotiated an agreement ('the sand agreement') with the Rabi Island Council whereby they were permitted to remove sand from the beach at Ocean Island. In 1957 the commissioners agreed to raise the royalty payable under the 1947 agreement and subsequently they improved the financial lot of the Banabans by various ex gratia payments. In 1971 the office of resident commissioner was abolished and replaced by that of Governor. The function of prescribing the trees and shrubs under the replanting obligations in the A and C deeds accordingly devolved on the Governor.

The Council of Leaders and some (but not all) of the Banaban landowners owning individual plots of land scattered about Ocean Island brought proceedings against the commissioners and the Attorney-General on behalf of the Crown. In the first action (*'Ocean Island No 2'*) they claimed that the Crown was in a fiduciary relationship to the Banabans and that in respect of the 1931 transaction and the 1947 transaction the Crown had acted in breach of that relationship through a conflict of duty and interest. In the second action (*'Ocean Island No 1'*) it was claimed that the commissioners had wrongfully removed sand from a particular plot. It was also claimed that they had failed to comply with the obligations affecting some 250 acres to replant worked-out lands and that they should be required to demolish the pinnacles, to import soil, to plant coconuts in baskets of soil six feet deep and ten feet in radius and to provide access to the replanted plots. That aspect of the claim would involve constructing some 80 miles of roadways in the 250 acres and the importation of soil from Australia over several years; it would take at least five years before planting could begin and a

further 12 to 14 years before the trees began to fruit. The plaintiffs claimed specific performance and alternatively damages. In respect of certain plots where not all who might be interested were before the court, the claim for specific performance was expressed to be 'should all the owners of such land wish it'.

Held – (i) The fiduciary claims in *Ocean Island No 2* failed, since any obligation which the Crown had towards the Banabans was a governmental obligation (or 'trust in the higher sense') and as such was not justiciable in the courts; it was not a 'true trust' in the conventional sense (see p 238 *b*, post); in particular—

(a) the naming of the holder of an office rather than an individual as trustee suggested an intention to create a governmental obligation rather than a true trust (see p 221 *c*, post);

(b) the problems inherent in relation to the law of perpetuities, the ascertainment of the beneficiaries and in the assessment of their interests made it difficult to infer that a true trust had been created in respect of the Banaban Fund (see p 226 *b* and *c*, post);

(c) the circumstances surrounding the 1913 arrangements, particularly the fact that the Crown was not a party to the agreement between the Banabans and the company and that there were no statements made on behalf of the government before, during, or after the 1913 agreement to show an unequivocal intention to hold the fund on a true trust, substantially supported the existence of a governmental obligation rather than a true trust (see p 226 *e* to *g*, post);

(d) the trust referred to in the 1928 Ordinance imposed a statutory duty on the resident commissioner to use the moneys received in a particular way, but in the absence of any intention (or implication) to create a fiduciary obligation, the Ordinance did not create a true trust or any other fiduciary obligation (see p 230 *j* to p 231 *a*, post); *Re Bulmer, Greaves* v *Inland Revenue Comrs* [1937] 1 All ER 323 distinguished;

(e) there were no express words in the 1937 Ordinance creating a true trust; the language of the Ordinance was more consonant with that of a governmental obligation than a true trust; and the words of trust in the 1931 transactions (which themselves created no true trust) could not convert the obligation under the Ordinance into a true trust (see p 235 *f* to *h*, post); *Kinloch v Secretary for State for India in Council* (1882) 7 App Cas 619 applied.

(ii) In the absence of a true trust there was no other fiduciary obligation of the Crown in relation to the Banaban community which would have given rise to a conflict of duty and interest in *Ocean Island No 2* because—

(a) nothing in the 1913 arrangements could be said to constitute the Crown an agent of the Banaban community so as to give rise to a fiduciary relationship (see p 227 *h*, post);

(b) a governmental obligation did not give rise to the application of the rules of equity relating to self-dealing and fair-dealing; to hold otherwise would be to render a non-justiciable obligation justiciable (see p 228 *f*, post);

(c) the imposition of a statutory duty by the 1928 Ordinance to fix the rate of royalty and to perform other functions was too wide and indefinite to impose fiduciary obligations; and coupling the performance of a non-fiduciary obligation with self-dealing did not subject the self-dealer to any fiduciary duty (see p 232 *d* and *g*, post); *Re Reading's Petition of Right* [1948] 2 All ER 68 distinguished.

Per Megarry V-C. (1) Breaches of the self-dealing and fair-dealing rules are not subject to the six year period of limitation laid down by the Limitation Act 1939, s 19(2) (see p 248 *d* and *e*, post).

(2) Where a claim to an account is ancillary to a claim for equitable compensation, the Limitation Act 1939 and the doctrine of laches apply to the ancillary claim as they apply to the substantive claim, notwithstanding s 2 of the 1939 Act (see p 249 *j* to p 250 *a*, post).

(3) In determining whether proceedings may properly be brought against the Crown under the Crown Proceedings Act 1947, it is sufficient (in an appropriate case)

if the plaintiff can show that the requirements of s 40(2)(*b*) have been met; he does not need also to show that, the claim being formerly enforceable by petition of right under s 1, the money was properly payable out of the United Kingdom Treasury (see p 251 *h*, post).

(4) Declarations should not be made against the Crown in the English courts under what was formerly the Exchequer equity jurisdiction unless the obligation is an obligation of the United Kingdom government (see p 256 *f*, post).

(iii) The statutory provisions which required royalties to be paid or applied to or for the benefit of the Banabans did not apply to moneys payable under various statutes and agreements to the government of the Gilbert and Ellice Islands Colony in lieu of taxation, even if they were described as royalties; the Banabans were accordingly not entitled to such moneys (see p 215 *f* to p 216 *a*, post).

(iv) The sand claim in *Ocean Island No 1* failed because—

(a) the term 'beach' meant the area from low-water mark upwards to high-water mark and beyond to all that lay to the landward of high-water mark and was in apparent continuity with the beach at high-water mark (see p 263 *a* and *b*, post); *Government of State of Penang v Beng Hong Oon* [1971] 3 All ER 1163 applied; *Fisherrow Harbour Comrs v Musselburgh Real Estate Co Ltd* (1903) 5 F 387 and *Musselburgh Magistrates v Musselburgh Real Estate Co Ltd* (1904) 7 F 308 considered;

(b) applying that test, it was clear that the land from which the commissioners had removed the sand was an area of beach in respect of which they were entitled to remove sand under the sand agreement (see p 265 *c* and *d*, post).

Per Megarry V-C. Although the court has no jurisdiction to determine title to foreign land or the right to possession of it or to award damages for trespass to it, ownership of foreign land would be merely incidental to a claim for the conversion of sand removed from it and hence the court would have jurisdiction to hear such a claim (see p 266 *g* and p 267 *b*, post).

(v) The replanting claim in *Ocean Island No 1* succeeded in part on one of the two grounds put forward; for—

(a) as the replanting obligations had not been entered into by the present commissioners with the present owners of the land, the present commissioners were not liable on them unless liability could be established either by novation or by the doctrine of benefit and burden (see p 279 *d* and *j* to p 280 *a*, post).

(b) although it would be unfair to allow the present commissioners to escape liability by reason of their unincorporated state and the failure of the governments to ensure that each generation of commissioners succeeded in law to the burdens as well as benefits of the company's undertaking, it was impossible to find or infer the massive series of novations required to make the present commissioners liable; for there was a complete lack of the requisite animus contrahendi, especially in view of the absence of any explanation to the landowners in 1920 of the significance of the change from an incorporated company to unincorporated commissioners (see p 280 *b d* and *e*, post).

(c) nevertheless the present commissioners were liable under the doctrine of benefit and burden; for contemporary documents and circumstances showed that the original commissioners took over the rights and liabilities of the company and on subsequent changes of individual commissioners it was clearly intended that each should enjoy the benefits and be responsible for the liabilities; furthermore, there was sufficient connection between the present commissioners and the A and C deeds creating the benefits and burdens to enable the principle that he who takes the benefit of a transaction must bear the burden of it to be applied (see p 293 *f* to *j* and p 296 *a*, post); dictum of Upjohn J in *Halsall v Brizell* [1957] 1 All ER at 377, *Parkinson v Reid* [1966] SCR 162 and *E R Ives Investment Ltd v High* [1967] 1 All ER 504 applied; *Bagot Pneumatic Tyre Co v Clipper-Pneumatic Tyre Co* [1902] 1 Ch 146 not followed;

(d) although the benefits taken by the present commissioners under the 1913 agreement were, at highest, minimal, the mining rights which they enjoyed under the A and C deeds were substantial; moreover, the commissioners and their predecessors

had treated the mining areas globally and not on a plot-by-plot basis and hence they could not escape the burdens by maintaining in respect of individual plots that they had not derived any benefit therefrom (see p 294 *j* and p 295 *f*, post); accordingly, the commissioners were liable on the replanting obligations of the A and C deeds (into which, in respect of parcels covered by A and C deeds, the replanting obligations of the 1913 agreement had merged) and were subject to the normal remedies, including damages, for breach of that obligation; if specific performance of the obligation could be decreed, they would be liable for damages under Lord Cairns's Act (see p 277 c and *f* and p 297 *g*, post);

(e) the present owners of the land were competent to bring proceedings to enforce the replanting obligations which ran with the land both at law and in equity (see p 297 *h*, post);

(f) the replanting obligation would not be defeated by the failure of the resident commissioner or the Governor to prescribe trees and shrubs when the benefits under the A and C deeds had been enjoyed by the commissioners and the court could, if necesary, make an appropriate order (see p 303 *a b* and *e* to *g*, post); however, the function of prescribing trees and shrubs was purely governmental in nature and the court therefore had no jurisdiction to make a declaration relating to its performance (see p 305 *a* to *d*, post);

(g) the word 'replant' was to be construed in its context and in the circumstances existing when the 1913 agreement and the A and C deeds were executed; so construed, it did not require the execution of extensive and disproportionately expensive works such as levelling pinnacles, constructing roadways and baskets of soil, importing soil, and so on; instead, it merely required planting in a few feet of loose phosphate in the land in its worked-out state; and this construction was supported by the words relating to possibility in the 1913 agreement and the A and C deeds (see p 273 *a* to c and *h*, p 275 *b* to *d* and p 276 *a* and *b*, post).

(vi) The court would not order specific performance of the replanting claim in *Ocean Island No 1*, because—

(a) in relation to the plots in respect of which some co-owners were not parties to the action, the plaintiffs could only obtain specific performance if all other parties entitled to join in enforcing the obligations were before the court; and this defect could not be cured by seeking a form of order leaving the views of the other parties to be ascertained after the action (see p 310 *b f* and *g*, post); *Hasham v Zenab* [1960] AC 316 considered;

(b) in relation to the other plots (which were scattered about the island), damages would be a more appropriate remedy than specific performance since the latter would result in a small number of isolated plots being replanted with trees in hollows beside the pinnacles; the coconuts were unlikely to fruit and the plots would be surrounded by other plots not so replanted, thus making access for the owner, at best, difficult; accordingly, as a matter of discretion, specific performance would be refused (see p 312 *a* and *b*, post).

(vii) Any plaintiff in *Ocean Island No 1* who had sufficiently established his title to land that was the subject of an A or C deed was entitled to damages if the land had ceased to be used by the commissioners; those damages would be based on the diminution in value of the land resulting from the breach of the replanting obligations; they would not be the cost of replanting the land in accordance with them unless the plaintiff showed that this cost represented the loss to him; no plaintiff had established this; there was not enough evidence of the diminution in value of the land caused by the failure to replant to enable damages to be assessed; and accordingly, failing agreement, there must be further submissions to establish the extent of each plaintiff's loss (see p 313 *e* and *f*, p 319 *f*, p 320 *a* to *d* and p 321 *a* and *b*, post).

Notes

For the meaning of trust, see 38 Halsbury's Laws (3rd Edn) 809, 810, para 1346, and for cases on the subject, see 47 Digest (Repl) 14, 15, 1-21.

For the doctrine of privity of contract, see 9 Halsbury's Laws (4th Edn) 329-334, and for cases on the subject, see 12 Digest (Reissue) 48-55, 237-289.

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Actions

Two actions (*'Ocean Island No 1'* and *'Ocean Island No 2'*) were brought by the owners of certain lands in Ocean Island and by Rotan Tito, a prominent landowner, and the Council of Leaders (a statutory body) against three individuals who were, at the date of the writ, the British Phosphate Commissioners (an unincorporated body) and Her Majesty's Attorney-General. The nature of the litigation and the claims and the facts are set out in the judgment.

J R Macdonald and *C L Purle* for the plaintiffs in *Ocean Island No 1*.

R A MacCrindle QC, *N C Browne-Wilkinson QC* and *D K Rattee* for the three defendant British Phosphate Commissioners in *Ocean Island No 1*.

J G Le Quesne QC, *J E Vinelott QC*, *P L Gibson* and *D C Unwin* for the Attorney-General in *Ocean Island No 1*.

The fifth to 18th defendants in *Ocean Island No 1* did not appear and were not represented.

W J Mowbray QC, *J R Macdonald QC*, *L A Tucker* and *C L Purle* for the plaintiffs in *Ocean Island No 2*.

J E Vinelott QC, *P L Gibson* and *D C Unwin* for the Attorney-General in *Ocean Island No 2*.

Cur adv vult

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29th November. **MEGARRY V-C** read the following judgment:

a

I GENERAL

1. Introduction

This is litigation on a grand scale. From 8th April 1975 until 18th June 1976 I was engaged in hearing two cases relating to Ocean Island. Each was commenced by the same writ, issued on 10th November 1971. However, as one substantial section of the plaintiffs' claim did not directly concern one group of defendants, the three British Phosphate Commissioners, a sensible arrangement was made with a view to saving part of what were bound to be massive costs. A second writ was accordingly issued on 18th June 1973 with the British Phosphate Commissioners among the defendants; and then on 20th September 1973 the commissioners were struck out of the first action, which was left to proceed against Her Majesty's Attorney-General as the sole remaining defendant to a substantially reduced set of claims.

b

c

It was agreed on all hands that the action as constituted by the second writ should be heard first, and that the original action, in its reduced form, should follow immediately afterwards. As a result, the action heard first became known as *Ocean Island No 1*, even though it was the subject of the second writ; the action heard second, based on the reduced form of the original writ, thus became *Ocean Island No 2*. I shall continue to use these names, or the abbreviations *No 1* or *No 2*. Put explicitly, *Rotan Tito and others v Waddell and others*, 1973 R 2013 is *No 1*, and *Rotan Tito and another v Her Majesty's Attorney-General*, 1971 R 3670 is *No 2*.

d

There was no agreement that the evidence in one case should constitute evidence in the other; but inevitably there was some degree of cross-reference between the two cases, and in *Ocean Island No 2* it was agreed that I should use in that case the background knowledge that I had acquired in *Ocean Island No 1*. This interrelation of the two cases was accentuated by various common elements. One was the sharing of counsel. For the plaintiffs there was accretion, and for the Attorney-General subtraction. Mr Macdonald led for the plaintiffs in *No 1*, and in *No 2* he was himself led for the plaintiffs by Mr Mowbray. For the Attorney-General in *No 1*, Mr Le Quesne, until he left the Bar for other duties, led Mr Vinelott, and thereafter Mr Vinelott led for the rest of *No 1* and for all of *No 2*. For the British Phosphate Commissioners, I may say, Mr MacCrindle led Mr Browne-Wilkinson in *No 1*.

e

f

Another common factor was much of the documentation. Fifty bundles of agreed letters, reports, minutes, and other documents did duty in both actions, together with a rich miscellany of other documents; and five more bundles served in *No 1*. In all, well over 10,000 pages must have been put before me. The documents and transcripts of the evidence, when stacked, stand well over six feet high, or perhaps I should say a little over two metres. This included the pleadings, which in *No 1* are over 120 pages long, ending with an amended surrejoinder to amended rejoinder; in *No 2* they are rather less in bulk and considerably shorter in substance, since over 35 pages consist of a detailed enumeration of documents relied on by the plaintiffs. In both cases there were many arguments on the pleadings, and much amendment during the hearings. In this, *No 2* perhaps surpassed *No 1*; certainly its pleadings became more prismatic. On the other hand, *No 1* amply demonstrated for all concerned the physical difficulties in conducting litigation in an orthodox courtroom when in addition to the voluminous documents and a wealth of authorities, there are manifold maps and plans, some of them five feet or more long or wide and some with an area of 20 square feet or more.

g

h

In duration, *Ocean Island No 1* took 106 court days as against the 100 days of *Ocean Island No 2*, and it also required the additional 15 days (between Day 74 and Day 75 of the hearing) that were needed for holding a view of the locus in quo in the circumstances that I have related in *Tito v Waddell*[1]. I heard much evidence, though in *No 1*

j

1 [1975] 3 All ER 997, [1975] 1 WLR 1303

there were many more witnesses than in *No 2*: there were over 30 in *No 1* as against
a nine in *No 2*. This difference was reflected in the speeches; in *No 1* they took a little more than 60 days out of 106, whereas in *No 2* they lasted for about three-quarters of the 100 days. It took counsel for the plaintiffs about a month to open *No 1* and another month to reply. Much law was involved in each case. Over 130 reported cases were cited in *No 1* and over 90 in *No 2*, with many passages from textbooks and other sources as well.

b I have recited these statistical details at the outset as they help to explain a number of matters. First, all concerned have encountered the obvious difficulties of volume and complexity. Second, the press of materials inevitably left some loose ends, with some points doubtless thought to be not worth the pursuit. Third, the judgment in such cases is bound to be massive, and to deal with every point that has been raised would make it of intolerable length. Fourth, I propose to set out in one judgment
c much material that is common to both actions, and then to treat as being incorporated by reference such of the material as is relevant to each action, without repeating it. Fifth, I propose to deliver judgment first in *Ocean Island No 2*, which is what remains of the original action, and then to deliver judgment in *Ocean Island No 1*. I may add that I fully concur with counsel in thinking that the appropriate course to pursue was to hear both cases before delivering judgment in either.

d There is one other matter that I must mention at this stage. I was told that a third Ocean Island action was waiting to come on after *No 1* and *No 2* had been decided. Subject to one reservation by the British Phosphate Commissioners, I was accordingly pressed on all hands in *Ocean Island No 1* to express my views on all the issues that arose, even if by reason of some finding of fact or some ruling on a point of law that issue did not necessarily arise for decision in *No 1*; for these views, it was said, might
e be of assistance in reaching a settlement in *No 3*. *No 3*, I was told, has not far short of 300 plaintiffs, instead of the dozen or so in *No 1* whose cases were intended to represent the various combinations of fact that might arise in *No 3*. In due course I shall have to consider how far I can properly give effect to this request, and to the reservation that went with it; this related to what was known as the purple land. For the present I merely record it, and also the fact that I know little more about *Ocean Island No 3* than
f is indicated by this statement.

I should add that in this judgment I have inserted a number of headings; and I shall preface the transcript with a list of these headings in order to provide something of a table of contents. I do this merely for ease of reference; the headings are not intended in any way to affect the meaning of the text.

g **2. Ocean Island**

I must first say something about Ocean Island. It lies just south of the equator in the Western Pacific, about 170° west of Greenwich, and roughly halfway between the Hawaiian Islands and the coast of Australia. Its nearest neighbour is Nauru, lying some 160 miles to the west; and Nauru plays an important though subsidiary part in the
h story. Both islands are known as phosphate islands, in that nature has given them deep deposits of high-grade phosphates. Whether these are of avian or marine origin seems to be uncertain. Ocean Island has a surface area of not much over 1,500 acres, or some 2½ square miles. It is roughly circular in shape, except for a bite taken out of the southern side, which is called Home Bay. Viewed in profile, the island is the shape of a shallow dome, with the centre of the island rising to some 250 feet. The structure of
j the island consists of a coral limestone base overlaid by phosphate; and there is a surrounding coral reef which dries out at low tide. On the island the coral is mainly in the form of a large collection of what are usually called 'pinnacles'. These are not easy to describe, and although the photographs are helpful, they do not really convey the picture that meets the eye. In its natural state, the surface of the island consisted of grass, trees and vegetation, growing more or less directly out of alluvial phosphate,

with very little of what could be called 'topsoil' in any real sense of the word; but there are outcroppings of coral pinnacles, of a greyish colour. The process of extracting the phosphate consisted of open-cast working which removed the relatively small quantity of alluvial phosphate, consisting of small fragments down to a dust, and the relatively large quantity of phosphate in rock form, some rocks weighing many tons. The phosphate deposits were deepest in the centre of the island, and there the process of extraction has left a terrain consisting of scores of pinnacles to the acre, many standing 60 or 80 feet high, or more, with pits beside each of them narrowing down to a small area. The pinnacles themselves are of widely varying shapes and sizes, with abundant pitting and erosion; admirers of modern sculpture might find much to please them in the pinnacles.

The depth of the phosphate deposits decreases as one approaches the coast, and there is a substantial 'pinnacle belt' of exposed pinnacles, mainly on the east and north, where the land drops away on the seaward side. On the surrounding rim of the island there is not enough phosphate to be worth mining. The main residential quarter for the staff and workmen who extract the phosphate is near the south-west and west of the coast; and the plant for treating the phosphate and providing services is on the south. I shall say more about the physical features of the island in due course; for the present that suffices.

3. The litigation

The general shape of the litigation is that various claims are made by the Banabans against the British Phosphate Commissioners and the Attorney-General, as representing the Government of the United Kingdom. Before I outline these claims, I must say something about the background. When phosphate was discovered on Ocean Island in 1900 the island was accupied by a population of some 500 indigenous inhabitants who called the island 'Banaba' and were themselves known as 'Banabans': in each name the first 'a' is long, being pronounced as if an 'r' were inserted between it and the following 'n'. For 20 years the phosphate was extracted by a British company, first by the Pacific Islands Co Ltd, and soon, from 1902, by its subsidiary, the Pacific Phosphate Co Ltd. Then in 1920 the British Phosphate Commissioners were constituted by the governments of the United Kingdom, Australia and New Zealand. This was when the governments had jointly acquired the mining undertakings which the company had built up on Ocean Island and on the neighbouring Nauru as well.

Since 1920 the mining has been conducted by the British Phosphate Commissioners, with one commissioner appointed by each of the three countries. The commissioners, who were never incorporated, held the undertaking in trust for the three governments in the proportion of 42 per cent for the United Kingdom, 42 per cent for Australia, and 16 per cent for New Zealand. The mining of phosphate on Ocean Island was carried on with the Banabans remaining in residence; but the outbreak of World War 2 in 1939, and the subsequent occupation of the island by the Japanese in 1942, first curtailed production and then brought it to an end. The Japanese transferred most of the Banabans to other islands, and when in 1945 Ocean Island was recovered from the Japanese, it had been devastated and was uninhabitable. Though the Banabans' right to return to Ocean Island has been carefully preserved, it was plainly impossible for them to go back immediately after the war. Another island, Rabi (pronounced as if an 'm' separated the 'a' and the 'b') had been bought for them in 1942 out of a fund which had been built up for them out of phosphate royalties; and it was to Rabi that they went, and where, after a plebiscite in May 1947, they finally decided to remain as their 'headquarters and home'.

One complication was that whereas Ocean Island was part of the Gilbert and Ellice Islands Colony, Rabi was in the Fiji Colony: it lies some 1,600 miles south-east of Ocean Island, and is some 17,000 acres in extent, compared with Ocean Island's 1,500 acres. Parties of Banabans have from time to time visited Ocean Island and remained

there for some while; indeed, a party was in residence when I visited it. But from any practical point of view there has long been no question of the Banaban community as a whole ever returning to live on Ocean Island. About three-quarters of the island has now had phosphate extracted from it, and when the last of the workable phosphate has gone in another two or three years, little will be left save a desolation of uninhabitable pinnacles surrounded by a rim of land bearing such buildings and plant on it as the British Phosphate Commissioners abandon there.

I think that I should at this stage give an outline of the litigation so that when I come to the detailed facts they may be seen in relation to the broad issues between the parties. I shall, of course, be guilty of some degree of duplication in doing this, since I shall have to consider the claims in detail at a later stage: but the size and complexity of the case seems to me to make repetition on a modest and selective scale a virtue rather than a fault. The litigation has two main aspects, one physical and the other financial: *Ocean Island No 1* is principally concerned with the former and *Ocean Island No 2* with the latter. In *No 1*; claims are made by a selection of Banaban landowners against the first three defendants, who were the British Phosphate Commissioners when the writ was issued. The first, Sir Alexander Waddell, was appointed by the United Kingdom Government on 1st January 1965; the second, Mr Gainey, was appointed by the New Zealand Government on 1st February 1973. Unhappily, he died during the hearing of *No 1*; but all concerned expressed themselves as being satisfied that any consequent procedural complications could be overcome. The third defendant, Sir Allen Brown, was appointed by the Australian Government on 1st July 1970; but after I had reserved judgment I was informed that as from 1st July 1976 he had been replaced by Mr Maurice Carmel Timbs.

In very broad terms, the claims in *Ocean Island No 1* that were made against the first three defendants fall under three main heads. First, there is a claim for specific performance of contractual obligations to replant certain land with trees and shrubs, or alternatively for damages; and this is the main issue in the case. Second, there is a claim for over-mining. This seeks damages for the wrongful removal of phosphate from what was called the purple land, consisting of long thin strips just outside the boundaries of the mining areas on the east and north of the island. Third, there is the sand claim. This alleges that there has been an unauthorised removal of sand from what was called the red land, on the south-east coast of the island. The fourth defendant, the Attorney-General, is concerned with only the first of these claims, and then only in minor degree. The contention is that the United Kingdom Government, acting by the Governor of the Gilbert and Ellice Island Colony, is bound to prescribe the trees and shrubs that are to be planted.

That is *No 1*. *Ocean Island No 2* is very different. The claim is made by Mr Rotan Tito, who claims to be the owner of much land on Ocean Island, and by the Council of Leaders, an incorporated body which is, in effect, the governing body of the Banabans. The sole defendant is the Attorney-General. Again there are three main heads of claim. The first two relate to the Crown standing in a fiduciary position towards the Banabans in connection with two transactions, one in 1931 and the other in 1947. These were quite different. The 1931 transaction was in essence the compulsory acquisition of 150 acres, whereas the 1947 transaction was a voluntary disposition of two areas of 291 and 380 acres. For the 1931 transaction, the core of the plaintiffs' claim is that the royalty payable to the Banabans under the mining lease granted to the British Phosphate Commissioners by the resident commissioner of the Gilbert and Ellice Islands Colony as part of the compulsory process was fixed under the relevant statute by an officer of the Crown (the resident commissioner) in a transaction in which the mining rights were being conferred by the Crown on the Crown itself, in the shape of the British Phosphate Commissioners, so that there was a conflict of duty and interest. The royalty was fixed at less than a proper figure, say the plaintiffs, and so the Crown must pay compensation to make up the amount in fact paid by way of royalties to the amount that ought to have been paid. An

alternative basis for the claim is that the mining lease was a lease by a fiduciary to itself, and that this produces the same consequences.

That is the 1931 transaction. The 1947 transaction consisted of an agreement made by the Banaban landowners with the British Phosphate Commissioners for the mining of the 291 and 380 acres, in return for certain lump sums and a royalty. No direct element of compulsion entered into this, though the compulsory powers still existed and had not been forgotten; but the claim is that the Crown stood in a fiduciary position towards the Banabans, and so the agreement was an agreement between a fiduciary acting by its creatures, the British Phosphate Commissioners, and the beneficiaries of that fiduciary. The Crown as such fiduciary was therefore, it is claimed (and I put it very broadly), under a duty to make full disclosure to the Banaban landowners, and to ensure either that they received a full commercial price, or that they had competent independent advice. The Crown failed to discharge this duty, it is said, by failing to reveal that the phosphate was being sold at less than its true value to Australian and New Zealand concerns for manufacture into superphosphates. Substantial benefits were thus being conferred on Australian and New Zealand farmers instead of larger royalties being paid to the Banabans. Furthermore, there had been no disclosure of what sums were being paid by the British Phosphate Commissioners to the Gilbert and Ellice Islands Colony, in respect of phosphate exports, in lieu of taxation or otherwise; and nothing was done to ensure that the Banabans had proper advice. The royalty payable under the 1947 agreement was far below the proper royalty, and so the Banabans were entitled to compensation against the Crown.

Those are the first two claims, based primarily on the alleged fiduciary position of the Crown; and together they constitute the major part of *Ocean Island No 2*. The third claim is completely different. It relates to certain of the sums in respect of phosphate exports that I have just mentioned. These sums were made payable by the British Phosphate Commissioners to the Gilbert and Ellice Islands Colony in lieu of taxation, or in relation to taxation, by a series of agreements between the British Phosphate Commissioners and the Gilbert and Ellice Islands Colony Government, and by a series of Gilbert and Ellice Islands Colony Ordinances. What the plaintiffs contend under what for brevity may be called 'the Crown royalties claim' is that certain other Ordinances of the Gilbert and Ellice Islands Colony and of Fiji catch these payments, and make them payable to the Banabans instead. Here the question is essentially one of construing the relevant documents. The relief under all three heads is primarily claimed in the form of a series of declarations that the Crown is liable or bound to pay or transfer the sums in question (and not in the form of judgments for the money, or orders to pay it), with supporting accounts, enquiries and directions.

4. The constitutional position of Ocean Island

Before I consider any of these claims, there are other matters that I should outline. First, there is the constitutional position of Ocean Island. I do not propose to discuss this in any great detail. The broad position is that under the Pacific Islanders Protection Act 1875, the British Settlements Act 1887, the Foreign Jurisdiction Act 1890 and the Pacific Order in Council 1893 a High Commissioner for the Western Pacific was established, together with a system of courts and other institutions, and provisions as to the law applicable. Article 108 of the Order in Council empowered the High Commissioner to make, alter and revoke 'Queen's Regulations' for various purposes. In 1892 the islands in the Gilbert and Ellice groups (not then including Ocean Island) were proclaimed as British Protectorates. On 2nd October 1900, after some correspondence between the Pacific Islands Co Ltd and the Colonial Office in Downing Street, a licence in the name of Queen Victoria and executed by the Secretary of State for the Colonies was granted to the company: the company had applied for such a licence on 4th January 1900. The licence granted the company the exclusive right to occupy

Ocean Island for 21 years from 1st January 1901 for the purpose of removing guano and other fertilising substances, and to display the British flag in token of the occupation.

The company had in fact already hoisted the British flag. This had been done on 5th May 1900 by Albert Ellis, an employee of the company, who had discovered the presence of rich phosphate deposits on the island. On 3rd May, two days before the flag was hoisted, Ellis had entered into a short written agreement on behalf of the company with the 'King and Natives of Ocean Island', expressed to be made 'for and on behalf of the entire population of Ocean Island'. The agreement purported to give the company the sole right to raise and ship all rock and alluvial phosphate on the island; it provided for the company to pay the natives £50 a year, or trade to that value; and the company agreed not to remove any alluvial phosphate from land where coconut or other trees or plants cultivated by the Banabans were growing. I do not think that I need comment on this piece of commercial enterprise. Nor shall I mention the other provisions of the agreement, apart from observing that it was to be in force for 999 years. This concept can have meant little to the Banabans, if, indeed, it was ever put to them; the interpreter stated that he was never told to interpret it to the Banabans, and his competence as an interpreter of written English seems at least doubtful. The 'King' was not in fact a king; he was, it seems, a ceremonial functionary of a much lower stature. Within a year it had been agreed that the annual £50 was to be divided among the landowners whose land had been worked. Active operations had begun in August 1900 when representatives of the company landed and started to erect houses and work the phosphate. But I need not pursue the point, for nothing that I have to decide turns on this initial agreement. It is the licence from the Crown that was the significant document. In addition to making the provisions that I have mentioned, it prohibited any assignment or underletting without the written consent of the Secretary of State for the Colonies, and it provided for the company to pay £50 a year to him for the use of the Crown; and there were various other provisions that I need not recite.

On 28th November 1900, the High Commissioner issued a proclamation applying the Pacific Order in Council 1893, and such of the Queen's Regulations made thereunder as applied to the islands of the Gilbert and Ellice Islands Protectorate, to all persons within Ocean Island, which was thereupon included within the jurisdiction of the resident commissioner and deputy commissioner of the protectorate. Two days later, on 30th November 1900, the High Commissioner made a Queen's Regulation. In this regulation, the term 'Gilbert and Ellice Islands Protectorate' was to include Ocean Island; and the removal of guano and other fertilising substances from waste or unoccupied lands in the protectorate without the prior permission of the High Commissioner or resident commissioner was prohibited. On 28th September 1901, the captain of HMS Pylades, on Admiralty instructions, hoisted the British flag on Ocean Island, and took possession of Ocean Island in the name of Edward VII. In doing this, the Captain read a proclamation stating that the hoisting of the flag showed that the jurisdiction of the resident commissioner and deputy commissioner of the protectorate, as notified by the proclamation of 28th November 1900, extended to Ocean Island.

In the meantime, a revised licence dated 13th August 1901 had been issued to the company in place of the first licence dated 2nd October 1900. This was for a term of 99 years from 1st January 1901. On 15th August 1902, the Secretary of State gave approval for the assignment of the licence for Ocean Island by the Pacific Islands Co Ltd to its newly-formed subsidiary, the Pacific Phosphate Co Ltd (which I shall call 'the company'). This assignment was soon made. Shortly afterwards, by a deed dated 31st December 1902, the third and final licence was granted. This was in the form of a grant by Edward VII to the company in substitution for the second licence. It conferred an exclusive right to occupy Ocean Island for the purpose of working phosphate deposits for the term of 99 years from 1st January 1902. By cl 2 of the licence the

company covenanted to pay to the Secretary of State, for the use of His Majesty, £50 a year for the first four years, and then, in lieu thereof, on or before 31st March 1907 and every subsequent 31st March until and including the year 2000, 'a royalty of sixpence a ton' on all guano and other fertilising substances exported by the company from the island during the preceding year. There were a number of other terms and provisions, and of these I think I need mention only cl 5. By this the company covenanted that it would properly feed, support and treat all its employees, and 'duly respect the persons and rights of other inhabitants of the said Island'. This third licence, I may say, is the licence that has remained in force throughout.

I can now come forward to 10th November 1915, when the Gilbert and Ellice Islands Order in Council 1915, was made. By that order, the Gilbert and Ellice Islands within the protectorate were annexed to His Majesty's Dominions, and became known as the Gilbert and Ellice Islands Colony. The order made a number of provisions relating to powers, jurisdiction, offices, and so on, which I need not mention at this stage. The order took effect on 12th January 1916. Shortly afterwards, by an Order in Council made on 27th January 1916 and taking effect on 19th May 1916, the boundaries of the Gilbert and Ellice Islands Colony were extended so as to include, inter alia, Ocean Island.

I can now summarise the position as follows. Jurisdiction over Ocean Island was obtained peacefully and without any overt act of conquest or cessation. It became part of the Crown's dominions by virtue of the occupation of the island by the company and the hoisting of the flag on May 5th 1900, coupled with the Crown's licence to the company; and it thereupon became a British settlement under the British Settlements Act 1887. The law officers (Sir Robert Finlay and Sir Edward Carson) so advised on 16th May 1904, and I think they were right. Although on 29th February 1912 the then law officers (Sir Rufus Isaacs and Sir John Simon) disagreed with part of their predecessors' opinion, that was on another point. On any footing Ocean Island was part of the Gilbert and Ellice Islands Colony from 1916 onwards. In 1975, I was told, the Gilbert Islands and the Ellice Islands were divided into two separate colonies, with Ocean Island remaining part of the Gilberts. But that, of course, was long after these proceedings had been commenced; and at all material times from 1916 onwards Ocean Island was part of the undivided Gilbert and Ellice Islands Colony. Before that, Ocean Island seems to have been a British possession administered as part of a protectorate. I do not think that any serious issue remains between the parties arising from this constitutional situation.

As a colony by settlement, Ocean Island received English law, apart from any relevant native customary law; and this was not affected when in 1916 Ocean Island became a part of the Gilbert and Ellice Islands Colony, a colony by cession. Article 20 of the Pacific Islands Order in Council 1893 provides that subject to the other provisions of the Order, civil and criminal jurisdiction exercisable under the Order are, 'so far as circumstances admit' to be exercised 'upon the principles of and in conformity with the substance of the law for the time being in force in and for England . . .' That language, it is contended, is wide enough to let in any recognised Banaban law; and this is not seriously disputed. What has been disputed is the extent to which the owner of the surface of land on Ocean Island is also the owner of the subjacent minerals, or has any right to dispose of them; and the Attorney-General contends that no such ownership or right has been established. Subject to this, I do not think that it is questioned that in essence English law has at all material times applied to Ocean Island, subject to local statute law.

5. The land transactions

The land transactions between the British Phosphate Commissioners and their predecessors, the two companies, on the one hand, and the Banabans on the other

hand, may be ranged under seven heads. In setting out the facts, I may say, I shall refer to many dates not because the exact date has any special significance, but in order to facilitate reference to the particular document, and so on.

(1) *1900-1913: before the 1913 agreement*

First, there was the period from 1900 to 1913, before the 1913 agreement had been made. During this period the company (by which I mean the relevant company at the time) at first entered into many somewhat haphazard transactions with individual Banabans. The island was divided into a large number of small separate plots of land, identifiable by landmarks, in a wide variety of irregular shapes; and most plots were substantially less than an acre in area. Many landowners owned more plots than one; and the Banaban custom of landholding kept the land within the family, so that on the death of a landowner his land would pass to one or more of his children. However, others could readily be adopted so as to take by descent, and so inheritance was not confined to issue of the landowner. At various times this system was described by Europeans as being one of the land being entailed, though this is obviously a very rough analogy.

It has long been a matter of dispute how far a landowner could dispose of his land inter vivos; but despite that dispute, in early days a number of leases and purchases were made from individual landowners. The company in effect made such bargains as could be made with those landowners who were willing to deal with the company, the general pattern being that of freehold sales at about £15 or £16 an acre. At an early stage, however, the Colonial Office drew the company's attention to the Queen's Regulations and other legislation which, in brief, prohibited outright purchases of native lands, with minor exceptions, and severely restricted leases of such lands. Under the amended and consolidated King's Regulations 1908, regs 22 and 23, purchases required the approval of the resident commissioner or High Commissioner; they were restricted to plots not exceeding 1 acre; nobody could buy more than one plot in any one island; and land in cultivation with permanent food-producing crops was excluded. Any conveyance required the endorsement of the resident commissioner as to the vendor's title, as to the land not being required for his support, and as to the fairness of the contract; and even when the conveyance had been thus endorsed, it might be disallowed by the High Commissioner. These provisions replaced the absolute prohibition on sales which reg 17 of King's Regulations 1903 had imposed.

Leases were dealt with by reg 24. They were restricted to 99 years and to land in any island not exceeding five acres. Furthermore, the lessee, if a non-native, was required to submit the lease to the resident commissioner, who was to make suitable enquiries of the lessor and native authorities. He was to refuse to confirm the lease—

> 'if it shall appear that the land sought to be leased is not the property of the proposed lessor, or that the lease had been unfairly obtained, or that the terms are manifestly to the disadvantage of the native lessor, or that there will not be left sufficient land to support the family of the lessor, or that the lease is otherwise contrary to sound public policy.'

This was virtually the same as reg 18 of the King's Regulations 1903, save that this had contained no five-acre limit, and the maximum term had been 21 years. If the resident commissioner confirmed the lease, he was to register it by having a copy entered in a book, indorse it, and charge £1. These and many other provisions of the King's Regulations were plainly designed to protect the native inhabitants against exploitation.

The difficulties for the company resulting from these provisions of the King's Regulations and other legislation were met in part by a King's Regulation made on 18th February 1903. This validated 19 specified outright sales to the company that had

been made in 1901. For the most part, however, the company sought to avoid the impact of the King's Regulations for the future by evolving what became known as the 'P and T' deeds, the initials standing for 'phosphate and trees'. These were documents expressed to be made in consideration of the payment by the company of a lump sum which varied from £6 to £30 per acre. The usual practice was to make an additional payment for any coconut trees on the land, though this was done outside the formal agreement, which remained silent on the matter. The landowner was expressed to sell to the company all the coconut, pandanus and other trees growing or to be grown on his land, and all the rock and alluvial phosphate that might be found on it, with the right to remove and ship the same within a period which was sometimes five years and sometimes ten.

Though expressed to be deeds, the documents were executed under hand only, with the landowner usually affixing his mark in lieu of a signature. The deeds were very short, and often the detailed description of the land was longer than the rest of the deed. I may take one such deed at random. It is dated 27th November 1903 and relates to Nei Benia's land. The description gives the area, and then continues: 'Commencing at Peg 1, and proceeding on a bearing of 311° 42' for 72 links to Peg 2, thence on a bearing of 323° 20' for 43 links to Peg 3 . . .', and so on, for 12 typewritten lines. A plan on the back shows the 12-sided plot. The word 'Nei', I may say, is a prefix used to denote that Benia was a female; this prefix is used for married and unmarried women alike. Among the Banabans there is not, and never has been, so far as I am aware, any difference between men and women in relation to the ownership of land or any other legal rights; and on marriage a woman has always retained her own name and has not assumed that of her husband. In such matters Ocean Island has never required the statutory reforms which England found necessary in the last century and this.

The P and T deeds were thus, it was thought, a solution of the company's difficulties under the King's Regulations. Without purchasing the land or taking a lease of it, the company nevertheless acquired the rights that it needed for the extraction of the phosphates. The deeds were registered, at first with the High Commissioner and soon with the resident commissioner. The first of these deeds was registered in April 1904. But acquisitions remained haphazard; the company was still acquiring small individual plots of land, as and when it could, by individual bargains with those landowners who were willing. The result was in some degree unsatisfactory to all concerned. The small island was becoming dotted about with small plots here and there that were being mined. This presented obvious mining difficulties for the company, and could hardly have been welcome to those neighbouring landowners who were not willing to have their land mined. Further, the company had no assurance how much more land would become available for mining. By the end of 1908 the company had worked some 65 acres and had another 135 acres available under P and T deeds; and the annual rate of export of raw phosphate had begun to exceed 200,000 tons. The Colonial Office decided that instead of the resident commissioner merely visiting Ocean Island from time to time (for he was then based on Tarawa) Ocean Island should become the headquarters of the Gilbert and Ellice Islands Protectorate. Thus at the end of 1907 it became a seat of government, and remained so until the resident commissioner left in World War 2. The Colonial Office also decided that as from 1st April 1909 the revenue under the Crown licence of 1902 should be paid to the government of the Gilbert and Ellice Islands Protectorate. Early in 1909, if not before, there was an acting resident commissioner in residence on the island.

By this time the Banabans were understandably getting alarmed at the extent of the company's operations in relation to the size of their island. The Banabans lived in four villages. Tabwewa was near the west coast. Tabiang was near the south-west coast, and at the western end of Home Bay. Ooma was not far from the coast near the centre of the curve of Home Bay, and rather further from Ooma Point (or Sydney Point) which is the southern tip of the island and forms the eastern extremity of Home

Bay. Buakonikai was near to the summit of the island, a little to the east of centre. All stood on phosphate land, though Buakonikai, in contrast with the others, was in the heart of the land with the greatest depth of phosphate.

The Banabans were not surprisingly concerned with their future in relation to the mining. Before 1900, they had been supporting themselves with some difficulty. The average rainfall was desperately small, and in times of drought they had had to collect what water they could from underground caves in the subjacent coral limestone, known as 'bangabangas'. They had in the main subsisted on the fruit of coconut, pandanus and almond trees, together with what fish they could catch. In years of drought hundreds had died of starvation when the fruit trees died. The coming of the company had meant that water could be obtained (the company produced it by condensing sea-water), and the money received under P and T deeds and for working for the company enabled them to buy food from the company's store. In that sense their lot had been improved; certainly their mode of life had greatly changed. But the land on their small island was being replaced at an alarming speed by the barren workings from which phosphate had been extracted: a scattered pattern of 65 acres of worked-out land out of a total of some 1,500 acres must have been striking, and so must the acceleration in the process that had occurred between 1900 and 1908.

In April 1909 the acting resident commissioner reported to the High Commissioner that, after allowing for the area occupied by the villages and also the area of the barren coral pinnacles, over one-third of the island was then useless to the Banabans. The future plainly held the grave question whether the company was to stop mining at some point, or whether the Banabans should be persuaded to go and live on some other island; and there was a suggestion that the company should purchase another island, Kuria, to be exchanged for Ocean Island. Questions such as these were being discussed at the time, not least in the Colonial Office minutes; and those minutes began to raise the question whether the P and T deeds were not an attempt to evade reg 24 of the King's Regulations 1908. Even as early as this, Ocean Island had been the subject of debate in the House of Commons and discussion in the newspapers. The company was finding increasing difficulty in persuading landowners to part with land near the existing workings: and while some owners contented themselves with asking £100 or £150 for their plots, others flatly refused to make any dispositions.

Matters came to a head with a letter dated 12th November 1909 from the resident commissioner to the company. In this, the resident commissioner said that he was unable to see that certain agreements which had been sent to him for registration were in accordance with any of the existing regulations, and so he could not register them until the High Commissioner had decided the matter. The agreements were evidently P and T deeds. A month later, after discussion with representatives of the company, the resident commissioner proposed that certain areas should be marked off for mining, with enough in them to last the company for another 20 years, and that no mining should take place except in a mining area. Land outside the areas which the company had already acquired, he suggested, should either be sold back to the former owner, or exchanged for land inside a mining area. He proposed that 170 acres should be marked off in addition to the areas already acquired by the company. He also suggested that the company should pay an annual sum to be held in trust for the general benefit of the Banabans, 'always having in view the purchase of another Island in the Gilbert Group and the ultimate transfer of the natives to that Island'.

The company viewed the general tenor of these proposals with favour, though it wished to make some variations in the terms. Thus for the resident commissioner's 170 acres the company wished to substitute 300, a figure which was later increased to 500. There was a long period of discussion of the proposals. There were discussions between the company and the Colonial Office, and discussions within the company and within the Colonial Office. The resident commissioner, the High Commissioner and various officials all played their part in the proposals and counter-proposals.

understandings and misunderstandings, and agreements and disagreements; and there was at least one official rebuke within the Colonial Service. Steps were taken, and steps were retraced; and from time to time there were massive recapitulations of the march of events. The Colonial Office was emphatic that there could be no question of removing the Banabans from Ocean Island unless the transfer was most clearly for their benefit and also voluntary in the full sense of the word.

I shall not attempt to summarise the ebb and flow of negotiations. The company, as it was entitled to, throughout bargained hard and astutely for its own benefit; but the Colonial Office was showing great concern for the protection of the Banabans, and so was the resident commissioner and, to a somewhat lesser extent, the High Commissioner. Innumerable arguments and contentions emerged from the company, whereas the Colonial Office, the resident commissioner and the High Commissioner, with whom rested the ultimate legislative and administrative power, argued less with the company and more among themselves. On the official side there was an evident concern that no terms should be put before the Banabans for acceptance unless they were considered to be proper and in the best interests of the Banabans. On all sides it was accepted that nothing could be done unless the Banabans agreed.

During this period there had been discussions on Ocean Island between the resident commissioner and representatives of the company as to the proposed mining areas. As far back as June 1910 a large meeting of Banabans had unanimously approved the principle of mining areas, and had left the details to the resident commissioner. After many discussions, by the end of 1911 three areas had been agreed, with a total of some 477 acres. There was a northern area of 171 acres, a central area which, with its extension, was 171·8 acres, and an eastern area of 134 acres. The company was not to be allowed to acquire all the land in these areas: they were to be areas within which future acquisitions could be made by the company up to a total of whatever acreage was finally agreed. In other words, the mining areas were to constitute an 'envelope', as it has been called, within which the company was to be permitted to acquire further land for mining up to the total of the agreed 'ration', so that if (as was the case) the 'ration' was less than the land available within the 'envelope', some of the 'envelope' would have to be left unmined. In the event, the acquisitions already made by the company in the northern area meant that the new acquisitions would all have to be in the central and eastern areas.

By the spring of 1913 the company and the Colonial Office had finally reached agreement. By then nearly 215 acres in all had been the subject of P and T deeds; and of this area, nearly 130 acres remained unworked. On 14th March 1913 the Colonial Office wrote to the company, setting out in 11 numbered paragraphs a recapitulation of the terms that had been agreed. The company had suggested that a draft agreement embodying the terms should be submitted to the company for approval; but the Colonial Office replied that a formal and definite agreement could not conveniently be drawn up until the consent of the native owners had been obtained. In fact, no formal agreement was ever drawn up. By a further letter dated 11th April 1913 the Colonial Office agreed an amendment to the terms set out in its earlier letter, and then on 23rd April 1913 the company replied. This reply was not a simple acceptance of the 11 numbered paragraphs in the Colonial Office letter of 14th March, but set out nine of these 11 paragraphs in extenso. The two omitted paragraphs related to the prices for goods sold by the company, and the sale of water to the Banabans. In one sense nothing turns on these omissions; but they do go some way towards supporting a contention that was put forward in *Ocean Island No 2*. Looked at in terms of offer and acceptance in the law of contract, the exchange of letters has its problems; looked at in terms of an agreement relating to the exercise of governmental powers the difficulties disappear. In fact, the two omitted terms duly appear in the 1913 agreement made between the company and the Banabans.

I do not propose to set out in full the 11 numbered paragraphs of the recapitulation in the Colonial Office letter of 14th March 1913; but I must make some reference to

them. By para 1, the future mining operations of the company were to be confined to the three mining areas that I have mentioned, with a 'ration' of 50 acres in the northern area, 100 acres in the central area, and 100 acres in the eastern area. By para 2, the mining rights in 103 acres of land within the mining areas which had already been acquired by the company under P and T deeds were to be recognised; and the mining rights on unworked land outside the mining areas were, with the consent of the landowners, to be exchangeable for mining rights in equivalent land within the mining areas. There was a time limit on this, which, however, was omitted from para 2 in the company's letter. Instead, the company's letter included a paragraph protesting about this time limit. Paragraph 3 of the Colonial Office letter prescribed that, apart from land exchanged, a price of not more than £60 an acre and not less than £40 an acre should be paid for 'the total of 147 acres (more or less) to be purchased', with a provision for paying any deficiency between the total paid and £6,000 'to the fund for the general benefit of the natives'. The 147 acres, I may say, when added to the 103 acres that the company already had in the mining areas, made up the total of 250 acres that the company was to be allowed. Paragraph 4 then provided that when the lands had been worked out they should revert to the native owners as soon as this could take place without inconvenience to the company's operations.

Paragraph 5 I should set out in full:

> 'That an additional royalty of sixpence per ton be paid by the Company on all phosphate shipped from Ocean Island as from the 1st July 1912, the royalty to be calculated on the same basis as the existing royalty, viz, on the total tonnage of phosphate exported by the Company from the island, the proceeds of this additional royalty to be devoted to the general benefit of the natives.'

This is a provision on which considerable argument developed in *Ocean Island No 2*. At this stage I propose to say no more than that the original 6d royalty payable to the Crown had, by this stage, as I have already mentioned, become payable by the company to the government of the Gilbert and Ellice Islands Protectorate; and although para 5 does not in terms specify the payee, it seems plain that the additional royalty, like the original royalty, was to be paid to the same government.

Paragraphs 6 and 7 dealt with mining rights in the 250 acres, allowing the company to make up the 250 acres gradually if there was difficulty in getting native owners to sell simultaneously, and permitting mining for the remaining period of the company's licence, subject for the provision for reverter. Paragraphs 8 and 9 dealt with trees and shrubs. They were not to be cut down on any of the 250 acres on which mining operations were not being conducted. Paragraph 9 read:

> 'That the Company shall replant with suitable trees and shrubs any land on which mining operations have been completed, before handing back the land to the owners.'

By a letter dated 11th April 1913 the Colonial Office agreed to meet the company's wishes by inserting between 'completed' and 'before' the words 'at least to the extent to which the land was previously planted'. Paragraphs 10 and 11 of the main letter I have already mentioned.

That was the agreement that was ultimately achieved between the company and the Colonial Office. Not until it had been made was the company in a position to proceed with the acquisition of any land from the Banabans. But, in addition, there had to be in existence forms for the individual transactions with the landowners, to take the place of the P and T deeds for the future. By May 1913 the Chief Judicial Commissioner of the High Commission had made a start in drafting these instruments. The Colonial Office then took a hand in the drafting, and on 13th August sent the company three draft deeds. These became known as the A, B and C deeds respectively. The B deeds, intended for exchanges of land, were of no importance. They

ran into difficulties, and I think in the end only one was ever executed. At all events, it was agreed during the hearing of *Ocean Island No 1* that there was no need to consider the B deeds. But the A and C deeds, when finally settled, were used extensively. The A deed was drafted for the case where the company had a P and T deed for the land and was surrendering its rights and interests under that deed for the rights granted by the A deed. The C deed was drafted for cases where there was no existing P and T deed. On 15th August the company made detailed comments on the draft deeds, and on 23rd August the Colonial Office sent to the company drafts revised so as to meet the company's points.

A day or two earlier Mr Eliot, the new president commissioner, had left London for Fiji and Ocean Island, taking the revised drafts with him. It was he who drew up the form of agreement between the company and the Banabans which was to become the 1913 agreement. The agreement, he said, 'embodied the conditions arrived at between the Colonial Office and the Company's Board'. The agreement also contained an important group of provisions agreed on Ocean Island between the resident commissioner and representatives of the company who had gone to Ocean Island. These provisions were set out in a letter from the resident commissioner dated 10th November 1913 and the company's reply dated 11th November; and on 12th November the resident commissioner reported the substance of these proposals to the High Commissioner, and sent a copy to the Colonial Office.

On 19th December 1913, after the 1913 agreement containing these terms had been signed, the High Commissioner wrote to the Colonial Office, concurring in the resident commissioner's proposals and recommending approval by the Colonial Office. I think that I should read most of the resident commissioner's letter to the High Commissioner. After some introductory matters, the resident commissioner wrote:

> '3. As Your Excellency is aware, the [company] have undertaken to pay the extra 6d. a ton to the proposed Banaban Fund as from the 1st of July, 1912, and I think it probable that I shall require the whole of the first year's payment, viz., from 1st July, 1912, to 30th June, 1913, for immediate expenditure, provided that the further leases are first signed. I propose that this money which, according to Mr. Ellis's calculation, represents a sum of £4,743, should be paid direct to me in the presence of the Banabans, and that it should be drawn out, whenever required, by the Banaban community with the approval of the Native Magistrate and Kaubure of the island, subject to my being satisfied that it was not used for any wasteful purposes. Mr. Ellis agrees to this proposal on behalf of his Directors; the Company would, of course, benefit by the expenditure of most of this money in the island, though I have no doubt that a portion of it would be used by the Banabans in travelling around the Gilbert Islands, and to this I see no objection.
>
> '4. Should I find that the purposes of the proposed trust fund are understood, and deemed satisfactory, I should not bring forward the above proposal, but it should be borne in mind that the greatest opposition to future leases within the permitted areas will be from the oldest members of the community, and I deem it essential that I should be able to demonstrate to them, by the immediate transfer of this sum for their use, that they will personally benefit, as well as the younger generation, by the early settlement of this business.
>
> '5. It will be made clear that no part of this trust money can be touched as from 1st July, 1913, without the permission of Your Excellency and the Secretary of State, but that I have no doubt that permission might be obtained to utilize the accruing interest for the payment of an annuity to those who have parted with their lands.
>
> '6. I trust Your Excellency may be able to support my action to the Secretary of State if I find it advisable to expedite the final settlement by going beyond the powers given to me, and without further delaying matters by obtaining sanction

for this proposal. I am aware that I shall bind the Government by so doing, and that I must incur the full responsibility for such action.'

The discussions on Ocean Island began on 7th November 1913, the day that representatives of the company reached the island. From 7th to 17th November there were daily meetings between the resident commissioner and the representatives of the company; and out of these arose the exchange of letters that I have mentioned. On 18th November long public meetings with the Banabans began, as well as separate meetings by the Banabans among themselves. Detailed accounts of the meetings between the resident commissioner and the company on the one hand and the Banabans on the other hand have survived. The proposed agreement was explained and discussed in considerable detail, and many questions and complaints were answered as well. Though the representatives of the company took part, the resident commissioner carried the main burden of the discussions with the Banabans. I think that it is reasonably clear that the resident commissioner did explain to the Banabans the provisions of the agreement relating to the Banaban Fund on the general lines set out in his letter of 12th November to the High Commissioner, though he went further in relation to the interest on the fund. Instead of the tentative reference to 'permission might be obtained to utilising the accruing interest for the payment of an annuity to those who have parted with their lands', there was the firm provision that the interest would be utilised thus. One record of the meeting on 19th November records the resident commissioner as telling this to the Banabans, and saying that future generations of Banabans would be the richest natives in the Pacific. He also said that he did not know what would be done with all the money, but the British Government would find a way to expend it in their interests, and would listen to suggestions from them in the matter.

At the public meetings a division between the Banabans began to emerge, with Buakonikai and Tabwewa tending to be in favour of the agreement and Tabiang and Ooma against it. On 28th November the resident commissioner allowed Banabans to begin signing the agreement, and 72 landowners signed; and within a few days 74 more had signed. On 10th December deputations from Tabiang and Ooma came to the resident commissioner to say they now wanted to accept the terms. At a meeting that day 86 more signed the agreement, and by then 250 landowners were in favour of the agreement and 63 against. Soon a number of others signed the agreement, and in the end it was signed by a total of 258 Banabans.

(2) *1913-1920: the 1913 agreement*

With the signing of the 1913 agreement comes the second main period. The agreement was the first comprehensive bargain with the Banabans, and it was to govern dealings in phosphate land on Ocean Island until the 1931 transaction. I propose to read the entire agreement, pausing from time to time to make brief comments on its provisions, but leaving any longer discussions until the end. The agreement, with the consequent A and C deeds, is in the forefront of *Ocean Island No 1*; in *Ocean Island No 2* it is an important part of the background to the claims based on the 1931 and 1947 transactions.

The agreement begins as follows:

> 'Agreement entered into on the under-mentioned days of November and December, in the year 1913, A.D., by us the undersigned landowners and natives of the Island of Banaba, and by Albert F. Ellis, Local Director of the [company], in the presence of E. C. Eliot, His Britannic Majesty's Resident Commissioner of this Protectorate.'

It will be observed that neither the resident commissioner nor any other organ of government is expressed to be a party. It is merely that all concerned signed in the presence of the resident commissioner.

The agreement continues:

'2. This Agreement shall be subject to the fulfilment of the conditions enumerated below, and shall entail on us the obligations herein stated.

'3. That land to the extent of t45 acres within the delimited areas shall be acquired by the [company] on the terms laid down by His Majesty's Government, and which are embodied in the deeds which shall hereafter be signed.'

The 'delimited areas' are, of course, what has been called the 'envelope', and the deeds in question are the A, B and C deeds.

'4. That as soon as each plot of land has been surveyed the owner of such land shall sign the prepared deeds before the Resident Commissioner on payment being made to him of the purchase price as arranged, namely, at a sum of not more than £60, and not less than £40, per acre, according to the position and quality of the land, or by exchange by mutual consent, also compensation for food-producing trees as has been done in the past under the "Phosphate and Tree Purchase" agreements.'

The Banabans had had it explained to them that the company was offering to pay £60 an acre for land in the central mining area and £40 in the eastern mining area; the deposits of phosphate were deeper in the central area than in the eastern.

'5. That as soon as the deeds have been signed to the extent of eight acres in the central mining area, and eight acres in the eastern mining area, the Company will at once comply with the terms agreed upon and which are embodied below, but it is hereby undertaken that as each lot is surveyed, up to the limit of t45 acres aforesaid, we, the landowners concerned, will be prepared to receive our purchase money and sign the deeds.

'6. We understand that should we, the Banaban landowners, fail to comply with these conditions, the Company would be at liberty to cancel the obligations imposed upon them.'

I do not think that I need comment on these two clauses; it is the next five clauses which form the central core of difficulty in the agreement. I shall read them without a break.

'7. On the above conditions the Company hereby undertakes to hand over to the Resident Commissioner the whole of the first year's contributions to the Banaban Fund, namely, from the 1st July, t9t2, to 30th June, t9t3, which amounts to a sum of £4,734, and that this money shall be devoted to the following uses:—

'8. After deducting a sum of £300 to start the annuity fund (at the rate of £150 for the two years 19t3 and 1914), the whole of this amount shall be expended for the benefit of the existing Banaban community in any way which may be recommended by them, and agreed to by their Native Magistrate and Kaubure, and subject to the decision of the Resident Commissioner that such expenditure is equitable and not wasteful.

'9. That this sum of £300 reserved out of the total payment of £4,734 shall be used to start the annuity scheme, which scheme is as follows:—

'10. For the three years, t9t3, t914, and t9t5, a sum of £t50 will be available each year, and in the following years this amount will be increased by £t50 each year; this represents the simple interest on the yearly sum of £5,000, payable by the Company to the Banabans (through the Government) in royalty. That this money shall be used each year for distribution among all Banabans who lease land to the Company from this date, in the proportion recommended by the Banabans themselves, and subject to the decision of the Resident Commissioner that such division is equitable.

'11. That this sum of £5,000 is approximate only, and would be subject to increase or decrease, according to the yearly tonnage shipped by the Company.'

I shall leave these clauses for discussion later. At this stage I merely say that the origin of this group of clauses was not in the correspondence between the Colonial Office and the company, but in the local discussions between the resident commissioner and the representatives of the company in November 1913. The reference in cl 7 to 'the first year's contributions to the Banaban Fund' is a reference not to any existing fund, but to a new fund which by implication was to be established and fed by the new 6d royalty. I may add that at the meeting with the Banabans on 28th November 1913, when Mr Ellis signed the agreement on behalf of the company, he handed to the resident commissioner a cheque for £4,743 with a covering letter. This was to the effect that the cheque should be held until the Banabans had signed the agreement and also had sold to the company eight acres in both the central and eastern areas, and should only be applied on the agreed terms after this had been done.

I continue with the agreement:

'12. That so soon as the 16 acres of land referred to in paragraph 5 hereof have been leased to the Company, the Company shall comply with the following conditions from that date, namely:—(a) That they shall return all worked out lands to the original owners, and that they shall replant such lands—whenever possible—with coconuts and other food-bearing trees, both in the lands already worked out and in those to be worked out. (b) That the royalty of 6d a ton on all phosphate shipped shall be paid to the Government by the Company for the Banaban Fund as from the 1st of July, 1912, which includes the first year's payment of £4,734 referred to in paragraph 7 hereof. (c) That the Banabans shall enjoy the right to cultivate all lands leased by them to the Company until the Company actually require to work such land, or to put up covered-in areas, or to make railways, etc., over such lands. (d) That the Company will adopt a system of uniform prices for all goods sold by them, either to their own employees, or to any natives or other inhabitants of Ocean Island, and pending the arrangement of this matter an immediate reduction in price will be made on many articles as specified on the attached list. (e) That the Company shall provide each adult Banaban native with one gallon of fresh water per diem whenever necessary, at the price of three farthings per gallon.'

The agreement then ends as follows:

'In witness whereof we, the undersigned, have hereby placed our signatures and duly witnessed marks, on the under-mentioned days and months in the Year of Our Lord One thousand nine hundred and thirteen, in the presence of the Resident Commissioner, at Ocean Island.'

There is then the date 28th November 1913. The agreement is signed by Mr Ellis 'per pro' the company, and by 258 Banabans, many signing by a mark, on a range of dates running from 28th November to 16th December 1913. At the end of the signatures there are the words, 'All the above signatures were affixed in my presence', and the signature of the resident commissioner.

I return to the group of clauses which have given rise to difficulty and argument, cll 7 to 11. Before I consider these, I must mention cl 12(b) which, despite its position, really forms a prelude to this group of clauses. It introduces an altogether new feature into the relationship between the Banabans and the company, a royalty of 6d a ton on all phosphate shipped as from 1st July 1912. This, of course, was quite distinct from the 6d royalty already payable under the Crown licence of 1902, a royalty which since 1st April 1909, as I have mentioned, had been payable to the government of the Gilbert and Ellice Islands Protectorate. It was the new royalty which was often referred to as the 'additional royalty', as from the point of view of the company it plainly was.

The 1913 agreement was, to some extent, backdated in its operation. The phosphate year from 1st July 1912 to 30th June 1913 had ended over four months before the agreement was signed, so that the tonnage for that year was already known, and the amount of the royalty for the year had already been ascertained to be the sum of £4,734 mentioned. The amount of the royalties for future years was, of course, unknown, but for the purpose of the agreement, and to facilitate explanation to the Banabans, the amount was taken to be £5,000, with the provision for increase and decrease made by cl 11.

By the terms of cl 12(b) all royalties, including the initial £4,734, were to be 'paid to the Government by the Company for the Banaban Fund'. No explanation of 'the Banaban Fund' in the documents seems to have been thought necessary, beyond what could be gathered from cll 7 to 12. The royalty was payable on all phosphate shipped since 1st July 1912, irrespective of the plots of land it came from; it was not confined to land newly provided under the 1913 agreement, but extended to phosphate taken from land which the company had already obtained.

I can now turn to the effect of cll 7 to 11. I found these somewhat elusive, and by no means easy to comprehend; and more than once during the hearing I had to return to a careful study of them to avoid misunderstandings. I think that their main import is as follows. First, what is established is a single fund, the Banaban Fund. The reference to 'the annuity fund' in cl 8 seems to have been a slip for 'the annuity scheme'; for under the agreement there never was any separate annuity fund. Second, the Banaban Fund had two quite different functions. One related to the initial payment of £4,734. Of this, £300 was to be used for the annuity scheme. The remaining £4,434 was to be expended 'for the benefit of the existing Banaban community' in accordance with cl 8. This, it will be observed, was a 'once for all' provision for the first payment alone, with nothing to match it for later years.

The other function of the Banaban Fund was to provide money for the annuity scheme. The £300 taken from the first payment of £4,734 provided for the years 1913 and and 1914, at the fixed rate of £150 a year. For 1915 and subsequent years, however, two new elements came in. First, the payments were variable with the royalty paid. Thus if in 1915 the royalty were to be £5,000 exactly, £150 would be distributable under the annuity scheme; whereas if the royalty was more than £5,000, or less than £5,000, the annuity payment would be correspondingly more or less. £150 is 3 per cent of £5,000, and so in effect the annuity payments would be 3 per cent of the actual royalty paid. Second, from 1915 onwards the annuity payments were to be cumulative. If one assumes royalty payments to be constant at £5,000 each year, the annuity payments would be £150 for 1915, £300 for 1916, £450 for 1917, and so on.

The second main feature of these clauses of the 1913 agreement relates to the recipients of the payments. The £4,434 was to be expended 'for the benefit of the existing Banaban community', in accordance with cl 8; and no particular point arises on this. The annuity scheme, on the other hand, was that 'this money' (which must mean the money available for annuities) was to be distributed 'among all Banabans who lease land to the company from this date' in accordance with cl 10. No difficulty has arisen before me relating to the mode of distributing this money; but it is noteworthy that the recipients of the annuities were by no means the same as those whose land had given rise to the royalty that produced the annuities. As I have mentioned, the royalty was payable on all phosphate shipped after 1st July 1912. Thus if phosphate had been shipped from A's land in 1912 or 1913, and A was not one of those who leased land to the company 'from this date' (probably 28th November 1913) within cl 10, A would get no annuity, even though his land had helped to produce the royalty; whereas B, who leased land to the company under the 1913 agreement, was entitled to share in the annuity scheme. However, so far as A was concerned, he had struck his bargain with the company before the 1913 agreement was made, and the 6d a ton royalty was no part of that bargain. The agreement was drafted so as to

provide an inducement to Banaban landowners to lease land to the company; and, in a sense, the payment by the company of a royalty in respect of land which they already had was mere bounty. Similar considerations apply to the devotion of the initial £4,434 to the benefit of the existing Banaban community.

The third main feature of these clauses of the 1913 agreement is the absence of any provision for the capital of the Banaban Fund. The fund would be increased each year by the royalties of £5,000 a year, more or less, and the notional interest at 3 per cent on the accumulated royalties would be distributed each year as annuities. Not a word is said about how long this process was to continue, or whether and for what purposes any of the capital of the fund could be expended, apart, of course, from the initial £4,734; this was to go as to £300 for annuities and as to the rest for the benefit of the existing Banaban community. This express provision for the disposition of the first year's royalty throws into relief the absence of any provision for all subsequent royalties. So far as the 1913 agreement itself was concerned, the accumulated annual royalties were to be held in perpetuity, yielding each year the appropriate annuities for those who leased land to the company 'from this date' within cl 10.

That leads me to the fourth main feature. 'The Government' had important functions under the agreement. One was the receipt of the 6d royalty payable under the agreement. In cl 10 of the agreement this was expressed in the form of the yearly sum 'payable by the Company to the Banabans (through the Government) in royalty'. Clause 12(b) states that the 6d royalty is to be 'paid to the Government by the Company for the Banaban Fund'. The latter form of expression seems to me to be the dominant form so far as the forms conflict. Clause 12(b) is an operative provision, obliging the company to make the payment, whereas in cl 10 the words are merely exegetical, explaining what the annuity payments of £150 represent. Furthermore, the words 'the Banabans' in cl 10 are somewhat indefinite in meaning, whereas 'the Banaban Fund', though unexplained, represents a more intelligible concept for money which is intended to yield annual payments of annuities. I should also mention the reference in cl 2 to 'His Majesty's Government' in relation to the A and C deeds.

In addition to these direct functions, there are a number of other functions which are consigned to a government official, the resident commissioner. He is to witness the A and C deeds (cl 4), he is to receive the initial £4,734 (cl 7), he is to consider whether the expenditure of the £4,434 is 'equitable and not wasteful' (cl 8), and he is to consider whether the Banabans' proposals for dividing the annuities are 'equitable' (cl 9). Nevertheless, despite these governmental functions, neither the government nor the resident commissioner was made a party to the 1913 agreement; that was an agreement between the company and the Banabans who signed it, and them alone.

There was also what might be called the fifth main feature of these clauses, save that it does not appear in them at all. This was the practice that grew up and was acquiesced in by the 1913 landowners of making payments out of the interest on the fund for the provision and maintenance of various services to the Banabans, such as education, medical services, and so on, with certain other payments, for example, to Banaban elders and for drought relief. Such payments, of course, reduced the sums available for the landowners, but were accepted by them without demur. Despite these payments, by 1930 the balance available for the 1913 landowners provided an income of about £6 a head.

I shall have to return to the 1913 agreement both for *Ocean Island No 1* and *Ocean Island No 2*; but for the present I need say no more than that in *No 1* the agreement (and in particular cl 12(a)) is relied on by the plaintiffs for the obligation imposed on the company to replant the worked-out land with coconut and other food-bearing trees, while in *No 2* it is relied on by the plaintiffs as helping to establish that prior to the 1931 transaction the Crown was in a fiduciary position in relation to the Banabans. With that, I can, I think, turn to the A and C deeds, which are mainly of importance in *No 1*.

The A and C deeds were printed forms, normally completed mainly in typewriting.

An original deed was put in evidence as exhibit D7, and I take this as being typical of the physical condition of the deeds. I think that I ought to set out a specimen of each type of deed. An example of an A deed is the deed made between Naribaua and the company dated 13th March 1916. It is headed with the number allotted to the land concerned, in this case A233, and the words, 'Deed for use where there is a licence already existing in respect of the land concerned'. The deed then proceeds:

'This deed is made the 13th day of March, 1916, between Naribaua his heirs executors or assigns of the first part the Pacific Phosphate Company Limited of London and Melbourne (hereinafter called the Company) of the second part and Edward Carlyon Eliot His Majesty's Resident Commissioner in Ocean Island (hereinafter called the Resident Commissioner) of the third part. Whereas by a deed dated the first day of September 1912 the said Nairbaua [sic] sold to the Company all the cocoanut pandanus and all other trees then growing or that should be grown and all the rock and alluvial phosphate that might be found (with the right to remove the same within the next [*blank*] years) on that piece of land situated at Ooma, Ocean Island as described in the plan on the back of the said deed. And whereas the Company has requested the said Naribaua his heirs executors or assigns to extend the said term of [*blank*] years referred to in the said deed which the said Naribaua his heirs executors or assigns has consented to do in the manner and upon the terms and conditions hereinafter appearing and subject to the concurrence of the Resident Commissioner being obtained to the transaction. And whereas the Resident Commissioner has agreed to join in this deed for the purpose of signifying his concurrence as aforesaid. Now it is hereby declared as follows: (1) The Company hereby surrenders to the said Naribaua his heirs executors or assigns all the rights and interests conferred on it by the said deed of 1st September 1912 to the intent that the said rights and interests may from the date of this deed absolutely cease and determine. (2) (i) The said Naribaua his heirs executors or assigns, hereby grants to the Company the right to remove from that piece of land situated at Ooma, Ocean Island the dimensions of which are described in the plan on the back of this deed all rock and alluvial phosphate that may be found therein during the term beginning at the date hereof and ending on the 31st day of December 1999 and the right during the said term to cut down and remove all trees, shrubs, &c, on the said land the cutting down and removing whereof may be necessary (a) for the exercise of any operations actually commenced or immediately contemplated by the Company for the purpose of or with a view to extracting any such rock or alluvial phosphate, or (b) to enable the Company to construct any railway which may be required for the carrying on of its operations as aforesaid on the said land or any land adjoining the same from which the Company has the right to take rock and alluvial phosphate. (ii) Until any such operations are commenced and being carried on the said Naribaua his heirs executors or assigns, his servants and agents shall have free access at all times to the said land for the purpose of cultivating the same and collecting and removing the vegetable produce thereof. (iii) Whenever the said land shall whether before or at the end of the said term cease to be used by the Company for the exercise of the rights hereby granted the Company shall replant the said land as nearly as possible to the extent to which it was planted at the date of the commencement of the Company's operations under Clause I (i) hereof with such indigenous trees and shrubs or either of them as shall be prescribed by the Resident Commissioner for the time being in Ocean Island and the said lands shall when and as soon as in the opinion of the said Resident Commissioner this may be without prejudice to the Company's operations as aforesaid revert to and become revested in the said Naribaua his heirs executors or assigns, freed and discharged from all rights of the Company under this deed. In witness whereof the parties hereto have hereunto affixed their signatures this 13th day of March, one thousand nine hundred and sixteen.'

The signatures are then witnessed, and there is a notation by rubber stamp showing that the transaction was registered in the resident commissioner's office on, in this case, 15th March 1916. There is also a plan with a statement of the area and a description of the boundaries, in the style used for the P and T deeds.

I pause there to mention three points. First, in addition to misspelling the grantor's name in the first recital, this particular deed is obviously imperfect in its failure in the second and third recitals to mention the term of years of the P and T deed which is to be extended. Second, the reference in cl (2)(iii) to the date of commencement of the company's operations 'under clause I(i) hereof' is an obvious slip; the reference should be to 'clause (2)(i) hereof'. Probably the slip came about through taking a C deed, where the reference is correct, and then producing an A deed by the insertion of a new cl 1 to effect the surrender, renumbering the former cl 1 so as to make it cl 2, and then forgetting to alter the reference in what had become cl 2(iii). Nothing, fortunately, turns on it. Nor has anything turned on the third point, that of the A and C deeds being called 'deeds' and yet providing for execution (and in fact being executed) under hand only. Perhaps they merely carried on an Ocean Island tradition established by the P and T deeds.

I turn to the C deed. The specimen that I have taken is headed 'C.101', with the title 'Deed for new plots within the mining areas'. The deed then reads as follows:

> 'This deed is made the 17th day of April between Nei Mimi of the first part the Pacific Islands Phosphate Company Limited of London and Melbourne (hereinafter called the Company) of the second part and Edward Carlyon Eliot His Majesty's Resident Commissioner in Ocean Island (hereinafter called the Resident Commissioner) of the third part to record the following transaction:— (1)—(i) In consideration of the sum of £97.11.11 paid to the said Nei Mimi by the Company (the receipt whereof the said Nei Mimi hereby acknowledges) the said Nei Mimi hereby grants to the Company the right to remove from that piece of land situated at Paukonikai Ocean Island the dimensions of which are described in the plan on the back of this deed, all rock and alluvial phosphate that may be found therein during the term beginning at the date hereof and ending on the 31st day of December 1999 and the right during the said term to cut down and remove all trees shrubs &c. on the said land the cutting down and removing whereof may be necessary (a) for the exercise of any operations actually commenced or immediately contemplated by the Company for the purpose of or with a view to extracting any such rock or alluvial phosphate or (b) to enable the Company to construct any railway which may be required for the carrying on of its operations as aforesaid on the said land or any land adjoining the same from which the Company has the right to take rock and alluvial phosphate. (ii) Until any such operations are commenced and being carried on the said Nei Mimi his servants and agents shall have free access at all times to the said land for the purpose or [sic] cultivating the same and collecting and removing the vegetable produce thereof. (iii) Whenever the said land shall whether before or at the end of the said term cease to be used by the Company for the exercise of the rights hereby granted the Company shall replant the said land as nearly as possible to the extent to which it was planted at the date of the commencement of the Company's operations under Clause I(i) hereof with such indigenous trees and shrubs or either of them as shall be prescribed by the Resident Commissioner for the time being in Ocean Island and the said lands shall when and as soon as in the opinion of the said Resident Commissioner this may be without prejudice to the Company's operations as aforesaid revert to and become revested in the said Nei Mimi freed and discharged from all rights of the Company under this deed. In witness whereof the parties hereto have hereunto affixed their signatures this 17th day of April one thousand nine hundred and fourteen.'

The rest of the document is on much the same lines as the A deed that I have set out.

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It will be observed that in each deed the last sub-clause (cl (2)(iii) in the A deed and cl (1)(iii) in the C deed) is in identical form, and contains a replanting obligation and a provision for reverter. Both play a prominent part in *Ocean Island No 1*. I shall have to return to them later. It will also be observed that the resident commissioner is a party to each deed, though on this the deeds differ somewhat in their terms. In the C deed, the resident commissioner is a party simpliciter, whereas in the A deed it is recited that the landowner has agreed to extend the period stated in his P and T deed subject to the concurrence of the resident commissioner being obtained to the transaction; and it is then recited that the resident commissioner has agreed to join in the deed 'for the purpose of signifying his concurrence as aforesaid'. There is also the difference that in the A deed there is no express statement of any consideration, though there is a surrender by the company of its rights under the P and T deed and a grant by the landowner of the right of removal. In the C deed there is an expression of consideration in the payment of the stated sum for the grant of the right of removal.

It will also be observed that the last sub-clause provides for 'the Resident Commissioner for the time being in Ocean Island' to prescribe the indigenous trees and shrubs to be planted, and that the third party to the agreement is the resident commissioner, Mr Eliot, who was in office at the time. There is nothing to constitute the resident commissioner a corporation, and so on the face of it, this cannot be more than an agreement by an individual who has long ceased to hold the office of resident commissioner (and is, I think, dead) that whoever is resident commissioner at the relevant time will do the necessary prescribing. There is also a minor difficulty about the words 'for the time being in Ocean Island'. At some time during World War 2 the resident commissioner left Ocean Island, and Ocean Island ceased to be the headquarters of the resident commissioner for the Gilbert and Ellice Islands Colony, which were established elsewhere in the colony. Thereafter there could thus be said to be no resident commissioner 'in' Ocean Island, though there was a resident commissioner 'for' Ocean Island, as for the rest of the colony. These are matters that I shall have to consider later.

Having described the 1913 agreement and the A and C deeds, I can pass quickly over the next six years. The necessary eight acres in each of the central and eastern mining areas were quickly provided by the Banabans, and large numbers of A and C deeds were duly executed. In the period 1913 to 1922 inclusive I think there were just under 300 in all. All were executed before the British Phosphate Commissioners came on the scene at the end of 1920, save for three C deeds, two of which were executed in June 1921, and the other in January 1922; but these are not directly concerned in the present proceedings. I can now come forward to 1920, when the British Phosphate Commissioners were constituted and took over; and that is the third period.

(3) 1920-1931: *the British Phosphate Commissioners and the compulsory acquisition*

As I have indicated, Ocean Island and Nauru have to a considerable degree been interlinked in relation to phosphate deposits. Before World War 1 Nauru was a German possession; but the Pacific Phosphate Co had by contract acquired considerable rights for the working of phosphates there, and during the war British forces occupied the island. After the armistice in 1918, there was much negotiation, and in the end three instruments were executed which have a considerable bearing on the issues before me. These instruments were as follows. First, there was a tripartite agreement dated 2nd July 1919 made between 'His Majesty's Government in London, His Majesty's Government of the Commonwealth of Australia and His Majesty's Government of the Dominion of New Zealand'. I shall call this 'the 1919 agreement'. Second, there was a five-part agreement dated 25th June 1920, which I shall call 'the 1920 agreement'. Third, there was a six-part indenture dated 31st December 1920, which I shall call 'the 1920 indenture'.

On the face of it, the 1919 agreement applied only to Nauru; but, as will be seen, the 1920 indenture made arts 9 to 14, inclusive, of the 1919 agreement apply to Ocean

Island as well. The 1919 agreement recited that a mandate for the administration of Nauru had been conferred on the British Empire, and that it was necessary to provide for exercising the mandate and mining the phosphate. It was then stated that the three governments agreed as set out in the following provisions. The administration of the island was to be vested in an administrator; and the Australian Government was to appoint the first administrator, for a term of five years. The powers of the administrator were defined. Then by arts 3 and 4 it was provided that there should be a board of commissioners with three members, one to be appointed by each government, and each was to hold office at the pleasure of the government appointing him. Their remuneration was to be fixed by the three governments, or by a majority of them, and the title to the phosphate deposits on Nauru and all the land, buildings, plant and equipment used for working them was to vest in the commissioners. The rights of the company were converted into a claim for compensation at a fair valuation, to be contributed by the three governments in the proportions they agreed, or in default in the proportions set out in art 14 of the agreement.

That brings me to arts 9 to 14, the articles which became applicable to Ocean Island as well as Nauru. I think I should set them out in full:

> 'Article 9. The deposits shall be worked and sold under the direction management and control of the Commissioners subject to the terms of this Agreement. It shall be the duty of the Commissioners to dispose of the phosphates for the purpose of the agricultural requirements of the United Kingdom Australia and New Zealand so far as those requirements extend. Article 10. The Commissioners shall not except with the unanimous consent of the three Commissioners sell or supply any phosphates to or for shipment to any country or place other than the United Kingdom Australia or New Zealand.'

In the event, very little of the phosphate from either island went to the United Kingdom, largely owing to the distances involved and the discovery of large deposits of phosphate in Morocco. Virtually the whole output went to Australia and, to a lesser extent, New Zealand, though from time to time there were surpluses which were exported to Japan and elsewhere.

I continue with the agreement:

> 'Article 11. Phosphates shall be supplied to the United Kingdom Australia and New Zealand at the same f.o.b. price to be fixed by the Commissioners on a basis which will cover working expenses cost of management contribution to administrative expenses interest on capital a sinking fund for the redemption of capital and for other purposes unanimously agreed on by the Commissioners and other charges. Any phosphates not required by the three Governments may be sold by the Commissioners at the best price obtainable. Article 12. All expenses costs and charges shall be debited against receipts and if by reason of sales to countries other than the United Kingdom Australia or New Zealand or by other means or circumstances any surplus funds are accumulated they shall be credited by the Commissioners to the three Governments in the proportions in which the three Governments have contributed under Article 8 of this agreement and held by the Commissioners in trust for the three Governments to such uses as those Governments may direct or if so directed by the Government for which they are held shall be paid over to that Government.'

Article 11 established the system whereby phosphate was sold to purchasers in the three countries at cost price, after allowing for interest on capital (which was charged at 6 per cent) and a sinking fund. Outside sales, on the other hand, were to be at the best price obtainable. In practice, the Commissioners established an 'f.o.b. equalisation fund', with a normal level of £100,000, and this provided a cushion whereby profits made in one year could be used to offset losses made in another year. The

'phosphate year' ran from 1st July to 30th June, and the price to be charged for phosphate was normally fixed in advance for the whole of a phosphate year. The expenses of the year might, of course, be more or less than the estimate; and another important variable was the quantity of phosphate sold during the year. If the sales were less than the estimate, the overheads would be larger in relation to each ton of phosphate sold, and so the prospects of a loss were increased; and conversely, if more phosphate was sold than was estimated. Furthermore, the operations of the British Phosphate Commissioners on the two islands were for many purposes treated by them as one, so that problems arose in this litigation in segregating the Ocean Island element from the Nauru element, particularly in relation to operating and other costs.

Next there is art 13:

> 'There shall be no interference by any of the three Governments with the direction management or control of the business of working shipping or selling the phosphates and each of the three Governments binds itself not to do or to permit any act or thing contrary to or inconsistent with the terms and purposes of this Agreement.'

This article established the independence of the British Phosphate Commissioners as against any one or two of the three governments, though not, of course, against all three acting in concert. Finally, there is art 14.

> 'Until the readjustment hereinafter mentioned each of the three Governments shall be entitled to an allotment of the following proportions of the phosphates produced or estimated to be produced in each year, namely—United Kingdom 42 per cent. Australia 42 per cent. New Zealand 16 per cent. Provided that such allotment shall be for home consumption for agricultural purposes in the country of allotment and not for export. At the expiration of the period of five years from the coming into force of this Agreement and every five years thereafter the basis of allotment shall be readjusted in accordance with the actual requirements of each country. If in any year any of the three Governments does not require any portion of its allotment the other Governments shall be entitled so far as their requirements for home consumption extend to have that portion allotted among themselves in the proportions of the percentages to which they are entitled as above. Where any proportion of the allotment of one of the Governments is not taken up by that Government that Government shall when the phosphates are sold be credited with the amount of the cost price as fixed by the Commissioners under the first paragraph of Article 11 but if such phosphates are sold to a purchaser other than one of the Governments any profit above the said cost price shall be carried to the surplus fund mentioned in Article 12.'

I need only say that there never was the readjustment that was contemplated by this article; the percentages remained unchanged throughout.

That concludes the articles which were to be applied to both islands. The only other article provided for the agreement to come into force on ratification by the Parliaments of the three countries. The Australian and New Zealand Parliaments ratified the agreement in October 1919, and the United Kingdom Parliament did so on 4th August 1920 by the Nauru Island Agreement Act 1920.

In the meantime, on 25th June 1920, the 1920 agreement had been made. The five parties were His Majesty King George V, the High Commissioners for Australia and New Zealand, Viscount Milner (who was then Secretary of State for the Colonies) and the company. After nearly five pages with over a dozen unnumbered recitals, the agreement provided, in effect, for the three governments (the reference to 'Government' in the singular in cl 1 is an obvious slip) to purchase from the company for £3·5 million the whole of the company's Ocean Island and Nauru undertakings, rights and assets as from 1st July 1920, together with the company's offices in Australia. As might be expected, the agreement included elaborate provisions for the

three governments to indemnify the company against a wide range of matters, including claims to royalties, and so on: see cl 5. There were also many other provisions. I need not mention these, apart from cl 17, which provided for the company, as from 1st July 1920, pending completion, to be deemed to be carrying on the undertaking on behalf of the governments.

After that agreement had been executed, each of the three governments proceeded to appoint a commissioner, a process which was completed by September 1920: on 21st September the three commissioners held a meeting in London. In that state of affairs, the 1920 indenture came to be executed on 31st December 1920. The six parties were (1) the company; (2) His Majesty King George V; (3) His Majesty the King represented by the High Commissioner for Australia; (4) His Majesty the King represented by the High Commissioner for New Zealand; (5) Viscount Milner, the Secretary of State for the Colonies; and (6) the three first British Phosphate Commissioners, Mr Dickinson for the United Kingdom, Mr Collins for Australia and Mr Ellis for New Zealand. The indenture was expressed to be supplemental to the 1919 agreement. After various recitals (including one which described the 1919 agreement as 'the Phosphates Deposits Agreement' and another which called the 1920 agreement 'the Purchase Agreement') the indenture proceeded to provide that the company, by direction of the three governments, conveyed to the three British Phosphate Commissioners all the company's assets in respect of Ocean Island and Nauru. By cl 1(c) these included—

> 'The full benefit of all leases tenancies and other rights to or over lands in the said Islands under the land deeds or leases made between native landowners of the said Islands and the Company and belonging to the Company and registered in the office of the Resident Commissioner for the Gilbert and Ellice Islands Colony at Ocean Island aforesaid and in the office of the Civil Administrator at Nauru for all the respective unexpired residues of the terms of years thereby created and for all the estate and interest of the company in the same premises subject to the payments and royalties thereby assured and reserved and the covenants and conditions therein contained.'

Then the habendum of the indenture ran as follows:

> 'TO HOLD all the said premises (SUBJECT respectively as aforesaid) Unto and TO THE USE of the present Commissioners their heirs executors administrators and assigns according to the nature thereof as joint tenants UPON TRUST and to the intent that the said premises shall at all times hereafter be held by the present Commissioners (as such Commissioners) and the Board of Commissioners from time to time hereafter to be duly appointed under the Phosphate Deposits Agreement (hereinafter included in the expression "the Board of Commissioners") for the purposes and upon the terms and with and subject to the powers and in accordance with the provisions contained in the Phosphate Deposits Agreement AND TO THE INTENT that the phosphate deposits on the said Ocean Island and the said Island of Nauru shall at all times hereafter be worked sold disposed of and dealt with by the Board of Commissioners in accordance with the provisions of Articles 9 to 14 (both inclusive) of the Phosphate Deposits Agreement AND SUBJECT ALSO to the Agreements and obligations on the part of the Board of Commissioners and the Governments respectively hereinafter contained.'

Next there were a number of provisions for indemnity and release:

> '2. THE Board of Commissioners shall henceforth duly perform and observe all the Agreements on the part of the Governments and provisions set forth in Clauses 3 and 4 of the Purchase Agreement. 3. THE Governments and each of them shall at all times hereafter duly observe and perform the Agreements by the Governments for the indemnity of the Company as set forth in Clause 5 of

the Purchase Agreement. 4. THE Governments and each of them hereby release the Company from all liability on and after the First day of July One thousand nine hundred and twenty to make any further payments of royalty under the provisions of the Ocean Island Concession and a letter dated the Fifteenth day of October One thousand nine hundred and twelve addressed by the Company to the Under-Secretary of State for the Colonies agreeing to pay a new royalty and from all liability in respect of any breach after the First day of July One thousand nine hundred and twenty of any covenant or condition therein contained.' *a* *b*

The reference to the letter of 15th October 1912, I should explain, is to a letter in which the company agreed to pay the further royalty of 6d a ton which in due course became the subject of cl 12(b) of the 1913 agreement.

'5. THE Board of Commissioners and the Governments and each of them shall as from and after the First day of July One thousand nine hundred and twenty undertake to make all payments and observe and perform all covenants and conditions reserved by and contained in the land-deeds and leases referred to in Sub-sections (C) and (D) of Clause 1 hereof and shall at all times hereafter keep the Company indemnified against all claims demands actions and proceedings by any person firm company or authority in respect thereof or in respect of any breach thereof after the said First day of July One thousand nine hundred and twenty.' *c* *d*

I can pass over several more clauses, and then there was cl 10. This runs as follows:

'AND IT IS HEREBY DECLARED that on any and every appointment from time to time by any of the said three Governments of a new Commissioner under the Phosphate Deposits Agreement in the place of any dead retiring or outgoing Commissioner it shall be lawful for such Government by a deed to be executed by any Minister of such Government to appoint such new Commissioner to be a trustee of these presents in the place of such dead retiring or outgoing Commissioner (as the case may be) and to make a vesting declaration and do all such acts and things (if any) as may be necessary for vesting the said premises in the Board of Commissioners under the Phosphate Deposits Agreement for the time being.' *e* *f*

At this point I should mention one of the problems that has run through the two cases before me, and especially *Ocean Island No 1*. That is the status of the present British Phosphate Commissioners. None of them, of course, was a party to the 1920 transactions: each is a successor to successors to the original commissioners. Though the commissioners were from time to time referred to as a 'Board', there never was anything to incorporate them. Indeed, cl 10 of the indenture, with its machinery for the appointment of new commissioners as trustees, and the making of vesting declarations, points against any intention to incorporate them. Yet the provisions for vesting contained in cl 10 seem to have been ignored from the outset. From time to time new commissioners have been appointed, yet all concerned seem to have acted as if the commissioners for the time being automatically succeeded to all the property and all the contractual rights and liabilities of the predecessor commissioners, without any need for assignments, or vesting provisions, or novations, or indemnities, or anything else. *g* *h*

The change of ownership from the company to the British Phosphate Commissioners seems to have been effected smoothly enough; but there was a very proper concern on all hands that some explanation should be given to the Banabans. On 25th September 1920, the Colonial Office sent a telegram to the High Commissioner saying that the acting resident commissioner should— *j*

'make clear to natives that agreement under which Board of Commissioners will work phosphates on behalf of Governments of this country Australia and

New Zealand has not conferred any political authority on Board or brought about any change in the natives' relations to the local Administration.'

A little earlier, on 11th September 1920, the company's local manager had written to the acting resident commissioner to say that all the company's labourers had been informed that the governments had purchased the company's business on Ocean Island and Nauru, and that the change of ownership made—

'no difference in the agreements or conditions of employment as the company continued to carry on the management of the Island for the present, and at no time will any change be made detrimental to their interests.'

On 18th October 1920, the acting resident commissioner reported to the High Commissioner, referring to this action by the company, and enclosing a copy of the letter of 11th September. The acting resident commissioner continued as follows:

'5. With reference to your telegram of the 25th ultimo, conveying instructions to me from the Secretary of State to inform the Banabans that the change in the ownership of the Company would not affect the natives' relations to the local Administration and to my telegram of even date, I have the honour to inform you that on the afternoon of the 16th instant I gathered all the Banabans together and informed them as instructed by the Secretary of State in the telegram first above-mentioned. 6. They all seemed perfectly satisfied, merely remarking that they had been aware of the change for a long time past and were quite satisfied about it.'

I pause there. The relationship of the company and the commissioners to the employees is one thing; the relationship of the commissioners and the administration to the Banabans generally is another. Both seem to have been dealt with. But the relationship of the individual Banaban landowners to the company, a body capable of perpetual existence, and the replacement of that potentially perpetual body by the individual unincorporated commissioners, is very much another matter; and this seems to have remained unconsidered and unexplained. The three original commissioners, I may say, held office for varying periods. The first New Zealand commissioner, Sir Albert Ellis, continued for over 30 years; the first United Kingdom commissioner, Sir Alwin Dickinson, continued for 10 years; while the first Australian commissioner was replaced within the year of his appointment, in 1920. In all, there have been five New Zealand commissioners, seven United Kingdom commissioners, and eight (which very recently became nine) Australian commissioners; but whatever the changes among the commissioners, the undertaking of the commissioners has been carried on without a break, though, of course, subject to the disruption of war. The company, I should add, was ultimately put into liquidation, and on 6th November 1925 was dissolved.

The change made, the British Phosphate Commissioners continued with the extraction of phosphate, exercising all the rights that had been conferred on the company, and observing all the obligations of the company, apart from those in dispute in this litigation, on which I say nothing at this stage. But the land provided under the 1913 agreement would not last for ever, and gradually the need for further land became more and more pressing. As early as 28th September 1923 the British Phosphate Commissioners were writing to the Colonial Office seeking approval for the acquisition of another 150 acres. From the outset the Banabans were firmly opposed to parting with any more land for phosphate working. Their understanding (or more probably misunderstanding) of what had been said to them prior to the 1913 agreement was that no further land would be taken.

I shall not attempt any summary of the ebb and flow of argument, contention, suggestion, proposal, hope and despondency that there was over these years among the Colonial Office, the High Commissioner and the resident commissioner, the British Phosphate Commissioners and the Banabans. Gradually it settled down into

a state of affairs where it became reasonably plain that if mining continued, a time would come when it would be virtually impossible for the Banabans (who then numbered some 550) to continue to live on Ocean Island, to which they were fiercely and understandably attached. At the same time, the Colonial Office, though making prolonged enquiries about other possible islands for the Banabans, were firmly refusing to contemplate any removal of the Banabans to another island without their full consent. The Banabans were also adamant in their refusal to part with any more land. In the end, their refusal was often expressed in a demand for a payment of '£5 a car'. This in effect was a royalty of £5 a ton; and in 1924 phosphate was being sold for £1 5s a ton f o b.

Many suggestions for meeting the difficulty were considered, including, of course, the offer of better terms to the Banabans. One suggestion was that an undertaking should be proffered that no further land would ever be taken for mining. This was strongly opposed by the British Phosphate Commissioners. An alternative was an undertaking that no more land would be taken for a fixed period such as 20 years, a proposal which the British Phosphate Commissioners, though unwilling to give any undertaking to that effect, found less objectionable. It would, of course, solve nothing; but it would leave the problem for future generations to solve, and something might always turn up.

By the end of July 1927, agreement had been reached between the British Phosphate Commissioners, the Colonial Office, and the High Commissioner and resident commissioner as to the terms to be put before the Banabans for the acquisition of 150 acres in the central mining area. The main features of these terms were as follows. £150 was to be paid for each acre, inclusive of all trees on the land; and in addition to the existing Crown royalty of 6d per ton, the British Phosphate Commissioners were to pay a royalty of 10½d per ton in place of the existing 'additional royalty' of 6d per ton for the Banaban Fund. Of this 10½d, 2d was to go to a new fund, the Banaban Provident Fund; and with £20,000 from the existing Banaban Fund, this was to accumulate at compound interest until it reached £175,000. 4d out of the 10½d was to go to the landowners of the new 150 acres and also of the land already alienated, with a maximum of £5,000 per annum. (At a later stage it was suggested that this 4d should be increased by an addition of ¼d per ton for every 1s by which the f o b price of phosphate exceeded the price for the year beginning 1st July 1927; but this suggestion was never acted on.) Out of the 10½d, the final 4½d (with a maximum of £5,750 per annum) was to be divided so that about £2,000 would go to the government for services to the Banabans in the form of a hospital, education, and so on, and the rest would be divided equally among the entire Banaban population. This 4½d could be increased by a further ½d to make 5d, in which case the maximum of £5,750 per annum would become £6,250 per annum; but this possible increase was to be held in reserve and not mentioned to the Banabans initially. In the event the British Phosphate Commissioners' local representative, Mr Gaze, preferred the alternative ¼d that I have mentioned. There were a number of other details, but as the offer was not accepted, I do not propose to set them out.

On 25th July 1927, the resident commissioner, who had delayed going on leave for the purpose, opened discussions with the Banabans on these terms. The resident commissioner, Mr Grimble, entered in his diary details of these discussions, which continued throughout August and September; but the pages covering 16th August to 20th September have not survived. There were meetings with individuals, with committees, and with various groups of Banabans. By the end of the first week in August one group had decided that they would sell their land only if they received £5 for every car of phosphate removed, a proposal which was said to have been carried by a large majority. As I have mentioned, this was the equivalent of a royalty of £5 a ton for phosphate which was being sold at an f o b price of barely a quarter of that sum. As before, the demand for such a royalty was more a way of refusing to dispose of any land than a serious proposal for payment.

At one stage a proposal for a royalty of 1s (instead of 10½d) and £175 per acre (instead of £150) looked as if it might gain acceptance; and later some of the younger Banabans spoke up for 1s and £150. But then many women reverted to the demand for £5 a car; and when a body stood firm on a proposal of 1s 8d the resident commissioner said that this was an absolutely impossible royalty. In the end some of the landowners agreed that they would accept 1s.

By early October 1927, out of the 153 Banabans who owned land within the proposed 150 acres, 62 continued to demand £5 a ton, 12 abstained from discussion, and 79 were willing to sell at varying prices. Of these, only five were willing to accept the terms offered. The others sought sums varying from 1s plus £500 an acre, or 1s 8d plus £150 an acre, down to 1s plus £150 an acre. After this, there were more discussions; and the British Phosphate Commissioners then brought the Governors-General of Australia and New Zealand into the fray with long telegrams to the Secretary of State for Dominion Affairs. Sir Alwin Dickinson, the United Kingdom commissioner, who was evidently a formidable and pertinacious negotiator, and a ready critic of all who did not agree with his views, maintained a steady and voluminous pressure on the Colonial Office. His object was to obtain firm instructions from the Colonial Office which would secure the phosphate that the British Phosphate Commissioners required on the terms offered by them.

By November 1927 the previously scattered references to compulsion, mostly in relation to the suggested removal of the Banabans to another island (suggestions which the Colonial Office continued to reject), were becoming focused on the enactment of legislation to allow compulsory acquisition of the land. By 3rd February 1928 the Secretary of State was authorising the preparation of a draft Ordinance, suggesting that compensation should be settled by a single arbitrator appointed by him in default of agreement, but with the royalties to be as already agreed between the resident commissioner and Mr Gaze, the local representative of the British Phosphate Commissioners. By 14th February the Chief Judicial Commissioner of the High Commission had produced a draft Ordinance. On 5th March the resident commissioner reported that after protracted meetings the Banabans had silenced those disposed towards accepting the existing terms, and had decided to sit down and see what happened about their demand for £5 a car. The Colonial Office then decided that the draft Ordinance put forward by the High Commission was unsuitable, and that a new draft should be produced in London. Pressure from Australia and New Zealand continued and there was much discussion of the terms of the draft Ordinance.

Suddenly, on 25th June 1928, the Banabans executed a volte face. They unanimously asked the resident commissioner to tell the Secretary of State of their sincere regrets for having opposed his advice in the land negotiations, and said that they were ready to accept the terms offered by the British Phosphate Commissioners and approved by the Secretary of State; and they asked the resident commissioner to settle the precise boundaries of the land with them. On 8th August the resident commissioner reported that on 25th July the Banabans had ratified their agreement as to the terms, and on 27th July they had agreed the proposed boundary of the mining area. But then, on the evening of 27th July they had suddenly reopened their opposition to the inclusive price of £150 offered for land and trees. The resident commissioner asked for a month in which to try to reach agreement with the Banabans; and with the assent of the British Phosphate Commissioners this was agreed.

While these negotiations had been taking place, discussions on the terms of the draft Ordinance had continued; and the British Phosphate Commissioners had been consulted and had commented on the draft. On 7th September the resident commissioner reported that all efforts to persuade the Banabans to honour their pledge had failed, and that there seemed to be no hope of their signing the agreement on the authorised terms. The point of disagreement was that the Banabans wished to be paid for coconut, almond and pandanus trees on the 150 acres in addition to the £150

an acre, instead of that being a price inclusive of trees. The resident commissioner said that if this demand had been made initially he would have advised acceptance; but if it was now to be conceded, there would be every reason to expect the Banabans to demand still further concessions. With this, the negotiations came to an end; and on 18th September the draft Ordinance was enacted as the Mining Ordinance 1928. By a proclamation made on 18th December 1928 the Ordinance was brought into force on 20th December 1928.

In the meantime there had occurred an event which has understandably given rise to great concern. On 5th August 1928 Mr Grimble, the resident commissioner, sent a letter in the Banaban language to the inhabitants of Buakonikai, the village in the centre of the island. This, of course, was just over a week after the Banabans had retracted their agreement to the terms offered. The letter was produced in evidence in *Ocean Island No 1*, and an agreed translation was put in to join the agreed bundle of documents in both cases. The translation of what came to be called the Buakonikai letter reads as follows:

'To the People of Buakonikai, Greetings. You understand that the Resident Commissioner cannot again discuss with you at present as you have shamed his Important Chief, the Chief of the Empire, when he was fully aware of your views and your strong request to him and he had granted your request and restrained his anger and restored the old rate to you—yet you threw away and trampled upon his kindness. The Chief has given up and so has his servant the Resident Commissioner because you have offended him by rejecting his kindnesses to you. Because of this I am not writing to you in my capacity as Resident Commissioner but I will put my views as from your long-standing friend Mr. Grimble who is truly your father, who has aggrieved you during this frightening day which is pressing upon you when you must choose LIFE or DEATH. I will explain my above statement:—

'POINTS FOR LIFE. If you sign the Agreement here is the life:—(1) Your offence in shaming the Important Chief will be forgiven and you will not be punished; (2) The area of the land to be taken will be well known, that is only 150 acres, that will be part of the Agreement; (3) The amount of money to be received will be properly understood and the Company will be bound to pay you, that will be part of the Agreement.

'POINTS FOR DEATH. If you do not sign the Agreement:—(1) Do you think that your lands will not go? Do not be blind. *Your land will be compulsorily acquired for the Empire.* If there is no Agreement who then will know the area of the lands to be taken? If there is no Agreement where will the mining stop? If there is no Agreement what lands will remain unmined? I tell you the truth—if there is no Agreement the limits of the compulsorily acquired lands on Ocean Island will not be known. (2) And your land will be compulsorily acquired at any old price. How many pence per ton? I do not know. It will not be 10½d. Far from it. How many pounds per acre? I do not know. It will not be £150. Far from it. What price will be paid for coconut trees cut down outside the area? I know well that it will remain at only £1. Mining will be indiscriminate on your lands and the money you receive will be also indiscriminate. And what will happen to your children and your grandchildren if your lands are chopped up by mining and you have no money in the Bank? Therefore because of my great sympathy for you I ask you to consider what I have said now that the day has come when you must choose LIFE or DEATH. There is nothing more to say. If you choose suicide then I am very sorry for you but what more can I do for you as I have done all I can. I am, your loving friend and father, Arthur Grimble.

'P.S. You will be called to the signing of the Agreement by the Resident Commissioner on Tuesday next, the 7th August, and if everyone signs the Agreement, the Banabans will not be punished for shaming the Important Chief and their

serious misconduct will be forgiven. If the Agreement is not signed consideration will be given to punishing the Banabans. And the destruction of Buakonikai Village must also be considered to make room for mining if there is no Agreement.'

In considering that letter, one must bear in mind the position of Mr Grimble at the time. He had been put into a position of great difficulty. All concerned had accepted that it was he who should negotiate with the Banabans; and for a long while he had been doing this. He was the resident arm of government, yet it was he, and not any officer of the British Phosphate Commissioners, who had been trying to persuade the Banabans to enter into an agreement with the British Phosphate Commissioners on terms which had been negotiated between the Colonial Office and the British Phosphate Commissioners, with, of course, much assistance from him and the High Commissioner. For the purpose of negotiating the agreement Mr Grimble had postponed the leave to which he was entitled. He was, I understand, to some extent a sick man at the time. The negotiations had dragged on for a long while; they had finally come to nothing, or so it seemed, and then, when they suddenly came to life again, they had as suddenly been halted once more, and, as it turned out, killed. The climate, too, was the climate of Ocean Island, and the year was 1928, when the means of alleviating equatorial climates were not what they are today. One must bear all this in mind, and not least that resident commissioners are human beings. I should also say that the letter seems to me to be wholly out of character for one who was a dedicated colonial servant with a deep affection for the Banabans.

Even so, with every allowance made, it is impossible to read the letter without a sense of outrage. The letter makes grievous threats if the inhabitants of Buakonikai do not sign the agreement to sell their property to the British Phosphate Commissioners. Those threats are of unspecified punishment; of the destruction of their village; of the compulsory acquisition of their land for 'any old price' and for less than the ro½d royalty being offered; and of 'indiscriminate' mining on their lands. These threats were made by the man who, though subject to the High Commissioner and the Colonial Office, was the effective governor of the colony.

Those threats by a high government officer are bad enough; the future was to make it worse. As I have mentioned, some six weeks later, on 18th September 1928, the Mining Ordinance 1928, was enacted; and under this the royalty to be paid for minerals extracted was to be such 'as the Resident Commissioner may prescribe'. The Ordinance was brought into force on 20th December 1928; and under it the Banaban landowners were to get whatever royalty was prescribed by a resident commissioner who had uttered these threats to the people of Buakonikai, and had made these assertions about the low level of royalty payable under a compulsory acquisition.

Now there is nothing to suggest that at any relevant time the High Commissioner or the Colonial Office knew about the Buakonikai letter; nor is it clear when Mr Grimble first knew that the duty of prescribing a royalty would be his. Indeed, some two and a half years were to go by before on 12th January 1931 (and after an abortive attempt rather over a month earlier), Mr Grimble finally exercised his statutory power to prescribe the royalty. Long before then he knew about his statutory powers and the position in which he had been put, and in which he had put himself. One question is thus that of the position of a person who, in a proposed transaction between vendors and purchasers, has done all the bargaining on behalf of the purchasers, and, being in a position of high authority, has uttered grave threats to the vendors in an unsuccessful attempt to persuade them to accept the purchasers' offer. Can such a person, within three years, properly exercise a statutory power to fix the major part of the consideration on a compulsory acquisition, especially when the threats included a statement that on such an acquisition the royalty will be less than has been offered?

I do not think that one has to be a lawyer to see that in such a case the vendors may at least suspect that the decision might not be made with the impartiality and detachment that there ought to be, and that someone who finds himself in such a position

ought at least to lay his predicament before higher authority and seek some alternative arrangement. That was not done. Part of the responsibility must be laid at the door of the Colonial Office and the High Commissioner, who had arranged for the resident commissioner to attempt to get the consent of the Banabans to the terms agreed with the British Phosphate Commissioners and who nevertheless put the resident commissioner, with this background of apparent partiality, into the position of prescribing the royalty. This, of course, is quite apart from the Buakonikai letter. For that letter and its consequences, and not least for what ought to have been done (but was not) during the two and a half years between the exasperation of the moment that seems to have produced the letter and the actual prescribing of the royalty, the whole responsibility must be borne by Mr Grimble. Unfortunately I shall have to come back to this letter in due course.

I must now return to the march of events. I had reached the enactment and bringing into force of the Mining Ordinance 1928. Much turns on this, and I must read most of it. It is entitled 'An Ordinance to regulate the right to mine and work minerals in the Gilbert and Ellice Islands Colony', a title which conveys little idea of the main purport of the statute. Section 1 confers the short title, and s 2 defines 'minerals' in terms which I need not set out; 'phosphates' are expressly included. By s 3,

> 'No person shall work or raise any minerals on or remove any minerals from any lands in the Gilbert and Ellice Islands Colony unless he is authorised to do so by licence from the Crown and subject to such terms and conditions as may be prescribed in the licence.'

There is then s 4:

> 'Where the holder of any such licence as in the last preceding section provided does not possess rights over the surface of any piece of land comprised in the licence which are necessary for the purpose of the licence and has been unable to come to an agreement with the owner or owners for the acquisition of the said rights and the Secretary of State for the Colonies deems it expedient in the public interest that the land should be made available to the holder of the licence for the purpose of enabling him to work raise and remove any minerals or for any purpose connected therewith or ancillary thereto and the Resident Commissioner is satisfied having regard to all the circumstances (including any royalties payable by the holder of the licence) that the terms offered for the acquisition of the said rights are reasonable it shall be lawful for the Resident Commissioner to deliver to the owner or owners of the said rights a notice (in such form as may be prescribed by the High Commissioner) of his intention to take possession of the said land and if the terms offered as aforesaid are not accepted by the owner or owners by a date named in the notice the Resident Commissioner may enter into possession of the said land and the said land shall thereupon be deemed to be Crown land.'

This is a section which cries aloud for subdivision, a cry that today is heard more and more often and seems to be heeded less and less. There are in effect four conditions to be satisfied before the section comes into play. These are: (1) that the holder of a mineral licence from the Crown does not have surface rights over a piece of land that are necessary for the purpose of his licence; (2) that he has been unable to come to an agreement with the owner of these rights to acquire them; (3) that the Secretary of State deems it expedient in the public interest that the land should be made available to the licence-holder for working minerals; and (4) that the resident commissioner is satisfied that in all the circumstances (including any royalties payable by the licence-holder) the terms offered for the acquisition of the surface rights are reasonable.

If these four conditions are satisfied, the ordinance confers a twofold power on the resident commissioner. The first power is to deliver a notice to the owner of the

surface rights in the prescribed form, stating the resident commissioner's intention to take possession of the land, and stating a date for acceptance of the terms offered by the licence-holder. The second power is a power to enter into possession of the land; but this can be exercised only if the terms offered by the licence-holder have not been accepted by the date stated in the notice. When the resident commissioner enters into possession of the land, it is thereupon deemed to be Crown land.

Section 5 deals with the next stage, the process whereby the deemed Crown land is made available to the licence-holder:

> 'The Resident Commissioner may issue to the holder of any such licence as hereinbefore provided at an annual rental not exceeding two shillings and sixpence per acre a lease of the said land for such period as may be required for the purposes of the licence subject to payments by the holder of compensation to the original owner or owners assessed by arbitration in such a manner as the Secretary of State for the Colonies may direct and subject to payment of such royalty on any minerals raised removed and exported as the Resident Commissioner may prescribe.'

Before I comment on this, I think I should read s 6(1). This runs:

> 'In assessing any compensation on any land acquired under this Ordinance there shall be taken into account the market value of the land (exclusive of any increase in the value of such land by reason of the existence thereon of any minerals) and the improvements thereon reasonable allowance being made for any damage that may be caused by severance and if there be a tenant thereon he shall receive a reasonable compensation for disturbance.'

These provision invite a number of comments. First, as a practical matter, ss 4 and 5 must be regarded as two parts of a single process. There cannot be much point in 'issuing' a lease to the licence-holder subject to paying compensation and royalty if the licence-holder is not willing to accept a lease on such terms. If s 4 was operated but the licence-holder refused to accept the proffered lease, land which had been acquired because the licence-holder needed it would have become Crown land, and yet there would be no effective provision for the payment of any compensation to the landowner; for all the provisions for payment are intended to be contained in the lease. To operate the statutory powers without an assurance that the licence-holder will accept the proposed lease would thus produce a most unsatisfactory result.

Second, there is the striking contrast between compensation and royalty in the provisions for the basis of assessment. Compensation is to be assessed by arbitration; and s 6(1) provides a proper basis for assessment, related to market value, though excluding minerals from the assessment. Royalty, on the other hand, which is to be paid for minerals, is merely to be 'such royalty . . . as the Resident Commissioner may prescribe'. No standard or basis for prescribing this royalty is laid down; there is no reference to market value or to anything else. Obviously the resident commissioner must do his prescribing with due propriety; but apart from that, the matter is left at large. One approach is to invoke s 4: since the process of compulsion comes into play only if there has been a rejection of terms which, having regard to all the circumstances, including royalties, the resident commissioner is satisfied are 'reasonable', then the royalty prescribed by the resident commissioner under s 5 must also be 'reasonable'. That is a slender enough guide; but it is better than nothing.

Third, there is the striking contrast between compensation and royalty in the machinery for assessment. The value of surface rights on a tiny and often parched Pacific island, with phosphate being mined nearby, is obviously very much smaller than the value of the many thousands of tons of phosphate beneath the surface. Yet whereas the machinery of arbitration, with its opportunities for making representations and adducing evidence, is provided for the assessment of the lesser sum for

surface rights, a bare process of prescription by the resident commissioner, without any of these opportunities and safeguards, is laid down for the assessment of the greater sum for the much more valuable mineral rights. What the sense in this was I have remained unable to discover. The Colonial Office files reveal considerable discussion about the relatively unimportant process of arbitration, with questions about whether there was to be an arbitrator or arbitrators, and whether there should be an umpire, and so on; but the important process of the resident commissioner prescribing a royalty remains in relative oblivion.

I now turn to the last group of provisions that I need to set out verbatim, ss 6(2) and 7:

> '6(2) Any moneys payable by way of compensation or royalty shall be paid to the Resident Commissioner to be held by him in trust on behalf of the former owner or owners if a native or natives of the Colony subject to such directions as the Secretary of State for the Colonies may from time to time give. 7. All moneys payable to any native or natives of the Colony in cases where acquisition of rights has been the result of agreement shall be paid to the Resident Commissioner and shall be held by him in trust on behalf of such native or natives to be used in such manner and subject to such directions as the Secretary of State may from time to time give.'

I think at this stage I should say something about these two provisions, which were much discussed in argument. First, they make quite distinct provisions for the fruits of agreement, on the one hand, and the fruits of compulsion, on the other; and it is the case of agreement that I shall consider first. If the holder of a mineral licence (and on Ocean Island that meant the British Phosphate Commissioners) reached agreement with a landowner for mining rights, then there was no need, and no power, for any process of compulsion to be operated under the Ordinance. The agreement might, of course, provide for payment by means of royalties, lump sums, instalments, or anything else that the parties wished. Whatever it was, if the money was payable to a native or natives of the colony (and I need not consider any other case) it had to be paid to the resident commissioner; and it was to be 'held by him in trust' on behalf of the native or natives to whom it was payable, subject to the provision relating to the Secretary of State. Unlike s 6(2), s 7 does not in terms specify 'former owner or owners'; but 'such native or natives' carries one back to the reference to moneys payable to any native or natives in cases where the acquisition of rights has been the result of agreement, and in any ordinary case that will be the landowners who, by agreement, have parted with the mining rights. The provision relating to the Secretary of State is that the money is 'to be used in such manner and subject to such directions as the Secretary of State may from time to time give'. This, though clear enough, is a little lacking in elegance; for although the Secretary of State may of course 'give' directions, in the ordinary use of English he can hardly 'give' manner.

Second, there are the fruits of compulsion. Section 6(2), with its reference to 'compensation or royalty', is plainly in point. Once again, such money is to be paid to the resident commissioner 'to be held by him in trust'; but this time the trust is 'on behalf of the former owner or owners', if a native or natives of the colony. This is to be subject to such directions as the Secretary of State may from time to time give; but this time the phrase 'to be used in such manner' is omitted.

At that point I pause, as anyone might. The process of compulsion was firmly linked with the attempt to achieve an agreement, and the failure of that attempt: only on that failure was compulsion to come into play. In the present case, the background to compulsion was that ever since the 1913 agreement, a royalty of 6d per ton had been paid to the Banaban Fund, with the landowners in effect getting only the interest on that fund. Broadly speaking (I omit details), the proposed new agreement was that in place of that 6d royalty payable to the Banaban Fund there was to be a royalty of 10½d. Of this, 4d was to go to the landowners not only of the new

150 acres, but also of the land already alienated; 2d was to go to a new Banaban
a Provident Fund, to be accumulated; and 4½d was to go to the government to be used for the general benefit of the entire Banaban population, in the form either of services or payments.

That being the offer so strongly commended to the Banabans by the government, the government then proceeded to enact s 6(2). This provides nothing for the landowners of land already alienated, nothing for the Banaban Provident Fund, nothing
b for the general benefit of the entire Banaban population, and everything for the landowners whose land is taken under the Ordinance. If the Banabans had known about the Ordinance and had fully understood it, it would have provided every landowner of the 150 acres wanted by the British Phosphate Commissioners with a strong incentive to reject the commissioners' offer. 'Accept the offer, and you will share with the landowners covered by the 1913 agreement a mere 4d out of the proffered
c 10½d royalty, with a hope of getting some benefits as a member of the Banaban population. Reject the offer and you will be entitled to share the entire royalty among yourselves, subject to the directions of the Secretary of State.' Why the legislation took this form I do not understand. The remaining three sections of the Ordinance, I may say, merely lay down penalties for working minerals without a licence and for obstructing licence-holders, and provided for the commencement of
d the Ordinance.

I confess that I leave this Ordinance with feelings of some relief, tempered by the realisation that I shall have to return to it. It would be merciful to resist temptation and merely describe it as inept. Thirteen years later a memorandum by the Secretary to the High Commission was to describe the provision in s 6(2) which carried the money to the landowners instead of to the community as an 'error' and as being contrary to
e the directions of the Secretary of State. The execution of the Ordinance, too, was attended by no excess of competence, as will be seen. Soon after the final breakdown of the negotiations and the enactment of the Ordinance, Mr. Grimble was at last able to go on his long overdue leave, and an acting resident commissioner was appointed in his place. On 28th December 1928, the acting resident commissioner reported that he had held a meeting of the Banabans the previous day, that the
f provisions of the Ordinance had been 'thoroughly explained to them', and that copies of the Ordinance had been given to them. To give a thorough explanation would have taxed most men; one can only guess at what the Banabans made of it.

Soon the British Phosphate Commissioners were at work preparing the detailed offer which had to be made to the Banabans as a preliminary to the process of compulsion. It gradually emerged as being in essence the previous offer (without the ½d or
g ½d extras), with minor variations. The possible impact of the terms of the Ordinance on the destination of the payments seems to have been ignored on all hands. At a meeting with the Banabans on 14th February 1929 the commissioners offered these slightly varied terms to the Banabans; the Banabans forthwith rejected the offer, and although the commissioners kept it open for 14 days, the Banabans did not accept it. On 13th April the commissioners wrote formally to the Colonial Office, asking the
h Secretary of State to deem it expedient under s 4 of the Ordinance for the 150 acres to be made available to the commissioners; and on 6th May the Secretary of State did this.

By the end of June the High Commission had sent to the acting resident commissioner a draft notice under s 4 relating to the 150 acres, of which, said the High Commission, 'you are directed by the Secretary of State to enter into possession';
j there was, of course, no such direction. The letter concluded with a reminder of 'the importance of adhering strictly to the provisions of the Mining Ordinance'. There was some delay while the British Phosphate Commissioners decided on the areas of certain ancillary non-mining land that they needed, but by October an area of some 27¾ acres of such land had been identified; and in December the commissioners were making offers to the landowners for this land. In the middle of the month Mr

Grimble left England to return from leave to Ocean Island. At the end of December the Banabans made a written offer in place of their former demand of £5 a ton. This is not very clear, but I think it was an offer to accept for the mining land 1s 6d per ton and £180 an acre, with additional payments for trees. For the non-mining land they sought 3d per square foot for the land on which the buildings stood, as against the commissioners' offer to pay rent at £3 an acre. To this the High Commissioner replied on 14th March 1930, bidding the Banabans to be reasonable.

In January 1930, Mr Grimble, who by then was back on Ocean Island as resident commissioner, submitted a new draft notice to the High Commission, relating to both the mining and the non-mining land; and on 15th February the resident commissioner expressed himself as considering that the terms proposed for the non-mining land were reasonable. On 11th April the Secretary of State informed the British Phosphate Commissioners that he was satisfied that it was expedient in the public interest that the non-mining land should be made available for them. The commissioners then, on 23rd April, sent to the Colonial Office a formal offer for both the mining and non-mining land.

The offer followed the lines of the previous proposals, the main change being that for the mining land the offer was £60 an acre plus £2 per fully-grown coconut tree (and less for partly-grown trees) instead of £150 an acre with nothing for the trees; the change was made to meet what were believed to be the wishes of the Banabans. The annual rent of £3 per acre for non-mining land, too, was simplified for areas under one acre. The total royalty offered was the same 10½d, but its distribution was amended. The Banaban Provident Fund was to receive 3d a ton instead of 2d a ton; and £35,000 instead of £20,000 was to be taken from the existing Banaban Fund to start the Banaban Provident Fund. Each of these changes, of course, would accelerate the time when the limit of £175,000 would be reached and the British Phosphate Commissioners would cease to pay this royalty. The extra 1d a ton was found by reducing from 4d to 3d the royalty that was to go to the landowners; and the annual maximum payment was correspondingly reduced from £5,000 to £3,750. Throughout there was a bland disregard of the destination for the payments laid down by the 1928 Ordinance, which was, of course, in force.

The British Phosphate Commissioners then sent details of the offer to the resident commissioner, saying that before they placed the offer before the Banabans they would be glad to know if he considered it 'reasonable'; and on 30th April 1930 the resident commissioner replied, saying that the terms and conditions of the offer were 'advantageous to the Banabans'. The word used in s 4 of the 1928 Ordinance is, of course, 'reasonable', and a month later the resident commissioner was to say that no official consent of the resident commissioner for the purposes of s 4 of the Ordinance had been given. On 6th May the British Phosphate Commissioners put the offer before the Banabans; it was not well received and on 12th May it was rejected, though the commissioners kept it open for the full 14 days. By 15th May the High Commissioner was beginning to question the changes in the terms offered which had appeared in the formal offer of 23rd April, and by 21st May he had sent detailed criticisms to the resident commissioner. Thus the extra £15,000 to be taken from the existing Banaban Fund would save the British Phosphate Commissioners that amount, and the annual maxima were open to the grave objection that increased production by the commissioners would reduce the rate of royalty. The resident commissioner's reply was that he had fully considered the matter, and that his view was that the paramount consideration was the speediest possible accumulation of the provident fund.

Not surprisingly, this explanation did not satisfy the High Commissioner. He could not understand why the resident commissioner should regard favourably terms offered by the commissioners which were considerably less favourable to the Banabans than the terms previously offered, when those previous terms had been considered to be the minimum which could be regarded by the government as reasonable. The

resident commissioner's explanations and justification came in an 11-page letter on 14th August. The whole emphasis was on the need to have a large provident fund quickly in order to safeguard the Banabans against the consumption of their island, the exhaustion of the phosphates and the possible failure of the phosphate industry. He admitted that the commissioners would profit from the transfer of the extra £15,000 from the Banaban fund to the proposed provident fund; but he submitted that 'the question of relative profits, as between the natives and the Commissioners, should not be allowed to obscure the main issue in this matter'. He regarded the financial plight of the race as 'being at present so precarious, and the political consequences of the financial failure being so mortal', that it was immaterial whether or not the British Phosphate Commissioners would profit by the transaction.

I have found some of the reasoning in this letter baffling; and the criticism of it in a High Commission memorandum of 21st September is cogent. In particular, looked at in a broad sense, the extra £15,000 was already Banaban money, and if there was good reason for it, that money could at any time by legislation be transferred from the Banaban Fund to the Banaban Provident Fund. The main effect of transferring it forthwith would be to reduce by £15,000 the amount which the commissioners would ultimately pay to the Banabans. (Of course, anything taken from the Banaban Fund would also reduce the amount of capital that was available to produce income for the Banaban landowners under the 1913 agreement.) I find it difficult to resist the sad conclusion that the resident commissioner had not fully appreciated the effect of the revised terms, and having expressed the view that they were advantageous to the Banabans, he felt driven to a process of ex post facto self-justification.

In the meantime the High Commission had sent to the Colonial Office for approval a draft of the lease to be 'issued' by the resident commissioner under the Ordinance to the British Phosphate Commissioners, and the Colonial Office had replied, making a number of amendments. Then on 27th September there was a conference between the High Commissioner, the Judicial Commissioner, the resident commissioner and representatives of the British Phosphate Commissioners. There was considerable discussion of the process of arbitration, and who should be the arbitrator or arbitrators. In the course of this the High Commissioner expressed the view that the surface rights were not worth anything like £150 an acre. The British Phosphate Commissioners' representatives stated that the British Phosphate Commissioners would stand by the offer of £150 an acre or £60 plus payment for the trees; the High Commissioner preferred the £150 with no payment for trees.

There was also a discussion on royalties. The British Phosphate Commissioners agreed that there should be no maxima and no minima. The High Commissioner also expressed the view that the former offer of a 4d royalty to the landowners and 2d to the Provident Fund was preferable to the revised offer of 3d to each, but that the 4d to the landowners should not go to them but should in effect be amalgamated with the 4½d which was to be held by the resident commissioner in trust for the Banaban community generally. The effect would be that the total 10½d royalty would be split into 2d for the Provident Fund and 8½d for the Banaban community. The High Commissioner also proposed that the sum to be taken from the Banaban Fund to start the Provident Fund should revert from £35,000 to £20,000. All these proposals were submitted on the same day by telegram to the Colonial Office for approval, and amplified two days later in a long despatch, on parts of which counsel for the plaintiffs placed great reliance.

On 6th October the Secretary of State sent a telegram expressing general approval of the High Commissioner's proposals, but pointing out that they must be put before the Banabans, and refused, before any notice under s 4 of the Ordinance was delivered. By another telegram of the same date the Secretary of State pointed out the difficulties that arose in relation to arbitration from the High Commissioner's expression of the view that it was impossible to place a higher value than £150 an acre on the land. The High Commissioner replied to this latter comment by saying that if the arbitration

assessed compensation on actual values the Banabans would be heavy losers, and that they certainly would not ask for arbitration if they understood the situation.

On 11th October the British Phosphate Commissioners put the revised offer before the Banabans, but this time they gave them only seven days for acceptance in place of the previous 14. On 17th October the British Phosphate Commissioners wrote to the resident commissioner, informing him that the Banabans had that day refused the offer, and asking him if he would inform the British Phosphate Commissioners whether he considered the terms reasonable and whether he would proceed under s 4 of the Ordinance. However, the Colonial Office then told the British Phosphate Commissioners that the offer must remain open for not less than 14 days before the resident commissioner was requested to deliver a s 4 notice.

In the meantime, the resident commissioner had acted on the request of the British Phosphate Commissioners. On 18th October, after a meeting with the Banabans at which he 'very strongly' advised them to accept the terms offered, he had issued a s 4 notice naming 25th October as the date of 'resumption' of the land by the Crown if the terms were not accepted; and copies of the notice were served on individual landowners. The resident commissioner suggested to the High Commissioner that a week was reasonable and that the Banabans themselves were impatient. But the High Commissioner refused to authorise any departure from the procedure laid down by the Secretary of State. He stated that the offer must remain open for 14 days, that is, up to October 25th; and on 23rd October the resident commissioner told the Banabans that the notice of 18th October was cancelled. The British Phosphate Commissioners then, on 27th October, informed the Banabans that the offer should have been left open until the 25th October and asked them if they would accept it; and they refused. Thereupon the British Phosphate Commissioners again wrote to the resident commissioner asking if he considered the terms reasonable, and whether he was able to proceed under s 4. The resident commissioner replied the same day: he again abjured the statutory word 'reasonable' and stated that he considered the terms 'advantageous to the Banabans', adding that he was prepared to proceed under s 4. The next day the resident commissioner issued a notice to the Banabans under s 4, dated 27th October 1930. This stated his intention to enter into possession of the two areas of 150 and 27¾ acres of land on 4th November unless the Banabans accepted the terms offered to them in an attached notice. These terms set out the revised version of the terms, with 8½d of the 10½d royalty being expressed to be held in trust by the resident commissioner for the benefit of the Banabans. The notice also contained a statement that the resident commissioner was satisfied that the terms offered were 'reasonable'.

By 1st November the High Commissioner and the Colonial Office had agreed that if the terms were not accepted, the resident commissioner should proceed to take possession. They also agreed that he should then hand over the land to the British Phosphate Commissioners forthwith on the understanding that the form of lease, which was still in draft, would be completed as soon as possible. On 5th November the resident commissioner accordingly issued a second notice to the Banabans, stating that he did that day enter into possession of the 150 and 27¾ acres, and declaring the lands in question to be Crown lands within the meaning of s 4.

In the meantime a draft lease had been settled by the Chief Judicial Commissioner; and on 13th November the British Phosphate Commissioners wrote to the resident commissioner stating that they were prepared to give a formal written undertaking that the new scale of royalties would be brought into force as soon as the land was handed over to them, and that they would execute a lease as soon as it was agreed with the Colonial Office. On 18th November the resident commissioner sent the High Commissioner a convenient summary of the steps taken up to 5th November; and the next day the British Phosphate Commissioners gave the resident commissioner their formal written undertaking in the terms of their letter of 13th November. On 24th November the resident commissioner wrote to the British Phosphate

Commissioners, saying that he had the honour to hand over the 150 acres of mining land to the commissioners as from that day on the footing stated in their undertaking. The 27¾ acres of non-mining land was not mentioned, as the resident commissioner considered that the handing over of the mining land alone would suffice to bring into play the new rate of royalty.

The resident commissioner then, on 5th December 1930, issued a proclamation prescribing the royalties that the British Phosphate Commissioners were to pay as from 24th November. This was destined to be replaced by another proclamation on 12th January 1931, and so I shall not refer to it in any detail. It was in terms of the 2d royalty for the Banaban Provident Fund, which was to be accumulated at compound interest with £20,000 from the Banaban Fund until the end of the year in which the principal reached £175,000, and the 8½d royalty, which was 'to be held in trust by the Resident Commissioner for the benefit of the Banabans'.

By 12th December further difficulties had appeared. The resident commissioner sent a telegram to the High Commissioner saying that he was convinced that the notices issued by him were defective, in that the names of many landowners were omitted, and other land was set down as being owned by the wrong persons. He therefore proposed to issue new notices. The British Phosphate Commissioners had, he said, done no act of ownership on the land handed over on 24th November. On 17th December the High Commissioner approved this proposal, though warning the resident commissioner that a full period of 14 days' notice should be given. On 22nd December the resident commissioner issued 244 amended notices in respect of both the 150 acres and the 27¾ acres, covering 368 parcels of land, and specifying 5th January 1931 as the date of entry by the Crown. It was in fact on 10th January 1931 that the resident commissioner gave the landowners written notice of entry for both the 150 acres and the 27¾ acres.

Two days later, on 12th January 1931, the resident commissioner issued a proclamation prescribing the royalties under the 1928 Ordinance, in place of the proclamation of 5th December 1930. After a number of recitals, including a recital about the 1928 Ordinance and a recital that the resident commissioner was satisfied that the terms offered by the British Phosphate Commissioners were reasonable, the proclamation states:

> 'NOW THEREFORE by virtue of the authority vested in me as aforesaid, I do hereby order and proclaim that from and including the 12th day of January, 1931, the British Phosphate Commissioners shall pay, in respect of all phosphate bearing rock or other phosphate bearing substance raised, removed and exported from Ocean Island the following royalties, that is to say (i) two pence per ton to be credited to a fund to be termed "the Banaban Provident Fund" to continue to be paid until the end of the quarterly period during which the Banaban Provident Fund, accumulating at compound interest, shall have reached a total of £175,000 and thereafter to cease; (ii) eight and one half pence per ton to be held in trust on behalf of the Banaban community generally to be held and used or expended in such manner as the Secretary of State for the Colonies may from time to time direct; such royalties to be paid on all phosphate shipped from Ocean Island from the date on which the land hereby demised was made available to the Lessees, that is to say, the twelfth day of January 1931.'

It will be observed that, unlike the previous version, no mention is made of the £20,000 to be taken from the Banaban Fund, so that on the face of it the British Phosphate Commissioners would ultimately have to pay £20,000 more before their liability to pay the 2d royalty ceased. The point was in fact dealt with on 21st January 1931 by the High Commissioner instructing the resident commissioner to transfer £20,000 to the Provident Fund and to inform the British Phosphate Commissioners. At the time the Banaban Fund consisted of securities which had cost £32,000, and

£40,000 in cash. It will also be observed that as regards the 8½d 'the Resident Commissioner' has disappeared, and 'the Secretary of State' has been inserted; instead of the money being 'held in trust by the Resident Commissioner for the benefit of the Banabans', it is to be 'held in trust' (without specifying by whom) 'on behalf of the Banaban community generally to be held and used or expended in such manner as the Secretary of State for the Colonies may from time to time direct.'

On the same date as the proclamation, 12th January 1931, the lease was executed. By then there had been incorporated in it the various amendments that had been made in London and the Pacific. The lease was expressed to be made between 'the Resident Commissioner of the Gilbert and Ellice Islands Colony' and 'the British Phosphate Commissioners'. By it, the resident commissioner demised to the British Phosphate Commissioners both the 150 and 27¾ acres for a term of 69 years from 1st January 1931. In accordance with s 5 of the 1928 Ordinance, the lease provided for the annual payment of 2s 6d per acre rent to the resident commissioner (or to someone authorised by him) for the use of the government of the Gilbert and Ellice Islands Colony. It provided for the British Phosphate Commissioners to pay to the resident commissioner (or to someone authorised by him) 'upon trust in accordance with the provisions of the Mining Ordinance 1928, such sums as may be assessed by arbitration' held in such manner as the Secretary of State might direct. It then provided for the payment of the royalties of 2d and 8½d in terms which were identical with the terms of the proclamation of 12th January 1931 that I have set out above.

I pause at that point. The 1928 Ordinance is no lengthy enactment; its ten sections occupy little more than a page and a half of print. It has, indeed, a number of difficulties; but it is manifestly an enactment authorising the compulsory acquisition of land. The general import of the words in s 6(2) which run, 'All moneys payable by way of compensation or royalty shall be paid to the Resident Commissioner to be held by him in trust on behalf of the former owner or owners . . .' is not very difficult to gather. Furthermore, during the whole of this protracted process of compulsory acquisition, all concerned must have made frequent reference to the Ordinance. The lease, indeed, in terms provided for the compensation under the arbitration to be held in trust in accordance with the provisions of the 1928 Ordinance.

Despite this, the royalty was treated quite differently. Throughout, all concerned seemed to have been content to arrange to dispose of it by agreement and proclamation and lease as if the rights given by the 1928 Ordinance to the former owner or owners could and should be ignored. The transfer of £20,000 from the Banaban Fund to the new Banaban Provident Fund of course reduced the capital which had yielded income for the landowners under the 1913 agreement. Further, the 4d royalty that had originally been intended for the landowners under the earlier proposals for the disposition of the 10½d royalty had disappeared, being swallowed up in the 8½d royalty for the benefit of the Banaban community. I may add that when in May 1933 the High Commissioner enquired when the £20,000 had been transferred to the new Provident Fund, the resident commissioner's answer was that this was done in February 1931, apart from £1,200 which had not been transferred until April 1931.

I can pass over the arbitration on compensation quite shortly. The offer of £150 an acre was obviously greatly in excess of the market value of the land devoid of mineral rights. The High Commissioner had plainly been perfectly right in his view on this, though it was doubtless injudicious of him to speak of it in the way that he did. Considerable negotiations had been going on, and in the end the Secretary of State had appointed an experienced colonial servant in the Pacific (though from outside the Gilbert and Ellice Islands Colony), a Mr J S Neill, to act as arbitrator for the Banabans. Mr H B Maynard, who within three years was to become the British Phosphate Commissioner's manager on Ocean Island, was the arbitrator for the British Phosphate Commissioners. The arbitrators gave notice that they would proceed to assess the compensation on 27th January 1931; and three days earlier Mr Neill met the Banabans. He gave them a detailed explanation of what was involved, and then

there was a discussion, consisting of questions by the Banabans and answers by Mr Neill. The Banabans took part in the hearing on 27th January; and then, on 30th January, the arbitrators issued their award. This was in terms of the offer made by the British Phosphate Commissioners, that is, £150 per acre for mining land, inclusive of trees, and rent for other land at the rate of £3 per year per acre (with smaller sums for smaller units), and a scheme of payment for trees cut down. The next day Mr Neill sent a long report of the arbitration to the High Commissioner, stating, inter alia, that the terms offered and awarded were clearly excessive, and that he had agreed to the award as he was getting for the Banabans a much larger sum than he could have pressed for.

(4) *1931-1937: the Funds*

With the process of compulsory acquisition complete, I can come forward to the aftermath. The fourth period covers 1931 to 1937. By way of prelude, I should refer to a proposal that the resident commissioner made to the High Commissioner on 17th December 1930, shortly before the final stages of the compulsory acquisition. The resident commissioner recommended that a Banaban trust officer should be appointed 'for the special purpose of guarding the interests and guiding the development of the Banaban race'; for 'the task of trusteeship for the Banabans has assumed such substantive importance that it can be no longer safely handled as one of the numerous functions annexed to the office of Resident Commissioner'. The resident commissioner thought that the officer selected should be a man of legal training, as many aspects of the Banaban situation put the resident commissioner in the position of needing legal advice which was not then available. There was some discussion of what was involved in relation to substantial sums of money on the one hand and schemes for improving education, medical facilities, housing and so on, on the other hand. On 27th February 1931 the resident commissioner submitted a valuable 15-page memorandum dealing with the administration of 'Banaban royalties and other trust moneys paid to the Resident Commissioner by the British Phosphate Commission under section 6(2) of the Mining Ordinance 1928'.

One feature of this document is the emphasis put on the contractual right of the Banaban landowners under the 1913 agreement to receive the interest on the Banaban Fund. In 1930, about £1,550 was distributable, giving each landowner an average annual income of £6. The removal of £20,000 from the Banaban Fund to start the Banaban Provident Fund would, of course, greatly reduce the interest that was distributable among these landowners. According to the resident commissioner, only about £18,000 would be left in the Banaban Fund, though another memorandum received by the High Commissioner on 27th March 1931, which appears to be the work of Mr Neill, the arbitrator, states that the amount was about £26,000. Ultimately it emerged as being a little over £24,000. Such a sum would not support an annual payment of £1,550, and the resident commissioner recommended that the deficiency should be made up out of the royalties payable under the 1931 transaction, and that the payments to the 1913 landowners should thus be stabilised at £1,550. There were 260 of these, and instead of an exactly proportionate division of the £1,550, the resident commissioner recommended an annual payment of £6 a head to all of them. He referred to these payments as 'annuities'.

That was not all. The resident commissioner further recommended that the annuities of £6 a head should be extended so as to include every other person born a Banaban by descent through either father or mother. The resident commissioner said:

> 'It would be invidious and unfair to grant annuities to the 1913 landowners, and refuse the same privilege to those whose land was alienated before 1913, or to those who have been expropriated this year; and since all these classes will claim the right to draw annuities when still other owners alienate their land, they

cannot exclude such future alienators from a share of the advantages at present obtaining.'

As there were some 530 Banabans, £6 a head would mean about £3,200 a year; and this was to be paid out of royalties.

I pause at that point; for it illustrates the official approach at that time. It would be charitable to call it flexible. Under the 1913 agreement the Banaban Fund was producing income which went to the 1913 landowners. £20,000 was taken out of that fund to start the Provident Fund, and so the 1913 landowners lost the income from that £20,000. However, they were to be recompensed out of the royalties payable in respect of the 1931 land, royalties which by statute were to be held in trust for the 1931 landowners, but which by proclamation and by contract were to be held in trust for the Banaban community generally. (I think the resident commissioner's recommendation was directed to the 8½d royalty and not the 2d royalty.) However, those royalties were also to provide annuities for all other Banabans. Those who had alienated their land before 1913, and perhaps for 20 years or more had been getting nothing, were to share equally in the fruits provided by the 1931 lands. Those who still had all their land were to get the same. Large landowners, small landowners, owners of no land, all were to be provided for equally out of the 150 acres taken in 1931. As a process of administering property rights under enforceable trusts, comment is superfluous. As a process of wise government and social justice, there is much to be said for it, though of course in this sphere there is ample scope for argument.

Another feature of the resident commissioner's memorandum was that he pointed out that there was a conflict of principle between the Banaban custom of land-holding and the payment of lump sums to individual landowners for surface rights. Under Banaban custom, a Banaban's land will of necessity normally descend within his family. Within this principle the landowner has considerable liberty of action. He may divide his land among his children in such proportions as he wishes, irrespective of sex or age; and he may by adoption add to those who are considered his children. In certain limited instances the land might pass out of his family. Thus a landowner whose kindred refused to look after him in sickness or old age might give land to someone who did care for him. Another example, which later was to be denied recognition by the Native Lands Commission, was where land was taken from a man to provide compensation for a girl whom he had jilted. But subject to that, the land was to stay in the family.

The resident commissioner said that the Banaban 'holds his land in fee tail to the extent that the succession is reserved generally to his family group'; and if one disregards English eccentricities such as barring the entail, this description will do well enough. The payment of a lump sum to an individual landowner for the surface rights in his land, enabling him to spend any or all of the money and leave none for his family, would thus contravene the Banaban system of land holding; and the resident commissioner said that—

'the money should have been invested in trust for each landowner with remainder to his or her customary heirs or successors. The interest only should have been made available for expenditure by successive holders.'

At this, an English lawyer's thoughts will turn to the principle of capital money under the Settled Land Act 1925. In relation to the £150 per acre for 150 acres (a total of £22,500) payable as compensation to some 160 owners under the compulsory acquisition, the resident commissioner accordingly recommended that the money should be deposited in trust in the local savings bank, and that only the interest should be paid to successive holders. He also advised that a suitable system of registration and procedure, based on custom, should be authorised by law for the regulation of the scheme.

A third feature of the resident commissioner's memorandum is that it drew attention to something that all concerned seemed to have been ignoring. This was the

conflict on the destination of the royalties that there was between the Ordinance on the one hand and the scheme agreed by the resident commissioner and all others concerned except the Banabans, and set out in the proclamation and lease. The resident commissioner observed that a change in the law would presumably be necessary to validate the use of the royalty for general communal purposes; and he recommended the change.

There is much more in the resident commissioner's memorandum which I do not think I need discuss, especially in relation to the non-mining land. There is also the memorandum, apparently by Mr Neill, that I have already mentioned; and in this the residue of the Banaban Fund, after losing the £20,000 to the Provident Fund, is dubbed the 'Common Fund'. I shall not discuss this in detail. It supports the view that every Banaban should receive an annual allowance, and that the residue of the royalty payments should be expended under government control in services for the 'public benefit', to be interpeted in a liberal spirit. On 8th May 1931 the High Commissioner sent a copy of this and the resident commissioner's memorandum to the Colonial Office.

In February 1931 the British Phosphate Commissioners began to survey the land compulsorily acquired; and at once they encountered opposition from the Banabans. It is plain that the whole process had come as a shock to the Banabans; and they were resentful and suspicious of all concerned. Indeed, in a telegram to the High Commissioner the resident commissioner reported that his presence on the island was a hindrance to a peaceful settlement, and that the Banabans would only realise the facts if the case already put to them were to be re-stated by a new resident commissioner appointed from elsewhere. But the High Commissioner did not think that the resident commissioner should be replaced, and said that steps should be taken under s 9 of the Ordinance to ensure that the British Phosphate Commissioners had peaceful possession. Opposition continued through March, April and May; but in the end the actions of the resident commissioner, aided at times by the police, resulted in matters settling down.

In July 1931, Sir Murchison Fletcher, the High Commissioner, visited Ocean Island. He held office as High Commissioner, I may say, from November 1929 until May 1936. He discussed the resident commissioner's memorandum of 27th February 1931 with him, and on 29th July he met the Banabans. They put their grievances before him, and he then addressed them. In the course of this address he is reported as saying that it was the rule generally that the surface of land belonged to the owner, but—

> 'any minerals under the land belonged to the Government which can do what it pleases with them. The surface owners had not planted the minerals nor were they responsible for them, therefore they belonged to the Crown.'

I mention this merely to dispose of it. Whatever may be said about the logic of the proposition, it is clear that no claim to Crown ownership of the phosphates is now made. Counsel for the Attorney-General was quite explicit on that. Apart from a few sporadic statements in minutes and so on, at long intervals, Sir Murchison was on his own in making this assertion, for which I can see no support at all. Indeed, a letter by Sir Murchison himself dated 2nd June 1933 is hard to reconcile with any theory of Crown ownership. Whatever difficulties there are in determining the nature and quality of the ownership of land by the Banabans on Ocean Island, they do not include any claim by the Crown to ownership of the phosphate. I speak only of phosphate and say nothing of other minerals, and in particular of gold and silver; for happily such matters are not before me.

On 7th March 1932 the newly-appointed Native Lands Commissioner, Mr H E Maude (who later, as Professor Maude, was to give evidence before me in *Ocean Island No 2*), reported to the resident commissioner on the proceedings of the Native Lands Commission under the Gilbert and Ellice Native Lands Ordinance 1922. This

body included four Banabans from each of the four village districts on the island; and it sat in the villages successively from 5th October 1931 until 7th March 1932. A large number of claims were investigated, and in the end 2,479 parcels of land were registered, and their ownership and boundaries settled. These registers would have been invaluable in this litigation, but unhappily they were destroyed during the Japanese occupation of the island. The report had a number of enclosures dealing with matters such as the conveyances which were and those which were not recognised by the commission, in the sense that the commission recommended that they were not to be recognised for the future. There was also a draft Ordinance to regulate the inheritance and conveyance of lands, to give effect to the recommendations in the report. On 27th May the resident commissioner sent the report to the High Commissioner, with an amplified draft of the Ordinance.

On 21st March, soon after Mr Maude made his report, there was a long High Commission minute discussing the Banaban funds in relation to a despatch that the High Commissioner had sent to the Colonial Office on 29th September 1930, and also the resident commissioner's memorandum of 27th February 1931. The minute took a number of the points of difficulty that I have commented on, particularly in relation to the various departures from what appeared to be the rights of the various landowners. These included the 1913 landowners getting royalty on land acquired by the British Phosphate Commissioners before the 1913 agreement, and on the other hand having the fund which produced the interest that they received, the Banaban Fund, depleted by expenditure for the general benefit of the Banabans.

In August the Banabans presented a petition (which was treated as being a petition to the Secretary of State) complaining of the 1931 transaction; and they repeated this in November. On 8th April 1933 the Secretary of State requested the High Commissioner to give the Banabans a written or oral reply as he thought best. On 19th September the senior administrative officer to the resident commissioner sent the Native Magistrate a written reply, pointing out, inter alia, that the arbitration had been in accordance with the law; and the Native Magistrate was asked to call a meeting of the Banabans, and to inform them of the reply. This was done, and on 26th October five members of what was known as the Banaban Committee saw the senior administrative officer about the reply. Finally, on 19th March 1934 the Banabans told the High Commissioner that, though heartbroken, they would loyally accept the final decision that the Secretary of State had made.

In October 1932, Mr Neill had submitted another long memorandum on the Banaban funds, largely following the resident commissioner's recommendations, but explicitly recommending that the residue of the original Banaban Fund should be transferred to the new Common Fund, that is, the fund to be fed by the 8½d royalty. The Colonial Office had not yet spoken on this subject; and on 18th October 1932 the High Commissioner wrote to the Colonial Office. He enclosed a number of documents, including a copy of Mr Neill's latest memorandum, and a note of the discussion with the Banabans that the High Commissioner had had in July 1931. The High Commissioner suggested that as the resident commissioner, Mr Grimble, was in England, the Colonial Office might wish to discuss Mr Neill's proposals with him. The urgency, said the High Commissioner, was that the Banabans who had disclosed the boundaries of their land within the 150 acres should receive payment of interest on the sums paid for surface rights. The object was to encourage those Banabans who were still refusing to disclose their boundaries to the British Phosphate Commissioners to make this disclosure.

The Colonial Office reply on 17th December 1932 was to approve payment of the interest on the £22,500 until 30th June 1932, or, if that would give an excessive sum to any individual, until the end of 1931. On the other matters the Colonial Office asked the High Commissioner for his recommendations; Mr Grimble was ill and not available for consultation. On 15th April 1933, the Banabans signed a complaint, but stated that they had decided to disclose the bounds of their lands because of their

love for them, and so that they be not forgotten; and on 2nd May they began to do as they had said.

On 7th March 1933 the acting High Commissioner sent to the Colonial Office his recommendations, made on the assumption that the terms of the 1913 agreement had been superseded, and that the propriety of past payments from the Banaban Fund was not to be opened in the light of the 1913 agreement. Put shortly, his recommendations were, first, to keep the balance of the old Banaban Fund separately as a reserve fund, either adding the interest to capital or crediting it to the new Banaban Common Fund. Second, the new Banaban Common Fund was to provide an annuity of £6 for all members of the Banaban community, and was to bear the cost of maintaining recognised Banaban community services, and any additional services agreed by the Banabans and approved by the High Commissioner. But a warning was added that landowners might sooner or later seek a judicial decision on the disposal of the Banaban Fund, in view of s 6(2) of the 1928 Ordinance; and it was recommended that steps to guard against this should if possible be taken. Third, the acting High Commissioner assumed that the Colonial Office had approved the principle of the compensation paid for surface rights being held in permanent trust for the landowners and their heirs, who would get only the interest. Rents and compensation for trees should be paid to the landowners, as representing the annual produce of the land.

In December 1933 there was a new resident commissioner in place of Mr Grimble, Mr J C Barley. On 9th April 1934 he sent to the High Commissioner a nine-page letter about the still unsettled position of the Banaban funds. He pointed out that no decision had yet been made on Mr Grimble's proposal to keep the residue of the old Banaban Fund (which the letter called 'the Old Royalty Trust Fund') separately as a reserve, or Mr Neill's proposal to amalgamate that fund with the new fund, called the Banaban Common Fund, which was to receive the 8½d royalty. The resident commissioner had ascertained that the Treasurer of the colony had been crediting the new 8½d royalty to 'the old Banaban Royalty Trust account', and not, it seems, to a new account for the new Common Fund. Furthermore, nothing had been done to pay the proposed annuity of £6 to every Banaban. The letter also stated that the Banaban Common Fund 'has become merged in the Old Royalty Trust Fund'. On the other hand, the interest on the reduced investments of the old Banaban Fund had continued to be distributed, so that the 1913 landowners had been getting their accustomed half-yearly payments, though reduced in amount. Not surprisingly, the Banabans had been bitterly complaining that the only visible result of the new arrangements was that a 35 per cent reduction had been made in the sums paid to the 1913 landowners. The Banabans asked that three-quarters of the 8½d royalty should bear the cost of services to them, with the balance being distributed to them, and that the remaining quarter should be added to existing funds.

Before this had been replied to, a matter on which a great deal had been written had been brought to a close. The Gilbert and Ellice Islands Colony had no currency of its own, and Australian currency and also sterling had circulated in the colony. In April 1930 Australian currency became worth less than sterling, and one odd result was that the quantity of sterling silver in circulation was reduced because, though worth more, it bought no more than the Australian silver. The whole question of currency in relation to the pay of colonial civil servants and otherwise was much debated between London and the Pacific; and one facet of this was that of the currency in which the arbitrators' award had been made. In the end it was decided to ask the arbitrators; and on 18th October 1934 Mr Neill wrote to say that so far as he was concerned the sums were expressed 'in the currency used in the Colony', and that 'in other words it was not intended that the award should be in sterling'. On 29th November Mr Maynard, the other arbitrator, made it explicit that the award was intended to be expressed in Australian currency.

I can now return to the progress of the discussions about the Banaban funds. In

the High Commission office it was being pointed out that in view of the rights of the 1913 landowners, the transfer of the £20,000 from the old Banaban Fund to the new Provident Fund 'would appear to have been illegal as well as without justification, but it was part of the arrangement between the Government and the British Phosphate Commissioners'. It was added that if it was desired to retransfer the £20,000, the difficulty could easily be overcome by arranging with the British Phosphate Commissioners to reduce the agreed total which the Provident Fund was to attain. In discussing this and other matters in a letter dated 12th February 1936, Mr Barley, the resident commissioner, helpfully summarised the position as it stood on the latest figures then available. There were four funds.

(1) *The old Banaban Royalty Trust Fund.* This was the fund on which the 1913 landowners drew the interest. It stood at a little over £29,000, having been shorn of the £20,000 used to start the Provident Fund.

(2) *The Banaban Common Fund*, or *the new Banaban Royalty Trust Fund*, as it was sometimes called. This was the fund fed by the 8½d royalty under the 1931 transaction. It had reached a little over £33,000, but this had been reduced by over £12,000 for public services, and so stood at rather more than £20,000. The income from this fund was awaiting the decision of the Secretary of State as to its destination.

(3) *The Banaban Provident Fund.* This fund, fed by the 2d royalty, was accumulating, and stood at nearly £33,000.

(4) *The Banaban Landholders Fund.* This consisted of £22,500, the total of the compensation of £150 an acre for the 150 acres of mining land under the 1931 transaction. The interest on this fund was being paid to the owners of the mining land which had been taken in 1931.

What the resident commissioner proposed was that the first two funds should be merged; that the £20,000 used to start the Provident Fund should be restored with interest to the old Banaban Royalty Trust Fund; that the interest from the combined Trust Fund and Common Fund should be used to meet the cost of direct public services provided by the government for the Banabans; and that an annuity of £10 a head should be paid to all true-born Banabans out of the 8½d royalties coming in each year. A long letter from the High Commission to the Colonial Office on 5th August 1936 took the view that £10 a head was unnecessarily high. By this time there was considerable Banaban discontent; and on 6th August the resident commissioner sent to the High Commissioner and the Colonial Office a copy of a petition by the Banabans. Discussions continued, mainly in the Colonial Office. By the end of 1936 the Colonial Office had approved a settlement on the general lines proposed by the resident commissioner, and had informed the High Commissioner that the consent of the individual landowners to it should be obtained before legislation to amend the 1928 Ordinance could be enacted.

By 21st February 1937 meetings with the Banabans had been going on for three weeks. The officer then in charge of the colony reported general approval by the Banabans, provided that the landowners had some slightly preferential treatment over the non-landowners. He made appropriate recommendations on these lines, with annuities of £8 for adults and £4 for children for all Banabans, and with all landowners whose land went under the 1913 or 1931 transactions receiving annuities ranging from £2 for less than one acre to £10 for landowners with ten acres or more. Although a number of variants were mooted, it was to a settlement along these lines that official sanction was given on 9th March 1937. At a meeting with the Banabans on 24th July 1937, a spokesman for the Banabans told the High Commissioner and the resident commissioner that the Banabans were agreeable, and the 1913 and 1931 landowners were ready to waive their rights to royalties. Mr Rotan, however, demurred; he wanted the royalties on his own lands kept separately for him. He was a large landowner, if not the largest.

On 28th September 1937 the resident commissioner reported that every Banaban landowner except Mr Rotan had accepted the proposed terms; and on 12th October

the resident commissioner reported that he held a separate document signed by every individual landowner concerned (except Mr Rotan and his two daughters), accepting the proposed terms of settlement unconditionally. The document was in the Banaban language, and a translation shows that the Banaban Provident Fund and the Banaban Landholders Fund were in terms expressed not to be affected by the agreement. The landowners agreed that phosphate royalties which had accrued or were to accrue should be paid into the Common Fund. Out of this fund an annuity of £8 for adults and £4 for children under 15 years was to be paid to all true-blooded Banabans, and also to half-Banabans so long as they resided at Ocean Island. The resident commissioner soon framed elaborate rules defining who were to be accounted true-blooded Banabans, and who were to be regarded as half-Banabans; and these rules were accepted by the Banabans. Landowners were to receive an annuity of £2 if the total land holding in the 1913 and 1931 areas was less than one acre, £4 if between one and two acres, £6 if between two and five acres, £8 if between five and ten acres, and £10 if over ten acres. The payments were to come from the Common Fund, which was also to bear the cost of services performed by the government for the Banabans. Payments of annuities to the Banaban elders or for drought relief were to cease.

While this 1937 waiver (as I may call it) was being obtained, steps were at last being taken to amend the 1928 Ordinance; and this amendment, under the title of the Mining (Amendment) Ordinance 1937, was enacted on 10th December 1937. I shall turn to this in a moment. On the same day, the resident commissioner paid to the Banabans the annuities of £8 for adults and £4 for children; £36 was refused by Mr Rotan, his two adult daughters and three children, and this was placed in a deposit account. The resident commissioner also reported that the necessary schedule of landowners for payment of the landowners' annuity was not complete, but that he hoped to be able to pay the annuity by the end of the year. On 17th December he sent to the High Commissioner a long letter which provided a useful summary of the position. In it, the resident commissioner explained that he had decided not to proceed with the proposed retransfer of the £20,000 from the Provident Fund to the old Banaban Royalty Trust Fund, which had become merged in the General or Common Fund; for this transfer had never proved to be the inducement to the Banabans that had been expected, and they had shown not the slightest interest in it.

In relation to the Banaban funds, that was a point of repose. Vigorous discussions were going on with the British Phosphate Commissioners about sums to be paid to the government in lieu of taxation; but I need not discuss these here, and can turn to the 1937 Ordinance. By s 1, the Ordinance was to be read and construed as one with the 1928 Ordinance. Sections 2 and 3 then repealed ss 6(2) and 7 of the 1928 Ordinance respectively, and substituted quite different provisions; and s 4 provided for a degree of retrospection.

First let me take s 6(2) of the 1928 Ordinance. This, it will be remembered, dealt with moneys 'payable by way of compensation or royalty'. It required them to be paid to the resident commissioner, to be held by him 'in trust on behalf of the former owner or owners', if a native or natives of the colony, and subject to the directions of the Secretary of State. The new s 6(2) was much narrower. It applied to compensation, but it did not apply to royalties at all; it omitted all words of trust; and it substituted the High Commissioner for the Secretary of State. It ran as follows:

> '(2) Any moneys payable by way of compensation for any land acquired from a native or natives of the Colony under this Ordinance shall be paid to the Resident Commissioner who shall pay the same to the former owner or owners or apply the same for their benefit in such manner as the High Commissioner may from time to time direct.'

This, of course, was apt to apply to the Banaban Landholders Fund.

The new s 7, on the other hand, was far wider than the old s 7. The new s 7 ran as follows:

'Any moneys payable by way of royalty whether prescribed under section five hereof or fixed by agreement shall be paid to the Resident Commissioner who shall pay or apply the same in such manner as the High Commissioner may from time to time direct to or for the benefit of the natives of the island or atoll from which the minerals were derived in respect of which the royalty was payable.'

The new s 7 accordingly embraced all the royalties, irrespective of whether they were payable by agreement or as a result of compulsion. Once again, the words 'in trust' that had appeared in the old s 7 were omitted from the new s 7; and once again the High Commissioner was substituted for the Secretary of State. There was also the important change that the persons to benefit were no longer the natives from whom the land had been acquired ('such native or natives') but were to be the natives of the island or atoll from which the minerals had been derived, in this case the Banabans generally.

Finally, there was s 4 of the 1937 Ordinance. This ran as follows:

'Any act or thing done or omitted under the provisions of the Principal Ordinance which would have been validly and properly done or omitted if section six and section seven of the Principal Ordinance had been as provided by this Ordinance shall be deemed to have been validly and properly done or omitted.'

At one stage there was some discussion about whether it was correct to describe this as being a retrospective provision. It seems plain to me that in some degree it was retrospective. Putting matters broadly, the result was that as regards acts and omissions occurring between the 1928 Ordinance coming into force and the 1937 Ordinance coming into force, the act or omission was to be valid and proper—(a) if it complied with the 1928 Ordinance as it stood at the time, or (b) if it would have complied with the 1937 Ordinance if that had been in force at the time. In short, the act or omission was given alternative forms of salvation. The most important practical effect of this was that the past use of royalties for the benefit of the Banabans generally, contrary to what the old s 6(2) had provided but in accordance with the new s 7, was at last made valid and proper.

(5) *1937-1947: the war, Rabi and the 1947 agreement.* With the 1937 waiver and the enactment of the 1937 Ordinance another stage in the history of Ocean Island came to an end. The next period, the fifth, covers the ensuing ten years up to the making of the 1947 agreement; and it includes, of course the havoc worked on Ocean Island by the war. First, the waiver and the 1937 Ordinance were carried into effect. By this time, the old Banaban Royalty Trust Fund and the new Banaban Royalty Trust Fund (or Common Fund) had been treated as being merged into one fund, called the Banaban Fund, or the Banaban Common Fund. The 1913 landowners no longer received separately the interest due on the old Banaban Royalty Trust Fund, but with the 1931 landowners received out of the common fund the agreed scale of annuities based on acreage. No further payments were made to the Banaban elders or for drought relief; but payments for services to the Banabans continued to be made, out of the Common Fund, replacing the old Banaban Royalty Trust Fund for this purpose. There were thus three funds instead of four. These were as follows: (i) *the Common Fund* that I have been discussing. This paid for services, and in addition provided both the flat-rate annuities payable to all Banabans and also the annuities on an acreage basis payable to all 1913 or 1931 landowners; (ii) *the Provident Fund*, which was accumulating money to make provision for the Banabans in the future; and (iii) *the Landholders Fund*, which paid to the 1931 landowners the interest on the £22,500 compensation paid for their surface rights.

On 19th May 1938 the landowners were paid their 'bonuses' (as they were often called) for the year ended 30th June 1937. The delay had been caused by various disputes concerning the partitioning of land and the preparation of a complete register of lands. On 15th and 16th August 1938 both the annuities to all Banabans

and the bonuses to the landowners were paid in respect of the year ended 30th June 1938. Mr Rotan was continuing to object to what was being done, but obtained no satisfaction for his requests. Towards the end of 1938, the British Phosphate Commissioners' need for further land for mining, about which nothing had been said to the Banabans during the various negotiations with them, was beginning to come to the fore. The British Phosphate Commissioners had only enough land for a further two or three years, and they considered that it was time to open negotiations with the Banabans. By the end of 1938 the view had been formed by the British Phosphate Commissioners and the resident commissioner that any negotiations should be conducted between the British Phosphate Commissioners and the Banabans, with the government taking no hand in the negotiations in the first instance.

Meanwhile the Banabans had made various proposals for increasing the payments to them and making some rearrangement in the division of the royalties, as well as other matters; and these proposals were considered by the High Commissioner when he met the Banabans on a visit to Ocean Island on 29th June 1939. But the most striking feature of this period was a petition by the Banabans to the Secretary of State dated 7th June 1940, seeking a new home for the Banaban people somewhere in the Fiji group, so as to be under the same High Commissioner. This request was made in view of the continued gnawing away of Ocean Island by mining operations. The Banabans wanted this other island not instead of Ocean Island but in addition to it, as a second home, and in order to preserve their racial identity and culture. They had in mind the island of Wakaya which they believed would soon be in the market; but if that was not available they would prefer some other island in the Fiji group. This was a striking volte face in the Banabans' attitude, and showed a realistic approach to a subject which for some while had been being avoided in any discussions with the Banabans, in view of their strong opposition to any idea of an alternative to Ocean Island. The Banabans also asked that Mr Kennedy, who was an officer in the Colonial Service, should be permitted to retire from it so that he could become the Banabans' adviser and help them in their settlement on an alternative island. The latter proposal was regarded by the resident commissioner as being premature.

On 16th July 1940 representatives of the British Phosphate Commissioners met the Banabans and put before them proposals for the acquisition of some 230 acres of land on Ocean Island for mining. The offer was to pay £175 per acre (in place of £150) and 1s a ton royalty (instead of 10½d), with 2d of that 1s continuing to go to the provident Fund and 10d to go to the Trust Fund. The payment to the Provident Fund would continue until the Provident Fund reached £250,000, instead of £175,000. There was much discussion of this proposal at this and another meeting on 29th July. The burden of the Banabans' attitude, after some skirmishing, was that the offer was acceptable but that they wanted the government to pay over to them more of the money that the government received on their behalf. The British Phosphate Commissioners duly carried out their promise to put this request before the government. Mr Rotan, however, still adhered to his attitude of independence. The resident commissioner wrote to the High Commissioner on 24th September 1940, stating that he considered that the British Phosphate Commissioners' offer was 'exceedingly generous', and supporting the Banabans' request that they should receive more of the money themselves. He suggested increasing the annuities and also the landowners' bonus. At about this time, I may say, the Banabans, with government assistance, formed a co-operative society.

Arrangements had been made to investigate the availability and suitability of Wakaya; and on 17th February 1941 an agricultural officer inspected it and made a detailed report which showed that it was unsuitable for the Banabans. Other islands were considered. By 20th September 1941 Rabi, which was much more suitable, and was to become the second home of the Banabans, had come on the scene; and its owner confirmed that it was available for purchase at £A25,000. The Banabans, however, still hankered after Wakaya, but in the end, with a few dissentients, they

agreed that both islands should be bought. Wartime conditions had made impossible a proposed visit of inspection. Wakaya was on offer at £F12,500; the High Commissioner offered £F5,000, and this offer was refused. On the other hand, on 22nd April 1942, a solicitor reported the completion of all documents necessary to vest Rabi in the High Commissioner at the asking price of £A25,000. The arrangement was that the vendor should continue to occupy the island (which was producing copra) on a leasehold basis for a short while. There was also some discussion about a Fiji government reserve of 50 acres on Rabi which I need not consider.

At the end of August 1942 the Japanese occupied Ocean Island. They made little or no attempt to work the phosphate, but heavily fortified Ooma Point. I do not propose to detail the great hardships that the Banabans suffered during this time. By the time of the Japanese surrender most of the inhabitants of Ocean Island had been either killed or deported to other islands. Of some 150 who were left on Ocean Island at the time of the Japanese surrender all save one were later killed by the Japanese; and the sole exception, after a remarkable escape, survived to give evidence in *Ocean Island No 1*. All the Banabans' houses on the island had been destroyed, and many of the trees as well. The island had been reoccupied in August or September 1945, but plainly the immediate return of the Banabans to live on the island was completely impracticable. After a detailed inspection of Rabi had been made by Major Kennedy, whom the High Commissioner had appointed to do the work, it was plain that the sensible course would be to attempt to arrange at least a preliminary resettlement of the Banabans on Rabi. Rabi had the disadvantage for the Banabans of having a much greater rainfall than they had been accustomed to on the often parched Ocean Island, but it had not been ravaged by war, and it had many advantages. Major Kennedy's 14-page report dated 8th October 1945 set out an admirably practical and detailed plan for the occupation of Rabi by the Banabans, and the High Commissioner promptly gave it his approval in principle. A month's notice was given to determine the tenancy of Rabi on 20th November 1945.

A camp was prepared for the Banabans on Bairiki Island, on Tarawa Lagoon, and Major Kennedy collected them from various villages throughout the northern Gilberts, and from Kusaie and Nauru, where many had been taken by the Japanese. All agreed to go to Rabi for an initial period of two years on the footing that they would all retain their rights in Ocean Island and the Banaban funds, and that their transport and maintenance for the first month would be met by the Gilbert and Ellice Islands Colony and not be a charge on their funds. Furthermore, if at the end of two years they wished to return to Ocean Island, the government would bear the cost of their transport. There were some 700 Banabans in all, and also a further 300 Gilbertese who had become associated with them, either on Ocean Island before the Japanese came, or after deportation; and in the latter case the Banaban families with whom they had become associated were required to sign bonds for their good behaviour.

On 14th December 1945 the Banabans and Gilbertese arrived on Rabi. Initially they were received in a camp that had been prepared for them: but soon some began to move away. On 27th December 1945 a Fiji Ordinance called the Banaban (Settlement) Ordinance 1945 established a Rabi Island Council, and empowered it, subject to the approval of the governor, to enact regulations on a wide variety of topics. On 26th January 1946, at a meeting of Major Kennedy with over 150 Banaban elders, representing over 150 families, councillors were nominated for the Rabi Island Council. The Banabans expressed the firm view that they preferred not to consider the question whether to settle permanently on Rabi until further agreements with the British Phosphate Commissioners had been made: the 1940 agreement in principle had never become a formal agreement. By this time the change of climate had produced a heavy incidence of pulmonary illnesses; and there were many other ailments, due in many cases to wartime hardships.

On 19th, 20th and 21st March, Mr Maynard, who had been the Ocean Island

manager for the British Phosphate Commissioners from 1933 to 1936, met many of the Banabans on Rabi. One of the questions raised by the Banabans and discussed at that meeting was the British Phosphate Commissioners' 1940 offer for more land for mining; and Mr Maynard told the Banabans that the offer had been asleep but was not dead. The Banabans then raised the question of marking the boundaries of the individual plots of land that would be taken for mining. The general view was that the Banabans would accept the 1940 offer; but one Banaban asked for better terms, and suggested 1s 6d a ton royalty and £225 an acre. Mr Maynard promised to report matters to the British Phosphate Commissioners, and said that he had not been sent to get the proposed agreement signed. On 22nd March a number of the Banabans put the request for 1s 6d and £225 into writing.

In June 1946, there were meetings on the 13th and 17th of the month between the Banaban elders and Mr Windrum, the Fiji District Commissioner (Northern), with Major Kennedy present. The Banabans wanted Major Kennedy removed from his post as the Fiji administrative officer in charge of Rabi. The complaints against him seem to have been a mixture of personal complaints, misunderstandings, and visiting on him homesickness for Ocean Island and a variety of difficulties on Rabi. The district commissioner heard these complaints, and he also raised the question of holding a ballot on whether the Banabans wished to make Rabi their home or whether they wished to return to Ocean Island. The Banabans asked how much Rabi had cost, and at any rate some of them approved the purchase at £25,000. On 28th June 1946 the Banabans wrote a letter, repeating their objection to Major Kennedy, and confirming their agreement to the purchase of Rabi, provided Ocean Island was not lost to them. Another letter of the same date sought the payment to them of the money in the Landholders Fund and the Royalty Trust Fund; and by a third letter of the same date Mr Rotan enquired about a variety of matters.

On 20th September, the High Commissioner answered the first two of these letters. To the first the reply was that Capt Holland had replaced Major Kennedy, and that there was no intention of affecting the Banabans' right on Ocean Island. To the second the reply was that the matter had been referred to the Secretary of State for his decision. The third letter seems to have been answered, but the answer does not appear to have survived.

I must now turn to a memorandum dated 2nd September 1946, written by Mr Maude, who by then was the Chief Lands Commissioner for the Gilbert and Ellice Islands Colony; this was often called the 'Maude Report'. It is, if I may say so, a most lucid and valuable document, providing a survey of Ocean Island and the Banabans for the past and making recommendations for their future. Mr Maude was reporting in accordance with instructions that had been given to him by the High Commissioner. He had known the Banabans for some 17 years; and he had been impressed by the progressive moral and physical degeneration of the people. The three main factors were, first, the dislocation of their traditional economy by the growth of the phosphate industry, making them a denaturalised race dependent for life on imported goods; second, there was the lack of any sense of responsibility for the conservation of the Banaban funds, since these were spent without any consultation with their leaders; and, third, there was the system of annuities for the Banaban 'which has sapped his moral fibre, turning him too often into a dole-fed hanger-on of the British Phosphate Commission'.

Mr Maude's main hope for the future lay in persuading the Banabans to settle on Rabi and not to return to Ocean Island; and for this purpose he urged the government to effect a settlement of all outstanding points at issue. He put these under four heads. First, the government should make it clear that the Banabans' rights over land on Ocean Island would in no way be affected by a decision to settle on Rabi; and he made certain detailed suggestions as to the revesting of the title to worked-out lands in the Banabans. He also regarded it as being 'advantageous, from every point of view', that the British Phosphate Commissioners should effect 'a single and final

settlement' with the Banabans covering all the land on Ocean Island that the British Phosphate Commissioners required either in the present or in the future. Second, he recommended that the ownership of Rabi, which stood in the name of the High Commissioner, should be vested in the Island Council on behalf of the Banabans residing there, subject to a number of detailed provisions. Third, there were the Banaban funds. Mr Maude discussed the unsettled question whether a landowner was owner of the minerals as well as the surface, and then he considered the control of the Banaban funds. He recommended the amalgamation of the Royalty Trust Fund (or Common Fund) with the Provident Fund, which had served its purpose, a reference, no doubt, to the purchase of Rabi. He advised that the control of the fund should be vested in a Banaban Funds Committee, with certain limitations on the expenditure, and that there should be control by the Banaban Welfare Officer (the new title suggested for the officer in charge at Rabi) and by the governor, by means of a system of estimates and so on. This committee would be an addition to the Banabans' other organisations, the Island Council, the Island Court and the co-operative society. Fourth, the report dealt with the annuities. These, said Mr Maude, 'have done nothing but harm to their recipients', and almost all connected with the Banabans had recommended their abolition. But they were too firmly entrenched to be abolished, and so they must be continued, though all attempts to have them increased should be resisted.

The report recommended that these proposals should be explained to the Banabans and embodied in an agreement to be signed by them and the government; and most of the recommendations of the report were conditional upon the Banabans electing to settle in Rabi. I should add that there is much in the report that I have not attempted to summarise; but I hope that I have indicated the main features of a document which shows an admirably unsentimental but real concern for the Banabans and their future.

30th November. **MEGARRY V-C** continued reading his judgment:

In November 1946 the Banaban Officer reported to the High Commissioner that the Banabans had informed him of their unanimous decision to make Rabi their permanent headquarters and home; but this proved to be premature. By December 1946 the British Phosphate Commissioners had decided that they were willing to negotiate a final settlement of the land question with the Banabans as Mr Maude recommended. The High Commissioner, however, considered that negotiation should be postponed until the Secretary of State had reached a decision on Mr Maude's recommendations. This was soon resolved, for on 2nd January 1947 the Secretary of State approved the recommendations with a few minor comments which have not been revealed to me as Crown privilege was claimed for the telegram. By early February the British Phosphate Commissioners had put before the High Commissioner, who was visiting Canberra, a proposal to offer the Banabans 1s 3d a ton and £200 an acre, with proportionately less for the less good land; and the High Commissioner's comment on this, in a telegram to the Assistant High Commissioner, was, 'This seems reasonable'. The Assistant High Commissioner replied that he regarded the proposed offer as a reasonable basis of negotiation but not unduly liberal, as it represented increases of only 25 per cent and 15 per cent respectively on the 1940 terms, whereas currency depreciation in the interval had been much greater.

At this stage the Banabans sent another letter to the High Commissioner, dated 7th March 1947, asking to be told that Rabi was their land, like Ocean Island. They stressed their desire to make Rabi their new headquarters and home, and they referred to many meetings that they had had about the division of the land on Rabi. Arrangements were being made for Mr Maynard to go to Rabi to negotiate with the Banabans for the further land, and on 25th March the secretary to the High Commission informed Major (formerly Capt) Holland of this impending visit. The letter contained a pregnant sentence which I shall quote:

'You should, of course, take no part whatever in Mr Maynard's land negotiations with the Banabans, making it clear to them, if necessary, that these negotiations are wholly between them and the British Phosphate Commissioners.'

In due course I shall have to return to this sentence and its implications. By a letter dated the next day, 26th March, Major Holland was also told that Mr Maude, who by now was the resident commissioner for the Gilbert and Ellice Island Colony, and Mr P D Macdonald, who would represent the Fiji administration, would be present at the final negotiations. On 9th April 1947, in the presence of Major Holland, Mr Maynard began his negotiations. They took place in a meeting which, with breaks, lasted from 9.00 a m to 1.30 p m.

The negotiations related to two parcels of land with a total area of 671 acres. One parcel consisted of about 291 acres of land coloured purple on a plan, which for the most part lay above the 170-foot contour on the island. This was good phosphate land, and included the site of Buakonikai village. The other area was the land marked with a colour called 'stone' on the plan, containing about 380 acres. This for the most part lay below the 170-foot contour, and included the sites of Tabiang and Tabwewa villages. This was described as poor phosphate land. The offer made to the Banabans was thenceforward to pay a royalty of 1s 3d per ton on all phosphate mined, including phosphate from land which the British Phosphate Commissioners already held and need pay for only at 10½d a ton. There was an estimated 3¼ million tons of such phosphate, so that for this an extra £65,625 would in effect be paid. For the land, the British Phosphate Commissioners offered £200 per acre for the land coloured purple, a figure mid-way between the £175 agreed in principle in 1940 and the £225 asked by the Banabans. This like all the other sums, was in Australian currency. The 291 acres at £200 an acre, came to £58,200, which was then worth about £51,500 in Fiji currency. For the 380 acres of the 'stone' land, the British Phosphate Commissioners offered £50 per acre.

After some discussion the Banabans decided that they wished to dispose of the 'stone' land as well as the purple. But they asked a better price for the 'stone' land; and Mr Maynard agreed to increase it from £50 to £65 an acre, but refused to go further. Three hundred and eighty acres at £65 an acre, I may say, is £24,700. Mr Maynard also rejected a request for the same figures but in Fiji and not Australian currency. There were various other requests that I need not mention, apart from a request for a better rate of interest on capital. This, said Mr Maynard, was bank business; but he promptly arranged for the British Phosphate Commissioners to pay 3 per cent interest on the total of £82,900 payable for the land, in place of what I think was the current 2½ per cent rate of bank interest.

On the next day, 10th April 1947, the 1947 agreement was signed by Mr Maynard and by 21 Banabans, who expressed themselves as signing 'for the Banaban Landowners of Ocean Island'. Major Holland witnessed all signatures. The agreement was simple in form, and occupies a little over a page in double-spaced typewriting. I do not think I need set it out in full. By cl 1 the Banaban landowners agreed to transfer the two areas of land to the British Phosphate Commissioners, and by cl 2 the British Phosphate Commissioners contracted to make the agreed payments for the land on 17th April 1947, and to pay the increased rate of royalty as from that date. Clause 3 provided that, after being worked out, all the land covered by the agreement was to revert to the Banaban owners as soon as this could take place without inconvenience or prejudice to the operations of the British Phosphate Commissioners; and by cl 4 there was a saving for the terms of the Crown licence. That was all. For the Banabans it was to prove a financial disaster.

Despite this speedy conclusion of the negotiations, so speedy that Mr Maude and Mr Macdonald did not arrive in time for the final stages, their proposed visit to Rabi duly took place; for the Banabans' future on Rabi and their rights in relation to Ocean Island had not been formally resolved. Mr Maude and Mr Macdonald were on Rabi

from 7th to 13th May 1947, and they spent 8th, 9th and 10th May in a series of meetings with the Banabans. On 10th and 11th May the Banabans voted by secret ballot on their future, with Banaban supervisors in charge; and then there were further discussions on the result of the ballot. Three hundred and eighteen out of a population of 336 adults over 18 years old had voted. By 270 to 48, a majority of nearly 85 per cent, the Banabans decided to make Rabi their headquarters and home.

On that footing, a formal 'Statement of Intentions' of the government was then signed by Mr Maude, Mr Macdonald, Major Holland, and an administrative officer on the government side, and by 20 representatives of the Banabans on the other side. This statement, made in May 1947, provided that the Banabans' decision to remain on Rabi was not in any way to affect their rights to lands on Ocean Island, and that the title to all worked-out phosphate lands there which had or might in future come into the possession of the Crown should revert to the Banabans. The ownership of Rabi was to be vested in the Rabi Island Council, except for the Fiji government reserve of 50 acres, and subject to the erection of a government station at Nuka; and the stock, tools, houses and other assets of the copra estate on Rabi were also to vest in the Council. The Council was to legislate for the division of lands on Rabi, and for the system of land tenure and inheritance.

The Banaban Royalty Trust Fund and the Provident Fund were to be amalgamated into one fund, called the Banaban Fund, to be used exclusively for the benefit of the Banaban community on Rabi. The management of the Banaban Fund was to be vested in a Banaban Trust Fund Board consisting of the Banaban Adviser as chairman and up to five members of the Rabi Island Council elected by the council; and there were provisions as to the board's powers and mode of operation. The board's accounts and estimates were to require the approval of the Governor of Fiji. The capital of the Landholders' Fund was to be transferred to the board for investment, and each landholder was to have the same rights over his invested capital fund as he would have had over the lands represented by the funds. The governor was to be petitioned to permit a landholder to withdraw capital, with the governor's consent, for the purpose of effecting permanent improvements to his Rabi land. Annuities were to continue to be paid in accordance with the terms of the 1937 annuities settlement, unless the governor varied them on the recommendation of the board; and they were to be paid in Fiji currency to those resident in Fiji, and in Australian currency to those resident elsewhere.

Subject to the laws of Fiji and to the availability of shipping, the Banabans were to be permitted to travel freely between Rabi and Ocean Island, and, subject to the rights of the British Phosphate Commissioners over lands purchased by them or leased to them, to reside on Ocean Island. The Banabans on Rabi were to be subject to the laws of Fiji, including the laws relating to taxation, and so they would be eligible to receive all normal services provided by the government of Fiji on the same terms as other residents in Fiji. Finally, the Banaban Adviser was to be an officer of the government of Fiji, appointed by the governor to advise the Banabans on Rabi on all matters connected with its social and economic advancement; and his salary was to be paid from the Banaban Fund.

That Statement of Intentions undoubtedly represented a very considerable step forward towards the final settlement of the Banabans; but it did not satisfy by any means all of them. A lengthy report by Mr Maude to the High Commissioner on 11th July 1947 records a variety of demands by a number of Banabans. One was that the landowners should be absolutely entitled to the capital as well as the interest in the Landholders' Fund, a demand that was at variance with the restrictions on disposition that the Banaban custom of landowning imposed on the owners of land on Ocean Island. Other demands related to the royalties. They sought a proportionate division of future royalties among the landowners, and a division among all Banabans of any balance in the Royalty Trust Fund after paying for any communal works on Rabi that the Provident Fund could not meet. Some even wanted the Provident fund

to be distributed. These proposals ran counter to the government view that royalties should be used for the community as a whole and not merely for those who were members of the community at a particular time. Mr Maude and Mr Macdonald took the attitude that they had no power to discuss such radical changes, and that it was premature to consider them before it had been seen how much needed to be spent on communal works. A little later, on 12th September 1947, the High Commissioner sent the Colonial Office a detailed commentary on the Statement of Intentions.

In the meantime, on 5th, 6th and 7th August 1947, there had been a number of meetings between Mr Maynard and the Banabans, with Major Holland present. For some months there had been various references to a proposed visit to Ocean Island to be paid by a Banaban boundary-marking party, to mark out the boundaries of the various holdings of land which were included in the 1947 agreement. Some 400 or more Banabans were to be in this party, and the task of carrying out a detailed survey of the many small plots of land in the 671 acres of land covered by the 1947 agreement would obviously be very considerable. The British Phosphate Commissioners estimated the total cost at some £A 11,000, and so they evolved a scheme for approximating the area of each landowner to the nearest quarter acre and dividing the payments on this basis. At the meetings with Mr Maynard the Banabans unanimously agreed to this method of dealing with the matter, in return for the British Phosphate Commissioners making an additional payment of £A 7,500 to the Banabans. This was to be allocated among the landowners within the 671 acres as they decided. Further meetings with the Banabans on 8th, 9th and 11th August 1947 dealt with various other matters, including an agreement for the removal of sand from sites to be agreed with the Banabans when the marking party was at Ocean Island. In return, an annual sum of £A15 was to be paid by the British Phosphate Commissioners to the Banabans, to be allocated as the Banaban community decided. I shall shortly come to what was called 'the sand agreement'.

In the middle of August 1947 the boundary-marking party of some 400 Banabans left Rabi by ship, and the marking of boundaries on Ocean Island on the approximate basis began on 22nd August. By 27th September the marking of the 291-acre area had been completed, and by 6th November the marking of the 380-acre area had been finished. There were a number of other matters to be dealt with, but finally, after a farewell dance to Ocean Island on 5th December 1947, the Banabans left by ship for Rabi.

(6) *1947-1973: voluntary increases in royalties*

I now come to the sixth period, from 1947 to 1973. This was characterised by a series of attempts by the Banabans to obtain better terms than they had agreed in the 1947 transaction. These attempts achieved some success, but far less than the Banabans considered right. Steps in accordance with the Statement of Intentions were taken early in 1948, and by May an Ordinance was in draft, dealing with the Banaban funds. In June the Banabans petitioned that they should have independence of the governments of Fiji and the Gilbert and Ellice Islands Colony, and that, under the Governor of Fiji, the Rabi Island Council should administer both Ocean Island and Rabi. At a meeting with the Banabans on Rabi on 3rd August 1948, the governor referred to the Statement of Intentions, and explained that the Banabans' request could not be granted. Later that month the High Commissioner agreed that the Banabans should be administered by Fiji as from 1st January 1949.

In September there were two further meetings with the Banabans. On 14th September, Mr Maynard gave the Rabi Island Council an answer to their claim that they had been promised that when the 150 acres taken in 1931 had been fully worked out the Provident Fund would have reached £175,000, and that as it had not done this the British Phosphate Commissioners had become obliged to make up the difference. This answer involved reminding the Banabans in detail about the offers made by the British Phosphate Commissioners prior to 1931 and their rejection of these offers, and much else besides.

On 21st September, Sir Albert Ellis, who had known the Banabans since 1900, and had been the New Zealand British Phosphate Commissioner since 1920, in company with Mr Maynard and Major Holland, talked to the Banabans at their request about early days on Ocean Island. In the course of this meeting Mr Rotan put on a blackboard some figures showing under the heading 'Royalties' in one column what payments the company (and later the British Phosphate Commissioners) had made to the government, and what payments they had made to the Banabans. These figures showed the increased rates of royalty payable to the Banabans, from 6d for 1912 to 1930 and 10½d for 1931 to 1947 to 1s 3d for 1947 until 1999; and beside them there was a uniform 6d payable to the government throughout from 1906. The significance of this is that the payment to the government had in fact been increased from 6d to 1s in 1931, and from 1s to 1s 9d in 1947, and this appeared to be unknown to the Banabans. A memorandum by the Banabans which seems to be dated June 1950 is to the same effect. Of course, as the British Phosphate Commissioners were to point out much later (in August 1968), 6d had remained the 'normal' government royalty throughout, and the extra payments were in lieu of taxation; but this distinction would have had little appeal to the Banabans, whatever significance it might have for officials of the British Phosphate Commissioners. This blackboard exercise, I may say, was the prelude to a request by the Banabans for a 6d royalty to be paid to them from 1906 to 1912. The Banabans also asked for copies of various documents, from the initial agreement of 3rd May 1900 onwards; and Mr Maynard replied helpfully.

A few days later, on 30th September 1948, Mr Maynard, Major Holland and the Rabi Island Council met again. At this meeting the right of the British Phosphate Commissioners to take sand on Ocean Island was recognised by a written document dated that day. This was signed by the chairman (Mr Rotan) and members of the Rabi Island Council and witnessed by Major Holland. It reads as follows:

> 'The BANABANS have accepted the offer of THE BRITISH PHOSPHATE COMMISSIONERS to pay the BANABANS the sum of £A15 per annum as from the 11th January 1946, such annual payment to be continued until the mining operations on Ocean Island cease, and in return for this annual payment the Banabans raise no objection to the removal of sand and shingle from the beach at Ocean Island for making concrete and for other work. The Banabans agree that sand and shingle may be taken from Ooma Boat Harbour to beyond Nei Mokai [a prominent outcrop of coral]—the sites in use and shown to the Banaban Marking Party during their visit to Ocean Island 18th August 1947 to 6th December 1947. The receipt of the sum of £A45 [£F39 16s 6d] covering the period 11/1/46–10/1/49 is at the same time acknowledged.'

I shall call this 'the sand agreement'. It is, of course, of importance in relation to the claim in *Ocean Island No 1* in respect of the removal of sand from the red land. At this meeting the Banabans asked that the £15 a year, as well as the £7,500 for forgoing detailed boundary markings and another sum, should all be in Fiji pounds and not Australian pounds; but this Mr Maynard refused.

On 8th October 1948 the Banabans petitioned the Secretary of State, asking that the government should bear all the costs of the huts, tents, equipment, utensils and other things provided in 1945 to establish themselves on Rabi, and not merely the cost of establishing the temporary camp; and they referred to their great losses and sufferings during the war. They said that none of them could recollect having agreed that only the cost of transport to Rabi, of establishing the camp and of rations for one month should be borne by the Gilbert and Ellice Islands Colony. Even if they did agree it, they were not then in a fit state to think for themselves, and so their acceptance ought not to bind them. This petition seems to have arisen out of a charge of nearly £F7,500 made against Banaban funds for the materials and equipment in question. On 15th December 1948 the Secretary of State asked the High Commissioner to tell the Banabans that he was not prepared to intervene as they requested.

On 1st January 1949 the Banaban Funds Ordinance 1948 came into force; it had been enacted on 29th September 1948. It carried out part of the Statement of Intentions by establishing the Banaban Funds Trust Board. This consisted of the Banaban adviser as chairman, and five members of the Rabi Island Council elected annually by the council. The board was to be a body corporate, and there were provisions as to elections, quorums and so on. By s 9, all moneys standing to the credit of the Banaban Royalty Trust Fund and the Banaban Provident Fund were to vest in the board. The funds were to be amalgamated under the name of the Banaban Trust Fund, and be operated, controlled, invested and expended by the board in accordance with the provisions of the Ordinance.

Section 10 provided that:

> 'All sums payable by way of royalties in respect of minerals mined by the Phosphate Commission on Ocean Island shall be paid into and form part of the Trust Fund'.

By s 11:

> 'Payments may be made by the Board from the monies constituting the Trust Fund for all or any of the following purposes—(*a*) for the benefit of members of the Banaban community and of the community generally; (*b*) for the payment of the reasonable expenses incurred by the Board in carrying out the provisions of this Ordinance; (*c*) any other purpose for which the Board considers payments may properly be made; Provided that no such payment shall be made unless it has been approved by the Governor in accordance with the provisions of section 12.'

By s 12, a system of annual estimates of revenue and expenditure was instituted. The board was to prepare them, and submit them to the Island Council, which was then to submit them to the Governor of Fiji with their recommendations.

Section 13 dealt separately with the Landholders' Fund.

> 'All monies standing to the credit of the Banaban Landholders' Fund on the date of the coming into operation of this Ordinance shall vest in the Board and shall be held by the Board in trust for the payment of the interest accruing from the fund to the persons lawfully entitled thereto: Provided that the Board may, with the consent of the Governor, pay to any person entitled to a payment of interest as aforesaid the whole or any part of the capital sum representing his interest in the fund.'

There were various ancillary provisions as to authority for making payments, accounts, audit and so on, and an exemption from income tax. There was also a general provision in s 16 that subject to the provisions of the Ordinance, the moneys constituting the funds held by the board in pursuance of the provisions of the Ordinance should 'be operated, controlled and invested in such manner as the Governor may direct'.

Not surprisingly, there were some accountancy problems in relation to the funds in question, partly due to the destruction of records on Ocean Island by enemy action during the war. In January 1949 the Fiji government was stating that it had not yet taken over the administration of the funds, and that it could not do so until there were audited accounts of them. By August 1949 the Fiji government was pressing the Gilbert and Ellice Islands Colony government for the accounts. Not until 17th October 1949 were the Royalty Trust Fund and the Provident Fund actually amalgamated to form the Banaban Trust Fund.

In 1950 the Gilbert and Ellice Islands Colony was still receiving grants in aid from the United Kingdom Treasury to assist it in its post-war difficulties; and these grants, together with the degree of Treasury control that the grants carried with them, continued until January 1955. During this period, and beyond, there were many

discussions about the level of taxation that should be borne by the British Phosphate Commissioners, but I do not think that I need say any more about these. In 1957, after the Banabans had sought an increase in their royalties, the High Commission and the Banaban Adviser pointed out that although there was no legal basis for the claim, in that the 1947 agreement did not envisage any variation, nevertheless in their view the request was reasonable and should be considered between the Banabans and the British Phosphate Commissioners. This view was communicated to the British Phosphate Commissioners in October 1957; and in December the British Phosphate Commissioners agreed to increase the rate of royalty from 1s 3d to 1s 9d as from 1st July 1958.

On 30th June 1959, the Colonial Secretary of Fiji wrote a long letter to the general manager of the British Phosphate Commissioners. The Banabans had observed from the recent annual reports of the Nauru administration to the United Nations that they seemed to have been much less generously treated by the British Phosphate Commissioners than had been the Nauruans. There were two aspects of this. First, there had been two reconstruction loans for the Nauruans' benefit after the war. £350,000 had been advanced for the complete rehabilitation of administrative buildings and installations and Nauruan villages which had been completely destroyed; and by June 1957 this loan had been fully amortised by payments at the rate of 10½d per ton of phosphate. Under the other loan, 350 houses had been built at a cost of £303,775 to replace Nauruan houses that had been destroyed. By January 1959 less than £5,000 of this remained to be amortised, by payments at the rate of 9d per ton.

The second comparison made by the Banabans was of the rate of royalty. Their royalty, of course, was running at the recently increased rate of 1s 9d a ton. On Nauru, the rate had risen from 1s 7d to 2s 7d on 1st July 1957, the payments going partly to the landowners and partly to trust funds. In those circumstances the British Phosphate Commissioners were asked in effect to make the Banabans a loan of £200,000 for the erection of permanent housing, and also to increase the royalty of 1s 9d so that the increase would amortise the loan and the existing 1s 9d would continue to be paid.

On 26th September 1960 the British Phosphate Commissioners replied to this request, after two of the commissioners themselves, with their general manager and administrative secretary, had visited Rabi and discussed the matter with the Rabi Island Council and the Banaban Adviser. They rejected the request for an increased royalty, though they said they would consider a future request for an increase. They also rejected the request for a housing loan of £200,000. Instead, they offered to make forthwith an ex gratia payment of £15,000 a year for 12 years or until 250 houses had been built, whichever was the earlier. (In parenthesis, I may say that if the payments continued for the full 12 years this would amount to £180,000 in all; but by October 1964 the British Phosphate Commissioners seemed to have accepted that at £1,000 a house they were committed to a total contribution of £250,000 for houses.) There were certain conditions attached to the offer, including a condition that the Banabans should contribute not less than £4,000 per annum, and that all the money should be held in a special account and be used exclusively for properly designed housing. The letter also discussed other matters, including the lack of roads on Rabi, and the training of some Banabans by the British Phosphate Commissioners.

In November 1960 the acting Colonial Secretary of Fiji replied to the British Phosphate Commissioners, saying that the Banabans welcomed the housing offer, and putting forward certain details. The letter also asked the British Phosphate Commissioners to consider assisting the Banabans on the provision of roads on Rabi. In the end, in July 1961, the British Phosphate Commissioners duly provided the annual payment of £15,000 for houses, and in April 1962 they agreed to meet half the cost of a road-building programme up to a maximum of £F35,000 in all.

In July 1963, the Banabans wrote to the British Phosphate Commissioners asking for the rate of royalty to be increased from 1s 9d to 4s and for increases to be made in the

payments for housing and roads. The letter referred to the amount being paid to the Gilbert and Ellice Islands Colony as having 'increased from 6s to over £1 a ton', so that even if the Banabans did not then know the exact figures (the payment went up from 21s to 23s as from 6th February 1963) they knew approximately. In May 1964 the British Phosphate Commissioners agreed to an increase of about 50 per cent, to match the 50 per cent granted to Nauru, so that the Ocean Island royalty became 2s 8d as from 1st July 1964.

One of the considerations that the British Phosphate Commissioners bore in mind throughout, and was emphasised before me, was that for geographical and other reasons the costs of production of phosphate on Ocean Island were very much higher than those for Nauru. Estimates made by the British Phosphate Commissioners for 1963-64 show the total island expenses (that is, apart from administration, sinking fund, pension fund and so on) as being 74s 6d per ton for Ocean Island and 33s 4d for Nauru. In considering this, one must remember that the output from Ocean Island was only one-fifth of that from Nauru. Further, these figures include 26s 3d for Ocean Island and 13s 6d for Nauru, representing, for Ocean Island, 23s for commuted taxation, and 1s 9d royalty for the Banabans, plus 1s 6d for roads and housing, as against the Nauru royalties and administration expenses. A Colonial Office table of January 1965 shows how for Ocean Island over the period 1946 to 1964 the payments by the British Phosphate Commissioners to the Gilbert and Ellice Islands Colony had risen from 1s 9d a ton to 23s a ton, compared with the increase in the payments to the Banabans for royalties and, latterly, houses and roads, from 10½d a ton to 4s 2d a ton.

In April 1965 there was an ugly episode which, among other things, gives some indication of how strong and deep-seated the feelings of some of the Banabans about the phosphate royalties had become. A number of the Banabans had become dissatisfied with the Banaban Adviser, then Mr Laxton. This was mainly on the ground, said the Rev Tebuke Rotan, that Mr Laxton had not obtained information on the Gilbert and Ellice Islands Colony share of the royalties, and had not helped them to get more for their phosphate. I pause there merely to say that nearly two years earlier, as I have mentioned, the Banabans knew at least approximately what the Gilbert and Ellice Islands Colony was then getting, and the real complaint may have been that Mr Laxton had not told them that more money was available and so higher royalties could have been paid. However that may be, some Banabans were dissatisfied, while others supported Mr Laxton.

The Rev Tebuke Rotan is a Methodist minister; he held his first appointment as such in 1960 on Rabi. In his evidence before me, he described in chief what happened in April 1965. A short passage in his cross-examination by counsel for the Attorney-General puts it succinctly.

> 'Q. You told my Lord that you became the leader of the faction, the powerful group on the Banaban Council which was determined to get itself rid of Mr Laxton. That is right, is it not? A. Yes, that is correct.
>
> 'Q. And the way you planned to get rid of him, you told my Lord, was to burn down his house and to murder his supporters? A. That was the plan, yes.'

The witness then said that at the time they thought that there were about 100 supporters of Mr Laxton; that he thought that he had been asked to carry out this armed rising before he had had a chance to consider petitioning the governor; that he was told that the others had done all they could to persuade the authorities, though he had not asked them if they had petitioned the governor; that the plan was that 400 armed men should surround and cut down the 100; and that they had a right to do this in order to save their country. The witness had previously in chief summarised the plan to get rid of Mr Laxton.

> 'I asked 400 of our men to arm themselves with spears and knives, and we made a pledge that we should burn his house and take him to the other side of the island, and let the government pick him up, and then to kill the followers.'

When he was asked what was so urgent about the removal of Mr Laxton, the witness answered: a

> 'We could not stand paying someone whom we trusted that he should look after our interest and yet he did not. Secondly, he gradually built up his followers, as I have said, to 100. If we delayed he would be in the end successfully getting another 200, another 300, so it is basic, we must stop it before he got more and more people on his side.'

b

The plan, in short, was a plan for the wholesale murder of fellow countrymen with different political, economic or social views in order to prevent the minority becoming the majority. I am glad to say that prompt and tactful action by a Fiji District Officer, Mr Hughes, averted any actual uprising. Mr Laxton departed, and on 1st June 1965, the council terminated his appointment. Shortly afterwards, the Rev Tebuke Rotan was appointed manager by the council; he moved into Mr Laxton's c house and took over most of his functions.

Some two months after this incident, in a petition to the Governor of Fiji dated 11th June 1965, the Banabans referred to the Gilbert and Ellice Islands Colony receiving 23s a ton (which was the correct amount) and contrasted it with their 2s 8d, a figure which of course ignores the payments for housing and roads. By August 1965, the Rabi Island Council had instructed Mr Walker, an Australian economic and d market research consultant who gave evidence before me; and by October 1965, the council had instructed solicitors in Fiji. The council nevertheless continued to negotiate on its own account. A letter to the Colonial Office, dated 5th November 1965, signed by Mr Rotan, as chairman of the council, and by four others, contained the statement that—

> 'No Banaban has ever had the chance to discuss or negotiate with either the British Phosphate Commissioners or the British Government the amount he should receive for the sale of his homeland.' e

I cannot imagine the point of making a statement so obviously untrue or misleading as this.

In December 1965, Mr Christofas, the head of the Economic Department of the f Colonial Office, and others, had two meetings with the Rabi Island Council on Rabi; and the council's solicitor was there. At the first meeting, Mr Christofas put forward the result of discussions in Canberra with the governments of Australia and New Zealand. It had been agreed that there should be an increase of 3s a ton in the total royalty payments for an interim period consisting of most of 1965 and much of 1966, and that the sole responsibility for dividing the increase between the Gilbert and g Ellice Islands Colony and the Banabans was to be the British government's. The proposal that he had in mind to put to the Secretary of State was that the Banabans should receive 1s of this increase and the Gilbert and Ellice Islands Colony the other 2s. An independent Technical Advisory Group ('TAG') was to be set up to examine and report on all aspects of the phosphate question, and the long-term settlement would depend on the group's report. h

At the second meeting the Banabans' answer was uncompromising. They firmly asserted that the royalty belonged to the Banabans absolutely. They did not agree to any division of it whereby any person or government obtained any part of it, and they did not recognise that any person or government (including the British government) had any right to dispose of the royalty to anyone except the Banabans. Mr Christofas expressed disappointment, but after a long discussion, in which the Banabans emphasised their distinction from the Gilbertese, and Mr Christofas emphasised the governmental right to tax, little progress had been made. j

Very shortly afterwards, on 17th December 1965, the Colonial Office wrote a long letter to the Commonwealth Development Corporation, setting out the terms of reference of the TAG, with the names of the agreed members and a summary of the

position. From this letter it appears that by this time the payment to the Gilbert and Ellice Islands Colony stood at 26s a ton, though this included the additional 3s of which the Banabans had been told by Mr Christofas; and it was stated that consideration was being given to paying 1s of this 3s to the Banabans. Furthermore, the British Phosphate Commissioners' exemption from taxation had been cancelled. The Nauru payments had reached 17s 6d a ton. In addition, there were the payments for the cost of administration which were borne by the phosphate revenue, which were estimated at 10s a ton. The report of the TAG would, it was stated, be confidential to the Secretary of State, and would not be made available in toto to the Australian and New Zealand governments. In 1966 the TAG duly reported; and what I understand to be Part I of the report was put in evidence. It gives a most useful account of the whole operation on Ocean Island, and much else besides.

On January 14th 1966 Mr Christofas, who was passing through Fiji, had a meeting with Mr Rotan and other members of the Rabi Island Council, with their solicitor present. Mr Christofas told them that the TAG had already started work, and discussed this; but the main subject of discussion was the extra 3s and the future. The Banabans claimed that as the 3s had been called a royalty, all of it must go to them. This seems to foreshadow the 'Crown royalties' claim in *Ocean Island No 2*. However, in the end, without prejudice to anybody's claims of principle, and without resolving problems of terminology, the Banabans accepted as an interim arrangement that if the British government gave them 1s as royalty they would accept it, leaving 2s to go to the Gilbert and Ellice Islands Colony. A month later Mr Rotan wrote to Mr Christofas to say that the council was not satisfied with what had been done, and was going to send a delegation to the United Nations in New York. Mr Christofas duly replied, suggesting that Banaban representatives might be attached to the United Kingdom delegation at proposed talks between the governments of Australia, New Zealand and the United Kingdom. Mr Rotan replied, requiring in effect independent representation in the talks.

In Suva, on 5th May 1966, there was a further meeting between Mr Christofas, members of the council (including Mr Rotan) and others. In the course of this, Mr Christofas explained that although originally the British Phosphate Commissioners had the responsibility for the phosphate payments, for 'some years now' they had been instructed to stay clear of it, and it had been a matter for the three governments. After much discussion, in which the Banabans' solicitor played a leading part, the Banabans accepted the proffered status of advisers to the British delegation at the proposed talks on phosphates. On 8th July 1966 Mr Christofas wrote to Mr Rotan to say that the British government agreed that the payments made by the British Phosphate Commissioners should be split into taxation, payable to the Gilbert and Ellice Islands Colony, and royalties, all of which were to go to the Banabans. He proposed that the contributions for roads and housing should be consolidated with the royalty; and he said that the British government would agree to a delegation of four to represent the Banabans at the talks, and pay their expenses.

The long-awaited discussions duly took place in Wellington, New Zealand, from 29th August to 1st September 1966, with representatives of the Gilbert and Ellice Islands Colony and the Banabans present as advisers to the British delegation. It was agreed to put forward to the governments a series of recommendations. The road and housing payments to the Banabans, the value of which had previously been overestimated, were to lapse. The Banaban royalty was to be increased by 9d per ton from the existing 3s 8d (made up of the 2s 8d which had run from 1st July 1964, and the 1s which had emerged from the discussions with Mr Christofas) to 4s 5d per ton. (The difference between the 9d, and the 1s 6d at which the roads and housing payments had previously been estimated, was at least in part a reflection of the difference between spreading the payments over a shorter period and spreading them over the whole remaining life of the phosphates.) The rate of export of phosphates from Ocean Island was to be increased from 340,000 to 450,000 tons a year. Another meeting was

to take place after discussions with Nauru, and in any case by June 1968. Until then, the total payments to the Gilbert and Ellice Islands Colony and the Banabans were to be 42s 1d per ton, with the British government having the sole decision on how much of the increase was to be treated as taxation for the Gilbert and Ellice Islands Colony, and how much of it was to be royalty for the Banabans.

The New Zealand and Australian delegations asserted that these provisions represented the maximum reasonable total levels of benefit for the interim arrangements, and that further discussions might well show that they represented the most that the Ocean Island phosphate industry could support, or more. The British delegation said that they would seek the most generous possible definitive settlement in the interests of the Gilbert and Ellice Islands Colony and the Banaban community. A letter from the Department of External Affairs in Wellington estimated that the proposed terms represented a total additional payment by the British Phosphate Commissioners of £2s 8d, though after allowing for various savings (including the payments for roads and housing) the net increase would be £os 10d.

On 8th November 1966 the Secretary of State wrote to Mr Rotan to say that the three governments had accepted the recommendations of the Wellington meeting, and that he had decided that out of the increased payment to be made by the British Phosphate Commissioners, £os 1d was to go to the Gilbert and Ellice Islands Colony, and 2s 7d was to go to increase the royalty payable to the Banabans from the 4s 5d that had emerged from the meeting to 7s. The letter took the value of the road and housing payments as being not 9d but 4d, and on this footing stated that the increase from 4s (consisting of 3s 8d plus 4d) to 7s was an increase of 75 per cent, compared with an increase of only 34 per cent in the payment to the Gilbert and Ellice Islands Colony. I may say that a contemporary Colonial Office document which during the hearing acquired the marking 'Misc. 3A' shows that these changes were to take effect as from 1st July 1966. The document, which is an extension of the table of January 1965 that I have already mentioned, usefully shows the rates paid to the Gilbert and Ellice Islands Colony and the Banabans for each year from 1946 to 1966. The council's view of this decision (which I think reached them in advance of the letter) was that it was unjust and unreasonable; and they said that they would continue to fight for a proper distribution, and would seek world opinion on the action of the British government.

In May 1967, Mr Rotan, the Rev Tebuke Rotan and their solicitor attended a series of meetings with representatives of the United Kingdom government in London. The discussions were wide-ranging. They included questions of the political separation of the Banabans, and their protection against the Gilbert and Ellice Islands Colony if it became independent. The contrast between the 35s 1d for the Gilbert and Ellice Islands Colony and the 7s for the Banabans naturally loomed large with the Banabans, particularly in view of the prospects of mining ceasing in about 12 years. By this time, claims by the Banabans to have soil shipped to Ocean Island, and food-bearing trees planted, had been made. The Banabans contended that the British Phosphate Commissioners' payments should be divided on a 50-50 basis, in place of the ratio of 7s to 35s 1d. The meeting on 18th May 1967 was presided over by the Minister of State for Commonwealth Affairs, Mrs Judith Hart MP; and after some discussion, her proposal of a further meeting was agreed to.

At this meeting, on 23rd May, Mrs Hart read a prepared statement in which she told the Banabans that, subject to Parliamentary approval, Her Majesty's government proposed to make a once-for-all ex gratia payment of £80,000 sterling (equivalent to £100,000 in Australian pre-decimal currency) to the Banaban Development Fund under controlled conditions for the purpose of developing Rabi economically. In addition, the government would provide technical assistance; and at the next round of phosphate discussions, the government would take fully into account, as sympathetically as possible the Banabans' case on the interrelation of taxation and royalties. These proposals were put forward for the Banabans to accept as a satisfactory settlement for the time being.

The next meeting was on 24th May. At this, Mrs Hart's statement was discussed at length; and what was stated to be an agreed minute of the discussions, dated 6th June 1967, was prepared and placed in the library of the House of Commons. In this, the proposed ex gratia payment of £80,000 is stated to be made 'in consideration of the effects of phosphate mining upon Ocean Island since 1900', a form of words which the Banabans say they should not have agreed. The Banaban delegation promptly left London, after they had been advised by their solicitor to accept the £80,000. Back in Fiji, they consulted another lawyer, Mr Patel, who advised the council not to accept the £80,000; and the money was not then accepted.

At about this time the British Phosphate Commissioners were occupied in considering the areas of land on Ocean Island from which phosphate could still economically be extracted. These included a number of areas occupied by the commissioners otherwise than under mining leases, and two areas of some 65 acres in all which had not so far been leased to them. One result was that the question of the terms on which the British Phosphate Commissioners could obtain these additional rights from the Banabans was added to the existing questions in dispute. On the other issues, in a long memorandum for which the appropriate date seems to be about 9th September 1967, the Banabans expressed themselves as being greatly disappointed by the result of the May meetings in London, and as being unwilling to take part in a further conference that was to take place in Wellington, New Zealand, in September. While in Auckland on 9th September, Mr Rotan wrote to Mr Christofas, who was also there, saying that the Banaban delegation would not take part in the Wellington conference merely as advisers to the United Kingdom delegation. They required to be free to take part in the talks with the Australian and New Zealand governments, and to leave the division of the 42s 1d, and any further sums, to be decided at a subsequent conference between the Banabans and the United Kingdom government. On 11th September, Mr Rotan communicated with the Australian and New Zealand delegates, also claiming direct representation, as well as other things.

On 12th September, Mr Rotan wrote again to Mr Christofas to emphasise that 'the agreed minutes' of the discussions in May were 'an agreed minute of *the discussions*. It would be wrong to call it an agreement'. The letter disagreed with other parts of the minutes, and said that the Banabans were not agreeable to the ex gratia grant of £80,000 '*in consideration of the effect of phosphate mining* upon Ocean Island since 1900'. The letter claimed that the British Phosphate Commissioners should restore the land and replant it with food-bearing trees, and said that the Banabans would seek a separation of the island politically from the Gilbert and Ellice Islands Colony as soon as possible.

Meanwhile, on 11th September, the discussions had begun, without the Banabans but with representatives of the Gilbert and Ellice Islands Colony present as advisers to the British delegation. The conference ended on 15th September, and there is an agreed minute of that date. On 20th November, after the three governments had approved the recommendations contained in the minutes, Mr Christofas sent copies of the minutes to Mr Rotan, and asked him for the Banabans' considered recommendations on the division between them and the Gilbert and Ellice Islands Colony, with their detailed reasons.

The agreed recommendations to the three governments included financial provisions for the Banabans on an entirely new basis, in effect scrapping the existing payments made in excess of the contractual royalty of 1s 3d and starting again. To the contractual 1s 3d payable to the Banabans was added 9d as representing the road and housing payments, instead of the 4d which had been taken by the Secretary of State in November 1966. The resulting 2s was then converted into decimal currency at 20 cents: all the figures are in Australian currency. This sum of 20 cents was to be added to the costs of production (as defined), and then the total was to be deducted from the phosphate revenue. The balance was then to be divided between taxation to be paid to the Gilbert and Ellice Islands Colony and additional royalties to be paid

to the Banabans (in addition to the basic 20 cents) as the British government should decide from time to time. Further provisions were made as to the basic and actual f o b price of Ocean Island phosphate; and provision was made for a review of the arrangements, subject to which they were to operate indefinitely from 1st July 1967.

Some six weeks later, on 29th October 1967, a party of over 50 Banabans arrived at Ocean Island on a pre-arranged visit, together with Mr Patel, their new legal adviser, and a surveyor. The main purposes of the visit were to inspect and survey the 65 acres of unleased phosphate land, to check the leased areas and inspect them with a view to resettlement, and for their surveyor to check certain boundaries where mining was suspected of having extended into unleased areas. This, of course, presaged the over-mining claim in *Ocean Island No 1*. The visit was attended by a number of incidents which I need not relate. On 12th January 1968 the surveyor sent the council a long letter and a number of plans, containing the results of his surveys. At the end of the month, Nauru became an indepedent self-governing republic.

There was then correspondence between Mr Rotan and the Commonwealth Office in which the Banabans sought a conference to discuss the allocation of the British Phosphate Commissioners' payments as between themselves and the Gilbert and Ellice Islands Colony. Further, the Banabans' legal adviser wrote to the Trusteeship Department of the United Nations to say that the Banabans wished to present to a United Nations' committee a case for immediate independence and for support and assistance. On 5th June 1968, a committee heard Mr Patel, the Banabans' legal adviser, who presented a long memorandum with an addendum. In these the Banabans sought immediate political independence, re-establishment on Ocean Island, no acceleration in the extraction of phosphate, and immediate steps for the full rehabilitation of areas affected by phosphate mining.

Much could be said about these documents; but I propose to confine myself to saying that nobody who knew the facts could escape the conclusion that a forceful presentation of the Banabans' genuine grievances had been marred by significant omissions of what was true and by intemperate assertions of what was false. I shall give only one example under each head. First, a picture of coercion to go to Rabi and stay there was built up without any mention of the ballot or of the large majority for remaining on Rabi. Second, it was said that 'the Banaban people revere and worship the remains of their ancestors'; and in relating what the Banabans had found on their recent visit to Ocean Island, it was said that—

> 'the Banaban Cemetery had totally vanished. We believe that in their greed for phosphate the BPC has dug out the remains of our forefathers and shipped them away to fertilise the farms in Australia and New Zealand.'

This statement plainly referred not to the Banaban cemetery near the Sacred Heart Mission, which was outside the areas leased to the British Phosphate Commissioners and was intact, but to the Banaban cemetery at Ooma Point, near the area from which sand had been taken, and where there had been extensive Japanese earthworks and fortifications.

During my view of Ocean Island in October 1975 I saw the cemetery; and what has been called the 'Pastor's Tomb' (his name, I think, was Apisaloma) was still standing there prominently. It was, indeed, often used as a point of topographical reference in the hearing before me. The cemetery appeared to have been completely neglected for a very long time; and on a plan delivered with further and better particulars served by the plaintiffs in *Ocean Island No 1* on 11th March 1975, the area is marked 'Ooma Cemetery, Neglected Graves'. The plaintiffs' own surveyor who prepared the plan dated the survey 'July 1973'. When I visited Ocean Island, a party of Banabans was living on the island; yet the cemetery showed no signs of attention by anyone, and certainly not reverence or worship. It is completely untrue to say that it 'had totally vanished'. Nor has there been any extraction of phosphate anywhere near. What was

taken nearby was sand, not phosphate, so that the emotive phrases about 'greed for phosphate' and shipping 'the remains of our forefathers' to 'fertilise the farms in Australia and New Zealand' were stupidly and offensively false.

As I have said, the statement to the United Nations' committee was made by Mr Patel. He had been in the party that had visited the island, so that he must at least have had an opportunity to see for himself what he was talking about. Whoever was responsible, he plainly did not understand the elementary verity that even if simple honesty is to be ignored, a good case does not need to be bolstered up by falsities and half-truths, and that in the end these recoil on the heads of those who utter them. As I have said, I shall say no more about this document. Nor need I say anything about the statement in reply made by the United Kingdom representative on 10th June, beyond mentioning that it refuted the allegations about the graves and much else besides, and referred to the ballot about remaining on Rabi. With that, I can leave the United Nations' episode; it seems to have produced no direct result.

In August 1968 the British Phosphate Commissioners' general manager had a meeting on Rabi with the Banabans, in which Mr Patel and Mr Walker took part; and at this, much was discussed and little achieved. Soon afterwards, in October 1968, there were discussions in London between the United Kingdom government and representatives of the Banabans and of the Gilbert and Ellice Islands Colony, mostly in separate meetings. The Banaban representatives included Mr Rotan and the Rev Tebuke Rotan, and also Mr Shrapnel and Mr Walker, both of Philip Shrapnel & Co Pty Ltd of Sydney, who presented a long memorandum. Mr Shrapnel said that an ex gratia payment for the development of Rabi would be very acceptable as a quid pro quo for lack of past development, but that it did not remove the 'moral obligation' of the three governments to restore Ocean Island, or to pay full compensation in lieu, which he put at £40 million. He accepted that if the ex gratia payment of £80,000 was made it would be used solely for developing Rabi under Her Majesty's Government control. On the division of phosphate payments made by the British Phosphate Commissioners, he said that the Banabans were in equity entitled to the whole benefit, but that they realised that Her Majesty's Government would be unlikely to agree, and so they sought a substantially greater share.

The United Kingdom representatives next met the Gilbert and Ellice Islands Colony representatives separately from the Banabans, and then on 29th October there was a joint meeting at which the Banaban representatives and the Gilbert and Ellice Islands Colony representatives made their final statements. The Banaban statement included a request for immediate independence for Ocean Island. The contrast between an independent Nauru receiving 100 per cent of the profits from her phosphate, and a dependent Ocean Island receiving only 15 per cent, and watching the remaining 85 per cent going to the Gilbert and Ellice Islands Colony, was naturally emphasised.

The next day Lord Shepherd, the Minister of State, announced the decision of the United Kingdom government. The Banabans' request for independence, the rehabilitation of Ocean Island, the limitation of the rate of phosphate extraction, and an increased share of the phosphate payments, were all rejected; but the offer of the £80,000 was renewed.

In March 1969, there was another Banaban visit to Ocean Island, much concerned with boundaries of the land leased for mining and a number of other matters. By this time it had been agreed with the Republic of Nauru by the three governments that the British Phosphate Commissioners would continue to operate the phosphate industry on Nauru until 30th June 1970, paying the whole proceeds of an agreed f o b price to the Republic after deducting costs, and that the Republic would purchase the British Phosphate Commissioners' assets at an agreed price. The three governments had also agreed among themselves that a similar f o b price would be charged for Ocean Island phosphate as from 1st January 1968. The proceeds of this, however, would be allocated between the Banabans and the Gilbert and Ellice Islands Colony

by the United Kingdom government, and the British Phosphate Commissioners would continue to operate the industry until the phosphate was exhausted in about eight years.

In the autumn of 1969, the Rev Tebuke Rotan was in London, and wrote to the Prime Minister and the Foreign and Commonwealth Office; and in October he had discussions with Lord Shepherd and subsequently with certain officials. There was another meeting with Lord Shepherd on 6th January 1970. From this it appeared that the renewed offer of £80,000 had been accepted; for one of the officials at the meeting referred to 'the development grant of £80,000 made to the Banabans following the phosphate talks in London in 1968' as having 'largely been spent and mainly on clearing coconut plantations on the island'. On 28th January 1970, Lord Shepherd was in Fiji and met a large delegation of Banabans. One subject for discussion was the impending independence of Fiji, which in fact came about later in the year, on 10th October. Once again much was discussed at these meetings but little achieved; the decision as to the amount of royalty for the Banabans remained unchanged.

A meeting between Lord Shepherd and the then leading counsel for the Banabans on 23rd February 1970 was concerned mainly with obtaining representation for the Banabans at forthcoming talks in Fiji between officials of the three governments. These talks were to review the Ocean Island phosphate arrangements, particularly in relation to the separation from Nauru; the Banabans' share of the payments was not to be a subject for discussion. Immediately prior to those talks, which began on 18th March 1970, representatives of Fiji, the Gilbert and Ellice Islands Colony and the Banabans (including leading counsel for the Banabans) held what were called informal discussions with the United Kingdom delegation; and in the familiar pattern they attended the talks as advisers to that delegation. The main object was to obtain as high a profit as possible by reducing costs and raising the price. The talks produced agreed recommendations to the three governments, including an increase in the agreed basic price for the phosphate up to the price sought by the United Kingdom delegation; and there were provisions for review. Leading counsel for the Banabans raised the question whether the British Phosphate Commissioners would work hitherto unleased land on Ocean Island; and he was told that the British Phosphate Commissioners would do this provided permission to do it were given at a fairly early date. By June 1970 the three governments had all approved the recommendations that had resulted from the talks.

On 20th March 1970 the Banabans submitted a memorandum seeking to present their case to an independent body such as a Select Committee of the House of Commons, or a Joint Select Committee. Some six months later, on 30th September 1970, leading counsel for the Banabans saw the Parliamentary Under-Secretary at the Foreign and Commonwealth Office in order to request an inquiry. From this meeting it appeared that the Banabans were no longer seeking independence for Ocean Island, as they had decided to take up Fiji citizenship. The main point was, as might be expected, the 15 per cent that they received compared with the Gilbert and Ellice Islands Colony's 85 per cent. On 2nd March 1971, the Foreign and Commonwealth Office replied in detail to the Banabans' memorandum, which was treated as a petition. The request for an inquiry was rejected, but there was an offer to discuss certain matters; and these were discussed with leading counsel for the Banabans on 26th March, though this was before he knew the Banabans' detailed reactions. These came in a long letter to the Secretary of State by the Rev Tebuke Rotan, dated 5th July 1971, written in London. It sought reconsideration of the refusal to agree to an independent inquiry.

In the meantime the Banaban Settlement Ordinance 1970 had been enacted by the Fiji legislature. This constituted the Council of Leaders, one of the plaintiffs in *Ocean Island No 2*, as a body corporate, and provided for the election of its members by the four communities on Rabi. It empowered the council to make regulations on a wide range of subjects, and provided for enforcing them. It also established the Rabi

Island Fund, to be controlled by the council, and provided for the payment into the fund of all moneys standing to the credit of the Banaban Trust Fund, and also all royalties and other moneys accruing to the Banaban community for minerals mined by the British Phosphate Commissioners on Ocean Island; these royalties and other payments were to be exempt from income tax.

I need do no more than mention a long memorandum by Philip Shrapnel & Co Pty Ltd. It was prepared for submission to Her Majesty's Government, but it was apparently never submitted, though a copy was sent to the British Phosphate Commissioners in October 1971. The letter before action came from the Banabans' solicitors on 27th October 1971; and, as I have mentioned, the original writ was issued on 10th November 1971.

(7) 1973: the last agreement

Although it was made after writ issued, I think that I should briefly refer to an agreement dated 17th May 1973 and made between the Council of Leaders and the British Phosphate Commissioners. The salient feature of this was that the council undertook that all landowners on Ocean Island would grant to the commissioners leases in an agreed form of all land on Ocean Island not then leased to the commissioners which contained workable phosphate that the commissioners wished to mine. There was a similar provision for the grant of leases of the right to remove phosphate from defined land which had already been leased to the commissioners for building purposes. The area of the two categories of land were said to be approximately 34·17 and 52·5 acres respectively. The commissioners were to pay the landowners (not the council, though the council warranted that it was authorised by all landowners to receive all payments) a premium of $A1,000 per acre for land above the 170-foot contour and $A325 per acre for land below it. There were provisions for survey, for the reverter of the land to the landowners as soon as it would not prejudice or inconvenience the operations of the commissioners, and for the agreement to be construed by English law and be enforceable in the English High Court.

That agreement was made conditional on the execution within 30 days of another agreement, to be made between the Governor of the Gilbert and Ellice Islands Colony, the Council of Leaders and the Secretary of State; in fact, this other agreement was duly executed on the same day. It made complicated financial arrangements under which certain lump sums were to be paid or released to the Council of Leaders as soon as the leases were granted, including $200,000 from the United Kingdom government. Further, the council was to receive 15·12 per cent of the net proceeds from mining the land to be leased, including the contractual 20 cents; but in the final reckoning, after mining had ceased, any necessary adjustments were to be made so that the total benefits would have been equally shared between the Gilbert and Ellice Islands Colony and the council. In this way, in this last tidying-up operation, which was to include the remaining land on Ocean Island from which phosphate could economically and properly be removed, the Banabans at last achieved the equal division of phosphate profits for which they had so long striven, though not, of course, the entire benefit which they had so long claimed. I may add that the Banaban population, which had been of the order of some 500 in 1900, and was not much more in the 1920s, is today of the order of some 2,500.

At that point I pause. I have recounted the main facts that seem to me to have a greater or lesser degree of relevance to the issues in the case, as well as a number of others which I have included in order to provide the background and continuity against which this unusual litigation may be seen. Ocean Island, of course, is not England, and 1976 is not 1900, or 1920, or 1950; and I think it is important to have some picture of the place and age in which so many of these events occurred. I have not set out all the relevant facts: there are some which may more conveniently be dealt with in relation to particular heads of claim, and to these I shall come in due course.

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6. The claims in general

Before I turn to the detailed claims and the substantial body of law concerned, I think that I should say something about the Banabans' claims in general. There is no difficulty whatever in appreciating the deep-seated feelings of grievance that the Banabans have. Stripped of all that is false, misleading or intemperate, their claims have a central core of genuine grievance. Nobody could say that in recent years anything has been lacking in the tenacity with which they have pressed their claims in every way that seemed open to them, with very little result before 1973 beyond the ex gratia increases in the royalties and ultimately the ex gratia £80,000. A feeling of desperation, however exaggerated, may explain, though not justify, some of the excesses in their actions and contentions before the proceedings came before me.

For the Banabans, the major disaster was the transaction that they so readily entered into in 1947. The 1913 and 1931 transactions had each related to some 150 acres of further land for mining; the 1940 negotiations had been for 230 acres; but the 1947 transaction disposed of more than twice the amount of mining land that had been dealt with in the two earlier transactions put together. Moreover, in accordance with the recommendations of the Maude Report, the land was substantially the whole of the remaining land in the island that was economically workable. True, the 1973 transaction swept up a not insubstantial residue; but its area was only about one-eighth that of the 1947 land. The Banabans thus in 1947 deprived themselves of what undoubtedly would have been the very substantial bargaining counter of having a large area of workable land still undisposed of. Furthermore, the 1947 transaction had in it no provision whatever for revision or renegotiation; in 1947 they were disposing of phosphate which would take well over a quarter of a century to work at a rate of royalty which was fixed and unvariable, no matter how long the extraction took. With hindsight, it is plain that it would have been far better for the Banabans either to dispose of much less land (even if they committed themselves in principle to disposing of it all) or else to insist on including some provision for varying or reconsidering the royalties. 1947 is not 1976, of course, but even in 1947 the possible improvidence of the disposition that was in fact made must have been foreseeable by persons with business experience.

During the post-war period, and especially latterly, the Banabans had much to compare themselves with, always to their disadvantage. There was Nauru, a trust territory under the United Nations, and so with an independent supervisory body to which the administration was responsible; and there were the prospects of independence which in the end ripened into achievement. There was the Gilbert and Ellice Islands Colony, which took far more of the phosphate revenue than the Banabans got for themselves from the consumption of their own property and the ruining of their own island; and from any such rival claim Nauru was completely free. There were the increased payments which from time to time the British Phosphate Commissioners agreed to make to the Banabans, as well as to the Gilbert and Ellice Islands Colony. Paradoxically, the fact that these increased payments to the Banabans were made ex gratia only made it worse; for if this much could be obtained ex gratia, arguing from a position of weakness, how much might have been obtainable as of right if the Banabans had only had a position of strength from which to advance their arguments?

It was in those circumstances, all else having failed, that this litigation was commenced. With that background, it is not in the least surprising that the Banabans should seek to avail themselves of every contention, however technical, which offered any prospect at all of providing them with some recompense for what they had failed to obtain in the past. However, the question for me is not a broad question of whether the Banabans ought to succeed as a matter of fairness or 'equity' in the non-technical sense, or ethics or morality or sympathy. I have no jurisdiction to make an award to the plaintiffs just because I reach the conclusion (if I do) that they have had a 'raw deal'. This is a court of law and equity (using 'equity' in its technical sense), administering justice according to law and equity, and my duty is to examine the plaintiffs'

claims on that footing. To the lawyers engaged in the case there is no need to say this: but for the non-lawyers I think it right that I should make it explicit. With that, I turn to consider the claims of the plaintiffs.

II. OCEAN ISLAND No 2

As I have already said, I propose to consider first the claims made in *Ocean Island No 2*; and of these, the first that I shall discuss is the claim made under the third head in that case, namely, the claim to the Crown royalties.

1. The Crown royalties

As I have indicated, the basis of the claim to the Crown royalties is that certain statutory provisions caught certain payments made by the British Phosphate Commissioners to the Gilbert and Ellice Islands Colony under certain statutes and agreements. Accordingly, the sums so paid, being thus caught, ought not to have been paid to the Gilbert and Ellice Islands Colony, but instead should have been paid, in accordance with the statutes, to the Council of Leaders (the second plaintiff) as holding the Rabi Island Fund (replacing the Banaban Trust Fund), or their predecessors in title. The first step is to identify (a) the statutes alleged to have caught the payments, and (b) the statutes and agreements yielding the payments which are said to have been caught. In its most naked form, the contention is that the statutes provide that 'royalties' are to be paid for the benefit of the Banabans: subsequent statutes and agreements provide for the British Phosphate Commissioners to pay 'royalties', albeit to the Crown or the Gilbert and Ellice Islands Colony government: ergo, these 'royalties' are caught by the earlier statutes and so should have been paid for the benefit of the Banabans. I shall begin with category (a), the 'catching' statutes.

Initially the claim was based on four Ordinances as effecting the catching. The first was s 7 of the Mining Ordinance 1928, which I have already read. On Day 28, however, counsel for the plaintiffs abandoned this claim; but I must nevertheless refer to the section, for the second provision on which counsel relied, the Mining (Amendment) Ordinance 1937, which I have also read, operated by way of amending the 1928 Ordinance in the way that I have mentioned. Section 7 of the 1928 Ordinance deals, of course, with moneys payable by agreement; but it carries those moneys not to any trust fund for the benefit of Banabans generally, but to the individual native or natives in question, and in any case it does not use the word 'royalty' on which so much of counsel's argument depended. I can well understand why counsel abandoned any claim based on the unamended Ordinance of 1928.

The second of the four Ordinances is the Mining (Amendment) Ordinance 1937. As I have explained, this repealed the two provisions of the 1928 Ordinance that I have recently considered, s 6(2) and s 7, and substituted two entirely different provisions for them. Although I have already set these out, they are brief, and it is convenient to quote them again here. The new s 6(2) ran as follows:

> 'Any moneys payable by way of compensation for any land acquired from a native or natives of the Colony under this Ordinance shall be paid to the Resident Commissioner who shall pay the same to the former owner or owners or apply the same for their benefit in such manner as the High Commissioner may from time to time direct.'

Then there was the new s 7:

> 'Any moneys payable by way of royalty whether prescribed under section five hereof or fixed by agreement shall be paid to the Resident Commissioner who shall pay or apply the same in such manner as the High Commissioner may from time to time direct to or for the benefit of the natives of the island or atoll

from which the minerals were derived in respect of which the royalty was payable.'

As I have mentioned, the changes are many: I shall do no more than summarise the main instances. Section 6(2) provides for the former owner or owners of land; but whereas the old version embraced both compensation and royalty, the new version is confined to compensation. The old s 7 was confined to moneys payable where the acquisition was by agreement; the new s 7 deals with all royalties, whether prescribed as part of the process of compulsion or fixed by agreement. Furthermore, the new s 7 carries the benefit of the money to 'the natives of the island or atoll from which the minerals were derived'. This is a category that was not mentioned in the old s 7, where 'such native or natives' seems to mean the former landowner or landowners. Yet again, the words 'in trust' which appear in the old ss 6(2) and 7 nowhere appear in the new ss 6(2) and 7: this is of importance in relation to other aspects of the case than the present.

I will defer the consideration of the effect of these provisions until I have set out the other statutory provisions. The two Ordinances that I have just mentioned are of course both Ordinances of the Gilbert and Ellice Islands Colony; the other two of the four Ordinances are both Fiji Ordinances. One is the Banaban Funds Ordinance 1948. This, of course, was enacted after the Banabans had established themselves on Rabi, in Fiji, and were no longer living on Ocean Island. The Ordinance, it will be remembered, established a Banaban Funds Trust Board, which was made a body corporate. The board was to administer the Banaban Trust Fund (which was to combine the existing Banaban Royalty Trust Fund and the Banaban Provident Fund) and the Ordinance then provided, by s 10, the section on which counsel for the plaintiffs relied, that—

'All sums payable by way of royalties in respect of minerals mined by the Phosphate Commission on Ocean Island shall be paid into and form part of the Trust Fund'.

The other Ordinance is the Banaban Settlement Ordinance 1970. As I have mentioned, this established the Council of Leaders, the second plaintiff in *Ocean Island No 2*, as a body corporate, and also the Rabi Island Fund, which was to be credited (inter alia) with all moneys standing to the credit of the Banaban Trust Fund and was to be under the control of the Council of Leaders. Counsel for the plaintiffs relied upon s 6(2)(*f*) of this Ordinance. This provided that there should be paid into the Rabi Island Fund 'all royalties and other moneys accruing to the Banaban community in respect of minerals mined by the British Phosphate Commissioners on Ocean Island'.

Those, then, are the statutory provisions upon which counsel for the plaintiffs relies. He depends heavily on the word 'royalty' in the 1937 Ordinance and the word 'royalties' in the 1948 and 1970 Ordinances, But before I consider this, I must refer to the items constituting category (b), the statutes and agreements yielding the sums said to be caught. The payments may be ranged under five heads. First, there is the royalty of 6d per ton payable to the Crown under the Crown licence granted to the company in 1902; but this claim is limited to payments made after the 1937 Ordinance took effect. These payments were, as I have mentioned, expressed as being 'a royalty of sixpence per ton' on all guano and other fertilising substances exported from the island, and was in the form of a covenant by the company to pay the money to the Secretary of State for the use of His Majesty.

Second, there is the British Phosphate Commissioners Taxation Ordinance 1938, coupled with an agreement constituted by a letter from the British Phosphate Commissioners dated 2nd February 1938 and a reply by the Colonial Office dated 21st February 1938. Originally there was a claim under the British Phosphate Commissioners (Payment of Revenue) Ordinance 1934, but counsel abandoned this. The 1938

transaction continued arrangements which the British Phosphate Commissioners and the government of the Gilbert and Ellice Islands Colony had previously made for a general exemption of the British Phosphate Commissioners and their employees from Gilbert and Ellice Islands Colony taxation in return for block payments by the British Phosphate Commissioners. Under the 1934 Ordinance that I have just mentioned, the British Phosphate Commissioners undertook to make up the difference between the receipts and the expenditure of the government. Under the 1938 arrangement, as set out in the letters, the commissioners were to pay the government £20,000 a year plus 'a royalty' of 6d a ton on phosphate exported, with a guaranteed minimum of £6,000 a year; and if the phosphate exported in the year 1938-39 exceeded 300,000 tons (or 250,000 tons in any of the four succeeding years) 'an additional royalty' on the excess at the rate of 6d a ton was to be paid. There were various other provisions, but these were the essentials. The arrangement was to commence on 1st July 1938 and continue for five years. The Ordinance of 1938, enacted on 1st July 1938, conferred the necessary exemptions from taxation by s 3, and then, by s 4, enacted the provisions as to payment. These provided, 'in consideration of the exemptions granted in the last preceding section', for the payment by the British Phosphate Commissioners 'into the revenue of the Colony' of the annual £20,000 (which counsel for the plaintiffs initially claimed, but abandoned on Day 29), and then, by s 4(1), the payment of the 'royalty'.

Third, there is the 1946 and 1947 transaction. In 1946 there was an exchange of letters, this time between the British Phosphate Commissioners and the High Commissioner, by letters dated 5th and 17th April 1946. The consequent Ordinance was the British Phosphate Commissioners Taxation Ordinance 1947. This time the fixed annual sum was £24,000; and although counsel initially claimed it, he abandoned this claim on Day 29. His claim extended, however, to both the royalties, which were rather more clearly set out as being 'the normal Government royalty of sixpence (6d) per ton' and 'an additional Government royalty at the rate of one shilling and threepence (1s 3d) per ton'. In other respects the transaction conformed to what had become a familiar pattern, and I abstain from setting out the details.

Fourth, there was a complex of agreements with relation to the British Phosphate Commissioners Taxation Ordinance 1952. This Ordinance varied the accustomed wording. First, instead of providing for payment of the 'normal Government royalty of sixpence per ton', s 7 exempted the British Phosphate Commissioners from paying it. What was made payable by s 8, 'In consideration of the exemptions granted in the preceding sections', was a lump sum of £40,000 and an annual sum of £40,000 (neither of which counsel claimed), and 'a tax of six shillings in Australian currency per ton on all phosphate exported from the Colony'; and this 6s a ton was claimed by the plaintiffs. In effect, for the first time the original 6d Crown royalty was being absorbed in a larger payment. This Ordinance, enacted on 27th March 1952, gave effect to an oral agreement recorded in a letter from the High Commissioner dated 21st August 1951 in which the 6s was described as a 'royalty'. That the change of language from 'royalty' in the letter to 'tax' in the Ordinance was deliberate is shown by an exchange of telegrams between the High Commissioner and the Colonial Office on 26th and 29th February 1952. The High Commissioner regarded 'tax' as a more appropriate term than 'royalty' for a payment which was made in lieu of other taxes and was not in any way in respect of the ownership of the minerals.

This state of affairs did not continue for long; for there were a number of subsequent 'adjustments', as they were described. The British Phosphate Commissioners extracted a greater tonnage of phosphate than had been contemplated when the 1951 agreement was made, and in relation to which the fixed sum of £40,000 a year had been agreed. In 1953 the British Phosphate Commissioners and the Colonial Office accordingly agreed that on all tonnage in excess of 212,500 tons a year a payment at the rate of 3s and 9·18d per ton should be made, to operate as from the taking effect of the 1952 Ordinance. This curious figure arose because it was the equivalent of the annual £40,000 spread over an annual output of 212,500 tons.

There was then the 1954 adjustment, agreed in February 1955, to take effect from 1st October 1954. This provided in effect for the annual £40,000 to be appropriated to the first 200,000 tons each year, and for 4s a ton to be paid on all tonnage over that amount. As £40,000 for 200,000 tons is the equivalent of 4s a ton, the practical result was that 4s a ton was added to the 6s a ton under the Ordindance of 1952, and so a flat rate of 10s a ton was paid overall. The 1956 adjustment simply substituted a payment of 14s a ton overall, coupled with an agreement by the British Phosphate Commissioners to restrict the output to 310,000 tons per annum; and this operated as from 29th May 1956.

Pausing there, the payments made in excess of those provided for by the 1952 Ordinance were necessarily consensual payments, resting on a series of agreements and not taking effect under statute. The agreement provided for duration, review after notice of a stipulated length, and so on, but the Ordinance was left unchanged. Not until 31st December 1963 was a further Ordinance enacted, the British Phosphate Commissioners (Taxation) Ordinance 1963; and this is the fifth and last head of payments said to be caught. This Ordinance was retrospective, for s 1 provided that it was to be deemed to have come into operation with effect from 6th February 1960. This was the result of discussions in May 1960, when it was agreed that there should be an inclusive payment of 21s a ton for the first three years from 6th February 1960, and 23s a ton thereafter, and that the existing maximum tonnage of 310,000 a year should be continued. The 1963 Ordinance was in the familiar pattern, though more explicit in some respects. The exemption of the British Phosphate Commissioners from the 'normal Government royalty of sixpence a ton' continued (s 6), and the payment of 21s and then 23s a ton were expressed by s 7(1) not as a 'royalty' or a 'tax' but simply as 'a sum'. Finally, it is pleaded that under the 1965 agreement the 23s became 24s, though from some of the documents it appears that the figure may have been larger.

I can now turn to consider the plaintiffs' claim. Basically, as I have indicated, it is that all the tonnage payments under the various Ordinances and agreements were caught by the revised s 7 of the 1937 Ordinance, and must be paid in accordance with it. It mattered not that the later Ordinances and agreements provided that these sums were to be paid to the Gilbert and Ellice Islands Colony; nor did it matter if the payments were not described as 'royalties' (though it was helpful if they were), for in substance they were royalties. Counsel for the plaintiffs emphasised the width of the revised s 7, which was not narrowly confined to 'royalty' but extended to 'any moneys payable by way of royalty'. This, he said, gave a flexibility to the phrase, and let in what was not called a royalty. To some extent he relied on *Attorney-General of Ontario v Mercer*[1] as showing the width of the word 'royalty' by holding that the term included escheats of land. He accepted that the term 'royalty' must be confined to royalties for phosphate, and so would not, for example, apply to royalties payable by a publisher to an author. He also accepted that he could claim nothing in the nature of dead rents, so that the fixed annual sums were excluded. But subject to limitations such as these, he claimed that all tonnage payments, to whomsoever payable and for whatever reason, and whether called a 'royalty' or a 'tax' or a 'sum', fell within his grasp as being in substance a royalty, or moneys payable by way of royalty.

Pressed on the ability of the Fiji Ordinances of 1948 and 1970 to divert payments which under the Gilbert and Ellice Islands Colony law were to be made by the British Phosphate Commissioners to the Gilbert and Ellice Islands Colony government, counsel admitted in the end that really his whole argument depended on the operation of the amended s 7 enacted by the 1937 Ordinance; if that did not carry the point, the Fiji Ordinances could not help him. Pressed on the merits and substance of his claim, counsel accepted that he could succeed only if the court was driven to the

1 (1883) 8 App Cas 767

conclusion that the statutory language brought about a result that had been in nobody's mind.

I have no hesitation whatever in rejecting this claim in its entirety. I do this for a variety of reasons. First, what the 1937 Ordinance did was to insert a new s 7 into the 1928 Ordinance. The 1928 Ordinance was concerned with the compulsory acquisition of mining rights. The new s 7 deals with two classes of royalty, namely (a) those 'prescribed under section 5 hereof', and (b) those 'fixed by agreement'; and it deals with each class in exactly the same way. Royalties comprised in category (a) are necessarily those imposed in respect of minerals which have been extracted under mining rights acquired under the compulsory process of the 1928 Ordinance. It would be strange if the royalties comprised in category (b) were not to be confined to royalties payable under the agreement whereunder the mining rights were acquired, but were to comprise any royalties payable under any other agreement. One of the conditions for the operation of compulsion set out in s 4 of the 1928 Ordinance is that the holder of a mineral licence 'has been unable to come to an agreement with the owner or owners for the acquisition of the said rights', that is, 'rights over the surface of any piece of land comprised in the licence which are necessary for the purpose of the licence'. The reference in the new s 7 to a royalty 'fixed by agreement' seems to me to mean a royalty fixed by such an agreement as s 4 contemplates as making compulsion unnecessary; and that is an agreement with a landowner conferring the necessary rights to mine.

Second, it is an essential for counsel's argument that the royalty should be 'fixed by agreement' within the new s 7. When an obligation to make a payment is imposed by statute, I do not think it can fairly be said that it was 'fixed by agreement' within s 7 merely because the taxpayer and the Government had agreed beforehand what was to be made payable. The statute was an essential part of the process, if only to exempt the British Phosphate Commissioners from liability to normal taxation; and 'moneys payable by way of royalty . . . fixed by agreement' seems to me to be a compound phrase which contemplates an agreement which itself makes payable the moneys that are to be paid. Here, most of the payments were to be made by force of statute, not by agreement; and I cannot think that the 'adjustments', and so on, assuming the additional sums payable under them to be purely contractual or voluntary in nature, could sensibly be treated as being caught by the new s 7 when the payments of which they were adjustments were not.

Third (and perhaps this should be put foremost), there is the inherent absurdity in attributing this intention to the legislation. Why should payments plainly intended to go to the colony government in lieu of taxation be diverted to the natives of one particular part of that colony? Why should the later legislation meekly bend its knee to the earlier legislation? Why should the court strain to put on the statutory language a meaning that would produce a result that nobody could have intended, when no intelligible reasons for producing that result have been put forward? To my mind these questions answer themselves. Counsel for the plaintiffs advanced his contentions in opening, counsel for the Attorney-General answered them briefly in opening the defence, and then, when counsel for the Attorney-General turned to this part of the case in his closing speech, counsel for the plaintiffs interposed to say that he was proposing to put forward no further argument on the subject. At that, counsel for the Attorney-General said that he too would argue the point no further. I should add that in his closing speech counsel for the plaintiffs made it plain that he had not abandoned his claim under this head. I have accordingly dealt with the claim fully—perhaps too fully—but the upshot is that I reject the whole of the claim to these payments.

The result is therefore that the plaintiffs' claim to declarations in respect of what the statement of claim calls 'the disputed royalties' and 'the disputed payments in the nature of royalties' under the prayer for relief fails and will be dismissed. I regret that such unmeritorious claims should have been made at all, and, when made,

persisted in, though not to their full extent. At the same time, for the reasons that I have given, I can understand how the Banabans' sense of grievance has led to a search for any possible head of claim, however technical, that might secure some compensation for them.

2. The 1931 and 1947 claims

I turn to the other two main heads of claim, relating to the 1931 transaction and the 1947 transaction. These, of course, constitute by far the most important part of the Banabans' claim in *Ocean Island No 2*. As I have already indicated, although initially there was some hesitation on the point, it was soon accepted on all hands that the law applicable to Ocean Island was basically English law, though subject, of course, to local variations, and in particular to local statutes. Thus much of the argument was in terms of the English law of trusts, with more than an occasional glance at the subject of perpetuity. On the procedural matter of limitation of actions, there was of course much discussion of the Limitation Act 1939, to which I shall turn in due course.

(1) *The Crown as trustee*

As might be expected, the claim in respect of the 1931 transaction was very different from the claim in respect of the 1947 transaction; for the former was an exercise of compulsory powers, and the latter was a voluntary agreement. Nevertheless, there was a common basis for counsel for the plaintiffs' contentions about them. That common basis was that the Crown was in a fiduciary position in relation to the Banabans, and in those transactions was guilty of a breach of fiduciary duty towards them. One source of this duty was the 1913 arrangements. The effect of these was carried forward into the 1931 transaction by reason, inter alia, of the 6d royalty under the 1913 arrangements being increased to 10½d under the 1931 transaction: the 6d was, as it were, embedded in the 10½d. Another source of the fiduciary duty was the trust declared by the Mining Ordinance 1928, s 6(2), whereby the resident commissioner held on an express trust for the former owner or owners.

A third source of the fiduciary duty, it is said, was the statutory duty of the resident commissioner under s 5 of the Ordinance of 1928 to fix the royalty and hold it in trust. In relation to the 1947 transaction it was also contended that the Mining (Amendment) Ordinance 1937, in its amended version of s 7 of the 1928 Ordinance, had imposed a trust for the Banaban community, even though it contained no express words of trust. The plaintiffs also relied on a very large number of references in the various documents (duly particularised) running from 1909 to 1949, in which there are references to trusts, trusteeship and the like. I do not propose to set out any of these, though I have read them all, often more than once. They make an impressive array.

I propose to turn at once to the position of the Crown as trustee, leaving on one side any question of what is meant by the Crown for this purpose; and I must also consider what is meant by 'trust'. The word is in common use in the English language, and whatever may be the position in this court, it must be recognised that the word is often used in a sense different from that of an equitable obligation enforceable as such by the courts. Many a man may be in a position of trust without being a trustee in the equitable sense; and terms such as 'brains trust', 'anti-trust', and 'trust territories', though commonly used, are not understood as relating to a trust as enforced in a court of equity. At the same time, it can hardly be disputed that a trust may be created without using the word 'trust'. In every case one has to look to see whether in the circumstances of the case, and on the true construction of what was said and written, a sufficient intention to create a true trust has been manifested.

When it is alleged that the Crown is a trustee, an element which is of special importance consists of the governmental powers and obligations of the Crown; for these readily provide an explanation which is an alternative to a trust. If money or other property is vested in the Crown and is used for the benefit of others, one explanation can be that the Crown holds on a true trust for those others. Another explanation

can be that, without holding the property on a true trust, the Crown is nevertheless administering that property in the exercise of the Crown's governmental functions. This latter possible explanation, which does not exist in the case of an ordinary individual, makes it necessary to scrutinise with greater care the words and circumstances which are alleged to impose a trust.

In this case, counsel for the Attorney-General did not attempt to argue that the Crown could never be a trustee. He accepted to the full *Civilian War Claimants Association Ltd v R*[1], and in particular a dictum of Lord Atkin. There, Lord Atkin said[2]: 'There is nothing, so far as I know, to prevent the Crown acting as agent or trustee if it chooses deliberately to do so'; and in *Attorney-General v Nissan*[3], Lord Pearce adopted this dictum. The claim in the first of these cases was in effect that moneys paid after World War I by Germany under the Treaty of Versailles were held by the Crown as agent or trustee for those who had made claims to His Majesty's Government for loss or damage caused by Germany during the war. The claimants drew a distinction between the treaty-making powers of the Crown, which were admittedly an exercise of the Royal prerogative, and the duties of the Crown in relation to moneys paid to the Crown under the treaty, which were said to be subject to the alleged trust or agency in favour of the claimants. However, on a submission by the Crown at first instance that the petition of right disclosed no cause of action, both the Court of Appeal[4] and the House of Lords[1], without calling on counsel for the Crown, unanimously upheld Roche J[5] in having entered judgment for the Crown on the demurrer.

In all the courts considerable reliance was placed on *Rustomjee v R*[6], a case in which it had been unsuccessfully contended that the Crown was a trustee or agent for the claimant in respect of moneys received by the Crown from the Emperor of China. In the *Civilian War Claimants* case[7] Lord Buckmaster quoted with approval a passage from *Rustomjee's* case[8] in which Lush J had said that no doubt as soon as the money was received a duty arose to distribute it among the persons towards whose losses it had been paid by the Emperor of China, but that the distribution, when made, would be 'not the act of an agent accounting to a principal, but the act of the Sovereign in dispensing justice to her subjects'. The distinction between a trustee accounting to a beneficiary and the act of the Sovereign in dispensing justice to her subjects must in essence be the same.

The distinction is strongly reinforced by a decision that does not seem to have been cited in the *Civilian War Claimants* case[1], possibly because the Crown was not called on to argue in the Court of Appeal or House of Lords. That case is *Kinloch v Secretary of State for India in Council*[9]. The claim arose out of some booty of war in the Indian Mutiny campaign. By an Order in Council in 1864, the Crown exercised a statutory power to refer to the judge of the Court of Admiralty certain disputes as to the persons entitled to share in the booty. The Order in Council required the judge to consider any capture of any property that might have been made during the operations 'both in regard to the persons who are, and the proportions in which such persons are entitled to share therein . . .'; but the order continued with the words—

> 'reserving however to her Majesty the right to direct the rates or scales of distribution according to which the said property, or the proceeds thereof, shall

1 [1932] AC 14, [1931] All ER Rep 432
2 [1932] AC 14 at 27, [1931] All ER Rep 432 at 436
3 [1969] 1 All ER 629 at 647, [1970] AC 179 at 223
4 (1930) 47 TLR 102
5 (1930) 46 TLR 581
6 (1876) 1 QBD 487, 2 QBD 69
7 [1932] AC 14 at 25, [1931] All ER Rep 432 at 435
8 (1876) 1 QBD 487 at 497
9 (1882) 7 App Cas 619

be paid to the several ranks of the force or forces to which such property shall be adjudged'.

The Order in Council will be found, set out verbatim, in the report of *Banda and Kirwee Booty*[1], the case that I shall cite next.

In accordance with this Order in Council, Dr Lushington heard the conflicting claims urged before him by 15 silks and 21 juniors during alternate weeks of January and February 1866. At the end of June he delivered a judgment that extended over some 140 pages of the Law Reports: *Banda and Kirwee Booty*[1]. His decision was that only two groups of claiments were entitled to share in the booty. In November 1866 a Royal Warrant was issued, and it was this that gave rise to the proceedings in the *Kinloch* case[2]. Before that, there had been an attempt in *Re Banda and Kirwee Booty*[3] to persuade the Court of Admiralty to accept jurisdiction on a claim that some of the booty had not been distributed among the persons entitled; but Sir Robert Phillimore rejected this, on the ground that the court had jurisdiction only to decide what was referred to it by Order in Council, and this claim had not been thus referred. In the end, the claimants turned to the Chancery Division in the *Kinloch* case[2].

The foundation of the *Kinloch* case[2] was the Royal Warrant. This contained a number of recitals, setting out a description of the booty concerned, the sale of the booty, the Admiralty proceedings and certain other matters; and it then continued with the operative words. These were[4]:

> ' "Now We do hereby give and grant to Our Secretary of State for India in Council for the time being ... all the aforesaid booty mentioned to have been captured at or in the said towns of Banda and Kirwee, and the proceeds thereof as aforesaid ... in trust for the use of" the persons intended, to whom Dr. Lushington had adjudged it, "such booty and proceeds to be distributed by Our Secretary of State for India in Council for the time being, or by any other person or persons he may appoint, as follows." '

and the warrant then went on to indicate the proportionate shares of each of the several classes of persons found entitled to share.

The royal warrant then ended as follows[5]:

> 'And We are graciously pleased to order and direct that in case any doubt shall arise in respect of the distribution of the booty or proceeds hereby granted as aforesaid, or respecting any claim or demand on the said booty or proceeds, the same shall be determined by Our Secretary of State for India in Council for the time being, or by such person or persons to whom he shall refer the same, which determination thereupon made shall with all convenient speed be notified in writing to the Commissioners of Our Treasury; and the same shall be final and conclusive to all intents and purposes, unless within three months after the receipt thereof at the office of the Commissioners of Our Treasury We shall be pleased otherwise to order; hereby reserving to ourselves the power to make such other order therein as to Us shall seem fit.'

I pause there only to mention that the words I have quoted are what appear to constitute the most probable version to be collected from the judgments and speeches in the case. Thus the words 'the power' near the end of the last quotation are omitted from the quotation of the royal warrant by Lord Selborne LC[5] and Lord O'Hagan[6]

1 (1866) LR 1 A & E 109, 115-117
2 (1879) 15 Ch D 1, 7 App Cas 619
3 (1875) LR 4 A & E 436
4 (1882) 7 App Cas 619 at 625
5 7 App Cas 619 at 626
6 7 App Cas 619 at 631

but appear in the quotation by Hall V-C[1]. This, however, makes a number of omissions from the version quoted in the House of Lords.

The case came in the first instance before Hall V-C on demurrer, sub nom *Kinlock v Secretary of State for India in Council*[2]. His view[3] was that the question was 'a very simple and narrow one'. He held that the Royal Warrant, which he regarded as a grant, 'was made in such a form as to create a trust for the persons who were to share under that decree', that is, the decree of Dr Lushington; and plainly these words refer to the phrase 'in trust for the use of' in the Royal Warrant. The question that Hall V-C said he had to determine was[3]—

> 'whether, that trust being so created by the instrument, there is anything at all which should deprive a person, who unquestionably is the *cestui que trust* under that instrument, of his right'

to enforce that trust. Hall V-C rejected the contention that the matter was a matter of state, not justiciable in the courts, and he read the clause at the end of the Royal Warrant, relating to the resolution of doubts by the Secretary of State, as not being inconsistent with the plaintiffs' right to enforce the trust in the courts. If in taking the accounts in court a doubt arose, it could be resolved in the manner specified in the Royal Warrant; but that did not exclude the jurisdiction of the court.

In the Court of Appeal[4], this decision was unanimously reversed. The court held that no trust, 'in the sense of a trust enforceable and cognizable in a Court of Law', had been created, despite the use of the word 'trust' in the royal warrant: see per James LJ. Furthermore, the Secretary of State for India in Council, though by statute made capable of suing and being sued in that name, had not been made a body corporate. All that had been done had been to provide that the Secretary of State for the time being should be the agent of the Crown for the distribution of the property. James LJ[5] regarded the consequences of holding that there was a trust enforceable in the courts as 'so monstrous that persons would probably be startled at the idea'. He referred to matters such as the right of every beneficiary to sue for the administration of the trust and have the accounts taken, and 'imposing upon the officer of State all the obligations which in this country are imposed upon a person who chooses to accept a trust'. He also emphasised the words at the end of the Royal Warrant as showing clearly that questions were to be determined, not by the courts, but by the Secretary of State, with an ultimate appeal to the Treasury, as advising the Queen[6]. Baggallay and Bramwell LJJ delivered concurring judgments, with the latter[7] emphasising the 'monstrous inconvenience' and 'enormous expense of litigation' if there were a trust enforceable by the courts, so that 'one would be reluctant, even if the words were much stronger than they are, to hold that there is a trust'.

The House of Lords[8] unanimously affirmed the Court of Appeal[4]. In the leading speech, Lord Selborne LC attached some weight to the words in the Royal Warrant being 'the Secretary of State for India in Council', and 'for the time being', instead of his being described by his personal name, as indicating that he was not intended to be a trustee in the ordinary sense, but was intended to act as a high officer of State. After discussing the Order in Council, Lord Selbourne LC quoted the part of the Royal Warrant which contained the words 'in trust for the use of', and said[9]:

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1 (1879) 15 Ch D 1 at 5
2 15 Ch D 1
3 15 Ch D 1 at 4
4 (1880) 15 Ch D 1 at 8
5 15 Ch D 1 at 9
6 15 Ch D 1 at 10
7 15 Ch D 1 at 13
8 (1882) 7 App Cas 619
9 7 App Cas 619 at 625, 626

'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 to 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.'

Lord Selborne LC then turned to the words at the end of the Royal Warrant, and said that the reference of disputes to the Secretary of State or his delegate, with the ultimate power reserved to the Crown, would be overturned if it were to be held that there was a trust enforceable in the courts. He firmly rejected the concept of administration by the court, with a reference of disputes to the Secretary of State, as creating a sort of mixed jurisdiction without precedent; in his view, there was a plain intention by the Crown to exclude any such extraneous interference. Lord O'Hagan concurred in rejecting the creation of any trust justiciable in the courts. He said[1]:

'There is no magic in the word "trust". In various circumstances, it may represent many things, and the Secretary of State to whom a delegation was made for special and specified purposes, might well be described as a "trustee" for the Crown, as, for the Crown, he was required to take on himself the distribution of the property in question. But he was not constituted a "trustee" for a cestui que trust entitled, according to the rules of Equity, to ask for the administration of a fund.'

Lord Blackburn also concurred. He said that although it would have been very injudicious to advise Her Majesty to do so, she might have handed over the fund to a trustee in trust for those to whom she had given a special interest in it, leaving the trustee to determine who they were; and that trust would have been enforceable in the courts. But instead she could appoint an agent to examine the claims and distribute the funds, subject to Her Majesty's control and power; and 'if this were a trust of that kind the Court of Chancery would have no power over it'[2]. On the true construction of the Royal Warrant, that was what Her Majesty had done, so that the Secretary of State was 'by no means made a trustee subject to the power and control of the Court of Chancery'. Lord Watson regarded the case as a very plain one, and simply concurred in the result and in the reasons that had been given.

That case, of course, concerned facts which were very different from the facts of the case before me. Yet it supports certain principles or considerations which are of relevance and importance. First, the use of a phrase such as 'in trust for', even in a formal document such as a Royal Warrant, does not necessarily create a trust enforceable by the courts. As Lord O'Hagan said[3]: 'There is no magic in the word "trust" '. Second, the term 'trust' is one which may properly be used to describe not only relationships which are enforceable by the courts in their equitable jurisdiction, but also other relationships such as the discharge, under the direction of the Crown, of the duties or functions belonging to the prerogative and the authority of the Crown. Trusts of the former kind, so familiar in this Division, are described by Lord Selborne LC as being 'trusts in the lower sense'; trusts of the latter kind, so unfamiliar in this Division, he called 'trusts in the higher sense'.

I pause at that point. This classification of trusts seems to have made little impact

1 (1882) 7 App Cas 619 at 630
2 7 App Cas 619 at 632
3 7 App Cas 619 at 630

on the books: see, e g, Lewin on Trusts[1], Underhill on Trusts and Trustees[2] and Halsbury's Laws of England[3]. There is, indeed, a certain awkwardness in describing as a trust a relationship which is not enforceable by the courts, though the so-called trusts of imperfect obligation perhaps provide some sort of parallel. Certainly in common speech in legal circles 'trust' is normally used to mean an equitable relationship enforceable in the courts and not a governmental relationship which is not thus enforceable. I propose to use the word 'trust' simpliciter (or for emphasis the phrase 'true trust') to describe what in the conventional sense is a trust enforceable in the courts, and to use Lord Selborne LC's compound phrase 'trust in the higher sense' to express the governmental obligation that he describes.

I return to the principles or considerations which the *Kinloch* case[4] appear to support. The third is that it seems clear that the determination whether an instrument has created a true trust or a trust in the higher sense is a matter of construction, looking at the whole of the instrument in question, its nature and effect, and, I think, its context. Fourth, a material factor may be the form of the description given by the instrument to the person alleged to be the trustee. An impersonal description of him, in the form of a reference not to an individual but to the holder of a particular office for the time being, may give some indication that what is intended is not a true trust, but a trust in the higher sense.

I do not think I need discuss *Te Teira Te Paea v Te Roera Tareha*[5] at any length. In that case an agreement (which later was incorporated in a statute) provided that various blocks of land in New Zealand should be allotted to various Maori claimants, and were to be 'held in trust in the manner provided or hereinafter to be provided by the General Assembly for Native Lands held under trust'. Despite the words of trust, the Judicial Committee, consisting of Lord Macnaghten, Lord Davey and Lord Lindley, held that in the circumstances of the case a particular named Maori claimant took absolutely and free of any trusts. The *Kinloch* case[4] was referred to[6] as being a 'striking example' of circumstances which excluded the creation of any equitable interest in members of a definite class for whom the property was said to be held 'in trust'.

In addition to these authorities, certain cases decided in the USA were put before me. There were two cases in the Supreme Court of the United States that were entitled *Chippewa Indians of Minnesota v United States*: they may be called No 1[7] and No 2[8]. *Wilbur v United States*[9] provides a complement to these cases, in that it sets out in extenso s 7 of the statute on which much of the argument turned. The facts of these cases were far removed from the facts of the cases now before me, and there is no counterpart to the peculiar status of tribal Indians in the United States. Nevertheless, counsel for the Attorney-General contended that *Chippewa No 2*[8] showed that the courts in the USA were slow to construe a statute as creating a true trust in relation to tribal Indians towards whom Congress had been exercising the functions of guardianship. Speaking for a unanimous court, Roberts J said[10]:

> '... we may not assume that Congress abandoned its guardianship of the tribe or the bands and entered into a formal trust agreement with the Indians, in the absence of a clear expression of that intent.'

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1 16th Edn (1964), pp 10, 13
2 12th Edn (1970), p 51
3 38 Halsbury's Laws (3rd Edn), p 810
4 (1882) 7 App Cas 619
5 [1902] AC 56
6 [1902] AC 56 at 72, 73 per Lord Lindley
7 (1937) 301 US 358
8 (1939) 307 US 1
9 (1930) 281 US 206
10 307 US 1 at 5

I do not find any real assistance in these American cases, on their very different facts. The most that can be said, I think, is that the dictum that I have quoted may be said to provide counsel for the Attorney-General with some illustrative ammunition in relation to one of his propositions. This was that if the Crown was a trustee at all, it would always be a trustee in the higher sense unless there was enough to show that it was intended to be a trustee in the lower sense. The burden, said counsel, was thus in effect on counsel for the plaintiffs to show that there was a true trust. Another way of putting much the same point is to emphasise the possible explanations that there are for a transaction. In the case of an individual, there will often be only two feasible explanations, either that he holds on a true trust, or else that he holds on no trust at all, but at most subject to a mere moral obligation. In the case of the Crown, there is a third possible explanation, namely, that there is a trust in the higher sense, or governmental obligation. Though this latter type of obligation is not enforceable in the courts, many other means are available of persuading the Crown to honour its governmental obligations, should it fail to do so ex mero motu. This is accordingly no mere moral obligation; and it can provide a satisfactory and probable explanation of a transaction which has been conducted with formalities which suggest that more than a mere moral obligation was intended. Without putting matters on the basis of any 'burden of proof', the existence of this alternative explanation when the alleged trustee is the Crown means that the courts will be ready to adopt it unless there is a sufficient indication that instead a true trust was intended.

Another American case that was cited was *Edgeter v Kemper*[1]. By cl 5 of his will, a testator left his residue—

> 'to the United States of America for a permanent fund, the interest of the said fund to be used for the relief of the various Tribes of Indigent American Indians of the United States of America . . .'

This was held to create a true charitable trust, despite the absence of the word 'trust' or any direct equivalent, with the USA as the trustee, notwithstanding that the USA could not be sued to enforce the trust. Counsel for the plaintiffs relied on this case to some extent as supporting his contention that a trust binding the Crown arose under the 1913 agreement, and not a mere governmental obligation. However, I think it is of some importance that cl 6 of the will provided that if the USA refused—

> 'to accept my gift as herein provided, I direct and empower the Executor of this my will, to turn over the remainder of my property to a responsible Institution, preferably a National Bank, with an agreement and instructions, that the remainder of my property as herein provided, will be invested in United States Government bonds and the interest from said gift be applied for the sole benefit of indigent American Indians and as provided in item 5.'

It seems clear that as the alternative provided by cl 6 could not possibly operate as a governmental obligation, but must be true trust, this provided a strong indication that cl 5 must have been intended to create a true trust as well. This by itself, I think, would suffice to negative any tendency to hold that a mere governmental obligation was intended.

There is one other American case that I should mention, as both counsel for the plaintiffs and counsel for the Attorney-General each claimed that it assisted him; that is *Fort Berthold Reservation Tribes v United States*[2]. I shall not discuss the case, since in the end counsel for the plaintiffs was able to extract very little help from the decisions, and what help he did obtain was, I think, reduced to vanishing point by counsel for the Attorney-General's submissions. The claim by counsel for the plaintiffs that the court recognised fiduciary obligations as flowing from what was not a true trust but

1 (1955) 136 NE 2d 630
2 (1968) 390 F 2d 686

merely a governmental obligation is one that I think must be considered against the statutory background in the case; for the statute gave the Indian Claims Commission jurisdiction in cases where the claim was based on 'fair and honorable dealings that are not recognized by any existing rule of law or equity'[1].

With the guidance that the Court of Appeal[2] and House of Lords[3] give in the *Kinloch* case[3], and the advantage of such illumination as the American cases provide, I turn to the case before me. What has been created here? Has there been a series of true trusts, or have there merely been trusts in the higher sense? I say 'merely' because I am of course concerned with what is justiciable in this court, and a trust in the higher sense is not. The plaintiffs' claim is in respect of the 1931 and 1947 transactions, but I must begin with the 1913 transaction, since that is said to have clothed the Crown with a fiduciary capacity towards the Banabans. So I return to the 1913 agreement and the A and C deeds.

(2) *The 1913 agreement*

As I have mentioned, the 1913 agreement is an agreement to which the only parties are the company on the one hand and a number of Banabans on the other; neither the Crown nor the resident commissioner is expressed to be a party, though Mr Eliot, the resident commissioner, is stated to be a witness. First, by cl 7 the company undertook 'to hand over to the Resident Commissioner' the initial £4,734. The expenditure of all save £300 of this sum was to be made—

> 'for the benefit of the existing Banaban community in any way which may be recommended by them and agreed to by their Native Magistrate and Kaubure, and subject to the decision of the Resident Commissioner that such expenditure is equitable and not wasteful'.

Second, there was the annuity scheme, fed by the initial £300 and by the subsequent payments of the interest on the 6d royalty. This interest was to be paid 'to the Government by the Company for the Banaban Fund', or as cl 10 put it, 'payable by the Company to the Banabans (through the Government) in royalty'. This latter expression, said counsel for the plaintiffs, amounted to a declaration of trust by the Crown, so that when the moneys were paid by the company they were forthwith impressed with a trust. He also emphasised that in establishing a fund the 1913 agreement was creating something that had a flavour of trust about it. In this connection counsel cited the line of cases that included *Re Nanwa Gold Mines Ltd*[4], *Barclays Bank Ltd v Quistclose Investments Ltd*[5] and *Re Kayford Ltd*[6].

I can well see that in deciding whether a particular obligation is that of a debtor to a creditor or that of a trustee to a beneficiary, it may be a matter of great importance to see whether some funds or assets have been segregated in some way to meet the obligation. Where, however, the question is whether there is on the one hand a true trust, or on the other hand a 'trust in the higher sense', or governmental obligation, it does not seem to me that segregation plays the same part. Governments have to keep accounts; and if there is a fund of money applicable for a particular purpose, then as a matter of practice the government will normally keep a separate account of that fund. In *Chippewa No 2*[7], I may say, there was a fund established by statute, and yet there was no true trust. In short, I cannot see how the maintenance of a

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1 (1968) 390 F 2d 686 at 690, n 1
2 (1879) 15 Ch D 1
3 (1882) 7 App Cas 619
4 [1955] 3 All ER 219, [1955] 1 WLR 1080
5 [1968] 3 All ER 651, [1970] AC 567
6 [1975] 1 All ER 604, [1975] 1 WLR 279
7 (1939) 307 US 1

separate fund, or a separate account, can normally play any significant part in distinguishing between a true trust on the one hand and a governmental obligation on the other: the separateness of the fund or account seems to me to be indifferently a badge of each.

Counsel for the plaintiffs also contended that the existence of a trust was shown by the antecedents of the 1913 agreement, and in particular by the recommendations by the resident commissioner that there should be a trust fund, and also by subsequent references in a variety of official documents to the existence of a trust. At one stage he relied on *Thorpe v Owen*[1] for the proposition that a subsequent acknowledgement of the existence of a trust operated as if it were a declaration of trust; but this proposition encountered such difficulties that in the end it was very properly abandoned.

Counsel further contended that his argument escaped the clutches of any rule relating to perpetuities. He accepted that the English concept of perpetuities arrived at Ocean Island with the flag, a blessing that the Banabans may not then have appreciated. It might therefore be contended that a trust for the landowners for the time being faced the consequences of having rendered the trust fund inalienable for an indefinite period. But, he said, just as by Banaban custom the land on Ocean Island was rendered virtually inalienable, so the application of any rule against perpetuity or inalienability must be subject to a corresponding modification in relation to moneys subject to a trust for the landowners. In the alternative, if the trust were void for inalienability or perpetuity, there was a resulting trust for the landowners.

Counsel's argument was founded on the 6d royalty being payable to the government by force of the 1913 agreement, made between the company and the Banaban landowners. They agreed that the 6d royalty should be paid to the government to be applied in a specified way for the Banabans, and when the government accepted the money with knowledge of why it was paid, the government became a trustee of the money. The defendants' case, he said, was based on a contention that the 6d royalty was not paid by force of the 1913 agreement, but had been imposed on the company by the government; and this, he said, could not be done, as was shown by *Attorney-General v Wilts United Dairies*[2]. In that case, to put it shortly, the House of Lords held that without statutory authority the Food Controller could not impose a charge of 2d per gallon on milk as a condition of granting a licence to deal in milk. Taxation cannot be imposed by a side-wind. The reply of counsel for the Attorney-General was that even if this applied, it did no more than give the company a ground for resisting payment, and as of course the money had been paid, this carried counsel for the plaintiffs nowhere.

Counsel for the Attorney-General, however, went further. He said that on a correct analysis of the facts and the true construction of the documents, the obligation of the company to pay the 6d royalty was not in any way imposed by the government on the company, nor did it spring from the 1913 agreement. The process had been quite different. After the system of P and T deeds had run into difficulties, there were prolonged negotiations between the company and the Colonial Office as to the terms on which the requisite governmental consent could be given to the acquisition of more land by the company. These terms included not only the demarcation of the mining areas and what was to be paid for surface rights but also a provision which I have already quoted This is that—

> 'an additional royalty of sixpence per ton be paid by the Company on all phosphate shipped from Ocean Island as from the 1st July, 1912, the royalty to be calculated on the same basis as the existing royalty ... the proceeds of this additional royalty to be devoted to the general benefit of the natives.'

(I quote from cl 5 of the terms set out in the exchange of letters of 14th March 1913

1 (1842) 5 Beav 224, 11 LJCh 129
2 (1922) 91 LJKB 897

and 23rd April 1913.) This agreement was plainly recognised as one which could not take effect unless the landowners agreed to part with their land on the terms as to the mining areas, price and so on that the Colonial Office and the company had agreed; but equally, the terms of these arrangements made it posssible for the resident commissioner to feel assured that the granting of leases by the Banabans to the company in accordance with them would not be 'contrary to sound public policy' within reg 24 of the King's Regulations 1908.

It was against this background that the resident commissioner explained the proposals to the Banabans and, when they had agreed, gave his consent to the consequent A and C deeds. On this footing, the exchange of letters between the Colonial Office and the company did not of itself constitute a binding contract or even a conditional contract. It was an offer by the company to pay the 6d additional royalty if the proposed transaction went through; and when the resident commissioner gave the requisite consent to the A and C deeds on this footing, the company became bound to pay to the government (i e the government of the Gilbert and Ellice Islands Protectorate) the new 6d royalty. This was described as an 'additional royalty' as being in addition to the existing 6d royalty already payable by the company to the Crown; and, as I have mentioned, this existing 6d royalty had since 1st April 1909 been payable to the Gilbert and Ellice Islands Protectorate government, and it would be natural for the 'additional royalty' to follow suit.

This way of regarding the matter explains some of the apparent curiosities of the 1913 agreement. Since the company's obligation to pay the government the additional 6d royalty had been the subject of an antecedent agreement, to be brought into operation by the resident commissioner giving his consent to the A and C deeds, it was reasonable to refer, in cl 12(*b*) of the 1913 agreement, to 'the' royalty of 6d a ton, rather than to set out an obligation to pay 'a' royalty of 6d a ton. More substantially, it helps to explain why the 1913 agreement makes no provision for the disposition of the capital of the Banaban Fund. As between the Colonial Office and the company, no more had been provided than that the proceeds of the additional 6d royalty should be 'devoted to the general benefit of the natives'. The resident commissioner had carried matters further by inserting in the 1913 agreement provisions which dealt specifically with the first year's royalty and the income flowing from the royalties of subsequent years, but had not dealt with the capital produced by adding those royalties each year to the Banaban Fund.

Of the many difficult questions in the case, this is not the least. The submission by counsel for the Attorney-General explains much; yet it has in some respects a tenuous and fine-spun quality about it which ill-accords with the unsophisticated nature of Ocean Island in 1913. It is tempting to prefer the blunt approach of counsel for the plaintiffs, that the 6d additional royalty was made payable by the 1913 agreement, and that, far from the royalties being payable to the government to be held as a fund which the government was to administer governmentally for the general benefit of the Banabans (except so far as it was otherwise disposed of), the royalty was payable to the government as a true trustee for the Banabans, who were entitled to capital as well as income. After all, by cl 10 of the 1913 agreement the yearly £5,000 (be it more or less) was to be 'payable by the Company to the Banabans (through the Government) in royalty.'

As against that, these very general words could be said to be explained by the words in cl 12(*b*), which were a little more explicit, stating that the 6d royalty 'shall be paid to the Government by the Company for the Banaban Fund'; and there was nothing to give any identifiable Banabans any definable rights in the capital of that fund. True, as counsel for the plaintiffs emphasised, the land was the Banabans' land, and the royalty was being paid in respect of the phosphate in that land. Yet there was no direct correlation between the royalty that was to be paid and any particular landowner. Much of the phosphate which yielded the royalty would come from land which the company already had obtained but had not begun to work; and yet under

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the 1913 agreement the interest on that royalty would be distributable only among 'all Banabans who lease land to the company from this date', i e from 28th November 1913. I cannot see that there is any satisfactory relationship between the property dealt with in the 1913 transaction and the 6d additional royalty which would give rise to a fair inference that what was being created was a true trust whereby the Crown, or some organ of the Crown, was to hold the royalties in trust for some group or body of the Banabans. Even if the Banaban custom of landholding, with its limited powers of disposition of the landowner, could be said to justify a modification of the rules relating to perpetuities so as to permit money to be held in trust in perpetuity for whomsoever was the owner for the time being of a particular plot of land (a proposition with a number of interesting difficulties), there would remain serious problems in ascertaining both the beneficiaries and the quantum of their beneficial interests in the Banaban Fund.

Quite apart from that, it seems to me that the surrounding circumstances, as well as the terms of the documents, do very little to support the concept of any true trust. Instead, they do much to support the view that, subject to the limited rights created by the annuity scheme, the Banaban Fund was a fund which was subject not to any true trust but to a trust 'in the higher sense', or a governmental obligation, to use it for the general benefit of the Banaban community. It was money which the Banabans were told would be expended by the government in their interests; and no doubt this acted as an inducement to the Banabans to sign the 1913 agreement.

I must also remember Lord Atkin's words in the *Civilian War Claimants'* case[1], and consider whether there is anything to show that in this case the Crown deliberately chose to act as a trustee. The fact that the only parties to the 1913 agreement were the company and the Banaban landowners who signed it, and that neither the Crown nor any officer of the Crown was a party, seems to me to go far towards negating any such choice. The Colonial Office, of course, had made the agreement with the company that is to be found in the exchange of letters in March and April 1913; but far from suggesting that the Crown is to hold the additional 6d royalty on a true trust for the Banaban landowners, this merely provides for the proceeds of the royalty 'to be devoted to the general benefit of the natives'. In my judgment, such language points firmly towards a obligation of government and not a true trust.

Difficult questions might have arisen if there had been statements by government officers before, during and after the 1913 transaction which showed an unequivocal intention that the 6d additional royalty should be held on a true trust, enforceable in the courts, and not merely under a governmental obligation, or trust in the higher sense. But in all the statements by the resident commissioner and others about trust funds and the like, I cannot see that there is anything that comes near to evidencing any such unequivocal intention. If there had been a well-known word in the English language which meant what Lord Selborne LC[2] called a trust in the higher sense, then the fact that instead of that word the documents, formal and informal, used the word 'trust' would have been much more significant. But there is no such word; 'trust' has to do duty for many things. Looking at matters as a whole, they seem to be explicable, and best explicable, on the footing of governmental obligation and not true trust.

In preparing this judgment, and in the judgment itself, I have traced the gradual development of the trust funds and matters connected with them in considerable, and perhaps excessive, detail, bearing in mind throughout the question whether there was a governmental obligation or a true trust. I do not say that the indications are all one way; but it seems to me that of the indications which are not wholly neutral, the overwhelming majority point against a true trust and in favour of a governmental obligation. I say that not only of the indications looked at by themselves, but also

1 [1932] AC 14 at 27, [1931] All ER Rep 432 at 436
2 *Kinloch v Secretary of State for India in Council* (1882) 7 App Cas 619 at 626

looked at against the general background that I have tried to describe. That also applies to the possibility that was put forward of there being a charitable trust. However, the difficulties in this seem to me to be too great to justify me in spending any time on it at this stage.

I must mention one point on which counsel for the plaintiffs placed some emphasis, and that was the fact that in the *Kinloch* case[1] the Crown was dealing with Crown property, whereas in the present case the property which produced the royalty belonged not to the Crown but to the Banabans. I do not think that this distinction is of any great moment. One has to look at the whole of the circumstances of the case. In one sense, it is easier to infer an intention to create a true trust in a transaction in the sophisticated England of the 19th century than in the unsophisticated Ocean Island of the first half of the 20th century. The Gilbert and Ellice Islands Colony government had peculiar governmental obligations to a relatively primitive people which were not owed by the United Kingdom government to citizens in England; and the concept of trusts, quite apart from its many complex and detailed provisions, was as commonplace in England as it must have been ill-comprehended on Ocean Island. I need not, for instance, enquire what the comparative distribution of the textbooks by Lewin[2] and Underhill[3] there was in the two countries. In other words, it seems to me that the *Kinloch*[1] decision that there was no true trust was in at least one sense a fortiori the present case, when the surrounding circumstances are considered.

There is one further matter that I should mention at this stage, and that is the question of the meaning of 'government'. Was the governmental obligation in question an obligation of the United Kingdom government, or an obligation of the government of the Gilbert and Ellice Islands Protectorate? That is a question that I shall have to consider more generally at a later stage in relation to the government of the Gilbert and Ellice Islands Colony. For the present, I shall say no more than that, without at the moment formally deciding anything, I shall treat 'the government' as being the government of the Gilbert and Ellice Islands Protectorate.

As I have already indicated, no direct claim is made in respect of the 1913 arrangements. Their importance is primarily in relation to the 1931 claim, on the footing that they had clothed the Crown with a fiduciary relationship towards the Banabans. There were other grounds on which this fiduciary relationship was based, and these I shall have to consider in due course. But for the present I shall confine myself to what flowed from the 1913 arrangements.

One way of putting matters is to say that even if (as I hold to be the case) the Crown did not hold the Banaban Fund on a true trust for the Banabans, that did not exclude the existence of some fiduciary relationship. Such a relationship may of course spring from other sources, such as that of principal and agent. It is well established that a agent owes important duties to his principal, and that, for example, a purchase by an agent of the property with which he is entrusted, or a purchase by an agent from his principal, is subject to rules similar to those which bind a trustee who purchases the trust property or purchases the interest of a beneficiary from him. What was important to the plaintiffs was to establish that the Crown stood in a fiduciary relationship towards the Banabans; and whether that fiduciary relationship was produced by a trust or by some other form of relationship such as agency mattered little. In relation to the 1913 transaction, however, I cannot see any real evidence that the Crown was ever constituted an agent for the Banabans or for any of them. If any fiduciary relationship existed, it must, I think, be founded on a trust For the reasons I have given, the only trust that there is in relation to the 1913 transaction is a trust in the higher sense, and not a true trust.

That gives rise to a further point. A true trust admittedly creates a fiduciary

1 (1882) 7 App Cas 619
2 Trusts
3 Trusts and Trustees

obligation, so that if the trustee purchases the trust property, or purchases the interest of a beneficiary, he is subject to the rules of equity governing such transactions. I shall have to discuss these rules in due course, but it is convenient for me to identify them briefly at this stage. It was a matter of controversy between counsel for the plaintiffs and counsel for the Attorney-General whether there were two rules or one rule; but even if there is only one rule, as counsel for the plaintiffs contended, there were admittedly two separate elements in that rule. During the argument, two agreed labels emerged for the two rules, or two elements of the one rule; and for convenience of reference I shall use those labels. Without attempting in any way to set out all the details of the rules or elements, and merely for the purposes of identification, I propose to refer to them as follows:

(1) *The self-dealing rule*: if a trustee purchases trust property from himself, any beneficiary may have the sale set aside ex debito justitiae, however fair the transaction.

(2) *The fair-dealing rule*: if a trustee purchases his beneficiary's beneficial interest, the beneficiary may have the sale set aside unless the trustee can establish the propriety of the transaction, showing that he had taken no advantage of his position and that the beneficiary was fully informed and received full value.

Suppose, then, that these rules, or either of them, apply not only to trusts but also to other cases where there is a fiduciary relationship, springing perhaps from agency, or partnership or membership of a committee of inspection in bankruptcy (on which see *Re Bulmer, Greaves v Inland Revenue Comrs*[1]), does a trusteeship in the higher sense, or governmental obligation, also give rise to a fiduciary relationship which invokes those rules? I think that the answer must be No. The fiduciary obligations all arise from relationships which are justiciable in the courts. The relationship from which the fiduciary obligations arise may itself be equitable, or it may be legal, or it may have its origin in statute: but it is a relationship with enforceable legal consequences. A trust in the higher sense, or governmental obligation, on the other hand, lacks this characteristic; and where the primary obligation itself is one that the courts will not enforce, then I do not think that it can of itself give rise to a secondary obligation which will be enforceable by the courts. To hold otherwise would be to give some legal force or effect to a relationship which had none. I therefore hold that the 1913 transaction did not put the Crown, or any officer of the Crown, into any fiduciary position in relation to the Banabans or any of them.

(3) *The 1931 transaction*

I can now come forward to the 1931 transaction. The royalty was finally fixed on 12th January 1931, and on that day, and subsequently, says counsel for the plaintiffs, the Crown stood in a fiduciary relationship towards the Banabans. This fiduciary relationship he based on three grounds. First, there was the fiduciary relationship which sprang from the 1913 transaction, a transaction that was affected by the 1931 transaction. Second, a fiduciary relationship arose from the trust of royalties which was constituted by the 1928 Ordinance. Third, a fiduciary relationship arose from the statutory duty under the 1928 Ordinance of fixing the royalty and holding the royalties in trust. I propose to deal with these three contentions in turn.

(*a*) *Trust from 1913 agreement.* The first contention is one that for the most part I have already dealt with. In my judgment, no true trust or other relationship capable of creating fiduciary obligations arose from the 1913 transaction. There is, however, one particular aspect of this that I have not examined, and that is the interrelation of the 1913 transaction with the 1931 transaction in respect of the increase of royalty; and this I shall consider later when I have discussed the 1931 transaction further.

1 [1937] 1 All ER 323, [1937] Ch 499

(*b*) *Fiduciary relationship from trust of royalties.* I turn next to the second contention, based on the 1928 Ordinance, and in particular on ss 6(2) and 7. I have already set these out, but I must quote the relevant parts again. By s 6(2), any moneys payable by way of compensation or royalty—

> 'shall be paid to the Resident Commissioner to be held by him in trust on behalf of the former owner or owners if a native or natives of the Colony subject to such directions as the Secretary of State for the Colonies may from time to time give'.

By s 7, all moneys payable to any native or natives of the colony in cases where the acquisition of rights was the result of agreement—

> 'shall be paid to the Resident Commissioner and shall be held by him in trust on behalf of such native or natives to be used in such manner and subject to such directions as the Secretary of State may from time to time give.'

Counsel for the plaintiffs naturally emphasised the use of the phrase 'in trust' in both provisions, and contended that it created a true trust. The difficulty that it was the resident commissioner and not the Crown that was expressed to be the trustee he met by contending that the resident commissioner was a Crown servant, and the references to him in the Ordinance were impliedly to the resident commissioner as such, i e as a Crown servant. Therefore, he said, it was the Crown that was the trustee, and not the resident commissioner. This view, counsel submitted, was supported by *Re Oriental Inland Steam Co, ex parte Scinde Railway Co*[1] which showed that if an official of a corporation was directed by statute to deal with property of the corporation in a specified way, on behalf of a specified class of persons, the corporation ceased to own that property beneficially and instead held it on trust. That case, I may say, concerned the assets of a company which was the subject of a winding-up order, and the official concerned was the liquidator of the company.

It is true that in that case both James LJ and Mellish LJ used the word 'trust', and James LJ[2] referred to the creditors as cestuis que trust. Yet in a case a year or two back I had expressed doubts whether the 'trust' there referred to was a true trust, or whether the creditors merely had a right to require the due administration of the assets for their benefit, a right akin to the rights of those entitled under an intestacy or a testamentary gift of residue, on the footing explained in *Comr of Stamp Duties v Livingston*[3]: see *Re Calgary and Edmonton Land Co Ltd*[4]. When it was pointed out to counsel for the plaintiffs that this approach now had the authority of the House of Lords in *Ayerst v C & K (Construction) Ltd*[5], he resourcefully retreated to a second line of argument, to the effect that if there was no true trust, there was at least a fiduciary relationship, and that this sufficed for his purpose.

I pause at that point to observe that the *Ayerst* case[5] illustrates the elasticity of the word 'trust'. I have already considered the way in which 'trust' may be used to describe on the one hand a true trust, and on the other hand a trust in the higher sense, or mere governmental obligation. The *Ayerst* case[5] shows how distinguished equity judges may use the word to describe a relationship which is not a trust in the full sense of the word, with the trustee owing to the beneficiaries all the duties that in equity a trustee owes to his cestui que trust, but is something less than that. In the words of Lord Diplock in the *Ayerst* case[6], all that may be intended to be conveyed by the use of the expression 'trust property' and 'trust' in such cases is that—

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1 (1874) 9 Ch App 557
2 9 Ch App 557 at 559
3 [1964] 3 All ER 692 at 699, 700, [1965] AC 694 at 712, 713
4 [1975] 1 All ER 1046 at 1050, 1051, [1975] 1 WLR 355 at 359
5 [1975] 2 All ER 537, [1976] AC 167
6 [1975] 2 All ER 537 at 543, [1976] AC 167 at 180

'the effect of the statute was to give to the property of a company in liquidation that essential characteristic which distinguished trust property from other property, viz that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons'.

One cannot seize on the word 'trust' and say that this shows that there must therefore be a true trust; the first question is the sense in which that protean word has been used. The word, indeed, is one that may be found by the unwary to invite the comment, Qui haeret in litera haeret in cortice.

That said, I return to the Ordinance. When it provides in ss 6(2) and 7 that the moneys are to be held by the resident commissioner 'in trust' as there stated, is the legislature creating a true trust, or a fiduciary obligation in the *Ayerst*[1] sense, or a trust in the 'higher sense' (or governmental obligation)? It is common ground that the resident commissioner is not a corporation, so that there would be great difficulty in giving literal effect to the statute by holding him to be a trustee A statutory direction that the resident commissioner is to hold money in trust is indeed an oblique way of manifesting an intention that the Crown is to be a trustee; and *Mitford v Reynolds*[2], which counsel for the plaintiffs cited, proved on examination to be more of a hindrance than a support for him on this point In any case, a colonial Ordinance is not the place where one would expect to find a trust imposed on the Crown in right not merely of the colony, but of the United Kingdom, or of the United Kingdom and Colonies. The power of the Secretary of State to give directions, worded rather differently in the two statutory provisions, also seems out of place in a true trust.

There is a further consideration, namely, the subject-matter of the alleged trust. That subject-matter is the royalties and other payments which will become payable in the future. What is to be held in trust is the fruits of the transaction in question. What the plaintiffs are claiming is that because (on their argument) the Crown will hold these fruits in trust, therefore the Crown is in a fiduciary position in relation to the transaction which in due time will produce those fruits. This, said counsel for the Attorney-General, cannot be right. A trust of a tree may impose a fiduciary duty in relation to the fruit of that tree: but it would be remarkable if a trust of the gathered fruit of the tree were to impose a fiduciary duty in relation to the tree itself. If a copyright is held in trust for a beneficiary, dealings by the trustee with that copyright or with the beneficial interest of the beneficiary will be subject to the rules of self-dealing and fair-dealing; but I cannot see how in any normal circumstances these rules can apply to the copyright or the beneficial interest in it if the trustee is a trustee of no more than the royalties as they fall due.

In my judgment, the difficulties in the way of establishing that the 1928 Ordinance gave rise to a trust or fiduciary obligation, binding on the Crown in right of the United Kingdom, and affecting the fixing of the royalty under the 1931 transaction, are far too great for even the resourcefulness and learning of counsel to be able to overcome. In their context, the provisions of ss 6(2) and 7 of the 1928 Ordinance, despite the use of the words 'in trust', are far more consonant with a governmental obligation than a true trust or fiduciary duty enforceable in the courts. The resident commissioner for the time being, in his official capacity, was to receive the moneys, and, subject to the directions of the Secretary of State, he was under a governmental obligation to use the moneys for those named. The Ordinance gave ample authority to the resident commissioner for him to expend the money only in this manner, and to resist any claim that it should be diverted to other uses; and no doubt that Ordinance imposed on him a duty to apply the money in this way. But in my judgment, in this respect the Ordinance operated only in the sphere of government, and not by way of imposing any justiciable true trust or fiduciary obligation. I do not think that a

1 *Ayerst v C & K (Construction) Ltd* [1975] 2 All ER 537, [1976] AC 167
2 (1842) 1 Ph 185, [1835-42] All ER Rep 331

statutory duty to administer money in a particular way can be said necessarily or even probably to impose a fiduciary obligation on the person subjected to the duty. Many statutory duties exist without giving rise to any fiduciary obligation, and before such an obligation can arise I think that there must be something to show that the imposition of such an obligation was a matter of intention or implication.

Counsel for the plaintiffs relied on *Re Bulmer, Greaves v Inland Revenue Comrs*[1], a case concerning a person in the position of a member of the committee of inspection in a bankruptcy; and in argument a number of aspects of what in some respects is not an easy case were fully discussed. I think that all that I need say is that the fiduciary position that was recognised in that case sprang not from the bare imposition of a statutory duty, but from the fiduciary nature of the relevant statutory duties and functions. A member of a committee of inspection is in a fiduciary position not because he has an office established by statute but because he has duties that are fiduciary in nature.

I can now mention the point that I postponed, namely, the interrelation of the 1913 transaction with the 1931 transaction. What counsel for the plaintiffs contended was that the 6d additional royalty under the 1913 transaction was bound by a true trust for the Banabans, and that what the 1931 transaction did was to increase the existing rate of royalty rather than impose a new and separate royalty. Accordingly, the increased royalty must be subject to the same trust as that which bound the royalty when it stood at its original rate: the increment takes the colour of the thing that it increases. My decision that the additional 6d of the 1913 transaction was not subject to any true trust (or, for that matter, any fiduciary obligation) of itself disposes of this contention.

However, in addition there is the fact that the subject of the 1931 transaction was different land from the land that had been the subject of the 1913 transaction. I do not see how, if a trust had existed in respect of the 1913 land and the royalty that it yielded, this could create a trust in relation to the 1931 land and the royalty that it was to yield. If T is a trustee in respect of A's land, and then, in a transaction in relation to B's land (of which he is not a trustee), he obtains an agreement to an increase in the payment to be made to A in respect of A's land, I cannot see that this imposes on T any fiduciary duty in respect of what is paid under the transaction in relation to B's land. A cannot complain that there is any breach of fiduciary duty by the trustee in getting for him more than he was entitled to receive; and although B may have some ground for complaint, in that T may in effect have diverted to A some of what might otherwise have been paid for B's land, that does not make T into a trustee for B.

Finally, there is the general background of the correspondence, discussions and statements that I have mentioned in relation to the 1913 transaction as pointing against a true trust and in favour of a governmental obligation. I accept, of course, that, if a trust or fiduciary obligation has been created, it will not be negated merely because those concerned behave as if it did not exist. You cannot destroy a trust by ignoring it. But such an attitude may indeed be significant if it is contended that some subsequent transaction of a similar nature or in similar circumstances was intended to create a trust or fiduciary obligation. What is impotent to destroy the living may well suffice to negative any intention to bring new life into existence. This consideration seems to me to point against any trust or fiduciary obligation having arisen under the transactions after 1913.

(c) *Fiduciary relationship from statutory duty.* I now turn to the third ground for alleging a fiduciary relationship, namely, the statutory duty under the 1928 Ordinance to fix a royalty and hold it in trust. Counsel for the plaintiffs made no claim for breach of statutory duty as such, but he did contend that it provided one route to the relief that he claimed. He put forward a proposition that A was in a fiduciary position

1 [1937] 1 All ER 323, [1937] Ch 499

towards B if he was performing a special job in relation to B which affected B's property rights, at any rate if A was self-dealing. This, he said, could be put in two ways. First, there was a fiduciary duty if there was a job to be performed and it was performed in a self-dealing way. Alternatively, there was a fiduciary duty if there was a job to perform, and equity then imposed a duty to perform it properly if there was any self-dealing. The concept of 'a job to be performed' was taken from Snell's Equity[1] where there is a brief quotation from the judgment of Asquith LJ in *Re Reading's Petition of Right*[2]. The quotation was to the effect that in the context there under discussion there is a fiduciary relationship 'whenever the plaintiff entrusts to the defendant a job to be performed'.

The *Reading* case[3], of course, was the case in which a Crown servant was held to be accountable to the Crown for bribes that he took for misusing the position of responsibility that he held under the Crown. The use that counsel for the plaintiffs sought to make of this concept was to say that the fiduciary relationship arose not only when the job to be performed was entrusted, but also when the job was imposed by law, or assumed, at all events if the job related to property; when there was no property, it might be that nothing save an entrusting would suffice. In the present case, the function of fixing a royalty was imposed by statute and assumed by the Crown, and that put the Crown into a fiduciary position. Thus ran the plaintiffs' argument.

In my judgment, this contention is far too wide and indefinite; and it is supported neither on principle nor by authority. I cannot see why the imposition of a statutory duty to perform certain functions, or the assumption of such a duty, should as a general rule impose fiduciary obligations, or even be presumed to impose any. Of course, the duty may be of such a nature as to carry with it fiduciary obligations: impose a fiduciary duty and you impose fiduciary obligations. But apart from such cases, it would be remarkable indeed if in each of the manifold cases in which statute imposes a duty, or imposes a duty relating to property, the person on whom the duty is imposed were thereby to be put into a fiduciary relationship with those interested in the property, or towards whom the duty could be said to be owed. The *Reading* case[3], too, was one in which the Crown servant was held to be accountable to the Crown. Here the contention is not that the resident commissioner is accountable to the Crown, but that the Crown is accountable to a third party by reason of the statutory duty imposed on the resident commissioner; and that involves very different considerations.

Furthermore, I cannot see that coupling the job to be performed with self-dealing in the performance of it makes any difference. If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing on some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty. In relation to the facts of this case, I hold that the contentions of counsel for the plaintiffs under this third head fail.

The result is thus that in my judgment the 1931 transaction did not place the Crown in any fiduciary relationship towards the Banabans. The 1928 Ordinance gave certain powers and imposed certain duties, but neither the Ordinance itself nor the exercise of the powers and acceptance of the duties brought the Crown into any fiduciary relationship with the Banabans. The claim before me is not a claim for negligence or breach of statutory duty, and whatever might be the position of any such claim, what I am concerned with is a quite different claim, based on a fiduciary obligation which in my judgment does not exist.

1 27th Edn (1973), p 243
2 [1949] 2 All ER 68 at 70, [1949] 2 KB 232 at 236
3 [1949] 2 All ER 68, [1949] 2 KB 232

It is of course true that compulsory powers were exercised for the purpose of granting a lease to the British Phosphate Commissioners, and on any footing the Crown in right of the United Kingdom was entitled to a 42 per cent interest in their assets. If one adds in the interests of the Crown in right of the Commonwealth of Australia and the Dominion of New Zealand, then the Crown is entitled to the entire interest in these assets. Whichever the position, if the Crown had stood in a fiduciary position towards the Banabans and had exercised the powers of compulsory acquisition for the purpose of granting a lease to itself or its creature, or to a creature in which it had any interest, then subject to any statutory provisions (an important qualification) there would plainly have been a basis for a claim against the Crown for self-dealing. But if there is no fiduciary relationship, the argument falls to the ground. In the absence of such a relationship, there is nothing that I know of to preclude the Crown from exercising compulsory powers for the purpose of taking the property for itself or leasing it to some emanation of the Crown.

(d) *'The Crown is one and indivisible'.* In this and other connections there was some discussion of the proposition that the Crown is 'one and indivisible throughout the Empire'. The proposition was enunciated in these terms by Viscount Haldane, speaking for the Judicial Committee, in *Theodore v Duncan*[1]; and it is usually illustrated by reference to *Williams v Howarth*[2]. In that case, sums paid to a soldier by the United Kingdom government were treated as a partial discharge of larger sums due to the soldier under a contract with the government of New South Wales. The proposition has emerged in a number of different contexts: see, for example, *Re Johnson, Roberts v Attorney-General*[3], per Farwell J, a case not often cited on the point. Despite the language of the authorities, today the proposition is usually stated in the form that the Crown is 'one and indivisible throughout the United Kingdom and its dependent territories': brevity has had to be sacrificed to an accurate reflection of constitutional change. It seems that at any rate for some purposes there are today as many Crowns as there are independent realms: see generally Halsbury's Laws of England[4] and Roberts-Wray, Commonwealth and Colonial Law[5]. In its modern form the proposition sufficed counsel for the plaintiffs, who contended that within the United Kingdom and the Gilbert and Ellice Islands Colony (including, of course, Ocean Island) there was but one Crown, so that the lease to the British Phosphate Commissioners was a lease by the Crown to itself.

In the absence of any fiduciary relationship, I do not think that I need pursue this point to any great extent. Broad propositions must be accepted for what they are, namely, broad propositions. The indivisibility of the Crown may well be a matter of high constitutional significance, and it may well still have important and practical applications in relation to individuals who stand in a particular relationship to the Crown, such as soldiers and, it may even be, judges. But in evolving its doctrines relating to self-dealing and fair-dealing, equity was concerned with the substance and the realities, and not with formulae. Furthermore, I do not think that the indivisibility of the Crown means that an obligation entered into by the government of a colony or other dependent territory can be said to be an obligation of the United Kingdom government merely because it was entered into in the name of the Crown; and similarly for the converse. Such governments, too, may have interests which sharply conflict with each other. If one of the governments enters into a transaction with the other government, it may well be wholly at arm's length and entirely removed, in fact and in interest, from any aspect of self-dealing; and, if this is the case, I do not think that equity, being satisfied that in truth there is no self-dealing, will feel constrained to hold that constitutional theory prevails over the realities.

1 [1919] AC 696 at 706
2 [1905] AC 551
3 [1903] 1 Ch 821 at 833
4 6 Halsbury's Laws (4th Edn), para 820
5 (1966) p 84-86

The facts of *Re Holmes*[1] are far removed from the facts of the case before me; but I think that it provides some support for what I regard as the right approach. There, by Canadian statute some land in Canada had been vested in the Queen, for Canadian purposes; and Page Wood V-C[2] refused 'to allow the technical argument that the Queen . . . is present in this country' to give jurisdiction to the English courts of equity, or to withdraw the land from the control of the Canadian legislature. At that time, of course, the Statute of Westminster 1931 lay 70 years in the future, and even the British North America Act 1867 was still to come, so that the constitutional position of Canada was far removed from that of the Dominion of today.

(4) *The 1947 transaction*

I turn to the 1947 transaction. The starting point is the contention of the plaintiffs that in 1947 the Crown was in a fiduciary position in relation to the Banaban landowners who entered into the transaction. This contention rests in the main on two alternative arguments. The first is that the 1937 Ordinance imposed on the Crown a true trust for the Banaban community. The second is that the Ordinance created a statutory relationship which was of a fiduciary nature. I shall take these in turn.

(*a*) *Trust under the 1937 Ordinance.* I will not read again all the terms of the 1937 Ordinance. The most relevant part is the new s 7 which was substituted for the old s 7 of the 1928 Ordinance. It will be remembered that this provides that any moneys payable by way of royalty, whether prescribed under s 5 of the 1928 Ordinance—

> 'or fixed by agreement shall be paid to the Resident Commissioner who shall pay or apply the same in such manner as the High Commissioner may from time to time direct to or for the benefit of the natives of the island or atoll from which the minerals were derived in respect of which the royalty was payable'.

It will be observed that the words 'held by him in trust' which appeared in the old s 7 have gone, and there is no repetition of the phrase 'in trust' or its equivalent, so that verbally the section provides less support for the contention that it created a trust. A similar contrast appears in the old s 6(2) and the new, where the old phrase 'held by him in trust' is replaced by a direction to pay the moneys to the former owners or apply them for their benefit.

Counsel for the plaintiffs was not daunted by the change of wording. He accepted that one possible inference of the change of language was to remove any argument that a true trust was intended; but he said that this was not the right inference to draw. A phrase such as 'shall pay or apply' was, he said, apt for creating a trust. He cited *Hardoon v Belilios*[3] as an illustration of the ease with which a trust can be inferred when the legal estate was in one person and the beneficial interest in another. He also relied on *Barclays Bank Ltd v Quistclose Investments Ltd*[4] as providing something of a parallel, in that the British Phosphate Commissioners paid royalties to the Crown for the purposes laid down by the 1937 Ordinance, and that the acceptance of the money with knowledge of the purpose sufficed to give rise to an inference that a trust was intended.

Counsel further relied on the absence of any express provision in the 1937 Ordinance which would revoke the trusts in the proclamation under the 1928 Ordinance and the 1931 lease, and said that the intention of the 1937 Ordinance was to confirm and validate the provisions of the proclamation and lease. He accepted that they differed (notably as to the 2d royalty to be credited to the Banaban Fund, a matter on which the 1937 Ordinance was silent), but said that this was not a matter of substance. In this way, the words 'in trust' in the proclamation and lease, which did not appear in

1 (1861) 2 John & H 527
2 (1861) 2 John & H 527 at 544
3 [1901] AC 118
4 [1968] 3 All ER 651, [1970] AC 567

the 1937 Ordinance, in effect gave life to the 1937 Ordinance and showed that it created or confirmed a trust, despite the absence from it of any express words of trust.

Yet a further contention was based on the 1937 waiver. This, it was said, was no agreement to the abolition of any trust, but was merely an agreement to the substitution of the Banaban community for the individual landowners as the beneficiaries under the trust: and if the 1937 Ordinance put an end to a subsisting trust, then the Ordinance was contrary to the waiver. This in turn led the 1937 Ordinance into conflict with art VIII (3) of the Gilbert and Ellice Islands Colony Order in Council 1915. Article VIII conferred the power for the High Commissioner to legislate by Ordinance. The power was to provide—

> 'for the administration of justice, the raising of revenue, and generally for the peace, order and good government of the Colony, and of all persons therein . . .'

To this there are three provisos, the third of which is—

> 'That the High Commissioner, in making Ordinances, shall respect any native laws and customs by which the civil relations of any native chiefs, tribes, or populations under His Majesty's protection are now regulated, except so far as the same may be incompatible with the due exercise of His Majesty's power and jurisdiction, or clearly injurious to the welfare of the said natives.'

An Ordinance which took away the beneficial interest under a trust by abolishing the trust was, said counsel for the plaintiffs, a breach of this third proviso, and so was ultra vires and void. This therefore pointed to the true construction of the 1937 Ordinance being one which preserved the trust and so escaped being ultra vires. It was further contended that there were a number of instances in which the Crown had, in subsequent documents, recognised the continued existence of a true trust, and that the Maude Report did the same.

I do not find these contentions persuasive. At the root of the matter is the *Kinloch* doctrine[1] of a trust in the higher sense. I have already rejected the existence of any true trust in relation to the 1913 and 1931 transactions, and in my judgment the 1947 transaction provides even less support for the existence of a true trust. Both the absence of any express words of trust from the 1937 Ordinance (unlike the 1928 Ordinance) and its language as a whole seem to me to make it more consonant with governmental obligation than true trust. There is nothing in terms to make the Crown a trustee: all that is provided by the new s 7 is that certain moneys are to be paid to the resident commissioner, who is to pay or apply them in such manner as the High Commissioner directs for the benefit of the natives of (in this case) Ocean Island. In other words, two high officers of government are directed by statute to use certain funds for the benefit of the inhabitants of the island which produced the funds. I do not see how this can be converted into a true trust by reason of the words of trust in the proclamation and lease, which themselves in my judgment created no true trust.

The arguments on the 1937 waiver and ultra vires also seem to me to lack any real cogency. I do not see how there is any failure to comply with the requirement to 'respect any native laws and customs'. If there were a true trust, what would be affected by the 1937 Ordinance would be a trust created by the 1928 Ordinance, the proclamation and the lease, and not 'native laws and customs'. The power to legislate by Ordinance for 'the peace, order and good government of the Colony' is a power expressed in terms which 'connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign': *Ibralebbe v R*[2], per Viscount Radcliffe,

1 *See Kinloch v Secretary of State for India in Council* (1882) 7 App Cas 619

2 [1964] 1 All ER 251 at 260, [1964] AC 900 at 923

speaking for the Judicial Committee. I can see nothing in the 1915 Order in Council (or, for that matter, in the Pacific Order in Council 1893, where the phrase occurs in art 108(2)) which reduces the width of this wide meaning.

It also seems to me that the words 'shall respect' merely require the enacting authority to give a real and proper weight to native laws and customs. I do not think that they mean that anything which can be said to be contrary to those laws and customs is for that reason to be void. What is meant is little more than that legislation is not to be enacted in heedless disregard of native laws and customs. The concluding words of art VIII(3) set the legislature entirely free from the obligation to respect native laws and customs where these are incompatible with the due exercise of the Crown's power and jurisdiction, and where they are clearly injurious to the welfare of the natives; but these exceptions do not elevate the obligation in other cases to 'respect' native laws and customs into a paramount law. When, in the completely different field of the law of income tax, Lord Radcliffe referred in *Edwards v Bairstow*[1] to the facts found by the general commissioners, he said that the duty of the courts on appeal was—

> 'no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.'

In that celebrated sentence I think that Lord Radcliffe demonstrated that in the proper use of language a 'decent respect' for a tribunal may be perfectly compatible with the reversal of a decision of that tribunal, and that 'respect' is a word which requires the giving of serious consideration but does not impose an abject subservience.

(2) *Fiduciary relationship under the 1937 Ordinance.* I turn to the alternative contention that if the 1937 Ordinance did not impose on the Crown a true trust for the Banaban community, it at least created a statutory relationship which was of a fiduciary nature. It is, of course, well settled that the fair-dealing rule, with or without modifications, applies to many persons other than trustees, including agents, solicitors, company directors, partners and many others: see, for example, Snell's Equity[2]. Counsel for the plaintiffs was, I think, seeking to add to this list an innominate statutory relationship in the nature of a trust. The categories of fiduciary obligation are not closed, and I see no reason why statute should not create a relationship which carries with it obligations of a fiduciary nature. The question, however, is not what statute could do, but what this statute has done.

I can see that if statute created some relationship essentially different from a trust or agency or partnership or the like, but carrying with it the elements which give rise to some fiduciary relationship, then a fiduciary relationship there would be. On the other hand, when the statutory obligation is said to constitute a trust, or else to be so closely similar to a trust as to carry with it the same or a similar fiduciary obligation, then it seems to me that the considerations which negative a true trust will almost certainly negative the alleged fiduciary obligation. In other words, if a trust is alleged, and alternatively a partnership, the fiduciary obligation will not be negatived merely by showing that no trust exists; for if the quite different relationship of partnership is established, then that can give rise to the fiduciary relationship. It is otherwise where the alternative to a trust is merely a statutory obligation with no features essentially different from a trust; for then if the trust is negatived as a source of fiduciary obligation, so also will be the statutory obligation. It would be a remarkably delicate feat of statutory draftsmanship to use language which, so far as it created a trust, created a trust in the higher sense and not a true trust, but insofar as it created a statutory obligation in the nature of a trust, it created an obligation in the nature of a true trust and not a trust in the higher sense. I can see no rational grounds on which

1 [1955] 3 All ER 48 at 59, [1956] AC 14 at 39
2 27th Edn (1973), pp 241-243

the Ordinance can be said to have created any obligation or relationship which gives rise to the fiduciary relationship claimed by counsel for the plaintiffs. Indeed, counsel's contention that there was a statutory obligation in the nature of a trust reminded me at times of Lord Bowen's saying that he understood counsel, when calling a man a 'quasi-trustee', really to mean that he knew that the man was not but wished that he were a trustee: see *Re Peterson*[1] per Farwell LJ.

(5) *Governmental obligations*

My conclusion, therefore, is that the Crown was not in a fiduciary position in relation to either the 1931 transaction or the 1947 transaction. Throughout, the obligations of the Crown were governmental obligations and not fiduciary obligations enforceable in the courts. As must be plain frnm what I have said, I think that there have been grave breaches of those obligations. I shall refer to two.

The worst was in the fixing of the royalty for the 1931 transaction. This was done under the 1928 Ordinance, an Ordinance which with generous moderation counsel for the Attorney-General was content to call 'quite fearful'. Another temperate description of it is that it was inept and liable to lead to injustice. That scheme was that while the value of the surface rights was to be ascertained by arbitration on the basis of market value, an entirely proper and fair scheme, the royalty for the phosphate rights was simply to be prescribed by the resident commissioner, with no process of arbitration and no basis of valuation laid down. The royalty was then in fact prescribed by a resident commissioner who less than two and a half years earlier had written the outrageous Buakonikai letter. I do not intend to add to what I have already said about this, beyond emphasising the length of time during which Mr Grimble must have known that unless he took some steps to avoid it, it was he who would have to prescribe the royalty; and yet, without taking those steps, he proceeded to fix the royalty.

The other failure of government tn which I shall refer was the gravest in its consequences to the Banabans. That was the absence of any advice to the Banabans, or encouragement to get advice, when they were embarking on the 1947 negotiations. The Banabans had suffered grievous hardships under the Japanese during the war: they had been uprooted from their homes on Ocean Island and had no immediate prospects of returning even to see what state that island was in; they had been less than a year and a half on Rabi, an unknown island in a different colony with a markedly different climate; they had had all the problems of living in temporary or makeshift accommodation, like so many others after the war; and many of them had been ill. In those circumstances, they were about to embark on negotiations for by far the largest disposition of phosphate land that they had ever made, one which would take nearly all the workable phosphate left on Ocean Island, and consume well over two-fifths of the entire island. The transaction was one in which some provision for varying or reconsidering the royalties ought at least to be considered. The negotiations would be with a concern with great experience of the phosphate industry, while the Banabans were a simple people, knowing virtually nothing of that industry beyond the operations that they had seen on Ocean Island; and these would be no help to them in negotiating. They were, I think, tenacious bargainers, with a tendency once one point had been gained and apparent agreement reached, to come back and make a further demand. But although they were not meek or overawed in bargaining, they needed knowledge and experience if they were to bargain effectively; and these they had not got.

All these facts must have been known, and well known, to the High Commissioner and to Major Holland, whom the High Commissioner had appointed to look after the Banabans. In those circumstances, I do not see how the omission to encourage the

1 [1909] 2 Ch 398 at 401

Banabans to get proper advice and assistance and to make haste slowly, and the prohibiting of Major Holland from helping the Banabans (for that, as will appear, is what it really amounted to) can possibly be called good government or the proper discharge of the duties of trusteeship in the higher sense. Had there not been this impar congressus Achilli, these proceedings might never have been brought.

It seems to me that I am powerless to give the plaintiffs any relief in these matters. If I am right in my conclusion that any obligation of the Crown towards the Banabans was a trust or fiduciary obligation in the higher sense, and not justiciable in the courts, then I have no jurisdiction to make any order on the matter. At the same time I do not think it could be right for a judge before whom matters such as these are brought simply to refuse jurisdiction and say no more. In litigation between subject and subject the position may be different; I have in mind *Re Telescriptor Syndicate Ltd*[1], when Buckley J said that the court was 'not a Court of conscience', but a court of law. But in litigation against the Crown in which the Attorney-General is a party, I think a judge ought to direct attention to what he considers to be a wrong that he cannot right, and leave it to the Crown to do what is considered to be proper.

Accordingly, I draw the attention of the Attorney-General to the matters of criticism that appear in this judgment, and in particular the two that I have just mentioned. How far these matters are proper for the attention of the Crown in right of the United Kingdom and how far they are for the Crown in some other right I shall not attempt to say: this is a governmental matter, and not legal. I shall accordingly leave the Attorney-General to make such communications to other persons concerned as he considers proper. The Crown is traditionally the fountain of justice, and justice is not confined to what is enforceable in the courts.

In those circumstances I have considered anxiously how far I ought to attempt to deal with the many other issues that have been argued before me; for the decision that the Crown was not under any fiduciary obligations that are enforceable in the courts is fatal to the plaintiffs' claim in *Ocean Island No 2*. The examination and resolution of these other issues would be laborious, and it would considerably increase the bulk of an already very long judgment. On the other hand, I must put in the forefront the interests of the parties, particularly in considering the prospects on appeal and the possible resolution of disputed matters by agreement. I also owe the appellate courts the duty of providing what assistance I can if the matter goes before them; and whether a judgment be right or wrong, it undoubtedly provides some assistance to the court and to the parties by at least in some degree crystallising the issues. If on appeal I am held to be wrong on the absence of any enforceable fiduciary obligation, then of course other important questions arise. After much hesitation, I have come to the conclusion that in the special circumstances of this case I ought to attempt to resolve most of those other issues, and not take the easy course of leaving unanswered important questions that have been argued with much learning over very many days. I therefore turn to these issues, and express my opinion on them in case my decision on fiduciary obligations is held to be wrong.

3. Results of a fiduciary position

First, let me suppose, contrary to what I have held, that the Crown had been in a fiduciary position towards the Banabans in relation to the 1931 transaction. On that footing, counsel for the plaintiffs advanced alternative contentions. First, he said that the Crown was in an acute conflict of interest and duty in fixing the royalty. The Crown, in right of the United Kingdom, Australia and New Zealand, owned the entire beneficial interest in the British Phosphate Commissioners' undertaking, while if it was right for this purpose to discard what the Crown owned in right of Australia and New Zealand (as I think it is), the Crown in right of the United Kingdom owned

1 [1903] 2 Ch 174 at 195, 196

42 per cent of the interest in the British Phosphate Commissioners' undertaking. In either case, the Crown had a substantial interest in the lease which was to be granted, and it was the resident commissioner, a Crown servant, who was to fix the royalty and grant the lease. This formulation concentrated on the process of fixing the royalty. The royalty, it was contended, was fixed at far too low a figure, and so the Crown must pay compensation to make up the royalties in fact paid to what they ought to have been.

The second way in which counsel for the plaintiffs put it was to concentrate initially on the lease rather than the process of fixing the royalty. The lease was in substance a lease granted by a fiduciary to itself or its creatures, and as such could have been set aside ex debito justitiae by any beneficiary. It was now far too late for that, for most of the phosphate had been extracted and sold; but instead there was a right to compensation equal to the difference between the royalty that had been fixed and the royalty that should have been fixed: see *Nocton v Lord Ashburton*[1]. This second way of putting the case thus reached the same result as the first.

(1) *Conflict of interest and duty*

The argument on the conflict of interest and duty requires a consideration of what was the interest and what the duty. The interest was the interest of the Crown in the British Phosphate Commissioners' undertaking. That, however, is a statement which I think is too bald and uninformative for equity. Of course, if you apply the principle that the Crown is one and indivisible throughout the United Kingdom and its dependent territories, then you produce the result that the Crown in Ocean Island is the same Crown as the Crown in the United Kingdom. As a matter of constitutional theory that may indeed be so. But as I have said, equity looks to the realities. As the evidence stands, any profit or advantage that flowed to the Crown in respect of the 42 per cent interest of the United Kingdom in the undertaking of the British Phosphate Commissioners flowed to the Crown in right of the United Kingdom; and there is nothing to suggest that the Gilbert and Ellice Islands Colony in general or Ocean Island in particular would derive any benefit from it. The interest, in terms of possible financial advantage, is the interest of the United Kingdom alone.

The duty, on the other hand, is the fiduciary duty of the Crown towards the Banaban landowners, a duty which, contrary to my judgment, I am assuming to have existed otherwise than as a mere governmental obligation. First, let me say that there has been no suggestion that this fiduciary duty required the colonial legislature to abstain from enacting the 1928 Ordinance, an Ordinance about which I have already said something, and propose to say no more here. Accordingly, in addition to the fiduciary duty that I have mentioned, there must be considered the powers and duties under that Ordinance. It is in the interplay of the fiduciary duty and the statutory duty that lies much of the difficulty that this part of the argument engendered.

I shall begin with the statutory duty. This is imposed on the resident commissioner for the time being. He is, I think, plainly an officer not of the United Kingdom government but of the Gilbert and Ellice Islands Colony government. In one sense, no doubt, he may be said to be an officer of the Crown; but as such he is an officer of the Crown in respect of the colony and not of the United Kingdom.

The statutory duty imposed on him is the general duty to act reasonably and in good faith in accordance with the terms of the statute. He must pay due regard to the relevant and disregard the irrelevant. But that is all. What the statute enacts, the official must obey; and he must do this even if the statute makes provisions which produce results which are far from according with ordinary ideas of justice or equity. If I may take an example, far removed from the present case, that I mentioned

1 [1914] AC 932, [1914-15] All ER Rep 45

during the argument, it would be remarkable if a solicitor could act as such in a county court case, and then, having succeeded, bring in his bill of costs for taxation by himself qua registrar of the county court. Yet in *H Tolputt & Co Ltd v Mole*[1] the Court of Appeal affirmed a Divisional Court decision that such a taxation was perfectly valid. Statute required the taxation to be made by the registrar of the county court, and statute must be obeyed, even if it made a man a judge in his own cause. I may say that subsequent changes in the relevant legislation preclude any repetition of such a taxation.

Now in the present case, the only person who could prescribe the royalty was, by s 5 of the 1928 Ordinance, the resident commissioner of the colony; and in doing so he was merely carrying out his statutory duty. If the words 'such royalty ... as the Resident Commissioner may prescribe' had stood alone, then I think his duty would have been to prescribe a reasonable royalty. Insofar as any assistance can be obtained from the rest of the Ordinance, there was the requirement of s 4 that the resident commissioner must be satisfied, having regard to all the circumstances, including any royalties payable by the proposed lessee, that the terms offered were 'reasonable'. This, I think, strongly points in the same direction: what the statute required the resident commissioner to fix was a royalty that was not arbitrary but was reasonable.

How, then, is this affected by the Crown's fiduciary duty that I am assuming to exist? The resident commissioner must obey the statute: there can be no equitable duty for him to disregard it and obey some fiduciary obligation instead. The argument must thus require that some fiduciary obligation should be superimposed on the statutory obligation. Yet I do not see how it could be said that such a fiduciary duty could effectually require the resident commissioner to fix a higher royalty than the statute provided for. If the statute had required the resident commissioner to fix such royalty as he might prescribe 'not exceeding 9d per ton' (like the 'not exceeding' 2s 6d an acre in s 5), and the market rate was 1s a ton, I cannot see any ground for contending that the resident commissioner ought to have fixed 1s. Statutes that provide for compulsory acquisitions at less than the market value are not unknown in England, and whatever ethical and political objections to them there may be, I do not think that equity can be used to override them.

There is a further consideration. To establish a case of conflict of interest and duty, a sufficient identity must be established between the body having the interest and the body owing the duty. For the reasons that I have given, I do not consider that this identity can be established by simply saying that in each case it is the Crown. I think that the Crown owed this assumed duty not in right of the United Kingdom but in right of the colony. The duty arose out of activities in the colony by the government of the colony. In any case, I do not think that there was any real conflict. I can see that as things stood in 1931 the colony, if struck with financial disaster, might hope to receive some grant in aid from the United Kingdom, and that, conversely, prosperity in the colony's finances would lessen the prospects of any such appeal being made to the United Kingdom. But that is both indirect and a mere matter of grace; and I cannot see how the colonial government and its officers could be said, either collectively or individually, to have any real interest in seeing that the Crown in right of the United Kingdom had any advantage that would flow from the British Phosphate Commissioners paying only a low royalty. I do not know where any sympathies of theirs lay, but any knowledge of officers serving in a colony suggest that in such a matter much of it may well have been with the inhabitants.

(2) *Lease by a fiduciary to itself*

I turn to the other way that counsel for the plaintiffs put the point, based on the 1931 lease being a lease by a fiduciary to itself. The lease, of course, is in terms a lease by the resident commissioner to the British Phosphate Commissioners, and as such is

1 [1911] 1 KB 836; *affd* [1911] 1 KB 87

literally far from being a lease by a person to himself. But of course equity looks beneath the surface, and applies its doctrines to cases where, although in form a trustee has not sold to himself, in substance he has. Again one must regard the realities. If the question is asked: 'Will a sale of trust property by the trustee to his wife be set aside?', nobody can answer it without being told more; for the question is asked in a conceptual form, and manifestly there are wives and wives. In one case the trustee may have sold privately to his wife with whom he was living in perfect amity; in another the property may have been knocked down at auction to the trustee's wife from whom he has been living separate and in enmity for a dozen years. So here one must look at the realities; and for my part I do not see how the British Phosphate Commissioners can in any way be sufficiently identified with the resident commissioner, duly exercising his statutory powers, so as to bring the equitable doctrine into play. Nor, for the reasons that I have given, do I see how the British Phosphate Commissioners can be said to be in any way the alter ego of the government of the colony, or the Crown in right of the colony.

(3) *Self-dealing and fair-dealing*

Let me revert briefly to the subject of the rules about self-dealing and fair-dealing, though on the view I take I doubt if much turns on this. As I have indicated, counsel for the Attorney-General took what I may call the orthodox view, namely, that there were two separate rules. The self-dealing rule is (to put it very shortly) that if a trustee sells the trust property to himself, the sale is voidable by any beneficiary ex debito justitiae, however fair the transaction. The fair-dealing rule is (again putting it very shortly) that if a trustee purchases the beneficial interest of any of his beneficiaries, the transaction is not voidable ex debito justitiae, but can be set aside by the beneficiary unless the trustee can show that he has taken no advantage of his position and has made full disclosure to the beneficiary, and that the transaction is fair and honest.

On the other hand, counsel for the plaintiffs strenuously contended that there was only one rule, though with two limbs, and he formulated an elaborate statement to that effect which I do not think I need set out. I can well see that both rules, or both limbs, have a common origin in that equity is astute to prevent a trustee from abusing his position or profiting from his trust: the shepherd must not become a wolf. But subject to that, it seems to me that for all practical purposes there are two rules: the consequences are different, and the property and the transactions which invoke the rules are different. I see no merit in attempting a forced union which has to be expressed in terms of disunity. I shall accordingly treat the rules as being in essence two distinct though allied rules.

That said, I turn to the 1947 transaction. Here, given an assumed fiduciary obligation, what I think in the end emerged from the ebb and flow of argument was a contention that the transaction was a transaction between the Crown through its creatures, the British Phosphate Commissioners, with its beneficiaries, the Banabans, and that the Crown had failed to comply with the requirements of the fair-dealing rule. This failure fell under two heads. First, there was a failure to disclose two matters, namely, the amount of the payments being made to the colony, and the fact that the price of Ocean Island phosphate was being fixed by the British Phosphate Commissioners so as to confer substantial benefits on the farmers of Australia and New Zealand. Second, there was a failure to see that the Banabans had proper advice on the transaction so that they would get a proper price.

There are many questions here. Perhaps the most fundamental is whether the fair-dealing rule applies to cases in which the transaction with the beneficiary is effected not by the trustee but by some person or body with which the trustee is connected. If T holds property in trust for B, and B sells his beneficial interest to X, does the fair-dealing rule apply if T and X are connected in some material way? If it does apply, how does it operate? If X is merely T's alter ego, one would expect the

rule to apply without any great difficulty. On the other hand, if X and T are distinct, but T has some financial interest in X, is the transaction between B and X to be set aside unless T has made full disclosure and ensured that B has proper advice, and so on? How far is T under an obligation to intervene in a transaction to which he is not a party? What if T knew nothing of the transaction before it was completed? Fortunately this last point cannot arise in the present case, where all concerned had full knowledge of the proposed transaction. Furthermore, there can be no question here of setting any transaction aside; the only question is one of compensation in lieu of setting-aside.

There is no claim in this case against the British Phosphate Commissioners. The plaintiffs are not seeking to claim compensation from the persons who have had the alleged advantage from the 1947 transaction. The contention is that the Crown has been guilty of a breach of fiduciary duty and must pay compensation in respect of what the British Phosphate Commissioners have had. Counsel for the plaintiffs relied in the main on *Randall v Errington*[1], though he also cited *Imperial Mercantile Credit Association (Liquidators) v Coleman*[2] and *Massey v Davies*[3]. In one of the transactions in *Randall v Errington*[3], counsel for the plaintiffs said that a trustee was held accountable for the profit made on the resale of property which in effect he had bought from a beneficiary through a nominee. He then said that it could make no difference that in that case the trustee got the benefit, whereas in the present case the nominee got it: for the Crown was accountable for what its nominee had. (The transaction in *Randall v Errington*[1] was in form a sale by the trustee to his nominee, but as the beneficiary joined in it, it was, said counsel for the plaintiffs, in substance a sale by the beneficiary.)

I can see much force in this contention. Equity must continue to be astute to see that trustees in no way obtain any improper advantage from their positions. But I cannot see how the 1947 transaction can be brought within the doctrine for which counsel for the plaintiffs contends. The main difficulty, which I find insuperable, is that of the property in question. The 1947 transaction consisted of the disposition to the British Phosphate Commissioners by the Banaban landowners of the land that they owned in the areas in question. Immediately before the transaction there was nothing that amounted to any trust or fiduciary obligation of the Crown in relation to that land. A fiduciary obligation towards the Banaban community generally is one thing; the existence of a trust or fiduciary obligation in respect of specific land another. How, then, can it be said that there was any dealing with beneficial interests under a trust or fiduciary obligation made by the British Phosphate Commissioners with the beneficiaries owning those beneficial interests? Each Banaban landowner was disposing not of a beneficial interest under a trust but of what he held free from any trust; and for that reason alone the fair-dealing rule cannot apply. I also feel some hesitation in saying that the peculiar relationship between the British Phosphate Commissioners and the Crown, having regard to the government of the colony and the government of the United Kingdom, was such as to bring the case within the rule.

I accept, of course, that trustees, and doubtless other persons in a fiduciary position, are under a duty to answer inquiries by the beneficiaries about the trust property: see, for example, *Low v Bouverie*[4]. But that is a far remove from saying that trustees have a duty to proffer information and advice to their beneficiaries; and I think the courts should be very slow to advance along the road of imposing such a duty. I say nothing about what may be kindly or helpful; I deal only with a duty for the breach of which the trustees may be held liable in equity. Short of the alter ego type of case, I do not think that trustees can be said to be under any duty to proffer information to their beneficiary, or to see that he has proper advice, merely because they are

1 (1805) 10 Ves 423
2 (1873) LR 6 HL 189
3 (1794) 2 Ves 317
4 [1891] 3 Ch 82, [1891-4] All ER Rep 348

trustees for him and know that he is entering into a transaction with his beneficial interest with some person or body connected in some way with the trustees, such as a company in which the trustees own some shares beneficially.

I have already mentioned the contentions that counsel for the plaintiffs advanced on the footing that the fair-dealing rule applied, and in view of what I have said I propose only to make brief mention of certain further contentions. One head of complaint is the Crown's failure to disclose how much the colony was getting from the phosphates. I find it difficult to see how there could be a duty to disclose what payments were being made in lieu of taxation under Ordinances of the colony: I have already discussed these Ordinances in relation to the claim for Crown royalties. I do not see how this can be affected by the fact that what Mr Rotan wrote on the blackboard at the meeting on 21st September 1948 indicated that over a year after the 1947 agreement had been made the Banabans still did not know of the increased payments being made to the colony government.

Another head of complaint is that there was a failure to disclose that the phosphate was being sold by the British Phosphate Commissioners at prices fixed so as to confer substantial benefits on the farmers of Australia and New Zealand. Mr Grimble recorded that on the 10th August 1927 he had explained to a delegation of Banabans that the British Phosphate Commissioners were a non-profit-making concern. In evidence, Mr Rotan said that although he had learned when at school the difference between a profit-making company and a non-profit-making company, in 1927 it was not clear to him which type of concern the British Phosphate Commissioners were. As the evidence stands, I do not think that it can be said to have been established that before entering into the 1947 transaction, the Banabans already knew that the British Phosphate Commissioners were a non-profit-making concern, or that the Australian and New Zealand farmers were reaping the benefit of this, or what that benefit was. Plainly the Banabans did not know how far the price at which the British Phosphate Commissioners sold the phosphate was below the market price of the phosphate; and of course knowledge of this would have been valuable to the Banabans in their negotiations. Counsel for the Attorney-General stressed that the Crown lacked some of this information, and in particular information as to the British Phosphate Commissioners' costs. Nevertheless, if the Crown had been under a duty of disclosure, it would have been no answer to say that the Crown's information was incomplete: there should have been disclosure of what was known, even though it was imperfect.

As for advice, it is common ground that the Banabans had no advice at all. Indeed, it will be remembered that on 7th March 1947 the High Commissioner had instructed Major Holland to take no part in the negotiations between the British Phosphate Commissioners and the Banabans, and to make it clear to the Banabans, if necessary, that the negotiations were to be wholly between them and the British Phosphate Commissioners. These instructions were put to Mr P D MacDonald when he was giving evidence. He had had a long and distinguished career in the colonial civil service, mainly in the Western Pacific, with four spells of duty on Ocean Island lasting about three and a half years in all; and it will be remembered that he played a substantial part in the Statement of Intentions of May 1947. His evidence was that he would have read those instructions as being instructions not merely to take no part in the negotiations but also to cease forthwith to give any advice to the Banabans in the matter. In other words, there was not merely a simple omission to see that the Banabans had proper advice but a positive prohibition against the giving of any advice to them by their primary and most obvious source of advice.

One can readily see the wisdom of avoiding any government officer being placed in what might be regarded as a dual position, not least when 1931 is remembered; and a prohibition against negotiating, but permission to advise behind the scenes while the negotiations progressed, would not have been realistic. But I think that counsel for the Attorney-General was driven to recognise that at least it would have been better if the Banabans had been advised that they ought to get proper assistance;

and they were in Fiji, so that professional skills were not very far away. On any footing I think that such advice could and should have been given; but it was not. If the fair-dealing rule applied, its requirements were not met.

1st December. **MEGARRY V-C** continued reading his judgment.

4. Limitation

I turn now to limitation. In its amended form the defence contains a plea in the alternative that the Limitation Act 1939 applies either directly or by analogy: there is no plea of laches or acquiescence. The plaintiffs' reply relies on s 19 of the Act, which excludes any period of limitation under the Act for actions against a trustee to recover trust property or its proceeds which are in the possession of the trustee or have previously been received by the trustee and converted to his use. The reply also relies on s 26(*b*) of the Act, relating to concealment of the right of action by fraud, a word which in this context has a far wider meaning than fraud at common law. These points were extensively argued, and I do not think it right to say nothing about them in reliance on what I have already decided. I think that they fall within the category that I have mentioned, namely, of points that I ought to consider, though with relative brevity, in the hope that this may provide some assistance to the parties and to any appellate court. 'Relative brevity', unhappily, is a phrase that has to be construed in the context of the case.

(1) *Fraudulent concealment*

I can take fraudulent concealment most briefly of all. The term 'concealed fraud' is still often used to describe this head. This is misleading, in that it suggests that this head applies only when it is fraud that is concealed, and that any process of concealment suffices, whereas in fact the head applies whatever the right of action, though not unless the process of concealing the right of action is shown to be fraudulent. 'Fraudulent concealment' thus seems to me to be the preferable term. For most purposes it is a sufficiently accurate description of the words in s 26(*b*) of the Limitation Act 1939: 'the right of action is concealed by the fraud' of the persons in question, namely, 'of the defendant or his agent or of any person through whom he claims or his agent': see s 26(*a*).

As I have indicated, the word 'fraud' is here used in a sense which embraces conduct or inactivity which falls far short of fraud at common law: see, e g, *Kitchen v Royal Air Forces Association*[1], *King v Victor Parsons & Co*[2]. Indeed, as the authorities stand, it can be said that in the ordinary use of language not only does 'fraud' not mean 'fraud' but also 'concealed' does not mean 'concealed', since any unconscionable failure to reveal is enough. Counsel for the plaintiffs contended that for this purpose it suffices if there is conduct or inactivity which would make it against conscience for the trustee to avail himself of the elapse of time. The main heads on which he relied (there were others) was that there had been a concealment from the Banabans of the benefits that the Australian and New Zealand farmers were obtaining by reason of low prices for the phosphates, and also a concealment of the gradual increase in the amount of royalty payable to the Gilbert and Ellice Islands Colony government by way of (or in lieu of) taxation, over the initial 6d Crown royalty. However, counsel said that fraudulent concealment really arose only in relation to his claim to the Crown royalties, and only if there was no trust, though he wished to keep it open for all the claims.

I propose only to say that I am not satisfied, on the civil standard of proof, that the plaintiffs have made out a case of fraudulent concealment. I was troubled by the

1 [1958] 2 All ER 241, [1958] 1 WLR 563
2 [1973] 1 All ER 206, [1973] 1 WLR 29

failure of anybody to correct Mr Rotan's unwitting mistake when he performed the blackboard exercise on 21st September 1948 and displayed his belief that the government royalty had remained at an unchanged 6d. But this was nearly 18 months after the 1947 agreement had been made. Under the Limitation Act 1939, s 26, the effect of fraudulent concealment is that 'the period of limitation shall not begin to run until the plaintiff has discovered the fraud ... or could with reasonable diligence have discovered it'. If time has already begun to run, I do not think that a supervening fraudulent concealment will start time running again. Counsel for the plaintiffs contended that *Kitchen v Royal Air Forces Association*[1] was an authority to the contrary, though he had to accept that the point did not seem to have been argued there, and that at best the case was an authority sub silentio. It is plain, of course, that under ss 23 to 25 of the 1939 Act a written acknowledgement or payment will start time running afresh. But the words of s 23(1) that produce this result are that in such cases 'the right shall be deemed to have accrued on and not before the date of the acknowledgement or payment'; and this language is very different from the 'shall not begin to run' of s 26.

Counsel for the plaintiffs then contended that s 1 showed that s 26, like s 23, was intended to start time running afresh, in that both sections were in Part II of the Act, and s 1 made the time limits of Part I have effect—

> 'subject to the provisions of Part II of this Act which provide for the extension of the periods of limitation in the case of disability, acknowledgement, part payment, fraud and mistake.'

However, a provision which postpones the commencement of the running of time seems to me to be one way of providing for the extension of the periods of limitation, just as to start time running afresh is another way of doing it; and I do not see why the fact that both are provisions for the extension of the periods of limitation should make one operate in the same way as the other, when the language of each differs so markedly from the other.

I also have in mind one of the general principles of the legislation on limitation, discernible as early as *Prideaux v Webber*[2]. This is that once time begins to run, it runs continuously, and that this principle can be ousted only by a statutory provision. Where the construction of a statutory provision is doubtful, I think the tendency should be towards construing it as conforming with the principle rather than as providing an exception from it. Accordingly I would hold that once time has begun to run, a subsequent fraudulent concealment will not start it running afresh. Even if the 'blackboard exercise' amounted to fraudulent concealment, it could have no effect on the time then running, quite apart from the fact that it took place on Rabi, outside the Gilbert and Ellice Islands Colony, and that no officer of the Gilbert and Ellice Islands Colony was present. Furthermore, I think that it would require altogether exceptional circumstances to establish a case of fraudulent concealment in relation to a transaction in the public domain such as provision for taxation contained in statutes; and I do not think that there are any such circumstances in this case.

(2) *'Trust'*

I can now return to the main question of limitation, namely, whether the Limitation Act 1939 applies at all, whether directly or by analogy; and this primarily depends on the terms of s 19. This provides as follows:

> '(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—(*a*) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or (*b*) to recover from the trustee trust property or the proceeds thereof in the possession

1 [1958] 2 All ER 241, [1958] 1 WLR 563
2 (1661) 1 Lev 31

of the trustee, or previously received by the trustee and converted to his use. (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued . . .'

There is then a proviso relating to future interests which I need not read; nor need I read sub-s (3).

Subsections (1) and (2) are plainly confined to actions 'by a beneficiary under a trust'; and of course it is only if I am wrong in holding that there is no true trust that the question of limitation can arise. Given a beneficiary under a trust, and the existence of no other period of limitation under the Act, sub-s (2) operates so as to bar any action by him after the expiration of six years after the accrual of the right of action in two cases. These are where the action is 'to recover trust property', and where the action is 'in respect of any breach of trust'. That, of course, is subject to the exclusion of any period of limitation under the Act in cases within sub-s (1).

One of the more unexpected curiosities of this case is that it became common ground between counsel that the term 'breach of trust' had not been defined in any case or textbook known to them. The question arose particularly in relation to a purchase by a trustee of the beneficial interest owned by one of his beneficiaries, made without a proper disclosure by the trustee or proper steps to see that the beneficiary was properly advised. In many cases, no doubt, s 19(1) would prevent s 19(2) from applying: but where it did not, could s 19(2) apply? The first limb of s 19(2), relating to an action 'to recover trust property', is open to the difficulty that an action to recover a beneficial interest in trust property cannot readily be described as an action to recover 'trust property': what a man owns beneficially is essentially different from what a man holds not beneficially but in trust. The second limb, an action 'in respect of' a 'breach of trust', raises the fundamental question of what is meant by a 'breach of trust'; and one aspect of this question is the distinction that I have just mentioned between dealing with a beneficial interest in the trust property and dealing with the trust property itself.

Counsel for the Attorney-General contended that any breach of a duty owed by a trustee as such to his beneficiary was a breach of trust. Alternatively, if this was too wide, and in s 19(2) 'breach of trust' was confined to dealing with the trust property, then he said that s 19(2) would apply by analogy to cases where a trustee dealt not with the trust property but with a beneficial interest. Applying the statute by analogy avoided the anomaly, he said, of an improper purchase of the trust property by a trustee having a six-years period of limitation and an improper purchase by him of a beneficial interest in the trust property having no statutory period of limitation.

This, and much else besides, was very properly debated at length. At the heart of the discussion, of course, was the meaning of 'breach of trust'. There seems to be a substantial body of American authority on this, and as this was not discussed in argument I must consider it with the reservations appropriate to anything which lacks the illumination that argument brings. Two definitions, or descriptions, seem to be current in the USA. The first is that 'every omission or violation by a trustee of a duty which equity lays on him . . . is a breach of trust'. This formulation seems to have been derived from Pomeroy's Equity Jurisprudence[1], and it is adopted by Corpus Juris Secundum[2]. (In the latter book, I may say, the term 'self-dealing' is used in the sense in which I have been using it[3].) The second formulation is that 'a trustee commits a breach of trust if he violates any duty which he owes as trustee to the beneficiaries'. This is the form adopted in Scott on Trusts[4] and also in substance by the Restatement

1 3rd Edn (1905), vol 3, p 2086, para 1079
2 (1955) vol 90, pp 225, 228, para 247
3 See vol 90, p 254, para 248
4 3rd Edn (1967), vol 3, p 1605, para 201

of the Law, Second, in the Trusts volumes[1]. Professor Scott, the distinguished author of Scott on Trusts, was, I may say, the reporter for these volumes of the Restatement. From Words and Phrases[2] it appears that some courts have adopted one version and other courts the other.

The second version seems to be in substance close to the formulation by counsel for the Attorney-General. I have not found any discussion which compares the two versions. The first seems the wider, for unless some expression such as the phrase 'as trustee' which appears in the second version is implied into the first version, it seems that a breach by a trustee of some duty which equity imposes on him otherwise than under the law of trusts would be a breach of trust. However, for reasons that will appear I shall not pursue the point. Nor, I may say, shall I attempt any comprehensive definition of a breach of trust myself, for I do not think it necessary to undertake this perilous task. I am concerned with the submission by counsel for the Attorney-General, and the assistance which the American books appear to provide for him; and with that I must deal.

For my part, I doubt whether defining a breach of trust in terms of a breach of duty, however widely cast or narrowly confined, carries the matter much further; for at once the further question arises of what is meant by a breach of duty by a trustee as such. In this case, the question becomes one of whether a trustee as such can properly be said to be under a 'duty' not to purchase the trust property, and under a 'duty' not to purchase a beneficiary's interest in the trust property without making proper disclosure, and so on. If the answer is Yes, then of course there is much logical force in the contention that a breach of these duties is a breach of trust within the Limitation Act 1939, s 19(2), and so is subject to the six-years period of limitation. The problem is essentially one of classification.

Now it is true that some textbooks set out the rules about self-dealing and fair-dealing as part of the duties and discretions of trustees. Snell's Equity[3] does this, and there are others. Some books avoid any problems of classification by setting out the rules in a separate self-contained chapter: see leading counsel for the plaintiffs learned edition of Lewin on Trusts[4]. But Halsbury's Laws of England[5] includes both the self-dealing rule and the fair-dealing rule under the head of 'Disabilities of Trustees' and not 'Duties of Trustees'; and it is this that appears to me to be the true view. Snell[6], I think, is wrong. In my judgment, what equity does is to subject trustees to particular disabilities in cases falling within the self-dealing and fair-dealing rules. I may add that Pomeroy's Equity Jurisprudence[7] discusses self-dealing under Constructive Fraud, and fair dealing under Constructive Trusts, with no more than a cross reference to these passages under Duties of Express Trustees[8].

This way of regarding the matter is reinforced by considering those who fall within the scope of the fair-dealing rule. This applies, of course, not only to trustees, but also to many others, such as agents, solicitors and company directors. If a breach of the fair-dealing rule by a trustee were to be treated as a breach of trust to which the six-years period under the Limitation Act 1939 would apply, while a breach of the rule by one of the others were to be free from the six-years period, the result would indeed be anomalous. A possible line of escape from the anomaly would be to treat agents, solicitors and the rest as constructive trustees for this purpose, so that all would be subject to the six-years period; but I should be reluctant to resort to such an artificiality unless driven to it.

1 (1959) vol 1, p 442, para 201
2 (1967) vol 5A, pp 309-312
3 27th Edn (1973), pp 240-243
4 16th Edn (1964), pp 693-706
5 38 Halsbury's Laws (3rd Edn), pp 961-966
6 Equity (27th Edn, 1973)
7 3rd Edn (1905)
8 See vol 2, p 1752, vol 3, pp 2020, 2085

Another aspect of the matter, producing the same result, is that the fair-dealing rule is essentially a rule of equity that certain persons (including trustees) are subject to certain consequences if they carry through certain transactions without, where appropriate, complying with certain requirements. The rule seems to me to be a general rule of equity and not a specific part of the law of trusts which lays down the duties of a trustee. Trusteeship is merely one of the categories of relationship which brings a person within the rule. There are many things that a trustee may do or omit to do which will have consequences for him as a trustee without the act or omission amounting to a breach of trust. I do not think that it could be said that a trustee is under a duty as trustee not to become bankrupt, so that his bankruptcy will constitute a breach of trust; yet his bankruptcy may be a ground for removing him from his trusteeship.

Yet a further consideration is the way in which the English textbooks on limitation have dealt with the subject. The predecessor of the Limitation Act 1939, s 19(1) and (2), was the Trustee Act 1888, s 8; and although the language of the two sets of provisions is very different, the broad general effect is the same. Nevertheless, English textbook writers of repute have continued to treat actions by a beneficiary to set aside purchases by trustees, whether of the trust property or of a beneficiary's interest, as being governed not by any statutory period of limitation but by the equitable doctrine of laches: see, e g, Lightwood, Time Limit on Actions[1]; Brunyate, Limitation of Actions in Equity[2]; Preston and Newsom, Limitation of Actions[3]; Halsbury's Laws of England[4]; and Lewin on Trusts[5].

My conclusion, therefore, is that notwithstanding the American support that there is for the contentions of counsel for the Attorney-General, a true analysis of the self-dealing and fair-dealing rules shows that the breaches of those rules are not subject to the six-years period laid down by the Limitation Act 1939, s 19(2). I bear in mind, of course, that it is common ground that in the case before me there is no question of setting aside any transaction. It is also common ground that *Nocton v Lord Ashburton*[6], a case as between solicitor and client, shows that in a proper case a claim for compensation in equity (as distinct from damages at common law) lies in lieu of setting a transaction aside; and the claim before me is essentially a claim for compensation in equity. It seems to me that such a claim ought to be in the same position as regards limitation as a claim to set aside the transaction; if it were not, there might be some very odd results.

In my judgment, therefore, s 19(2) of the Limitation Act 1939 does not apply directly to the plaintiffs' claims. I can see even less reason for it to apply by analogy, on the footing that the claim is not for breach of trust but is for breach of fiduciary duty. In each case I consider the matter to be one that falls within the equitable doctrine of laches, by which I mean pure laches and not any branch of laches which consists of applying a statute by analogy. That, however, does not conclude the question of limitation, for I have to consider the plaintiffs' claim for an account.

(3) *Account*

The law of limitation in relation to actions for an account seems to be in a curious state. An action for an account lay at common law, and the Limitation Act 1623, s 3, laid down a six-years' period of limitation for 'actions of account'. However, the procedure in Chancery, and in particular the machinery for taking accounts, was so superior that by the 18th century the common law action for an account had come

1 (1909) pp 263-266
2 (1932) p 243
3 3rd Edn (1953), p 263
4 38 Halsbury's Laws (3rd Edn), pp 963, 965
5 16th Edn (1964), pp 704, 705
6 [1914] AC 932, [1914-15] All ER Rep 45

to be superseded by equitable proceedings for an account. Bills in Chancery for an account did not directly fall within the term 'actions of account' in s 3 of the 1623 Act, and so any application of the six-years' period to them had to be by way of analogy.

In that state of affairs the Limitation Act 1939 came into force. Section 2(2) provided that 'an action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action'. If that had stood alone, the matter would have been simple. There would have been nothing to prevent the six-years period from applying both to an equitable action for an account (for by s 31(1) 'action' has a very wide meaning) and also, if anyone sought to revive it, to a common law claim. However, there is also s 2(7) of the Act:

> 'This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner as the corresponding enactment repealed by this Act has heretofore been applied.'

If the effect of s 2(7) is that an equitable claim for an account, being a 'claim . . . for other equitable relief', is excluded from s 2(2), the result is that s 2(2) is left to apply the six-years period only to the obsolete common law claim for an account. However, it may then be said that the second limb of sub-s (7) allows the six-years period of sub-s (2) to be applied by analogy to equitable claims for an account; for prior to the Limitation Act 1939 this is what equity did: see, e g, *Knox v Gye*[1], per Lord Westbury. On that footing, Parliament's scheme for dealing with equitable claims for an account seems to be, first, to appear by sub-s (2) to subject them to the express six-years period; then to appear to exclude them from that period by the first limb of sub-s (7); and finally, by the second limb of sub-s (7), to subject them to a six-years period by analogy, despite their exclusion from the express six-years period.

This tortuous scheme of indirection is one that I should be reluctant to attribute to Parliament. After all, s 2(2) is a subsection which deals solely and expressly with actions for an account. If the intention was to make it apply to both legal and equitable actions for an account, it would have been simple enough to say so, with perhaps the addition of a few words to sub-s (7) to make the word 'equitable' in sub-s (2) prevail over it.

My reluctance to attribute to Parliament an intention to legislate expressly for the obsolete and only circuitously for the effective is increased by the way in which the court dealt with sub-s (7) in *Moody v Poole Corpn*[2]. There, in relation to a power of sale, the subsection was treated by the Court of Appeal solely as a provision which excluded the operation of s 2 in claims for equitable relief, without any mention of the possibility of it applying the section by analogy. The omission is pointed: indeed, the quotation of sub-s (7) that is set out in a footnote[3] gives only the first half of the subsection and omits altogether the second half, which deals with application by analogy. This is done despite the mention in argument[4] of equitable applications of the statute by analogy in the same breath as a reference to sub-s (7). I may add that I do not see any grounds for excape by saying that 'other equitable relief' does not include an equitable action for an account.

I find this matter indeed puzzling. My difficulty is increased by the consideration that if, as I have held, no six-years period applies to the claim for equitable compensation, and there is no plea of laches which bars the claim, there may be items of claim beyond the six years which are not barred but to which the six-years period for an account would apply. However, I think the answer may be along the following lines. Insofar as the claim to an account is ancillary to the claim for equitable compensation, the application of the Act and the doctrine of laches to the ancillary claim

1 (1872) LR 5 HL 656 at 674
2 [1945] 1 All ER 536, [1945] KB 350
3 [1945] KB 350 at 351
4 [1945] KB 350 at 353

ought to be the same as its application to the substantive claim. Thus it seems clear that where a claim against a person in a fiduciary position is not barred by lapse of time, he must account without limit of time: see Halsbury's Laws of England[1]. If, contrary to what I have held, there is a time limit in the present case, I would hold that neither directly nor by analogy does the Limitation Act 1939, s 2, impose any time limit on the claim to an account that is not imposed on the substantive claim for equitable compensation.

The upshot is that if the plaintiffs' claim were otherwise valid, I would hold that it is not barred by any statutory period of limitation, either directly or by analogy. Though subject to the equitable doctrine of laches, it is not barred by laches either, since laches has not been pleaded.

I should add that this discussion of the subject has been of regrettable length; I can only say that it became longer in the execution than I foresaw when I first embarked on it. I do not think that I need deal with the further pleas by the plaintiffs that if any period of limitation would otherwise apply, s 19(1)(*b*) of the Limitation Act 1939 would exclude it on the footing of trust property or its proceeds being still in possession of the trustee or converted to the use of the trustee. Nor do I propose to discuss a point that was taken on the Limitation Act 1939, s 21, a section which related to actions against public authorities, and was repealed by the Law Reform (Limitation of Actions &c) Act 1954.

5. Jurisdiction against the Crown

I must now turn to a group of arguments concerned with whether the court has jurisdiction to make the orders claimed against the Crown. These arose in the course of the main argument, and not under any preliminary objection. Counsel for the plaintiffs framed his contentions that jurisdiction existed under three main heads. First, he said that all his claims fell within the old Exchequer equity jurisdiction to entertain direct claims against the Crown, a jurisdiction now vested in the Supreme Court. Second, he advanced the alternative contention that his claims could formerly have been brought by petition of right, and could now be brought by writ under the Crown Proceedings Act 1947. Third, he contended as a further alternative that his claims could all be framed as declarations, and so be brought within the wide jurisdiction to make declarations against the Crown. These contentions were buttressed by an argument that at all material times the government of the United Kingdom was the only government of the Gilbert and Ellice Islands Colony.

I do not intend to examine these contentions at any great length; for there are deep waters here, and on the basis of what I have already said the point does not need to be decided. But again I consider that I ought to attempt to provide some assistance by giving an indication of my views. The most convenient course, I think, is to begin with the Crown Proceedings Act 1947.

(1) *Crown Proceedings Act 1947*

The Crown Proceedings Act 1947 abolished petitions of right (see s 13 and Sch 1), and instead provided for ordinary actions to be brought against the Crown. Section 1 is as follows:

> 'Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty's fiat, by petition of right, or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act.'

1 24 Halsbury's Laws (3rd Edn), p 282

Pausing there, it will be seen that the right to sue the Crown is in this way defined by relation to claims which could have been enforced by a petition of right. Further, s 1 takes effect 'subject to the provisions of this Act', and s 40 contains important provisions which affect s 1. Section 40(2)(*b*), relating to proceedings against the Crown, is most directly in point, but I must also read s 40(2)(*c*), relating to proceedings by the Crown, because some argument was directed to the differences in the wording. The relevant parts of s 40(2) are thus as follows:

> '(2) Except as therein otherwise expressly provided, nothing in this Act shall:— ... (*b*) authorise proceedings to be taken against the Crown under or in accordance with this Act in respect of any alleged liability of the Crown arising otherwise than in respect of His Majesty's Government in the United Kingdom, or affect proceedings against the Crown in respect of any such alleged liability as aforesaid; or (*c*) affect any proceedings by the Crown otherwise than in right of His Majesty's Government in the United Kingdom; ... and, without prejudice to the general effect of the foregoing provisions, Part III of this Act shall not apply to the Crown except in right of His Majesty's Government in the United Kingdom.'

I should also read s 25(3). Section 25 appears in Part III of the Act, and is concerned with the satisfaction of orders against the Crown. By sub-s (3):

> 'If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government department shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon ...'

There is then a proviso that I need not read.

It was common ground that a petition of right claiming money could be brought in the English courts only if the money was properly payable out of the United Kingdom Treasury: see Robertson, Civil Proceedings by and against the Crown[1], which uses the phrase 'chargeable on the Imperial revenues'; and consider the Petition of Right Act 1860, ss 13 and 14. Consequently it was debated whether the right to sue under the 1947 Act was subject to two tests or one. For under s 1 the right to bring an action was dependent on the claim being formerly enforceable by petition of right, and so the case must be one in which the money was properly payable out of the United Kingdom Treasury. Second, there is s 40(2)(*b*), which I have just read, preventing the Act from authorising any right to sue 'in respect of any alleged liability of the Crown arising otherwise than in respect of His Majesty's Government in the United Kingdom'. In most cases the two tests would doubtless produce the same result, but in some they might differ.

I agree with the submission by counsel for the plaintiffs that there is only one test, namely, that provided by s 40(2)(*b*). The 1947 Act made great changes in the law, and in s 40(2)(*b*) it expressly dealt with the limits of the new law in days when large parts of the British Commonwealth had become self-governing. It would be wrong to construe the Act so that the overt test laid down by s 40(2)(*b*) were to have superimposed on it a covert test by means of s 1 and the old law, particularly when s 1 is expressed to be 'subject to the provisions of this Act', and these include both s 40(2)(*b*) and s 25(3). In short, I think that the express supersedes the implied.

The question, then, is whether the 1931 and 1947 claims are claims which arise 'in respect of His Majesty's Government in the United Kingdom'. If, as counsel for the plaintiffs contends, at all material times the government of the United Kingdom was the only government of the Gilbert and Ellice Islands Colony, then plainly s 40(2)(*b*) provides no obstacle to the plaintiffs. Nor do I think that there is any difficulty about

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1 (1908) p 340

the claims being claims not at law but in equity, for breach of fiduciary duty. There is a curious lack of direct authority on the point (see the discussion in Clode's Petition of Right[1]), but a good deal of general authority that is inferential or sub silentio. I do not think that I need discuss this, especially as counsel for the Attorney-General accepted that in principle such claims could be made by petition of right and so can now be made under the 1947 Act.

First, there is the 1931 claim. Counsel for the plaintiffs naturally emphasised the 42 per cent interest of the Crown in right of the United Kingdom in the British Phosphate Commissioners; and if this were all that had to be considered it would satisfy s 40(2)(*b*) as being an alleged liability not arising otherwise than 'in respect of His Majesty's Government in the United Kingdom'. However, in considering a conflict of interest and duty, one must, as I have already pointed out, look not only at the interest but also at the duty. This, I think, must plainly apply when considering the application of s 40(2)(*b*). Now the duty in fixing the royalty was the duty of the resident commissioner. He was an officer of the Gilbert and Ellice Islands Colony, performing a statutory duty under an Ordinance of the colony. It seems to me that the colony had a government of its own both then and at all material times thereafter. That government had, it is true, a somewhat unusual framework in that instead of there being simply a Governor and various subordinate officers there was a High Commissioner and a resident commissioner, with the High Commissioner having authority in more colonies than one. Nevertheless, under the Pacific Order in Council 1893 all essential legislative, executive and judicial functions within the colony could be performed in the Pacific; and the colony had its own financial system.

Counsel for the plaintiffs understandably contended that all important decisions were referred to the Colonial Office in London; and of course the Crown, on the advice of the United Kingdom government, had important powers that could be used to override acts of the colonial government, or impose direct rule, in which case the United Kingdom government would become the government. Plainly the colonial government was a subordinate government, as counsel for the Attorney-General accepted and asserted. But a government does not cease to be a government merely because it is subordinate, unless, indeed, the degree of subordination is so great that it really ceases to govern, and becomes merely the servant or agent of the paramount government; and there is no question of that in this case. Though the facts were very different, I think the passport case, *R v Secretary of State for Home Department, ex parte Bhurosah*[2] provides some support for this view, and at least is not inconsistent with it. Furthermore, an examination of the manifold communications between the Colonial Office and the High Commission frequently leaves it uncertain how far what the Colonial Office is saying is to be taken as an order or direction and how far it is advice which normally the High Commissioner will accept.

In my judgment the government of the United Kingdom was not the government of the Gilbert and Ellice Islands Colony at any material time. It had important advisory and supervisory functions, as well as paramount powers. It also contributed much to the governing of the colony in general and to the 1931 transaction in particular, e g, in settling the form of the 1931 lease; but it was not the government. I would therefore hold that s 40(2)(*b*) of the Crown Proceedings Act 1947 provides an additional bar to the success of the 1931 claim. Insofar as the claim is against the Crown in respect of its 42 per cent interest in the British Phosphate Commissioners, s 40(2)(*b*) is no bar; but that subsection is a bar insofar as the claim requires (as it does) the inclusion of the resident commissioner's activities in relation to the 1931 transaction. This applies, in my judgment, whether the 1931 claim is framed as a conflict of interest and duty, or whether it is based on a lease by a fiduciary to itself.

Next, there is the 1947 claim. Here, of course, the claim is based on the Crown's

1 (1887) pp 141-153
2 [1967] 3 All ER 831, [1968] 1 QB 266

alleged failure to comply with the fair-dealing rule. On any footing, 42 per cent of the interest in the British Phosphate Commissioners belongs to the Crown in right of the United Kingdom. I would therefore hold that the alleged liability of the Crown is one that to this extent arises in respect of Her Majesty's Government in the United Kingdom, and that if in other respects the claim could be sustained, s 40(2)(*b*) of the Crown Proceedings Act 1947 would provide no bar.

There are two minor points on s 40(2)(*b*) that I should mention. First, counsel for the plaintiffs emphasised that the phrase was His Majesty's Government 'in' the United Kingdom, and not 'of'; but I do not think that this has any great significance. Second, he also drew attention to the contrast between the phrase 'in respect of' His Majesty's Government in the United Kingdom in s 40(2)(*b*), and the phrase 'in right of' His Majesty's Government in the United Kingdom in s 40(2)(c). He emphasised that 'in respect of' was a very wide phrase which meant that any connection sufficed; and he cited *Paterson v Chadwick, Paterson v Northampton and District Hospital Management Committee*[1] in support of this contention. A view similar to that taken by Boreham J in that case had previously been taken in another case where the expression had been said to be 'a flexible phrase' which 'can be satisfied by any of a wide range of connections or relationships between the two matters in question': *No 20 Cannon Street Ltd v Singer and Friedlander Ltd*[2]. I do not read the words of Croom-Johnson J in *Ackbar v C F Green & Co Ltd*[3] as trenching on this.

Counsel for the Attorney-General sought to explain the contrast of language by saying that 'in right of' was appropriate to claims made by the Crown, and so was used in s 40(2)(*c*), and 'in respect of' was merely a corresponding expression that was more appropriate to claims made against the Crown, and so to s 40(2)(*b*); therefore, he said, the width of 'in respect of' was narrowed to being merely the counterpart of 'in right of'. I do not understand why the wider should be narrowed rather than the narrower widened; but in any case I doubt whether this submission can be right. The concluding words of s 40(2) provide that Part III of the Act is not to apply to the Crown 'except in right of His Majesty's Government in the United Kingdom'. Part III contains four sections, and two of these, ss 25 and 27, are concerned with the satisfaction of orders against the Crown and the attachment of moneys payable by the Crown. A draftsman who in the latter part of s 40(2) did not shrink from using the phrase 'in right of' in relation to claims against the Crown is hardly likely to have avoided the use of it in this sense in the earlier part of s 40(2). However, even if 'in respect of' has the wider sense for which counsel for the plaintiffs contends, as it probably has, it does not in my judgment suffice him, for the reasons that I have given.

I would only add one thing on this branch of the argument. I have already referred to the grants in aid which were made after the war and until 1955 by the United Kingdom government to the Gilbert and Ellice Islands Colony. I do not think that either the grants in fact made or the possibility of further grants being made or refused could very well confer jurisdiction where none would otherwise exist. A grant that is made ex gratia, and at most as a matter of moral obligation or governmental policy, cannot, in my view, be said to affect legal liability in this sort of case.

(2) Exchequer Equity jurisdiction

I turn from the Crown Proceedings Act 1947 to the old exchequer equity jurisdiction. I hope that counsel will not think me discourteous if I do not explore the substantial range of authorities and learned contentions that they deployed before me; for in the end a considerable measure of agreement emerged, and I think that I can deal with the point with a brevity that, once again, is relative.

1 [1974] 2 All ER 772 at 774, [1974] 1 WLR 890 at 893
2 [1974] 2 All ER 577 at 593, [1974] Ch 229 at 248
3 [1975] 2 All ER 65 at 67, [1975] QB 582 at 587

I can begin with *Dyson v Attorney-General (No 1)*[1]; *Dyson v Attorney-General (No 2)*[2] though not irrelevant, is of less importance for the present purpose. The cases, which were both decisions of the Court of Appeal, were concerned with the validity of certain notices issued by the Commissioners of Inland Revenue requiring a large number of landowners to deliver returns within 30 days under penalty for failure. In *Dyson v Attorney-General (No 1)*[1], it was held that a claim by a landowner against the Attorney-General for a declaration that he need not comply with the notice should not be struck out as disclosing no reasonable cause of action. In *Dyson v Attorney-General (No 2)*[2], a case that was heard immediately after *Burghes v Attorney-General*[3], which was on the same subject, it was held that a declaration that the notices were invalid and need not be complied with should be made.

A number of points derived from *Dyson v Attorney-General (No 1)*[1] were accepted by counsel for the Attorney General, and seem to me to be right. I should, however, add that counsel stated that some of these propositions, though logically faultless, were historically questionable. The points were as follows:

(1) The Court of Exchequer, in its equity jurisdiction, could grant declarations against the Crown in proceedings brought against the Attorney-General.

(2) When the Exchequer equity jurisdiction was transferred to the Court of Chancery under the Court of Chancery Act 1841, this power to make declarations against the Crown passed with it; and when under the Judicature Act 1873 the jurisdiction of the Court of Chancery was transferred to the Supreme Court, the power was included in the transfer.

(3) This jurisdiction was quite independent of proceedings by petiton of right: see generally *Esquimalt and Nanaimo Railway Co v Wilson*[4].

(4) Any requirement that a claim for a declaration must be coupled with a claim for other relief disappeared when what used to be RSC Ord XXV, r 5, and is now RSC Ord 15, r 16, was made in 1883.

(5) The jurisdiction was not confined to declarations that some document or action was invalid, but extended to other cases, such as making declarations that property vested in the Crown was subject to some trust or mortgage in favour of the plaintiff. In *Hodge v Attorney-General*[5] it was declared that the plaintiffs, as equitable mortgagees, were entitled to retain possession of mortgaged property until the Crown, as owner of the equity of redemption, redeemed the mortgage.

At this point there was a divergence between counsel about what could be done in this jurisdiction by way of declaration. Counsel for the Attorney-General said that what is summarised in para (5) above represented the furthest extent to which the court would go. On the other hand, counsel for the plaintiffs said that the court had power by way of declaration to make coercive orders against the Crown, requiring the Crown to pay a sum of money, or at least declaring that the Crown ought to pay a sum of money.

Counsel for the Attorney-General said that in no case did the Court of Exchequer without the consent of the Crown make an order against the Crown for any money payment, or make any other coercive order against the Crown; and in *Dyson v Attorney-General (No 1)*[6] Cozens-Hardy MR pointed out that the plaintiff in that case did not seek to divest any property of the Crown or to enforce any pecuniary claim against the Crown. In *Hodge v Attorney-General*[7], Alderson B held that he had no jurisdiction to direct a sale of the legal estate that had become vested in the Crown on the conviction of the owner for felony, though the court could and did declare the

1 [1911] 1 KB 410
2 [1912] 1 Ch 158
3 [1912] 1 Ch 173
4 [1920] AC 358, [1918-19] All ER Rep 836
5 (1839) 3 Y & C Ex 342
6 [1911] 1 KB 410 at 414
7 3 Y & C Ex 342 at 346

plaintiffs to be equitable mortgagees, and direct the master to take an account of what was due to them. The tertium quid of making a declaration that the Crown ought to sell the property does not appear to have been considered.

One case that I must discuss is *Poole v Attorney-General*[1]. The report is very short, and I shall read it all.

> 'Poole devised his estate to A. paying 200l. a-piece to his grandchildren, and a power to enter for non-payment, and died. A. sold the estate to B. who had notice of the charge; B. being indebted to the Queen, the estate was seized and extended; and Poole's grandchildren brought a bill against the Attorney-General and B. to have the legacies, and charge the estate therewith. And decreed accordingly.'

The words 'to have the legacies' and 'decreed accordingly' plainly give some support to the contention that the court may make an order for payment against the Crown. The sidenote gives even more support to this view; it runs: 'The court will decree payment of legacies charged on land tho' extended into the Queen's hands.' However, it should be observed that this case appears, with a number of others, not in the main body of reports in the time of Parker CB, but in an appendix of cases from former reigns, which in his preface he says 'were carefully transcribed from authentic manuscripts'. He was about 13 years old when the case was decided, and it seems improbable that he had any further information about it than appears in the report. If the court did no more than charge the estate with the legacies, the decision is in line with the submissions by counsel for the Attorney-General. But if the court made an order against the Crown requiring the Crown to pay the legacies, then of course the decision assists counsel for the plaintiffs; and he, I may say, accepted that it was the only authority supporting an order for direct payment.

I find the case puzzling. The preface to the reports is dated 1st February 1776, some four years after Parker CB's retirement from the bench; but the title page gives the date of publication as 1791, some seven years after his death. The provenance of the sidenote I must therefore regard as being problematical. On any footing, the case seems to provide very slender support for the existence of any general jurisdiction to make orders for payment against the Crown without the Crown's consent; and apart from the brevity and obscurity of the report, the slenderness of the support is emphasised by the case having neither pride of ancestry nor visible posterity. If it really had been possible to make monetary claims against the Crown by using the Exchequer equity jurisdiction, and so avoid having to resort to petitons of right, one would have expected the procedure to have achieved a greater degree of popularity and renown than it appears to have done.

In this connection I may mention *Bombay and Persia Steam Navigation Co Ltd v MacLay*[2]. There, the plaintiffs sued the Shipping Controller for a declaration that they were entitled to compensation for loss and expenses incurred by them in complying with some lawful directions that he had given under the Defence of the Realm Regulations. The action failed, on the ground that the plaintiffs could not obtain a declaration of their rights against the Treasury by suing an individual. In the course of his judgment, Rowlatt J[3] said:

> 'The plaintiffs then say that this is a trifling matter which can be cured by adding the Attorney-General. I do not think the defect can be remedied in that way. The machinery of *Dyson* v. *Attorney-General*[4] cannot be used to prejudge the issue of what may have to be adjudicated upon in a petiton of right as to a money claim against the Treasury.'

1 (1708) Park 272
2 [1920] 2 KB 402
3 [1920] 3 KB 402 at 408
4 [1911] 1 KB 410; [1912] 1 Ch 158

This seems to me to be some indication that a declaration against the Attorney-General could not be sought as a means of establishing a money claim against the Crown.

I do not propose to pursue the point at any length. It seems plain that there is a real difference between a declaration of right, on the one hand, and an order to pay on the other; and a declaration of obligation (i e that the Crown ought to pay something) seems to me to be in essence an order to pay, put in a somewhat pallid, or perhaps I should say respectful, form. At the very least it is morally coercive in effect. It may be that some case will emerge in which it is proper to make such an order; but I do not think that this case is that case.

In particular, I have it in mind that in ordinary actions for a declaration, as distinct from the Exchequer equity jurisidiction against the Crown, it is well settled that it is discretionary whether or not to make a declaration. That is not because the remedy is an equitable remedy, for as the Court of Appeal made plain in *Chapman v Michaelson*[1] it is not; it is neither a legal nor an equitable remedy, but statutory. If one then turns to the Exchequer equity jurisdiction, it seems clear that a declaration under this jurisdiction must also be discretionary, not least because the jurisdiction is equitable, and normally equitable remedies are discretionary. That being so, the question is whether, on the assumption that I have jurisdiction to make a coercive order against the Crown, declaring that the Crown ought to pay (and this I doubt), I ought to make such an order in the proper exercise of a judicial discretion.

I think the answer is No. I should hesitate in any case to make a declaration of obligation when it is highly doubtful whether there is any power to make a direct order for payment; for if there is no power to order payment, a declaration of obligation seems to me an indirect means of achieving what cannot be done directly, without any sufficient justification for the indirection. Furthermore, the Crown Proceedings Act 1947 was plainly intended as a comprehensive measure which at least in its procedural provisions would regulate virtually all proceedings against the Crown, including actions against the Attorney-General for a declaration: see the definition of 'civil proceedings against the Crown' for the purposes of Part II of the Act. But primarily it seems to me that the Exchequer equity jurisdiction to make declarations in England ought not to be exercised unless the obligation is an obligation of the United Kingdom government and not of a colonial or other overseas government which could be sued in the overseas courts. If the case were one where justice would fail because for some reason it was impossible to proceed in the appropriate colonial courts, then it may be that proceedings could be brought here, in reliance on the United Kingdom government being able to exercise the paramount powers of the Crown in the colony and so secure compliance with the judgment. But no case for that has been established here, and I do no more than suggest the possibility.

These considerations all apply to the 1931 claim. The 1947 claim, on the other hand, is one which, if it could otherwise be sustained, would not be prevented by s 40(2)(*b*) of the Crown Proceedings Act 1947 from being brought under the Act, in that it arises in respect of Her Majesty's Government in the United Kingdom. For that reason the last of the considerations that I have mentioned, relating to proceeding instead in the colonial courts, might not apply. On the other hand, the very fact that an ordinary action could be brought as of right in England under the 1947 Act would be some reason for not invoking the discretionary remedy of a declaration to secure indirectly what could be obtained directly.

(3) *Declarations*

On the subject of the general jurisdiction to make declarations, I do not forget the importance of not whittling down the subject's right to come to the courts for a

1 [1909] 1 Ch 238

declaration: see *Pyx Granite Co Ltd v Ministry of Housing and Local Government*[1], per Viscount Simonds. Nor do I think that this is a case like *Barraclough v Brown*[2] in which the legislature has given an exclusive remedy that precludes the making of a declaration. Again, I do not overlook *Guaranty Trust Co of New York v Hannay & Co*[3], which shows that the court can make a declaration at the suit of a plaintiff who otherwise has no cause of action, provided he is seeking something which can fairly be called 'relief' (see *Thorne Rural District Council v Bunting*[4]), and provided also that the dispute is within the jurisdiction of the court in a territorial sense. I think that this second proviso is in substance sufficiently established, but in any event counsel for the plaintiffs helpfully stated that his contention on the *Guaranty* case[3] was merely that it showed that, given territorial jurisdiction, the plaintiff could get declaratory relief without establishing any cause of action. The case also seems to me to indicate that one ground on which the discretion to refuse to make a declaration may be exercised is that another and more suitable procedure is open to the plaintiffs, and that they should not be allowed to obtain indirectly by declaration what is open to them to obtain directly by other means: per Pickford LJ[5].

In the end, my conclusion in relation to the 1931 claim is that even if there is jurisdiction to make a declaration as sought by counsel for the plaintiffs (which I very much doubt), the court ought in its discretion to refuse to do so. My conclusion in relation to the 1947 claim is similar though more hesitant, by reason of the territorial difference; and I think that if I had to rule on that claim, I should ask for further argument before doing so.

6. Locus standi

I now turn to what has been called the locus standi point. The defendant contended that neither the Council of Leaders nor Mr Rotan is entitled to bring these proceedings. The grounds for these two contentions are quite different. I shall consider them in turn.

(1) The Council of Leaders

Put very shortly, counsel for the Attorney-General's point is this. He accepts that the Banaban Funds Ordinance 1948, enacted by the Fiji legislature, was valid and effective to establish the Banaban Funds Trust Board, the predecessor of the Council of Leaders, and to vest in it any funds which had already arrived or later arrived in Fiji. But he contends that the Ordinance, being an Ordinance of Fiji, could not vest in the board any right to recover money outside Fiji. This applied in particular to any right to claim sums which arose out of any breach of duty relating to the royalties arising from the phosphate in Ocean Island, which of course was part of the Gilbert and Ellice Islands Colony, and has never been part of Fiji. In other words, while s 9 of the Ordinance succeeded in vesting the funds in Fiji in the board, s 10 was ineffectual. Although it provided that 'all sums payable by way of royalties in respect of minerals mined by the Phosphate Company in Ocean Island shall be paid into and form part of the Trust Fund', it was powerless to give the board any right to claim sums which should have been paid as royalties for the Ocean Island phosphate but had not been paid, or any sum in lieu thereof.

The contention on the Banaban Settlement Ordinance 1970 is similar. By this Ordinance the Fiji legislature validly established the Council of Leaders as a body corporate and the Rabi Island Fund as the fund into which all moneys standing to the credit of the Banaban Trust Fund were to be paid: see ss 3, 6(1), 6(2)(e). But s 6(2)(f),

1 [1959] 3 All ER 1 at 6, [1960] AC 260 at 286
2 [1897] AC 615, [1895-9] All ER Rep 239
3 [1915] 2 KB 536, [1914-15] All ER Rep 24
4 [1972] 1 All ER 439 at 443, [1972] Ch 470 at 477
5 [1915] 2 KB 536 at 564, [1914-15] All ER Rep 24 at 36

requiring all 'royalties and other moneys accruing to the Banaban community in respect of minerals mined by the British Phosphate Commissioners on Ocean Island', could not enable the Council of Leaders to sue for the sums that I have mentioned.

There was substantial argument on this point, and this includes some discussion of two conflicting decisions on the extra-territorial effect of legislation purporting to transfer movables. These were the decisions by Atkinson J in *Lorentzen v Lydden & Co Ltd*[1] and by Devlin J in *Bank Voor Handel en Scheepvaart NV v Slatford*[2], a decision which on appeal[3] was reversed on a quite different point. Counsel for the plaintiffs, I may say, accepted the *Slatford* rule (which was against him) for the purposes of this case at first instance, reserving his rights on appeal. I should also say that counsel for the Attorney-General accepted the validity of the Fiji legislation within Fiji, but said that the question was quite distinct from whether that legislation had extra-territorial effect.

There is plainly considerable force in the contention by counsel for the Attorney-General. But it seems to me to be a technical argument without much merit in it. Of course, an argument does not fail merely because it is technical; if it is right and inescapable, it will prevail. But were it necessary for me to decide the point I should seek to produce a result more in accord with the realities and the merits. For long, all concerned in the Gilbert and Ellice Islands Colony, Fiji and the High Commission have been acting on the footing that the Banaban Funds Trust Board and later the Council of Leaders were the proper recipients of all royalties payable by the British Phosphate Commissioners for the benefit of the Banabans. If the plaintiffs are right in their claim, then less has been paid than ought to have been paid. If, for instance, the Council of Leaders claimed that as a matter of accountancy there had been an underpayment to them of the admitted royalties, then the argument by counsel for the Attorney-General would lead to the conclusion that the council would lack any title to recover the underpayment; and this is a conclusion which seems to me to be unjust. There has not been, and there could not very well be, any suggestion that any other person or body was entitled to what is claimed by the council in this case. Throughout, all concerned, not only in Fiji but also in the Gilbert and Ellice Islands Colony, have acted as if the Fiji Ordinances were valid and effective, not merely within Fiji but also as justifying the transmission of the Ocean Island royalties to the board and then the council.

Counsel for the plaintiffs advanced an argument based on estoppel, which in one sense was appropriate as meeting technicality with technicality; but I felt some difficulty in seeing how a case of estoppel could really be got on to its feet. My inclination is to look towards some simpler principle. It may be that some process of recognition rather than estoppel would provide a solution. Suppose a law enacted by country A has been acted on by all concerned in country B, and treated by them for a substantial period as being effective. In such a case it does not seem to me to be wrong for the court in country C, when it is contended that only the law of country B could achieve what the enactment in question has purported to do, to say that whatever might have been the position initially, the law enacted by country A has been treated as being effective in country B to such an extent that the courts of country C will apply it as if it were indeed the law of country B. The law of country B is (or at least includes) what is recognised by country B as being its law. However, I do not think that it would be right for me to decide anything on this point, as the argument was not directed to any such proposition; and although it may be a cousin of estoppel, the argument on estoppel does not suffice for the purpose. All I shall say is that I would not without further argument hold that the Council of Leaders lacks the necessary locus standi to make the claims in this case.

1 [1942] 2 KB 202

2 [1952] 1 All ER 314, [1953] 1 QB 248

3 [1952] 2 All ER 956, [1953] 1 QB 248; *revsd* sub nom *Bank Voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] 1 All ER 969, [1954] AC 584

(2) *Mr Rotan*

I turn to Mr Rotan. Counsel for the Attorney-General contended that Mr Rotan had no locus standi to bring these proceedings. By the statement of claim he claimed to sue as a landowner entitled under the alleged trusts of the royalties; but, said counsel, such a claim could not be valid. If (contrary to what I have held) there was a true trust, then it must either be a charitable trust or a private trust. If it was a charitable trust, then nobody had a beneficial interest under it which entitled him to sue to enforce the trust; that was a matter for the appropriate Attorney-General. If it was a private trust, then Mr Rotan's path to establishing himself as a beneficiary under that trust was by reason of his being a landowner on Ocean Island. In this way he would be seeking to enforce in the English courts rights relating to foreign land in such a way as to fall within the doctrine associated with *British South Africa Co v Companhia de Moçambique*[1], relating to jurisdiction over foreign land.

The *Mozambique*[1] case, as I shall Anglicise and abbreviate the title, was of course a case of trespass to foreign land; and that is not an issue in *Ocean Island No 2*. Much of the discussion before me was concerned with a passage in the speech of Lord Herschell LC and the subsequent discussion of the principle in *St Pierre v South American Stores (Gath and Chaves) Ltd*[2] and *United Africa Co Ltd v MV Tolten (owners), The Tolten*[3]. What Lord Herschell LC said in the *Mozambique* case[4] was:

> 'It is quite true that in the exercise of the undoubted jurisdiction of the Courts it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the Courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands.'

In the *St Pierre* case[5], Scott LJ, after quoting this passage, said:

> 'By these words I understand him to have meant that it is the action *founded on* a disputed claim of title to foreign lands over which an English Court has no jurisdiction, and that where no question of title arises, or only arises as a collateral incident of the trial of other issues, there is nothing to exclude the jurisdiction.'

In that case the Court of Appeal refused to stay as being vexatious or oppressive certain proceedings in England to recover from English companies rent due from them in respect of land in Chile, when proceedings in Chile were pending.

The real point at issue is one on which there appears to be no direct authority. Where there is an equity between the parties, jurisdiction is not excluded merely because the equity relates to foreign land; and a similar rule applies where there is a contract between the parties; see, e.g. Dicey's Conflict of Laws[6]. But what if the plaintiff's title to that equity can be established only by means of establishing his title to foreign land? Counsel for the Attorney-General initially contended that where the title to the foreign land was a necessary ingredient in establishing the plaintiff's right to sue, there was no jurisdiction. Subsequently he accepted that the 'necessary ingredient' test put matters too high, and he contended that proof that Mr Rotan owned relevant land formed the whole basis of his case, and that therefore the *Mozambique* case[1] excluded his claim.

I do not propose to examine the many problems of this branch of the law at any length. If the subject-matter of the dispute is the ownership or possession of foreign

1 [1893] AC 602, [1891-4] All ER Rep 640
2 [1936] 1 KB 382, [1935] All ER Rep 408
3 [1946] 2 All ER 372, [1946] P 135
4 [1893] AC 602 at 626, [1891-4] All ER Rep 640 at 648
5 [1936] 1 KB 382 at 397, [1935] All ER Rep 408 at 413
6 9th Edn (1973), p 519

land, then plainly *Mozambique*[1] applies, and the English courts have no jurisdiction. If, on the other hand, the subject-matter of the dispute is the enforcement of some trust or other equity over which the court otherwise has jurisdiction, then the mere fact that a litigant can show that he is a beneficiary under the trust only by showing that he owns foreign land seems to me to be a question that arises 'incidentally' or 'as a collateral incident', to quote from the passages in the judgments that I have just read, at all events if there are no rival claimants to the foreign land. In such a case, I do not think that the enforcement of the trust or equity falls within the rule that 'the Court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction', to borrow the language of Parker J in *Deschamps v Miller*[2]. If there is some equity to which the owner of foreign land, whoever he may be, is entitled, then a dispute between rival claimants as to which of them was the owner of that equity would plainly, I think, come within the *Mozambique*[1] rule. But where there are no rival claimants, and merely a plaintiff who, in attempting to enforce the equity, adduces evidence of his ownership of the land and thus his right to the equity, I would hold that he is outside the *Mozambique*[1] rule.

This view, I think, covers in principle an alternative way in which counsel for the plaintiffs put the point in relation to the 1947 transaction. This was that there was a contract between the parties, so that the case fell within the contract exception from the *Mozambique*[1] rule, as well as the trust exception. The Crown's interest in the British Phosphate Commissioners sufficed to make the Crown in substance one of the parties, and Mr Rotan was one of the landowners with whom the British Phosphate Commissioners made the agreement; he was, indeed, one of the persons who signed 'for the Banaban Landowners of Ocean Island'. This made him a party to the contract, even though the Banaban landowners were not named in it.

For the reasons that I have given I do not think that the adduction of evidence to establish that Mr Rotan was one of the landowners, and so was one of the parties to the contract, suffices to invoke the *Mozambique*[1] rule and exclude the exception. The 1931 transaction was not, of course, based on contract, but counsel for the plaintiffs had a subsidiary argument. This was founded on the 1913 transaction having created a trust for the benefit of land owned by Mr Rotan's mother; the land had devolved on Mr Rotan, and had carried with it, as running with the land, the benefit of the trust. If the point arises, I think the same principle would apply.

The contention that there is a charitable trust, so that Mr Rotan cannot himself take steps to enforce it, is one in which, as I have previously indicated, I find considerable difficulty. The prime responsibility for enforcing charitable trusts lies with the Attorney-General, and the concept of the Attorney-General suing the Crown for the enforcement of a charitable trust is one which has its difficulties; this is no ordinary case of the Attorney-General and Solicitor-General each having a part to play. Of course, in a sense the Crown is a trustee when there is a general gift to charity without any selection of objects or nomination of trustees; but there the Crown is a trustee only in a special sense. In the well-known words of Lord Eldon LC in *Moggridge v Thackwell*[3], in such a case, 'the King, as *Parens Patriae*, is the constitutional trustee', and primarily it is for the Crown to apply such gifts to charitable purposes. I do not, however, propose to explore this subject. I shall say no more than that I should be very slow to hold that if in this case any true trust had been brought into being, that trust was a charitable trust.

7. Quantum

There is one further issue that I must mention, and that is the quantum of any sums

1 [1893] AC 602, [1891-4] All ER Rep 640
2 [1908] 1 Ch 856 at 863
3 (1803) 7 Ves 36 at 83

that the Crown is bound to pay the plaintiffs. As was to be expected, this was an issue on which there was much argument, particularly in relation to the extensive expert evidence given for the plaintiffs by Mr K E Walker, and for the defendants by Mr J P Silcock and Mr R M Collins. If what I have already decided is right, no question of quantum arises, and so there is no point in pursuing the matter. If my decision is wrong, and the Crown is liable, then of course much will depend on what the Crown is liable for, and on what basis that liability arises. Until that is known, I do not think that it would be useful for me to attempt to quantify the sums. Accordingly I think that it is proper for me, and probably desirable, to abstain from attempting to resolve what on any footing is a substantial and complex question.

In the result, therefore, I need only say that for the reasons I have given the plaintiffs' claims in *Ocean Island No 2* fail, and will be dismissed. I must, however, add an expression of my deep indebtedness to counsel and solicitors for having met the demands of an exceptional case by providing exceptional assistance. The process of discovery and agreeing the bundles of documents must have been daunting and burdensome in the highest degree; and in court counsel were unfailingly helpful to me, despite the difficulties that there must have been in finding at a moment's notice the right document out of the many thousands in the cramped conditions of the court room.

III. OCEAN ISLAND NO 1

I now come to *Ocean Island No 1*.

1. Sand: the red land

I shall consider first the only claim that is made in respect of something other than mining phosphate, namely the claim for damages for conversion made by the 12th plaintiff in respect of the alleged wrongful removal of sand and the destruction of the burial ground. This claim was initially made in relation to the land called the 'red land', being the land edged red on plan B annexed to the statement of claim. But in the course of the pleadings that plan was in effect superseded by another plan, called plan G, on a much larger scale, with a variety of hatchings and colorations, but with the boundary again coloured red; and it is in relation to the land included in this boundary that I use the term 'red land'.

The question is not easy to follow without a plan, but I must attempt a verbal explanation of the topographical complexities. In place of the rectangle shown on plan B, plan G, which was delivered by the plaintiffs with the further and better particulars served by them in March 1975, shows an area bounded on the south, the seaward side, by a curved line. This runs south-east, then east and then north-east, following the line of the high water mark round Ooma Point, at distances varying from about 30 feet to about 50 feet to the landward of that mark. The northern or landward boundary, on the other hand, runs in a generally north-easterly direction. It begins at a sharp point on the west where it meets the curved seaward line, and runs north-easterly in the shape of a very much flattened S-bend to its junction with the eastern boundary. This northern boundary consists of the southern edge of an earth road of variable width. The eastern boundary consists of a line that is nearly straight and some 80 feet long, running in a north-westerly direction. The total area of the red land is rather under two acres. The revised claim for the extraction of sand is made in respect of the western part of the red land, an area of a little under three quarters of an acre, hatched brown on plan G ('the brown land'). Apart from a small area at the north, the brown land occupies the whole of the western end of the red land, the eastern boundary of the brown land being a line which, with many changes of direction, runs from south a little west of north.

There are two other markings on the plan that I must mention. First, the plaintiff's claim is that the cemetery runs from the eastern boundary of the red land well into the brown land; and the blue colouring accordingly covers the whole of the area

claimed to comprise the cemetery (the 'blue land'). Second, the claim in respect of the sand is made by the 12th plaintiff; and his claim, which originally was that he owned all the red land, was later particularised as being joint owner with his brother and sister (who were joined as the 17th and 18th defendants and took no part in the case) of a red hatched strip of land some 80 feet wide. This strip was shown on plan G as running a little west of north from the high-water mark across the red land and running on across the earth road to the north, with its eastern boundary almost equidistant from the east and west ends of the red land. This strip (which I shall call 'the red strip') has within it nearly the whole of the irregular eastern boundary of the brown land which is the subject of the claim, and also the whole of a track which runs southwards from the earth road towards the sea at the very tip of Ooma Point; and within the red land it runs wholly over land coloured blue and so claimed as part of the cemetery. By the statement of claim the 12th plaintiff claimed damages for the removal of sand and the destruction of the burial ground. The claim was later particularised as relating to the removal of sand in or about 1964 from an area of about 60 feet by 160 feet to an average depth of 6 feet; and special damages of $A20,000 were claimed. It subsequently appeared that this sum was claimed for the whole of the brown land, and not merely the part of the brown land that was covered by the red strip.

There is one other area of land that I should mention, and that is the parcel of land which I may call 'the boot'; it is shaped roughly like a boot, with its sole at the south. It is wholly within the three areas of land that I have called the red land, the brown land and the blue land; that is to say, it is within the land the subject of the claim, it is within the land from which sand is said to have been extracted, and it is within the area claimed as the cemetery. Further, all save the toe of the boot is within the red strip, i e the land claimed by the 12th plaintiff. The boot is at the southernmost tip of the red land, and is the only part of the brown land which lies to the east of the track that runs north and south. I do not know its area, but it is very small. The sole of the boot appears to be less than 30 yards long, with a line from the heel to the top of the boot of about the same length. To the importance of the boot I shall now turn.

After hearing the evidence, counsel for the plaintiffs very properly accepted that the 12th plaintiff, who was the sole claimant in respect of the sand, had not shown title to any land to the east of the track, and that the only claim he could make was in respect of the boot, in which counsel included the width of the track. I think the claim must be for the boot minus the toe, for this toe projected eastward beyond the red strip. Furthermore, counsel accepted that he could only ask for nominal damages as there was no evidence of the area or depth of the sand extracted from the boot. What I must consider, therefore, is whether the 12th plaintiff has established any liability of the British Phosphate Commissioners in respect of the extraction of sand and destruction of the burial ground in relation to the toeless boot.

In their defence the British Phosphate Commissioners rely on the sand agreement and on limitation. I have already read the sand agreement made in 1948, but I think that I ought to repeat part of it. That part is the phrase which states that in return for the annual payments mentioned in the agreement the Banabans raise no objection 'to the removal of sand and shingle from the beach at Ocean Island'. No question has arisen on the location of the beach in question, and it has not been suggested that the sand agreement was not binding on the 12th plaintiff. But there was considerable debate on the meaning of the word 'beach', a word which does not appear to be a term of art, and on which no authorities were put before me.

Counsel for the plaintiffs contended that 'beach' has the same meaning as 'foreshore', and so meant the land between the high and low water marks of ordinary tides. Though this may well have been the usage in Shakespeare's time, I do not think that it can be right today. In the normal use of language I very much doubt whether anyone would now use the term 'beach' so as to exclude the sand and shingle which lie immediately above high water mark. The word no doubt includes the foreshore;

a child who steps below high water mark to paddle or swim could not, I think, be said to have left the beach. If one begins at the seaward side, I would say that the ordinary low water mark (or possibly the low water mark of spring tides) would normally be regarded as the dividing line between the beach and the sea-bed. From low water mark upwards to high water mark and beyond would all fairly be said to be part of the beach: but how far beyond? The terminus a quo may be clear, but what of the terminus ad quem?

In my judgment, all that lies to the landward of high water mark and is in apparent continuity with the beach at high water mark will normally form part of the beach. Discontinuity may be shown in a variety of ways: there may be sand dunes, or a cliff, or greensward, or shrubbery, or trees, or a promenade or roadway, or a dozen other natural or artificial structures or entities which indicate where one leaves the beach for something else. But until one reaches some such indication, I think the beach continues. I may add that I would not regard beaches as being confined to tidal waters. I see no reason why non-tidal waters should not have their beaches, running landwards from the normal water mark.

As I have said, no authorities were put before me on the meaning of 'beach'; and unguided by authority I would reach the conclusion that I have set out above. However, since reserving judgment I have found two authorities, one Scottish and the other in the Judicial Committee, which discuss the meaning of the term 'sea-beach', with or without a hyphen. I must consider these; for I can see no relevant distinction between 'beach' simpliciter and 'sea-beach'. *Musselburgh Magistrates v Musselburgh Real Estate Co Ltd*[1] concerned a feu charter which described land as being bounded on the north 'by the sea-beach'. It was held in the Inner House of the Court of Session that the boundary was not the sea at low water mark, and that the beach itself was not included in the land conveyed. By itself, that does not carry matters very far, as it does not state what constituted the sea-beach. But in the course of his judgment, Lord Kingsburgh, the Lord Justice-Clerk, said[2] that ' "sea-beach" as the boundary meant the line at which the land ended and the beach over which the sea flowed began'; and the reference to the flow of the sea seems to treat high water mark as the landward boundary of the sea-beach. See also per Lord Trayner[3] and per Lord Moncreiff[4]. This case is thus of some assistance to the 12th plaintiff.

The Privy Council case was an appeal from Malaysia: *Government of State of Penang v Beng Hong Oon*[5]. It concerned a conveyance of land which stated the western boundary as being the 'sea beach'. The landowners claimed that the boundary was accordingly the line of medium high tides, and that as the sea imperceptibly receded, the land thrown up became theirs. The majority held that this claim was right; and in delivering the judgment of the majority, Lord Cross of Chelsea duly considered the *Musselburgh* case[1]. As I read his judgment, Lord Cross drew a distinction between the meaning of 'shore' or 'beach' as ordinarily used, and the meaning of those words as used to describe a boundary in a legal document. In the latter case, the word is likely to be used with the precise meaning of 'foreshore', so that the boundary is that of medium high tide. After all, the purpose of describing a boundary is to produce a line to divide what is included from what is excluded, and so the court will readily adopt a meaning for the expression used which will define an ascertainable line. On the other hand, in its ordinary use the term 'shore' or 'beach' has no such exact meaning.

I think I should read the passage in Lord Cross's judgment[6] that I have in mind:

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1 (1904) 7 F 308
2 (1904) 7 F 308 at 319
3 (1904) 7 F 308 at 321
4 (1904) 7 F 308 at 323
5 [1971] 3 All ER 1163, [1972] AC 425
6 [1971] 3 All ER 1163 at 1170, [1972] AC 425 at 435, 436

'The words "shore" or "beach" as ordinarily used do not mean only the land lying between the lines of medium high and low tide. They cover also land which is washed by the ordinary spring tides and often land which is only washed, if at all, by exceptionally high tides but which nevertheless is in character more akin to the "foreshore" than to the "hinterland". As ordinarily used neither word has a precise meaning and opinions might well differ as to whether a particular patch of ground consisting of sand and pebbles interspersed with sparse vegetation should more probably be described as part of the "shore" or "beach" or part of an adjoining field. It is more likely than not that a word used to describe a boundary in a legal document has a precise meaning and it is well settled that the words "sea shore" when used to describe the boundary of land comprised in a conveyance mean prima facie the foreshore (see *Scratton v Brown*[1]; *Mellor v Walmesley*[2]). Their Lordships see no reason why the same prima facie meaning should not be attributed to the words "sea beach".'

In that passage, I would emphasis two phrases in the second sentence, namely, 'only washed, if at all, by exceptionally high tides', and 'in character more akin to the "foreshore" than to the "hinterland" .' These words seem to me plainly to negative ordinary high water mark as the landward boundary of the 'beach' in its ordinary meaning. The case thus provides some support for the contentions of the British Phosphate Commissioners. (In parenthesis, I may say that Lord Cross[3] pointed out that, contrary to what was said in Stroud's Judicial Dictionary[4], the *Musselburgh* case[5] never went to the House of Lords; and unfortunately this error has been repeated in the current edition of the book[6]. The Scottish case that did go to the House of Lords was *Fisherrow Harbour Comrs v Musselburgh Real Estate Co Ltd*[7], a case that I shall mention in a moment.)

In considering the *Musselburgh* case[5], I have to remember that the laws of England and Scotland diverge on what constitutes the landward boundary of the foreshore. In *Fisherrow Harbour Comrs v Musselburgh Real Estate Co Ltd*[8] the Inner House rejected the English test of taking the line of the average medium high tides as the landward boundary of the foreshore in favour of the Scottish test of the high water mark of ordinary spring tides. The court unanimously held that this was the better test, and that any desirable uniformity between England and Scotland should be achieved not by Scotland adopting the English rule but by England adopting the better Scottish rule. (This comment, I may say, was not mentioned in the judgments of the House of Lords which affirmed the decision, judgments which, incidentally, do not even mention the case said by the headnote to have been 'followed': *Musselburgh Real Estate Co Ltd v Provost of Musselburgh*[9].) In view of this divergence of law (even though not directly on the point) I would apply the Scottish case with caution. The Privy Council case, too, is the later case, and was one that was decided after considering the Scottish case. I therefore prefer it, so far as there is any conflict.

There is a further consideration. On the particular facts of the present case it seems to me to be most improbable that the word 'beach' was used in the sense of 'foreshore'. The sand agreement is a document of no great elaboration, and it was signed in surroundings of no great sophistication. If the extraction of sand was confined to sand

1 (1825) 4 B & C 485, [1824-34] All ER Rep 59
2 [1905] 2 Ch 164
3 [1971] 3 All ER 1163 at 1170, [1972] AC 425 at 435
4 3rd Edn (1953), p 2678
5 (1904) 7 F 308
6 4th Edn (1974), p 2455
7 (1903) 5 F 387; *affd* sub nom *Musselburgh Real Estate Co Ltd v Musselburgh Provost* [1905] AC 491
8 (1903) 5 F 387
9 [1905] AC 491

below high water mark, and thus excluded any sand above it, the British Phosphate Commissioners would have been faced with all the problems of extracting moist and salty sand, and allowing for the recurrence of high tide in planning their operations. The question is one of construction, and on the evidence as a whole I can see no ground for displacing what seems to me to be the ordinary meaning of the word 'beach' as used in the sand agreement.

When I put together the *Penang* case[1] and the particular facts of the present case, I feel no doubt that counsel for the plaintiffs' contention must fail. I cannot see how the high water mark could properly be said to mark the landward boundary of the 'beach'. In the sand agreement the use of the word 'beach' is not for the purpose of providing a boundary, and so a line, but to denote an area; and even if there are difficulties in pointing to the exact boundaries of that area, that cannot affect anything which on any footing is plainly within the area. The British Phosphate Commissioners were given the right to remove sand and shingle 'from the beach'; and that, I think, must be a right to remove sand and shingle from what may fairly and properly be described as the beach. Whether one regards the beach as running inland from the sea over all the land that is in apparent continuity with the beach at high water mark, or whether one regards it as running inland from the sea over all the land which in character is more akin to the foreshore than to the hinterland, I think the same conclusion is reached. The beach at Ooma Point was one of the places that I inspected on my view of Ocean Island, and after making every allowance for the effect of the removal of sand from the western portion of the red land, my conclusion from the evidence put before me in court and from what I saw on the view is that what can properly be called the beach at Ooma Point ran inland until it reached the earth road running in a north-easterly direction, except insofar as any area was occupied by the cemetery.

Whichever test is applied, I think that the cemetery was not part of the beach: for it provided either discontinuity with the beach at high water mark, or else a character more akin to the hinterland than to the foreshore. If the cemetery had been enclosed within a wall or fence I cannot see how anybody could have regarded it as remaining part of the beach; and I do not think that the absence of any such wall or fence makes any difference. Counsel for the defendant commissioners suggested that if the cemetery were part of the beach, there would be an implied term against extracting any sand from it. That may well be so; but I prefer to hold that the cemetery formed no part of the beach. The question, then, is whether any sand was excavated from land which, being part of the cemetery, was not part of the beach, and also was land which, being within the toeless boot, was land in respect of which the 12th plaintiff is able to sue. I must therefore consider the western and southern boundary of the cemetery; and this is not easy.

One difficulty is that there appears never to have been any proper survey of the cemetery and its boundaries. Another difficulty is that during the last war the Japanese dug an anti-tank ditch in about the position where the track runs today, and made a maze of foxholes in the land immediately to the west, in the brown land. But some facts are, I think, reasonably clear. I do not think that any part of the cemetery ever extended to the west of the track. Apisaloma's tomb, which lies in the red strip a few feet east of the track and a little over half way up the red strip from the south, stands at or very close to the western extremity of the cemetery. That, of course, does not establish that the boot was not an incursion into the cemetery, for the top of the boot lies some 50 or 60 feet south of the tomb, and as one goes further south there is more and more of the boot which lies to the east of the track.

I have to decide this question on the civil standards of proof, and with the general burden of proof resting on the 12th plaintiff. I have reviewed all the evidence on the

1 [1971] 3 All ER 1163, [1972] AC 425

matter, including that of Mr Chapman. He held a succession of offices for the British Phosphate Commissioners on Ocean Island from 1951 until the end of 1964. Then, after ten years in Melbourne as the senior engineer for the commissioners, he returned to Ocean Island at the end of 1974 as manager. He was an impressive witness, and was manifestly fair and reasonable in his approach. The evidence of the 12th plaintiff, on the other hand, after making all allowances for problems of interpretation, had difficulties for his counsel. At the end of the day, my conclusion, both on the evidence and on the probabilities, is that there was nothing in the boot which sufficed to withdraw it from the character of 'beach' which it otherwise would have had. It may be that in the course of time burials would have taken place in that area, or that it would have been enclosed so as visibly to become part of the cemetery. But in the absence of this, I think that the boot remained part of the beach. The boot lies, of course, at the extreme south of the red land, nearest to the sea, in low-lying land.

As counsel for the plaintiffs very properly accepted, there was no evidence that any bones had been dug up in any land to which the 12th plaintiff has shown title, or that the grave of the 12th plaintiff's father had been damaged. Whatever rumours and beliefs there may have been among the Banabans, the prolonged investigation that has occurred in this case has failed to produce any evidence that I can accept that the British Phosphate Commissioners ever made any incursion into the cemetery or dug up any human bones from it. The evidence of Mr Kabunare Koura, a Gilbertese who went to work on Ocean Island before the war, provides a possible explanation. He was the sole survivor of those who remained on the island after the Japanese came, and he was made by the Japanese to work on their fortifications at Ooma Point. This included digging in the cemetery there. In the course of this some bones were dug up, which were then collected and put in a hole. It seems at least possible that as their feelings of resentment against the British Phosphate Commissioners grew, some of the Banabans consciously or unconsciously transferred to the commissioners the blame for the unearthing of the bones that should have been attached to the Japanese. Rumours and resentment tend to grow, and I have already sufficiently commented on the plainly untrue statement on this point made to the United Nations on behalf of the Banabans. As I have said, that is a possible explanation, and there may be others; but however that may be, I hold that on the facts of the case the claim by the 12th plaintiff for the wrongful removal of sand and destruction of the cemetery fails in its entirety.

On the question of jurisdiction I need not say much. The contention made by counsel for the defendant commissioners was that in any case this court had no jurisdiction; and this applied to the purple land, which I shall consider later, as well as the red. I have already considered in *Ocean Island No 2* some of the leading cases on want of jurisdiction in cases of foreign land. The court has no jurisdiction to determine the title to foreign land, or the right to possession of it, or to award damages for trespass to it; and it may be that this last head includes other torts to foreign land, such as nuisance or negligence. But in the case before me the essence of the plaintiff's claim is the commission of the tort of conversion of the sand. The connection with foreign land is, of course, that the British Phosphate Commissioners extracted the sand from the land. If the 12th plaintiff had himself extracted the sand, and then the commissioners had taken it, I cannot see why the exclusion of jurisdiction in the case of foreign land should have any application, any more than if the commissioners had taken a table or a chair standing in his house. Does it make any difference that the severance from the land was effected by the commissioners, so that the 12th plaintiff's way of saying: 'You took my sand away' is: 'You dug my sand out of my land and took it away'?

The question is not easy, but as at present advised my answer would be No. If something is severed from land and is thereby converted into a chattel, that does not alter ownership. As the lorry draws away, the landowner may truly say, 'They are taking my property', whether the lorry contains the sand or the table and chair.

The difference lies in the evidence which will support the assertion of ownership. In the first case the landowner will say that the sand is his because the land is his, whereas in the second case he will say that the table and chair are his because he made them, or bought them, or as the case may be. That evidence seems to me to be something that arises 'incidentally' or 'as a collateral incident' within the fair meaning of those terms as used in the judgments that I considered in *Ocean Island No 2*. It does not seem to me to be an essential: a bare assertion of ownership, if believed, would suffice without an explanation of how ownership was acquired. Many men are unable to recollect or establish how and when they became owners of some of the chattels they know to be theirs. Accordingly, if I had to decide the point, I should hold that the jurisdiction of the court is not excluded in the case of the sand. In saying that, I do not forget *Re Trepca Mines Ltd*[1]; but that was a very different case.

On the defence of limitation, I shall say only this. The claim alleges acts by the commissioners in about 1964. On the evidence of the 12th plaintiff himself, he was told in 1964 that the commissioners had been digging his land, and he complained to the council. A period of six years from the end of 1964 ran out before the initial writ was issued in November 1971; and I do not see what effective answer counsel for the plaintiffs has to the defence of limitation. In short, I hold that I have jurisdiction, but that the sand agreement authorised what was done, and in any case the claim is statute-barred.

Finally, before leaving this part of the case, I should say that of course I have considered whether in view of my references to cases that had not been cited in argument I ought to restore the case for further argument. However, on the principles that I tried to state in *Re Lawrence's Will Trusts, Public Trustee v Lawrence*[2], I do not consider this to be necessary; for in the upshot my conclusions on those authorities support the view that I had formed without their aid.

2. Replanting

I shall next consider the major claim in *Ocean Island No 1*. This concerns the replanting obligations, and the plaintiffs' claim for specific performance of them, or damages in lieu thereof. As will become apparent in due course, there are many complexities under this head, both of principle and of detail, the latter largely due to differences in the circumstances of the individual plots of land in respect of which the claim is made. I propose first to consider the broader issues, before turning to the position of the individual plaintiffs in respect of their individual plots. Before I do this there is one thing that, in view of the many and persistent mis-statements and misunderstandings that have appeared elsewhere, I think that I should say very slowly and emphatically. There is not, and never has been, any claim whatever in this case that there is a legal obligation to replant the whole of the island: at its highest, the claim is that at most one-sixth of the island should be replanted.

(1) *The obligations*

The starting point must be the documents under which the contractual obligations arise. They are the 1913 agreement and the relevant A and C deeds. I have already recited most of the terms of these documents; but that was a day or two ago, and I think it would be convenient if I set out the most relevant provisions at this point. First, there is the 1913 agreement, entered into by the company and 258 landowners. Clause 12 provided that, in the events which happened,

> 'the Company shall comply with the following conditions . . . namely:—(a) That they shall return all worked out lands to the original owners, and that they shall replant such lands—whenever possible—with coconuts and other

1 [1960] 3 All ER 304, [1960] 1 WLR 1273

2 [1971] 3 All ER 433 at 447, 448, [1972] Ch 418 at 436, 437

food-bearing trees, both in the lands already worked out and in those to be worked out'.

Second, there are the A and C deeds, entered into between the company and the individual landowners over a period covering 1913 to 1922. The terms of the last clause of each of these deeds are identical. If the landowner were called X, the clause would read as follows, the 'end of the said term' being 31st December 1999:

> 'Whenever the said land shall whether before or at the end of the said term cease to be used by the Company for the exercise of the rights hereby granted the Company shall replant the said land as nearly as possible to the extent to which it was planted at the date of the commencement of the Company's operations under Clause I(i) hereof with such indigenous trees and shrubs or either of them as shall be prescribed by the Resident Commissioner for the time being in Ocean Island and the said lands shall when and as soon as in the opinion of the said Resident Commissioner this may be without prejudice to the Company's operations as aforesaid revert to and become revested in the said X his heirs executors or assigns, freed and discharged from all rights of the Company under this deed.'

In a few cases the plaintiffs base their claim solely on the 1913 agreement, since their lands were held by the company under P and T deeds, and no A or C deeds for them were executed. But for the most part the claims to specific performance rest on both the 1913 agreement and on an A or C deed; and there are many points of contrast and of resemblance between the obligations under the two categories of document which I should mention.

(*a*) In both cases the operative word is 'replant'. Much turns on what that word means in the context.

(*b*) In the agreement, the obligation to replant is modified by the words 'whenever possible'; in the deeds, the obligation to replant is not qualified in any way, though the extent of the replanting is subject to the 'as nearly as possible' phrase. The word in the agreement is 'whenever', and not the 'wherever' that appears in some misquotations of the clause.

(*c*) In the agreement, the replanting is to be with 'coconuts and other food-bearing trees'; in the deeds the phrase is 'indigenous trees and shrubs or either of them'.

(*d*) In the agreement, there is nothing to state how it is to be decided whether what is to be planted is to be coconuts or whether it is to be 'other food-bearing trees', or whether there is to be some mixture of these. Apart from any implication that can be gathered from the word 'replant', the matter is left at large. On the other hand, the deeds provide for replanting with 'such indigenous trees and shrubs or either of them as shall be prescribed by the Resident Commissioner for the time being in Ocean Island'. The apparent greater certitude of the deeds is balanced by the difficulties arising from there having been no resident commissioner in Ocean Island since the second world war.

(*e*) The agreement lacks any statement of the number of the trees, apart from anything to be inferred from the word 'replant'. The deeds, on the other hand, provide for the land to be replanted 'as nearly as possible to the extent to which it was planted at the date of the commencement of the Company's operations under Clause I(i) hereof'. Again there is a countervailing element for the apparent greater certainty of the deeds, in that the problems of ascertaining the extent to which a small plot of land was planted before mining began 50 or 60 years ago, or more, are not inconsiderable.

(*f*) Under the agreement, the obligation is to 'replant such lands', and that refers back to 'all worked out lands', so that on the face of it the obligation arises as soon as the lands are worked out. Under the deeds, the obligation to replant arises 'whenever the said land shall . . . cease to be used by the Company for the exercise of the rights hereby granted'. Those rights included not only the mining of phosphate but also the

right to remove trees and shrubs necessary for extracting phosphate or for constructing any railway required for the carrying on of the company's operations on the land, or any adjoining land from which the company had the right to take phosphate: I put shortly the provisions to be found in cl 2(i) of the A deed and cl 1(i) of the C deed.

(g) Under the deeds, the obligation to replant is plainly confined to the particular plot of land which is the subject of the particular deed; and the A and C deeds in all comprised a little over 186 acres. (The figures, I may say, are not easy, but document DAt, with the explanations given by Mr Chapman in evidence on Day 58, at least provide a foundation.) Under the agreement, the obligation to replant is expressed quite generally as applying both to lands 'already worked out' and also to lands 'to be worked out'. Initially counsel for the plaintiffs contended that the obligation applied to all land that had been worked out, wherever it was. In the end, however, he accepted that any land outside the 250 acres but inside the delimited areas which in 1913 had already been worked out must have reverted to the owners, and that it was now too late to claim that it should be replanted. But he contended that it did apply to all land within the 250 acres that the company had taken at any time. This raised the question whether the land comprised in the A and C deeds, being some 186 acres within the 250 acres inside the delimited areas, was subject to the replanting obligations both in the agreement and in the deeds, or whether to this extent the agreement had merged in the deeds. During the argument a number of variations emerged as to the various areas that were or were not affected by this point, or remained unaffected by it; but I do not propose to consider these, at any rate at this stage, as opposed to the question of principle.

(h) A common factor is that both under the agreement and under the deeds (apart from two C deeds executed in 1921 and one in January 1922) it was the company that entered into the transaction and thus the obligation to replant, whereas the claim for specific performance has been made against the three persons who were the British Phosphate Commissioners when the writ was issued. This, of course, raises the question whether the burden of the company's obligations passed to the commissioners. Counsel for the plaintiffs' argument that it had passed rested on two contentions. First, he said that the principle that he who takes the benefit of a transaction must also bear the burden applied so as to make the commissioners successively liable. Second, he contended that there had been a series of novations which resulted in the present commissioners being contractually bound to the plaintiffs. Under the first head there is also the question whether the plaintiffs, who were not themselves parties to the agreements or the deeds, are entitled to the benefit of them.

I pause there. I am far from having exhausted the features of the 1913 agreement and the A and C deeds that invite comment; and I have not attempted to set out all the consequent arguments on the meaning and effect of the documents in law. But I think that I have laid a sufficient foundation for the matters that I must now consider. Doubtless only a little ingenuity would have been needed to make the documents raise more problems than they do; but on any footing their achievements in obscurity and complexity are ample enough as they stand.

(2) *'Replant'*

I shall begin with the meaning of the verb 'replant' as it appears in its context in the 1913 agreement and in the A and C deeds. As a prelude to this I think that I should set out what it is that the plaintiffs' claim.

The plaintiffs' contentions developed considerably during the hearing. In the statement of claim there was a simple claim against the defendant British Phosphate Commissioners for specific performance of cl 12(a) of the 1913 agreement and of the A and C deeds, or damages in lieu thereof at the rate of $A73,140 an acre, with an alternative claim for damages at the same rate for breach of contract. For land which the British Phosphate Commissioners were still using the plaintiffs sought a declaration of the obligation of the British Phosphate Commissioners to replant it when they

ceased to use it, and before surrendering it to the owners. During the argument the claim to specific performance became modified in a variety of ways; and in the end, on Day 101, counsel for the plaintiffs put in the final version of the order that he sought, making a small addition to it on Day 105. The draft order, as I shall call it, consists of a number of paragraphs which I have lettered from (a) to (i), and five schedules identifying particular plots of land. Paragraphs (a) and (b) relate to the 1913 agreement and the A and C deeds respectively. In each case there is a declaration that the relevant replanting obligation 'ought to be specifically performed and carried into execution'; but this is expressed (i) in an unqualified form for some specified plots, and (ii) in a qualified form for other specified plots, the qualification consisting of the words 'should all the owners of such land wish it'. In due course I shall consider the effect of this qualification.

The body of the draft order then continues as follows: and I shall read it with para (d) containing the small addition at the end of it that was made on Day 105.

> '(c) ORDER that the First and Third Defendants do replant the plots of land specified in the Fifth Schedule hereto with coconuts pandanus and almonds at the following density per acre: Coconuts 58 Pandanus 18 Almonds 18 (d) FURTHER ORDER that the First and Third Defendants do provide a planting medium for each coconut tree which the said Defendants are bound to plant sufficient to enable such coconut tree to take root and grow and bear fruit. (e) DECLARE that a planting medium consisting of a depth of 6 feet and a uniform radius of 10 feet of soil shall be deemed for the purposes of the foregoing paragraph of this Order to be a sufficient planting medium. (f) FURTHER ORDER that the First and Third Defendants do provide sufficient access to the plots of land specified in the Fifth Schedule hereto to enable the coconuts pandanus and almonds to be planted and harvested and the First and Third Defendants do demolish all pinnacles necessary for this purpose. (g) FURTHER ORDER that the First and Third Defendants within 3 months do prepare or cause to be prepared all contour and land surveys for the purpose of carrying the foregoing provisions of this order into execution. (h) FURTHER ORDER that the First and Third Defendants do within 9 months prepare or cause to be prepared a Schedule of Works for the purpose of carrying the foregoing provisions of this order into execution such Schedule of Works to be agreed with the Plaintiffs or in default of such agreement to be approved by the Court. (i) LIBERTY TO APPLY.'

The five schedules set out 15 plots of land in all, most of them appearing in more schedules than one. There are nine plots in the 1st schedule, six in the 2nd, eight in the 3rd, five in the 4th and six in the 5th.

This draft order must be considered in the light of the plaintiffs' evidence. What they contend for is a massive programme of demolishing pinnacles, making roadways, constructing what are called 'baskets' beside the roads with a radius of 10 feet, filling the baskets with soil to a depth of 6 feet (in place of the 2 feet previously claimed), and carrying out the necessary plantings of seedling coconuts grown in nurseries and the other trees. There was no contention that the seedlings, once established, were to be watered. Senator Walker, an expert on coconuts who was called by the plaintiffs, said that about one-third of the total levelled area would be occupied by roads 9 ft wide. The result would be that if the scheme were carried out for the whole of the 250 acres (which is a little less than one-sixth of the island), there would be over 80 miles of road. Some indication of the cost is that while the proposal was for 2 feet of soil, Dr Schnellman, who was called by the plaintiffs, accepted that some $A50 million might have to be spent before a coconut was planted. I shall say more about this later.

I shall have to return to these claims of the plaintiffs; but for the present I am concerned with the meaning of the word 'replant' in its context. On this, the basic issue between the parties is whether or not the obligation to replant carries with it the extensive engineering obligations for which the plaintiffs contend. Counsel for the

plaintiffs relied on Dr Johnson's Dictionary as showing that the verb 'plant' meant 'to put into the ground in order to grow', and on the Oxford English Dictionary as showing that the verb meant 'to set or place in the ground so that it may take root and grow', with 'replant' meaning 'to plant (a tree, plant, etc) again'. In relation to Ocean Island, the obligation to 'replant', he said, could not mean planting on the bare coral rock after the phosphate had been extracted. Therefore the inference was that the obligation to replant must include an obligation to provide a planting medium sufficient for the coconuts, when planted in it, to take root, grow and fruit, and also to provide adequate access to them.

The question, of course, is not what 'replant' means in the abstract, but what it meant in these documents in 1913, and after, in Ocean Isand, with the experience that the extraction of phosphate from the island for a dozen years or more had given to all concerned. For the 1913 agreement, the date, of course, is 1913; for the A and C deeds there were various dates from 1913 onwards, with the last of these deeds being executed in 1922.

At the outset, it seems plain that on the argument of counsel for the plaintiffs the word 'replant' has to be construed so as to carry with it a heavy burden of implication; the word is 'replant', and not 'restore' or 'rehabilitate'. On the plaintiffs' evidence, extensive engineering works will have to be carried out for the demolition of a sufficiency of pinnacles and the construction of a criss-cross pattern of roadways giving access to all the land which is to be replanted. Furthermore, there will have to be a massive importation of soil, probably from Australia, to provide the 'baskets' of soil which will sustain the coconuts. Of course, if that is the contract, that is the contract. But inevitably the question must be asked whether parties who had any such intentions would be likely to have entrusted those intentions to so frail a carrier as the one word 'replant', and the implications to be found in it.

Second, there is the context provided by the terms of the 1913 agreement and the A and C deeds. They all make it perfectly plain that the company is to have the right to remove all the phosphate from the land in question, and that the process of replanting is to take place only when the land is worked out, or ceases to be used by the company for the purposes granted. What is to be replanted, in short, is the worked-out land; and by 1913 nobody on Ocean Island could have been unaware of what worked-out land looked like, with its pinnacles and adjacent pits. The practical difficulties of extraction in such a terrain normally meant that some residual phosphate was left at the bottom of the pits. It was that worked-out land that was to be replanted. If the worked-out land was to be transformed by the demolition of pinnacles, the construction of roads and the provision of baskets of earth 6 feet deep before it was replanted, then at the very least some indication of this in the instruments might have been expected; but I can see none. What is to be replanted is the land after it has been worked out, or after it has ceased to be used by the company. An obligation to replant must, in my judgment, be construed in relation to what is to be replanted.

Third, there are the circumstances surrounding the execution of the agreement and the deeds. The concept of replanting worked-out land on Ocean Island was no novelty in 1913. In 1903 the acting resident commissioner suggested to the company that coconuts and pandanus would grow very well in the worked-out spaces if they were not dug down too deep. He proposed to send down some coconuts to be tried out; and in 1904 the company ordered 1,000 coconuts for planting in worked-out ground. Early in 1905 the company took a Banaban representative, the Kaubure, over some old workings, where coconuts that the company had planted between the pinnacles were 'doing very well'.

In 1909, at a meeting between the company and the Colonial Office, the question of levelling the pinnacles arose as an alternative to a large part of the island having to be left unmined; and the company then investigated the feasibility of this. A detailed report towards the end of the year made by the company's representative on the

island, Mr Ellis, concluded that this was not an advisable proposal for several reasons. Instead, he proposed, leaving enough loose phosphate in the workings for pandanus, almond and coconut trees to be planted in, if experience showed that the coconuts grew satisfactorily; and the success of coconuts planted in this way five years earlier was referred to. The resident commissioner was reported to be of opinion that there was nothing in the proposal to level the pinnacles, and thereafter little or nothing seems to have been said about that proposal. The subject of plantings in the old workings nevertheless recurred at intervals. In March 1911 many of the coconuts planted in the old workings were said to be doing fairly well despite a severe drought; and in July 1911 the company was sent some photographs of coconut and other trees growing in the old workings, and looking quite strong and healthy despite the recent severe drought. Those photographs were included in the agreed photographs put before me.

In July 1912 Mr Ellis reported to the company that although experiments showed that the coconut tree would grown in the old workings, 'it has yet to be seen whether it will bear fruit'; and he observed that it was necessary for the welfare of trees planted in the old workings to have several feet of phosphate left in any case. A year later Mr Ellis reported that the coconut trees planted in the old workings were looking well; and on 11th November 1913 he reported that he had taken the resident commissioner, Mr Eliot, to see the coconuts growing in the old workings. On the same date Mr Eliot commented on the replantings with coconuts which he said had been made eight years before. He said that he was satisfied that—

> 'the clause dealing with the replanting of these worked-out lands may properly be retained in the draft deeds prepared for future use, as there can be no doubt that coconut trees so planted can thrive through such a drought as that experienced in 1909-1910'.

But he added that he was still of the opinion that it would be a waste of time and labour to attempt such replanting in certain worked-out fields that he had seen.

Just over a week later, at the second meeting with the Banabans that led up to the signing of the 1913 agreement, the resident commissioner said this:

> 'The Company would plant all worked-out lands with coconuts, pandanus, and wild almond, the work to be done by Banabans in its employ. While not saying definitely that coconuts will grown in the old workings, he had seen healthy trees at Ooma and Tapiwa, which had been planted 8 years ago, and had survived a severe drought. In future the Company would leave some more phosphate round the base of the pinnacles for the coconuts. After the lands were planted, they would be handed back to the natives.'

I should add that at the first meeting with the Banabans, the day before, one of the Banabans had asked how, without roads, they could get at the coconuts planted in the worked-out land, owing to the pinnacles; and the resident commissioner replied that though he would not like to get the coconuts, some of the young men would be able to do it.

Those, then, are the circumstances in which the 1913 agreement was signed. All concerned must have been well aware that some worked-out land had been replanted with coconuts, without any levelling of pinnacles or importation of soil to provide baskets of soil for each tree. Replanting consisted of putting the seed coconuts in a few feet of loose phosphate in the old workings at the foot of the pinnacles. It seems inconceivable to me that anyone in 1913 could have used the word 'replant' in the sense for which counsel for the plaintiffs now contends. Even without an examination of the surrounding circumstances I would have no hesitation in rejecting his contention; but in the light of those circumstances I can only say that, even if I disregard everything to which the Banabans were not privy, my lack of hesitation is, in my judgment, amply confirmed.

In my opinion, the word 'replant' in Ocean Island in 1913 in relation to the 1913 agreement and the A and the C deeds neither meant nor carried with it by implication any obligation to level pinnacles or construct roadways, or to import soil and form 'baskets' for planting coconuts in. In relation to coconuts it merely meant that seedling coconuts were to be planted in suitable positions in the worked-out land in a few feet of the loose phosphate, in a similar way to the replantings carried out in the first decade or so of the phosphate operations. Pandanus and almonds, which were much more hardy than coconuts, were to be planted in a similar way, though the scattering of seed on a sufficiency of loose phosphate beside the pinnacles rather than the planting of nuts previously nutured in nurseries would be all that was required.

That was the position in 1913; but of course A and C deeds continued to be executed up to January 1922, so that there is the question whether the word 'replant' continued to bear the same meaning in the deeds latterly executed. Subject to one point, I can see nothing to suggest that the word in any way changed its meaning. The one point is this. As I have mentioned, in July 1912 Mr Ellis had reported that it remained to be seen whether coconuts planted in the old workings would bear fruit. The evidence before me satisfies me that although coconuts planted in loose phosphate in the old workings will in many, and probably most, cases flourish to a considerable degree, it is most unlikely that they will bear fruit. Ocean Island, with its very limited annual rainfall and the intermittent recurrence of substantial periods of severe drought, is plainly fairly marginal for the growing of coconuts. The average annual rainfall is a little under 65 inches, and if evenly spread it would more or less suffice: but on the footing that a drought is a period of four or more consecutive months with less than two inches of rain in each month, Ocean Island had 26 droughts in 65 years, some lasting for over a year. Coconuts growing on the island in the unmined areas lost many of their number from time to time as a result of these droughts. Many growing in mined-out areas at least had a little help from the shelter provided by the pinnacles; but the few feet of phosphate left there was no substitute for the many feet of phosphate in the unmined areas.

Over the years, it gradually became plain that coconuts planted in the old workings flourished up to a point, but normally would not fruit. Some did; in 1937 a long British Phosphate Commissioner's report recorded that trees planted some 30 years earlier were coming into bearing, but that it was doubtful whether the deeper workings could be effectively replanted. Coconuts vary considerably in the age at which they may be expected to fruit. The more adverse the conditions, the older they are likely to be before they fruit; and drought, if it does not kill the tree, may cause its fruit to abort. Under very good conditions a tree might fruit at six or seven years of age. But on Ocean Island, if growing naturally in deep phosphate as in the centre of the island before it was mined, the tree was likely to be at least 12 or 15 years old before fruiting, and perhaps 20 years, unless it was in or near a village, when it would receive some waste products and liquids which would nourish it.

By 1922 some coconuts had been planted in old workings for something like 18 or 19 years. However, in 1916 and 1917 Ocean Island had had its worst drought in recorded history, lasting for the whole of 1916 and the first five months of 1917; and that had been preceded, with a break of only one month, by a four-month drought at the end of 1915. In those circumstances I cannot think that any failure of replanted coconuts to fruit could have contributed to any general realisation that coconuts planted in the old workings were never likely to fruit, however favourable the conditions, or that there is any basis for attributing to the word 'replant' in an A or C deed executed up to 1922 any meaning different from that which in my view it bore in 1913.

At this stage, I should mention certain other matters. It is clear that from time to time after 1913 the British Phosphate Commissioners carried out various replantings of coconuts on Ocean Island on a substantial scale. The defences alleged that in three waves of replanting, one in 1915-16, another in 1939-41 and the third in 1953-54, a

number of the plots in issue had been replanted. However, in the event it came to be accepted by the British Phosphate Commissioners that they could not establish that they had carried out any obligation to replant that lay on them: counsel for the defendant commissioners was unable to tie down such replanting as had been done to the particular plots in question. Second, in recent years some emphasis has been placed by some of the Banabans on modern ideas of rehabilitation and reinstatement being desirable and even obligatory on environmental grounds. I can indeed follow this as a general concept; but in deciding legal liability it is plainly impossible to take a bargain struck on a basis of no reinstatement but limited replanting and then say that because environmental ideas are changing for the better, the legal burdens accepted by one party to the bargain ought to be correspondingly increased. However potent such arguments may be in political or social fields, they cannot affect the law of contract.

Third, one must bear in mind that the provisions for replanting in the 1913 agreement and in the A and C deeds were the last provisions to this effect in any of the transactions between the Banabans and the company or the British Phosphate Commissioners. No such provisions were either effectively sought or actually made in later transactions. The 1931 transaction was, of course, the exercise of compulsory powers; and in the 1947 transaction the Banabans were no longer on Ocean Island and were still far from having recovered from the effects of their wartime hardships. Nevertheless, there were the 1940 negotiations. Though these resulted in no binding agreement, they nevertheless produced an agreement in principle which, in a revised form, later gave rise to the 1947 agreement. The 1940 negotiations were, of course, conducted on Ocean Island at a time before the Banabans had suffered as they did after the Japanese invasion; yet replanting or reinstatement formed no part of these negotiations. As one of the Banabans said at the time, without dissent by the others, 'The only thing we want is more money'.

When one is considering subsequent assertions by the Banabans about their deeply-felt desire for the replanting and reinstatement of Ocean Island, it should be borne in mind what their earlier acts and omissions were in this respect. I say nothing about the 1973 transaction on this point, as it was plainly a somewhat minor tidying-up operation which would not really raise this issue. Not until 1967 does there seem to be any record of any complaint by the Banabans about any failure to replant any land. Counsel for the plaintiffs asserted that not until 1970 did the Banabans have any copy of the 1913 agreement or the A and C deeds; but the Banabans' memorandum of 9th September 1967, just before the meeting in Wellington, accurately sets out the relevant words of the replanting obligation in the 1913 agreement, and this seems to be the first complaint by the Banabans that the agreed replanting had not been carried out.

(3) Possibility

Next I shall consider the words 'whenever possible' in the 1913 agreement, and 'as nearly as possible to the extent to which it was planted at the date of the commencement of the Company's operations' in the A and C deeds. I think that such phrases have to be construed in a reasonable sense when they are contained in business transactions intended to have legal effect. Today there are very many things which can be achieved, but only with a vast expenditure of time and effort and money. Because they can be achieved in this way they are literally 'possible'; but in a business document intended to have practical effect, the parties are unlikely to have contemplated an obligation to do something which is altogether outside the range of the practicable and reasonable merely because they use the word 'possible': see *Moss v Smith*[1], per Maule J.

To the contention by counsel for the plaintiffs that 'possible' bore its literal meaning,

1 (1850) 9 CB 94 at 103

counsel for the defendant commissioners replied that it meant what was reasonably practicable by reasonable endeavours. I do not think that counsel for the plaintiffs can be right, for the reasons that I have given. At the same time, I somewhat mistrust translations of a word into phrases such as counsel for the defendant commissioners', with its double reliance on reasonableness, although I think that this is nearer the true meaning of the word than counsel for the plaintiffs' literalness. Perhaps 'reasonably practicable', with no reference to 'reasonable endeavours', come fairly near the meaning. At all events, I think the phrase 'whenever possible' in the 1913 agreement softens the obligation enough to exclude any duty to replant the worked-out land to the same density as existed before it was worked, if its condition in a worked-out state makes it impracticable to achieve that density without carrying out levelling or other engineering operations on it. Similarly for the A and C deeds: for these, as for the 1913 agreement, I think that the qualifications introduced by the words of possibility are entirely consonant with, and support, a construction of the documents which makes the obligation to replant apply to the land as it is in its worked-out state, and points against there being any obligation to level the land, construct roads on it and resoil it.

There is another aspect of possibility, bearing as much on the making of any decree of specific performance as on the wording of the documents. Counsel for the defendant commissioners advanced a substantial argument on the impracticability of the scheme for replanting put forward by the plaintiffs. On the evidence it was plain that on no rational basis could so large an expenditure on the importation of the soil, the engineering works and all the other elements of the project be justified. As I have mentioned, one of the plaintiffs' witnesses, Dr Schnellmann, accepted that an expenditure of something in the region of $A50 million might be involved before a coconut was planted. He also accepted that importing and spreading the requisite half million tons of soil might well take up to 100 years. Senator Walker agreed that the result would not look very beautiful, and in terms of return for expenditure it would be an absurd exercise. Coconuts could be imported, or a coconut plantation could be bought and managed, which at a mere fraction of the cost would produce the same yield of coconuts. In due course I shall say something on the problems of replanting.

I pause there. Senator Walker's proposals were based on a 2-foot depth of soil in the baskets, though he said that he would prefer six feet. For a long while the plaintiffs' case proceeded on the basis of a 2-foot depth, though not formally tied to it; and the engineering estimates were based on this. Indeed, a 6-foot depth was not even put in cross-examination to Mr King, the British Phosphate Commissioners' engineering expert. As the hearing progressed, it became apparent that a 2-foot depth of soil on Ocean Island, with its marginal rainfall for coconuts, would give the scheme virtually no prospects of success. Indeed, Professor Russell, an expert in soil science called by the plaintiffs, said that coconuts planted on Ocean Island in two feet of soil would have no chance whatever of surviving to being fruit-bearing trees if the roots could not penetrate deeper than two feet. What is left after the phosphate has been extracted is unfortunately a hard form of rock known as dolomitised limestone, and the roots cannot penetrate this but have to engage in a difficult search for fissures. I think it clear on the evidence that a mere two feet of soil would bring no hope of success on Ocean Island.

In his closing speech, made after leading counsel for the defendant commissioners' closing speech, counsel for the plaintiffs accordingly contended that if two feet would not do, then an order should be made on a 6-foot basis; and of course the draft order that he submitted on Day 101 was, like an earlier version on Day 95, a 6-foot order. In the circumstances I of course invited counsel for the British Phosphate Commissioners to address me on this point, among others; and on Day 105 second counsel for the defendant commissioners did so. I do not think that I need explore his detailed comments on the difficulties in the plaintiffs' attempts to convert what in substance was a

2-foot case into a 6-foot case, and the revisions in the engineering and other estimates that must follow, both in time and cost. These, as might be expected, are far from being as simple as merely saying that as two feet require half a million tons of soil, six feet would need 1½ million tons. It suffices to say that in my judgment the revision in the depth of soil made a scheme which was thoroughly impracticable hopelessly so, and one which in the event had not been properly considered in evidence. In any case, I am far from satisfied that it has been established that even 6 feet would be enough to make success reasonably probable.

I must also mention the difficult question whether under the Customs Ordinance 1963 of the Gilbert and Ellice Islands Colony it would be legally possible to import soil into Ocean Island without a long and extremely expensive process of soil sterilisation first being carried out. I heard substantial argument about the differences between prohibited imports and restricted imports as set out in Sch 2 to the Ordinance; but all that I propose to say is that there seems to me to be a real point of difficulty here in carrying out the scheme proposed by the plaintiffs. The difficulty might be resolved by a legislative amendment, or by the exercise of an executive discretion, or possibly in other ways; but until there was any such resolution, the difficulty would remain very real.

(4) Merger

I now come to the question of merger that I mentioned a short while ago. Where land is the subject both of the 1913 agreement and of an A or C deed, is it subject to the replanting obligations of both documents, or is there a merger, so that the only replanting obligation is that in the A or C deed? In considering this, I bear certain points in mind. First, it is well settled that merger of this nature is a matter of intention: as Bowen LJ once said, the court must 'endeavour to see what was the contract according to the true intention of the parties': *Palmer v Johnson*[1]. Second, merger is not excluded merely because the terms of the subsequent document differ from those of the earlier document. Thus where there was a contract to convey land subject to a reservation of 'all coal', and in the subsequent conveyance there was an exception of 'all coal and other minerals', it was held that the contract was nevertheless merged in the conveyance, and that the exception applied both to coal and to all other minerals: *Knight Sugar Co Ltd v Alberta Railway and Irrigation Co*[2]. This does not mean that such differences are irrelevant; they may be such as to indicate that the contract was not intended to be merged in the conveyance. The real question is always one of intention, the essential question being whether the parties intended the obligation in the contract to be performed by the subsequent deed: see the *Knight Sugar* case[3] per Lord Russell of Killowen. In the present case there are a number of differences between the 1913 agreement and the A and C deeds in the obligation to replant.

Third, there are differences in the parties. The 1913 agreement was made between 258 Banabans and Mr Ellis on behalf of the company. The A and C deeds were made between the company, Mr Eliot the resident commissioner, and the individual Banaban landowner. Counsel for the plaintiffs accepted that such differences did not per se prevent merger, but he contended that they were strong indications against it. Fourth, there is the further point that the replanting obligation of the contract required compliance by the company only as soon as deeds had been executed for eight acres in the central mining area and eight acres in the eastern mining area. It would be odd, counsel for the plaintiffs said, if these first 16 acres were to be different from all subsequent transactions, in that there was merger for the subsequent transactions but not for the first 16 acres; for as the contractual obligation was not in force, it could not merge with the deed. Yet as merger may engulf a binding obligation,

1 (1884) 13 QBD 351 at 357, cf [1881-5] All ER Rep 719 at 722
2 [1938] 1 All ER 266
3 [1938] 1 All ER 266 at 269

I do not see why it should not absorb a conditional or suspended obligation with equal, if not greater, ease. Indeed, when examined, I think that this point really recoils on counsel for the plaintiffs' head. If merger applies throughout, then both for the first 16 acres and all subsequent dispositions, replanting will be uniformly governed by the A or C deeds alone. If there is no merger for the first 16 acres, these will be governed by the A or C deeds alone, while subsequent dispositions will be governed by both the agreement and the A or C deeds as well. Accordingly, since it is the anomalous result that is produced by holding that there is no merger, the more probable intention to be imputed to the parties is that there should be merger.

Whether one looks at this question as a matter of fine detail, or whether, as I think one should, one considers it more broadly, my conclusion is that the replanting obligation in the A and C deeds was intended to replace the replanting obligation in the 1913 agreement for the land which was the subject of the deed. The two obligations are, of course, different in a number of respects; but they are also basically similar, in that they are both obligations to replant the land concerned. If Ocean Island had possessed an officious bystander in 1913 (a gentleman whose functions in relation to implied terms must not be allowed to obscure his utility in other spheres), I suppose that he might have cross-examined the parties as to their intentions. If he had, I would have been very surprised if the upshot had been an expression of intention that land subject to A or C deeds should be bound by two differently expressed obligations to replant, operating in different ways both as to what was to be planted and in other respects. The 1913 agreement makes it plain that matters are not to be left resting on the agreement, but that the company is to acquire land under deeds which are subsequently to be executed: see cll 3, 4 and 5.

As for the difference in parties, I see no difficulty in the fact that the resident commissioner, though not a party to the agreement, was a party to the deeds. Nor can I see any difficulty in regarding the doctrine of merger as operating distributively: where a contract applies to many parcels of land, I do not see why it should not continue to apply to those parcels which are not subsequently conveyed and at the same time be merged in the conveyances of those parcels which are conveyed, quoad those parcels. Accordingly, in my judgment the only obligation to replant which applies to land subject to an A deed or a C deed is the obligation contained in that deed: in such cases the replanting obligation of the 1913 agreement does not apply. This conclusion, of course, leaves the replanting obligation of the 1913 agreement in operation for land within its scope which was not the subject of an A or C deed; and on the footing that counsel for the plaintiffs accepted on Day 81, that is the remainder of the 250 acres within the delimited areas.

Next I must consider a question that I have already mentioned, namely, whether the present defendants are liable to the present plaintiffs on the replanting obligation, whether in the 1913 agreement or in the A and C deeds, and, if so, on what footing. Here the main argument centred round the two contentions by counsel for the plaintiffs that I have briefly indicated, namely, whether the case fell within the principle that he who takes the benefit of a transaction must also bear the burden, and, secondly, whether there has been a series of novations. I shall consider novation first.

(5) Novation

It was common ground that none of the present plaintiffs and none of the present defendants were parties either to the 1913 agreement or to any A or C deed. What counsel for the plaintiffs has to show under the head of novation is that in relation to each parcel of land there has been a continuous series of novations, so that with every change, whether in the ownership of the phosphate undertaking or in that of the plot of land, the new owner or part-owner became contractually bound to the other party in place of the old owner. Counsel did not rely on any express novation, but founded himself on a series of implied novations. Halsbury's Laws of England[1]

1 4th Edn, vol 9, p 403, para 584

sufficiently supports the proposition that consent to a novation my be inferred from conduct, though it also shows that there must be an intention to effect a novation. In support of his contention, counsel relied in the main on the particulars which appeared in the statement of claim after the amendments had reached the purple state. He put the matter in three successive stages. These were: (1) the transfer of the company's obligation to the first three British Phosphate Commissioners in 1920; (2) the transfer of those obligations through successive generations of commissioners; and (3) the transfer of the rights of the original landowners to the present landowners.

I pause there. Counsel for the plaintiffs realistically accepted that he was contending for a prodigious number of implied novations, making a massive total. The difficulties are plainly many and substantial. It takes two to make a contract, as counsel for the defendant commissioners gently reminded me; and for the land in question there had been no dealings between the present landowners and the present commissioners, none of who had been appointed before 1965. But counsel for the plaintiffs contended that there were many matters, some of them small, though cumulatively important, which supported the conclusion that there had been a long series of implied novations. In particular, he emphasised that once a novation was established for the change-over from the company to the British Phosphate Commissioners in 1920, it became easier to imply subsequent successive novations; and accordingly he devoted much attention to this change-over.

The change-over occurred in three stages. First, there was the period from 1st July 1920, when no British Phosphate Commissioners had been appointed, and all continued as before, save that the company had become bound to sell its undertaking, and was managing it on behalf of the purchasers. Second, there was the period from September 1920 onwards, when the company continued to manage the undertaking on behalf of the purchasers, but the British Phosphate Commissioners had been appointed, and the change was explained to the Banabans. Third, there was the completion of the purchase on 31st December 1920. With operations on Ocean Island continuing unchanged throughout, and all concerned playing some part in the change-over, or assenting to it, there was much, said counsel for the plaintiffs, to support the view that there had been a series of novations. The British Phosphate Commissioners not only continued to exercise the mining rights that the company had acquired, but also continued to discharge the company's obligations to pay royalties; and three C deeds were executed in this time, which carried out the obligations under the 1913 agreement.

Counsel for the plaintiffs cited a line of cases running from *Clarke v Earl of Dunraven*[1] (better known as *The Satanita*) to *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd*[2], with a nostalgic glance at *Carlill v Carbolic Smoke Ball Co*[3] on the way, in support of the proposition that in appropriate cases the court will be ready to imply the existence of a contract despite the absence of any direct dealings between the parties to it. That, of course, may readily be accepted: given suitable facts, it may well be very easy to infer a novation, as appears from *Chatsworth Investments Ltd v Cussins (Contractors) Ltd*[4]. But the question must always be whether the facts of the particular case make it one that is appropriate for such an implication. I hope that counsel for the plaintiffs will not think it discourteous of me if I do not discuss at length all the detailed submissions that he made. Some of them carry less weight than others. Thus until the company ceased to exist in 1926, the continued payment of royalties by the British Phosphate Commissioners is readily explicable on the footing of the obligation to indemnify the company; and it also operated to indemnify previous commissioners after their retirement, though it may well be doubted whether this was ever considered.

1 [1897] AC 59
2 [1974] 1 All ER 1015, [1975] AC 154
3 [1893] 1 QB 256, [1891-4] All ER Rep 127
4 [1969] 1 All ER 143 at 144, [1969] 1 WLR 1 at 4

Practical men do practical things without analysing legal liabilities, and those who carry on mining concerns simply pay what the concern appears to be liable to pay.

However, though I have read and re-read my notes of the submissions by counsel for the plaintiffs many times, I shall not pursue the arguments of fact further. I have also, of course, examined the authorities that he cited. I have in particular considered *Hart v Alexander*[1] and *Bilborough v Holmes*[2], which must be weighed in the light of *Scarf v Jardine*[3] in relation to the borderline between novation and election. None of these involved a long chain of novations such as is claimed in this case, and I can see nothing in these or any other cases cited which provided any real support for counsel's contentions.

Hart v Alexander[4], indeed, seems to me to point to counsel for the plaintiffs' essential difficulty. The headnote appears to summarise the point correctly when it refers to the court as having held that certain facts were sufficient evidence to go to the jury to show that H, one of the contracting parties, knew that A (one of the contracting partners) had retired from the firm and E had come in in his place, and that H 'had agreed to discharge A from liability, and take the new firm as his debtors'. I say that this points to counsel's essential difficulty because it illustrates the basis of novation as being the making of an agreement.

Novation is the substitution of a new contract for an old by the agreement of all parties to the old and the new; and with the best will in the world I do not see how it begins to be possible to draw from the facts before me any inference of the animus contrahendi that must repeatedly and in multiplicity have brought about this large number of novations. If one takes the appointment of new commissioners alone, there is nothing to show that the Banaban landowners ever knew who had replaced whom, or that they ever had, or ought to have imputed to them, any intention of discharging the outgoing commissioner from liability and taking the incoming commissioner instead as one of their debtors or potential debtors. Nor, for that matter, has anything been put before me to suggest that a new commissioner, when appointed, had any idea that he was agreeing with a large number of Banaban landowners to undertake the obligations of a large number of contracts, and thereby releasing his predecessor in office. There has been nothing to suggest that a new commissioner even learned the names of those with whom he was said to have been contracting, or knew of the changes that occurred by death and the devolution of the land.

Even the 1920 transaction, so much relied on by counsel for the plaintiffs, seems to me to point against novation, rather than in its favour. I say this quite apart from counsel for the plaintiffs' vacillations about the date on which the first novations occurred, ranging from some date between the meeting with the Banabans on 16th October 1920 and 31st December 1920, to the date when the British Phosphate Commissioners first paid the royalties. In the end, that last date was ousted by 31st December 1920 as counsel's first preference; but even if that is right, such uncertainties do not provide favourable soil for a rich crop of novations. What seems to me to be most significant is that at the time of the change-over, as I have mentioned, explanations were given to the employees about their relationship with the company and the British Phosphate Commissioners, and explanations were given to the Banabans about the relationship of the British Phosphate Commissioners with the local administration. Yet not a word seems to have been said about the matter that is relevant to novation, namely, the relationship of the individual Banaban landowners to the company, a body capable of perpetual existence, and the replacement of that body by three individual unincorporated commissioners. If this had been explained to the

1 (1837) 2 M & W 484, *affg* 7 C & P 746
2 (1876) 5 Ch D 255
3 (1882) 7 App Cas 345, [1881-5] All ER Rep 651
4 (1837) 2 M & W 484

Banaban landowners and accepted by them, the drawing of the inferences for which counsel for the plaintiffs contends when each commissioner was replaced by another would present far fewer problems: but that was not the point to which the explanations were directed.

In a sense, one of the strongest points in counsel for the plaintiffs' favour was one which, as a seasoned advocate, he never made explicit in the somewhat crude form in which I propose to put it, though he saw to it that its presence could not pass unnoticed. Bluntly stated, it is that it would be unfair and wrong for the present commissioners to escape liability by reason of their unincorporated condition and the failure of the governments to operate any proper machinery for ensuring that each generation of commissioners was in law not only entitled to the benefits of the company's undertaking but also subject to the burdens. Therefore the court ought to strain to find a series of novations so as to bring about the proper result.

With the whole of that proposition up to the word 'therefore' I wholeheartedly agree; but with the 'therefore' and what follows I cannot agree, at any rate to the extent that the straining by the court should achieve success. It will be remembered that cl 10 of the indenture of 31st December 1920 provided for the making of vesting declarations when one commissioner replaced another. Yet neither this nor any other machinery for ensuring continuity in a legal sense seems to have been operated by the governments or the commissioners. I am indeed reluctant to say that the present commissioners should be able to escape liability on the ground that nothing had been done by them or their governments which would expose them to liability for the acts and omissions of their predecessors. Nevertheless I cannot permit that reluctance to induce me to hold that despite facts so unpromising for a massive series of novations, these novations should still be inferred. In my judgment there have been no novations which would make the present British Phosphate Commissioners liable to the plaintiffs.

(6) Benefit and burden

I next consider the principle that he who takes the benefit of a transaction must also bear the burden. As might be expected, this was the subject of extensive argument, and much discussion of the authorities; and I must consider it at length. There was general agreement that in a number of respects the present case did not fall within any of the authorities; and one of the many questions was whether the principles to be found in the authorities were properly applicable to this case, and what those principles were.

The basic principle has plainly been expanding. Its origin appears in at least two forms: see Megarry and Wade's Real Property[1]. One form of the principle is as a technical rule relating to deeds. If a person is named as a party to a deed, but does not execute it, the deed will nevertheless be held to bind him if he knowingly takes the benefit of it. In that form, it is not much more than part of a rule for determining who are to be treated as being parties to a deed. In another form, the rule is that if by an indenture to which A and B were the only parties A granted land to B for life with remainder to C, on terms that the land was to be held subject to certain conditions, then if C entered after B's death and took the land by virtue of the indenture, he thereupon became bound by the conditions, even though he was no party to the indenture. This is the instance given in a passage in Littleton[2] (and in Coke on Littleton[3]) to which reference is made in the cases. In each form, it will be observed, the principle applied only to a specified person, either named as a party to the deed, or named (or perhaps ascertainable) as the grantee of an estate.

Side by side with these technical instances, and probably underlying them, was

1 4th Edn (1975), p 750
2 At 374
3 At 230 b

the simple principle of ordinary fairness and consistency that from the earliest days most of us heard in the form 'You can't have it both ways', or 'You can't eat your cake and have it too', or 'You can't blow hot and cold'. The thought also appears in Latin, in a maxim that I shall mention in due course. With such foundations or parallels, it is not surprising that the principle has been expanding in its scope; and one of the questions is how far it can properly be carried in transcending technicalities. Before I turn to the cases, it is convenient to consider certain aspects of the doctrine that have been settled or are emerging. By no means all of them are clear.

(*a*) *Conditional benefits and independent obligations.* One of the most important distinctions is between what for brevity may be called conditional benefits, on the one hand, and on the other hand independent obligations. An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such as an obligation to make certain payments. Such restrictions or qualifications are an intrinsic part of the right; you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases it is not only the original grantee who is bound by the burden; his successors in title are unable to take the right without also assuming the burden. The benefit and the burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit. In the other class of case the right and the burden, although arising under the same instrument, are independent of each other: X grants a right to Y, and by the same instrument Y independently covenants with X to do some act. In such cases, although Y is of course bound by his covenant, questions may arise whether successors in title to Y's right can take it free from the obligations of Y's covenant, or whether they are bound by them under what for want of a better name I shall call the pure principle of benefit and burden.

(*b*) *Qui sentit commodum sentire debet et onus.* This ancient maxim, to be found in Coke's Institutes[1], bears an uncertain relationship to the principle under discussion. In spirit it is the same; yet the instances of its operation given in the books are curiously restricted and haphazard: see Broom's Legal Maxims[2]. Cases of burdens annexed to property binding those who take it are given as instances of the maxim, and so are cases of election. I shall not attempt to explore these thickets. In the case of burdens attached to land, such as mortgages or easements, it hardly seems necessary to resort to any doctrine about benefit and burden: if you take something that has a burden annexed to it, you have to take it as it is, burden and all. Again, you cannot pick out the good and leave the bad. If more Latin is required, transit terra cum onere will do. The parallel between this head and conditional benefits under the previous head is obvious. The only essential difference seems to be that where there is a burden which in its nature is annexed to property there will be no initial question of determining whether or not the burden is a condition of the benefit. In neither case is there any question of applying any pure principle of benefit and burden: each in essence consists merely of having to take a thing as it stands. Perhaps I should add that there may be some ambiguity about the word 'burden'. Sometimes it is used in the sense of burdens annexed to property, such as mortgages, and sometimes it is used in the sense of some onerous but independent obligation which under the pure benefit and burden principle may or may not bind successors in title. In most cases the context will make the sense clear. I do no more than indicate a possible source of misunderstanding of what has been said in some of the cases and elsewhere.

(*c*) *Obligatory and optional.* In some cases the principle of benefit and burden appears to operate in an obligatory form. In the two technical instances that I have given, once the benefit has been taken under the deed, or once the estate has been claimed under the indenture, the burdens are as binding as if the taker of the benefit or estate had executed the instrument. In the case of conditional benefits, the result seems to

1 2 Co Inst 489
2 10th Edn (1939) pp 482-486

be the same: take the benefit, and at once the burdens bind you. But in the case of independent obligations, the pure principle of benefit and burden (if it applies at all) seems at least in some cases to operate in an optional manner. Thus if the benefit is a licence to cross a neighbour's land and the burden is the making of an annual payment, an assignee of the licence appears to be able to resist claims for future payments if he ceases to enjoy the licence. In such a case, he can say that he has never become contractually bound to make the payments, and that he is taking no benefit for the period to which the payments relate. Plainly there is a great difference between saying, 'As soon as you accept any benefit you become subject to the whole of the burdens, past, present and future', and saying, 'As long as you continue to accept the benefit you must continue to bear the burden'. Whether in the latter case there would be any right to resume enjoying the benefit and bearing the burden after there has once been a discontinuance I do not know.

(*d*) *Continuing and unitary burdens.* The previous head leads to the present head. In some cases the burden may be a continuing burden, such as an obligation to pay an annual sum. In other cases the burden may be a future unitary burden, such as an obligation to pay compensation for damage, or to restore land after opencast working; and of course there may be many variants and mixtures of burdens. In the case of continuing burdens, the pure principle of benefit and burden seems to apply in the optional form discussed under the previous head. But in the case of unitary burdens, how does that principle apply? Does every successor in title to the benefit become liable for the whole of the burden when it accrues, however brief his enjoyment of the benefit? If not, how is the burden to be borne?

(*e*) *Relationship to assignment of benefit.* It was, of course, accepted on all hands that the burden of positive covenants will not run with the land; and if matters such as novation are left on one side, it is clear that in general contractual burdens are not assignable, though contractual benefits are. How, then, does the principle that he who takes the benefit must bear the burden fit in with cases where benefits such as the right to receive certain payments under a contract have been assigned but the assignee of those benefits has been held or assumed to take free of the burdens under the contract?

(*f*) *Active and passive.* The principle in its pure form may operate in two different ways; and during the argument these became known as the 'active' and the 'passive' forms. The active form looks to the future. X is seeking to exercise some right which has been assigned to him. If the doctrine applies, he can exercise the right only if he accepts the burdens; he has no choice. The passive form looks to the past. X has done some act, such as entering on Y's land and damaging it, and he is being sued by Y. X may then have a choice. He may claim to be an assignee under a grant of the right to do the act, in which case, if the doctrine applies, he must bear the burdens imposed by the instrument creating the right, e g an obligation to pay compensation. Alternatively, he may refrain from relying on the instrument, and instead accept liability on the footing that his act was unauthorised. If the rate of compensation and the measure of damages at common law differ, the active and passive forms may thus operate differently, though I do no know that there is any great difference in principle between them.

(*g*) *Legal and equitable.* It seems clear that the doctrine may operate not only at law, as in the two technical instances that I have given, but also in equity, as appears from the cases.

I think that I have said enough about some of the categories and problems of this branch of the law to make it desirable to turn to the authorities. They fall into three groups. In the first, the issue was on the pure principle of benefit and burden. The burden was held to have passed not because the right granted was held to be conditional on assuming the burden, or to be qualified by it, but because of the principle that he who takes the benefit must bear the burden. In the second group of cases the

issue has been whether or not the right granted was a conditional or qualified right; in all the cases save one the right has been held to be conditional, and the claimant has succeeded. The third group of cases consists of cases cited on the relationship that I have mentioned between the principle of benefit and burden, and the assignment of benefits. However, it will be seen on examination that there are cases in this category which really belong to the second group.

The leading case in the first group is the well-known decision of Upjohn J in *Halsall v Brizell*[1]. In that case the owners of an estate laid it out in 174 building plots, and formed roads and sewers, a sea wall and a promenade and so on; and in disposing of the building plots the developers, as I shall call them, retained the roads, sewers, sea wall and promenade. A deed of covenant made between the developers, as trustees for the parties to the deed, and the owners of plots made a number of provisions for the regulation of the estate. All this was done in 1851, in the spacious conveyancing language of the day; I shall try to put matters briefly. One of the provisions was that each party to the deed, and his successors, should contribute and pay a due and just proportion, in respect of his plot of land, of the expenses of maintaining the roads sewers, promenade and sea wall; and this was supported by a power of distress for the developers and their successors. The deed also provided machinery for the proprietors of plots to determine the expenses in general meeting, with provisions for voting and so on.

The litigation arose in respect of a house on one plot which, without being structurally divided, was let to five separate tenants; and much turned on a resolution passed at a general meeting of plot-holders in 1950. That resolution empowered the trustees to make additional annual calls for every house divided into two or more separate flats or dwellings, with a limit of three calls per plot. The defendants, who were executors of the plot-owner who had divided the house, duly paid single calls in respect of the house. But they refused to pay the two additional calls each year which the plaintiffs (who were the present trustees of the deed) had demanded in accordance with the resolution. The plaintiffs did not sue for payment, but instead took out an orginating summons which raised two main questions: first, whether the deed was valid and effectual at all in so far as it purported to make the successors of the original contracting parties liable to pay calls; and second, if it was, whether the 1950 resolution imposing additional calls was a valid resolution.

Upjohn J answered the second question by holding, for reasons that I need not discuss, that the resolution was ultra vires and void. That by itself sufficed to dispose of the case; and a declaration that the resolution was ultra vires and void was accordingly made. The trustees therefore failed in their claim, for the single calls had been paid, and only the liability for the additional calls was in issue. But before reaching this conclusion, the judge had considered the first question that was before the court; and of course it is this question that is important in the present case. On this, the judge said[2] that it was plain that the defendants 'could not be sued on the covenants contained in the deed for at least three reasons'. These were that a positive covenant such as that in question did not run with the land; that the provisions for the payment of calls plainly infringed the rule against perpetuities; and that it was conceded that the provision for distress, not being annexed to a rentcharge, was invalid.

On these last two points I may mention, first, that the case seems to have escaped notice in books on perpetuities. Second, on rentcharges, there is an interesting contrast with *Morland v Cook*[3]. In that case, a covenant by various landowners to share the expenses of maintaining a sea wall was held to be enforceable at law against successors in title of the covenantors. The reason subsequently given by the Court of

1 [1957] 1 All ER 371, [1957] Ch 169
2 [1957] 1 All ER 371 at 377, [1957] Ch 169 at 182
3 (1868) LR 6 Eq 252

Appeal was that, although framed as a covenant, the obligation was really a rent-charge; and this conclusion was reached because the covenant was to pay the money 'out of the said lands': see *Austerberry v Oldham Corpn*[1].

Having held that the defendants could not be sued on the covenants of the deed, Upjohn J[2] continued:

> 'It is, however, conceded to be ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder. If authority is required for that proposition, I refer to one sentence during the argument in *Elliston* v. *Reacher*[3], where SIR HERBERT COZENS-HARDY M.R. said: "It is laid down in COKE ON LITTLETON, 230b, that a man who takes the benefit of a deed is bound by a condition contained in it, though he does not execute it." If the defendants did not desire to take the benefit of this deed, for the reasons I have given they could not be under any liability to pay the obligations thereunder. They do desire, however, to take the benefit of this deed. They have no right to use the sewers which are vested in the plaintiffs, and I cannot see that they have any right, apart from the deed, to use the roads of the park which lead to their particular house, No. 22, Salisbury Road. The defendants cannot rely on any way of necessity nor on any right by prescription, for the simple reason that, when the house was originally sold in 1851 to their predecessor in title he took the house on the terms of the deed of 1851 which contractually bound him to contribute a proper proportion of the expenses of maintaining the roads and sewers, and so forth, as a condition of being entitled to make use of those roads and sewers. Therefore, it seems to me that the defendants here cannot, if they desire to use their house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder. On that principle it seems to me that they are bound by this deed, if they desire to take its benefits.'

It will be seen that this passage is founded on a concession by counsel. That concession is referred to in argument[4]. Upjohn J asked: 'Is there not a rule that a person who accepts the benefit of a deed must also accept the burden of it?' Counsel for the defendants replied: 'Yes, that is conceded'; and he cited Norton on Deeds[5] and the observation in *Elliston v Reacher*[3] which was cited in the passage of the judgment that I have just read. Before I go any further, I think I should say something about this observation and its sequel.

It is obvious that there is a considerable difference between a rule which applies only to a specified person who is named as party to a deed or as grantee of an estate, and who takes a benefit under the deed or takes the estate, and a rule which applies to 'a man' or 'a person' who takes the benefit of a deed. In the former case, the rule applies only to a persona designata who is within the contemplation of the other parties to the deed as being intended to take the benefits or the estate under it and bear the burdens of it; the doctrine simply cures the defect of that person not having bound himself by executing the deed. (It is old law that a person who is not a party to a deed may nevertheless bind himself by a covenant in the deed if he executes it: *Salter v Kidgly*[6]) In the latter case 'a man' or 'a person' may, if taken literally, be anyone in the world, and outside the contemplation of the parties to the deed, though some limitation must no doubt be implied.

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1 (1885) 29 Ch D 750 at 774, 775, 782
2 [1957] 1 All ER 371 at 377, [1957] Ch 169 at 182, 183
3 [1908] 2 Ch 665 at 669
4 [1957] 1 Ch 169 at 180
5 2nd Edn (1928), p 26
6 (1689) Carth 76

With that in mind, it seems plain that the interlocutory observation of Cozens-Hardy MR in *Elliston v Reacher*[1], the concession by counsel in *Halsall v Brizell*[2], and what Upjohn J said in that case, all involve a substantial expansion of the principle. The proposition laid down in Coke on Littleton[3] (and in Littleton[4], which must be read with it), was not in terms of 'a man' or 'a person', but merely in terms of the grantee of an estate. Similarly, the passage in Norton on Deeds[5] cited in counsel's concession was merely in terms of a party to a deed who does not execute it. Cozens-Hardy MR's observation was, indeed, an interlocutory observation not repeated in his judgment; and one must bear in mind the warning of Lord Simon LC that such observations are not judicial pronouncements, and decide nothing, even provisionally, but are merely made in order to elucidate the argument or point the question or indicate what needs investigation: *Practice Note*[6]. Furthermore, the judgment in *Halsall v Brizell*[2] was not a reserved judgment; indeed, I observe, a little wistfully, that the case was argued and decided in a single day.

Let it be accepted that a degree of historical frailty can be detected in the forensic process in this sphere, and let it also be accepted that at any rate on one view what Upjohn J said on the point was not necessary for his decision and forms no part of his ratio decidendi. Accept all that, and there still remains the fact that, quite apart from other authorities, the propositions enunciated by Cozens-Hardy MR and Upjohn J seemed right to them. Couple that with the simple principle of fairness and consistency that I have mentioned, and it will be seen that there is good reason why I should be ready to adopt and apply the broader proposition that has emerged from the technicalities of past ages. At the same time, in considering the application of the expanded doctrine to the case before me, it will be necessary to consider what are the true limits of that doctrine. With that, I turn to the only other case in this first group.

2nd December. **MEGARRY V-C** continued reading his judgment.

In *ER Ives Investment Ltd v High*[7], the owner of Blackacre erected a building with foundations which trespassed to a small extent on Whiteacre. The owners of Blackacre and Whiteacre then orally agreed that the trespassing foundations of Blackacre could remain but that Whiteacre should have a right of way over Blackacre. The agreement was never registered as a land charge, and Blackacre passed to purchasers. Difficult questions of registration arose, as well as questions of estoppel. But the point with which I am concerned was where Lord Denning MR[8] applied the principle that he who takes the benefit must also take the burden, referring with approval to *Halsall v Brizell*[2]. 'So long as' the owners of Blackacre took the benefit of having foundations which reached-into Whiteacre, he said, they must shoulder the burden of the right of way over Blackacre; 'so long as' the owner of Whiteacre took the benefit of the right of way, he must allow the trespassing foundations of Blackacre to remain. Danckwerts LJ[9] took a similar view, whereas Winn LJ put the emphasis on estoppel.

The words 'so long as' plainly appear to indicate that with continuing benefits and burdens on both sides the burdens could be escaped at the price of ceasing to enjoy the benefits. A similar view appeared in *Hopgood v Brown*[10]; but that was a case of

1 [1908] 2 Ch 665, [1908-10] All ER Rep 612
2 [1957] 1 All ER 371, [1957] Ch 169
3 At 230 b
4 At 374
5 2nd Edn (1928), p 26
6 [1942] WN 89
7 [1967] 1 All ER 504, [1967] 2 QB 379
8 [1967] 1 All ER 504 at 507, [1967] 2 QB 379 at 394
9 [1967] 1 All ER 504 at 510, 511 [1967] 2 QB 379 at 399, 400
10 [1955] 1 All ER 550 at 561, [1955] 1 WLR 213 at 226

reciprocal licences, and I think that Evershed MR put matters more on the basis of estoppel than on a basis of benefit and burden. However, the point seems to have been explicitly decided by the Supreme Court of Canada in *Parkinson v Reid*[1]. There, in the absence of privity either of contract or of estate, it was held that defendants who derive title under an instrument which conveyed land with the rights to use the plaintiff's wall but subject to certain repairing obligations were not liable on those obligations after they had ceased to use the wall. Before I leave the *Ives* case[2] I should add that it makes it clear that the principle applies in the case of parol agreements as well as for deeds, and that in that case the principle was operating in equity, rather than at law.

I have now considered the only cases cited which seem to me to depend on the pure principle of benefit and burden. I must next turn to the second group of cases that were cited on this topic, being those which depended on whether or not the benefit was a qualified or conditional benefit. I will first take *Aspden v Seddon*. This was litigated in two stages: *Aspden v Seddon (No 1)*[3] was in chancery, and *Aspden v Seddon (No 2)*[4] was at common law. The facts are a little complicated, but in essence they were as follows. A landowner conveyed part of his land to a trustee for a company, excepting and reserving the mines and minerals and the right to work them. The exception and reservation ended with the words 'so that compensation in money be made' by the landowner and his successors 'for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties, or in consequence thereof'. There was also an express covenant for the landowner and his successors to pay compensation for damage to buildings caused by mining.

As required by the conveyance, the company erected a cotton mill on the land. There was then a devolution of the landowner's adjoining land and his mining rights on the Seddons, and also a devolution of the mill on Aspden. The Seddons worked the minerals and damaged the mill, whereupon Aspden sued them in Chancery for an injunction to restrain the working, and damages. This claim failed on the ground that the conveyance gave the right to the Seddons to let down the surface and damage the mill on paying compensation, and that the claim for damages was a matter for the courts of law; the case, I may say, was decided before the Judicature Act 1873 came into force.

In *Aspden v Seddon (No 2)*[4] the litigation arose on a case stated by an arbitrator, the main question being whether Aspden was entitled to recover compensation from the Seddons. Both in the Exchequer Division and in the Court of Appeal it was held that the answer was 'Yes'. The essence of the reasoning was that the only right to let down the surface that the Seddons had was a right sub modo, or a conditional or qualified right, the condition being the payment of compensation. James LJ[5] did not think that the law of England could be in such a state that the defendants could justify a trespass in opening a mine under an authority in which there was a qualification, but refuse to pay anything in the way of compensation under the terms of that qualification. He held it plain that 'a man exercising the right is to pay compensation ... The simple thing is that the man who has exercised the right is to pay for the damage'. Mellish LJ[5] treated the case as one of annexing a condition to the grant of minerals, and giving a right to let down the surface subject to the condition. It could then be said: 'You shall let down the surface, but you shall only do that sub modo that the man, whoever does let down the surface by getting minerals, shall pay compensation'. In the court below Bramwell B[6] made it explicit that a remedy lay at common law for the compensation.

1 [1966] SCR 162, (1966) 56 DLR 2d 215
2 [1967] 1 All ER 504, [1967] 2 QB 379
3 (1875) 10 Ch App 394
4 (1876) 1 Ex D 496
5 (1876) 1 Ex D 496 at 509
6 (1876) 1 Ex D 496 at 504

Westhoughton Urban District Council v Wigan Coal and Iron Co Ltd[1] does not seem to me to add much to *Aspden v Seddon*[2]. The essential point was that what had been granted was merely a qualified right to work the minerals under certain land, the qualification being an obligation to pay compensation for damage done. The qualification is referred to in the report[3]. There was also a covenant by the grantees not to do damage, and to make it good if they did. The grantees worked the minerals and did damage, and were sued by lessees of the land who derived title under the grantor of the mining rights. The lessees were held to be entitled to damages against the grantees. Although they could not claim as assignees of the covenants, they were entitled as lessees to have their land supported except so far as this right had been taken away by the grant of mining rights. The grantees could therefore either rely on the grant and comply with its obligation to pay compensation, or else abstain from relying on it and pay damages at common law. For things past, the grantees had this choice; but for the future the lessees could force the grantees to rely on their grant by claiming an injunction against them: see per Swinfen Eady MR[4]. It appears that the order of the Court of Appeal included liberty to apply for an injunction[5].

I pause to emphasise that in these cases there is plainly an initial question of construction. If an instrument grants rights and also imposes obligations, the court must ascertain whether on the true construction of the instrument it has granted merely qualified or conditional rights, the qualification or condition being the due observance of the obligations, or whether it has granted unqualified rights and imposed independent obligations. In construing the instrument, the more closely the obligations are linked to the rights, the easier it will be to construe the instrument as granting merely qualified rights. The question always must be one of the intention of the parties as gathered from the instrument as a whole. It is familiar law that in leases the tendency is to construe the covenants of the lessor and the covenants of the lessee as being independent of each other, so that the observance of the one is not conditional on the observance of the other. Such covenants, of course, usually appear separately and distinctly in the lease.

In considering this question, the learning of counsel for the plaintiffs took me to a decision of the House of Lords on the point, reported only as a note to another case. The decision is *Chamber Colliery Co Ltd v Twyerould*[6]. In that case a grant of mining rights was made, the grantees doing as little damage as the nature of the case would admit of, and making satisfaction to the grantors for all unavoidable damage by making annual payments at a certain rate per acre. There was also a covenant by the grantees that if any damage to any buildings was caused by working the mines, they would make 'full satisfaction' for it to the grantors over and above the annual payments. The proceedings were between parties who derived title from the grantors and grantees respectively; and the plaintiff claimed damages and an injunction in respect of damage to his land and buildings caused by mining. It was argued that the covenant for making full satisfaction for damage to buildings was a personal covenant which could not run with the land, and that it could not be treated as a limitation or qualification of the right to work the mines.

In a speech with which Lord Herschell LC, Lord Macnaghten and Lord Morris simply concurred, Lord Watson rejected this contention. He said[7] that the covenant did not profess to impose a burden running with the land.

> 'It is an inherent qualification of the coal owner's licence to work with the effect

1 [1919] 1 Ch 159
2 (1876) 1 Ex D 496
3 [1919] 1 Ch 159 at 160, 171, 174
4 [1919] 1 Ch 159 at 171, 172
5 [1919] 1 Ch 159 at 177
6 (1893) [1915] 1 Ch 268
7 [1915] 1 Ch 268 at 273

of letting down the surface, and provides that he shall not do so except upon the condition of compensating the owner for the time being of buildings which are injured by his operations. I do not think it is open to question that what is in form a covenant may nevertheless appear from the whole of the provisions of the instrument to be intended to operate as a condition also.'

From the short report it is not very easy to see the exact grounds on which this conclusion was based. One thing seems plain: the opposite conclusion would have produced strange results. The provision for making satisfaction for damage to the surface by means of annual payments was plainly worded so as to qualify the right to mine, much as in *Aspden v Seddon*[1]. If the covenant to make full satisfaction for damage to buildings had been held to be an independent covenant, the right to mine would be in a curious state of being qualified as to compensation for one form of damage and unqualified as to another. That curiosity, and the express references to the payments under the covenants being 'over and above' the annual payments to be made under what were plainly words of qualification, seem to me to provide ample grounds for holding that both provisions for compensation were intended to qualify the right to mine. In the phrase of counsel for the defendant commissioners, the words of the grant showed that the covenant was intended to be an extension of the condition. Whether the House was actuated by reasons of this sort I do not know; but at least it seems possible and, indeed, probable.

The last case in this second group is *Radstock Co-operative and Industrial Society Ltd v Norton-Radstock Urban District Council*[2]. This concerned a sewer laid in the bed of a river. Predecessors in title of the owner of part of the bed had granted a lease to predecessors in title of the sewage authority, authorising those predecessors to lay, maintain and use the sewer. The lease contained various covenants by the authority's predecessors with the lessor, including a covenant in cl 14 not to interfere with the flow of the river. (I may say that although the report at first instance includes only an extract from cl 14[3], the clause appears in full in the report of the appeal[4].) In time the sewer became exposed, and caused eddies which eroded the banks and did other damage; and the owner then sued the authority (inter alia) on the covenant. On this point, the issue was whether the authority had merely a qualified right to maintain the sewer, qualified by the obligation of cl 14 not to interefere with the flow of the river, or whether the right was unqualified and cl 14 imposed an independent obligation.

At first instance Ungoed-Thomas J[5] held that the latter was the correct view, and on appeal Harman[6] and Russell[7] LJJ agreed: in the words of the former, 'this covenant is not and cannot be construed as a condition'. The dissent of Sachs LJ was not on this point. The conclusion that cl 14 did not qualify the rights of sewer granted by the lease was in all cases reached as a matter of construction in statements that were brief and emphatic, though Ungoed-Thomas J did discuss and distinguish the *Westhoughton* case[8]. The *Chamber Colliery* case[9] was not cited, and counsel for the plaintiffs contended that if it had been the decision on this point would have been different. However, the distinctions between the two cases on this point are too obvious to require mention. I should be astonished if any of the judges in the *Radstock* case[10] would have felt the least surprise at the proposition that what is in form a

1 (1876) 1 Ex D 496
2 [1968] 2 All ER 59, [1968] Ch 605; *affg* [1967] 2 All ER 812, [1967] Ch 1094
3 See [1967] Ch 1094 at 1096
4 See [1968] Ch 605 at 610, cf [1968] 2 All ER 59 at 63
5 [1967] 2 All ER 812 at 826, [1967] Ch 1094 at 1120
6 [1968] 2 All ER 59 at 67, 68, [1968] Ch 605 at 628
7 [1968] 2 All ER 59 at 70, [1968] Ch 605 at 632
8 [1919] 1 Ch 159
9 (1893) [1915] 1 Ch 268
10 [1968] 2 All ER 59, [1968] Ch 605

covenant may nevertheless appear from the instrument as a whole to be intended to operate as a condition also. Unhappily Ungoed-Thomas J and Harman LJ are no longer able to speak for themselves; but, if asked, I would have expected them to say: 'Of course; but what is there in this instrument to make that appear? 'I will venture no hypothetical reply for Russell LJ who, translated, is happily still with us; but I doubt very much if his answer would differ.

It is important to observe that this aspect of the *Radstock* case[1] seems to have been argued and decided solely on the question whether the right to maintain the sewer was a qualified right, or was unqualified. There does not seem to have been any argument on the further questions that might arise if, as was the case, the right was held to be unqualified, namely, whether the pure principle of benefit and burden could be applied so as to make the authority liable. There is a sentence in the judgment of Ungoed-Thomas J[2] which can be read as an oblique reference to the principle; but there is no reference in either court to *Halsall v Brizell*[3] or to *Ives* case[4], then very recently decided.

I now come to the third group of cases, those cited on the relationship of the pure principle of benefit and burden to the assignment of benefits. As I have already indicated, the point is that if the benefit and burden doctrine is to be given the full width claimed for it, questions must arise on the many instances of assignees of the benefit of a contract not being bound by the burdens of that contract. Counsel for the defendant commissioners relied on *Cox v Bishop*[5], *Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co*[6], and *Barker v Stickney*[7]. To these counsel for the plaintiffs replied with *Werderman v Société Générale d'Electricité*[8], *Dansk Rekylriffel Syndikat Aktieselskab v Snell*[9], and *May v Belleville*[10].

I do not think that I need examine these cases in detail. *Cox v Bishop*[5] holds that an equitable assignee of a lease who takes possession of the land is not liable to the lessor on the covenants of the lease. The case was argued and decided on privity, and not on any principle of benefit and burden. The *Bagot* case[6] concerned a licence to use patents which had been assigned in equity. The benefit and burden principle was argued in an attempt to make the assignees liable on the burdens of the licence, but Vaughan Williams LJ[11] rejected it, relying on *Cox v Bishop*[5]. Romer LJ[12] briefly cited *Cox v Bishop*[5] as showing that the plaintiffs had no special right to sue the defendants merely because the latter were equitable assignees, and Cozens-Hardy LJ simply expressed his agreement. This appears to be the strongest authority against the existence of any pure benefit and burden principle at all, although of course the authorities have not stood still since 1901. In due course I must return to this case.

In *Barker v Stickney*[7] the author of a book assigned the copyright to a publishing company, which covenanted to pay him a royalty. The copyright was later assigned to another company which succeeded to the publishing business, but the author was held not to be entitled to recover royalties from that latter company. The case was argued on variant forms of there being some charge or burden that was attached to the copyright assigned, or ran with it, but the Court of Appeal rejected them all. The case is a warning to authors, and others; and it accounts for the advice given to authors

1 [1968] 2 All ER 59, [1968] Ch 605
2 [1967] 2 All ER 812 at 826, [1967] Ch 1094 at 1119
3 [1957] 1 All ER 371, [1957] Ch 169
4 [1967] 1 All ER 504, [1967] 2 QB 379
5 (1857) 8 De G M & G 815
6 [1902] 1 Ch 146
7 [1919] 1 KB 121, [1918-19] All ER Rep Ext 1363
8 (1881) 19 Ch D 246
9 [1908] 2 Ch 127
10 [1905] 2 Ch 605
11 [1902] 1 Ch 146 at 156, 157
12 [1902] 1 Ch 146 at 161

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to see that they merely give the publishers a right to publish that is conditional on the payment of royalties: see per Scrutton LJ[1]. The case was decided purely as a matter of construction of the initial assignment (see per Bankes LJ[2] and per Warrington LJ[3]), though Scrutton LJ did also consider the question of covenants said to run with goods. The case is no authority on the pure benefit and burden principle, for that does not appear to have been argued; but the field is one in which that principle might well be applied so as to produce a more just result.

I turn to *Werderman's case*[4], a decision that was distinguished in both the *Bagot* case[5] and *Barker v Stickney*[6]. A patentee assigned his patent by an indenture which provided for certain payments to be made to him. The assignees assigned their rights to a company, and the patentee then claimed the payments from the company. The Court of Appeal held that the assignment made it plain that the parties intended the liabilities to attach to the patent itself. Lindley LJ[7] regarded the case as being almost the same as the dissolution of a partnership with an assignment of assets charged with an annuity to the outgoing partner; and in the *Bagot* case[8] Vaughan Williams LJ said that the *Werderman* case[4] was one of a charge or incumbrance imposed on the property. The *Dansk* case[9], too, was a case about an assignment of patents; and Neville J held that on the true construction of the assignment the vendor had a lien on the patents for the royalties, so that an assignee from the purchaser must pay the royalties to the vendor. The last three cases all seem to fall within the principle of the second group of cases, concerned with whether or not the right granted was a qualified or conditional right.

May v Belleville[10] was rather different. A man sold part of his land, the contract providing for him to reserve rights of way over the land sold. The conveyance contained an appropriate reservation, but the purchaser did not execute it, though he took possession of what he had bought. The question was whether the purchaser and his successors were bound by the reservation. Such a case seems to me to fall squarely within one of the two old versions of the benefit and burden principle that I have mentioned, namely, that if a person is named as a party to a deed but does not execute it, the deed will nevertheless be held to bind him if he knowingly takes the benefit of it. Such a liability was held to exist at law at least as early as *Brett v Cumberland*[11]. However, none of this seems to have been argued, and Buckley J held that the purchaser was bound in equity to give effect to the terms on which he obtained possession, and his successors in title were in no better case.

Before I go any further, I must return to the *Bagot* case[5], and consider how far it is an authority against the pure benefit and burden principle. The case initially came before Kekewich J[12]. Before him, it was argued on contract and on whether the licence had had liabilities attached to it; and *Werderman's case*[4] was distinguished. The benefit and burden principle did not appear until the case reached the Court of Appeal. There it was presented on the footing that *Werderman's case*[4] was a clear authority which supported it[13]. Vaughan Williams LJ[14] said that it had been contended that

1 [1919] 1 KB 121 at 133, [1918-19] All ER Rep Ext 1363 at 1372
2 [1919] 1 KB 121 at 124, [1918-19] All ER Rep Ext 1363 at 1365
3 [1919] 1 KB 121 at 129, [1918-19] All ER Rep Ext 1363 at 1368, 1369
4 (1881) 19 Ch D 246
5 [1902] 1 Ch 146
6 [1919] 1 KB 121, [1918-19] All ER Rep Ext 1363
7 19 Ch D 246 at 257
8 [1902] 1 Ch 146 at 157
9 [1908] 2 Ch 127
10 [1905] 2 Ch 605
11 (1619) Cro Jac 521
12 [1901] 1 Ch 196
13 See [1902] 1 Ch 146 at 150, 151
14 [1902] 1 Ch 146 at 156

the defendants were directly liable to the plaintiffs, not at law but in equity, because they had had the benefit of the licence and had been acting under it.

> 'They have, it is said, received the benefit which has resulted from a contract to which they were not parties, and they have thereby taken upon themselves the burden of that contract. To my mind that has never been the law.'

He then said that it seemed to him that this question had been clearly decided in *Cox v Bishop*[1] (a case, it will be remembered, which was also one of an equitable assignee), and after citing from the judgment of Knight Bruce LJ, he said that that principle applied in the present case and in all similar cases. Romer LJ[2] did not discuss the benefit and burden argument, though he did say that the fact that the defendants were equitable assignees 'would not of itself give the plaintiffs any special right to sue the defendants, as was pointed out in *Cox* v *Bishop*[1]'. Cozens-Hardy LJ simply expressed his agreement, and added nothing.

I do not think that the *Bagot* case[3] requires me to reject the pure benefit and burden principle. Only one Lord Justice really dealt with it; his judgment did not explore it in any detail; the argument on the point seems to have been brief, and it cited no authority; and, of course, *Halsall v Brizell*[4] and the *Ives* case[5] lay in the future. It is they and not the judgment of Vaughan Williams LJ that I think I should follow. The other assignment cases do not seem to me to provide any authority against the principle. A court is not to be treated as rejecting an argument that was never put before it, particularly when that argument rests on a doctrine that is in the course of evolution.

I emerge from a consideration of the authorities put before me with a number of conclusions and a number of uncertainties. First, for the reasons I have given, I think that there is ample authority for holding that there has become established in the law what I have called the pure principle of benefit and burden. Second, I also think that this principle is distinct from the conditional benefit cases, and cases of burdens annexed to property. Although language speaking of benefit and burden is sometimes used in the latter classes of case, I do not think it is really apt, and it is liable to confuse. In such cases the rule is really a rule of 'all or none', an inelegant but convenient expression that may be used for brevity. A burden that has been made a condition of the benefit, or is annexed to property, simply passes with it: if you take the benefit or the property you must take it as it stands, with all its appendages, good or bad. It is only where the benefit and the burden are independent that the pure principle of benefit and burden can apply.

Third, it is a question of construction of the instrument or transaction, depending on the intention that has been manifested in it, whether or not it has created a conditional benefit or a burden annexed to property. If it has, that is an end of the matter: if it has not, and the benefit and burden are independent, questions of the pure principle of benefit and burden may arise. On the question of construction, there is a possible parallel in the case of two or more things given by a will to the same person, e g a leasehold house and its contents: if the will is construed as making a single gift of the two things, as distinct from two separate gifts, the legatee cannot take one and reject the other, as he might wish to do if the lease is onerous.

Fourth, the application of the benefit and burden principle will normally come later than the question of construction. If the initial transaction has created benefits and burdens which, on its true construction, are distinct, the question whether a person who is not an original party can take one without the other will prima facie

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1 (1857) 8 De G M & G 815
2 [1902] 1 Ch 146 at 161
3 [1902] 1 Ch 146
4 [1957] 1 All ER 371, [1957] Ch 169
5 [1967] 1 All ER 504, [1967] 2 QB 379

depend on the circumstances in which he comes into the transaction. If, for instance, all that is assigned to him is the benefit of a contract, and the assignor, who is a party to the contract, undertakes to continue to discharge the burdens of it, it would be remarkable if it were to be held that the assignee could not take the benefit without assuming the burden. The circumstances show that the assignee was intended to take only the benefit, and that the burden was intended to be borne in the same way as it had been borne previously.

On the other hand, if the assignee takes as a purported assignee of the whole contract from a company which is on the point of going into liquidation, he undertaking to discharge all the burdens and to indemnify the company, then, unless the benefit and burden principle is to be rejected in its entirety, I would have thought that the circumstances showed that he was not intended to take the benefit without also assuming the burdens, and that the result would accord with the intention, vis-à-vis not only the company but also the persons entitled to enforce those burdens. No doubt the terms of any relevant document would be of major importance; but I would regard the matter as one which has to be determined from the surrounding circumstances as a whole. One possible way of looking at it is to regard the subsequent transaction as doing what the initial transaction did not, namely annex, the burden to the benefit so that the one could not be taken free from the other: but there are difficulties in this.

Fifth, a problem that is unsolved (and, it seems, unconsidered) is that of who falls within the benefit and burden principle. In the old forms of the rule there was no difficulty; a person named as a party to a deed, or a person granted an estate by a deed, could be indentified without difficulty. But when the rule came to be stated in the form of 'a person' or 'a man' who takes the benefit of a deed, the answer is not so obvious. Plainly this is wider than merely those named in the original instrument, but equally plainly it cannot sensibly mean anyone in the world. In *Halsall v Brizell*[1] and in the *Ives* case[2] the doctrine was applied to successors in title to land which one of the original parties had taken; and plainly such persons should be within the principle. But is it to be confined to those who are shown to be successors in title to land or other property? Should someone who has such a title be bound, while someone else, who may on investigation be found to have no proper title, take free? I do not see why there should be any such distinction. It seems to me that the principle ought to embrace anybody whose connection with the transaction creating the benefit and burden is sufficient to show that he has some claim to the benefit, whether or not he has a valid title to it. Mere strangers seem to me to be another matter: I would exclude them from the meaning of 'a man' or 'a person' for the purposes of the principle. I shall not attempt to explore the obvious difficulties in determinining just where the dividing line lies or ought to lie.

I shall next consider whether the defendant British Phosphate Commissioners are liable under any form of the benefit and burden rule, whether pure or 'all or none'. First, there is the question of the construction of the 1913 agreement and the A and C deeds. In the former I can see nothing which gives any real support to the view that the benefits to the company under the agreement have been made conditional on accepting its burdens; and in particular that applies to cl 12(a), relating to replanting. The mere fact that the same instrument creates both the benefit and the burden, or that they both relate to the same subject-matter, cannot possibly, in my view, make the one conditional on the other. I can see no words in the instrument, or for that matter anything else, that manifest any intention to bring about this result. The contrast between this document and the documents in cases where there has been held to be a conditional benefit are obvious.

The A and C deeds are in like case. Of course, they have fewer clauses than the

1 [1957] 1 All ER 371, [1957] Ch 169
2 [1967] 1 All ER 504, [1967] 2 QB 379

1913 agreement, and they concentrate on mining, without extraneous matters such as cl 12(d) and (e) of the 1913 agreement, which provide for uniform prices for goods and the supply of fresh water at ¾d a gallon. But I am quite unable to see anything which makes the grant of the rights to the company conditional on, or qualified by, the obligation to replant. In the result I hold that neither the 1913 agreement nor the A or C deeds confer benefits which are qualified by or conditional on the replanting obligations. Accordingly, for the plaintiffs to succeed under this head the case must be brought within the pure principle of benefit and burden.

I propose first to consider whether the two defendant British Phosphate Commissioners fall within that principle. There are two questions. First, do the circumstances in which they became connected with the 1913 agreement and the A and C deeds show that they ought not to be able to take the benefit without accepting the burden; and, second, have they a sufficient title to the benefit? I can consider these together.

The first defendant became a commissioner on 1st January 1965 and the 3rd on 1st July 1970; the 2nd defendant, as I have mentioned, died during the proceedings. There seems to be nothing special about the appointment of either. Each was put in a position of control over a large concern that had been carrying on the undertaking for over 55 years. The British Phosphate Commissioners have never been expressly incorporated, and it has not been contended that there has been any implied incorporation of them, whether for the purposes of their undertaking or otherwise. Furthermore, the machinery for vesting the assets of the concern in new commissioners never seems to have been operated. There may well have been what counsel for the defendant commissioners suggested, an equitable assignment of the assets of the undertaking to be inferred from the surrounding circumstances. Yet although not incorporated, the British Phosphate Commissioners carried on the undertaking in the manner of a corporation and not of a partnership. The death or retirement of one of the commissioners produced none of the complexities of a partnership. All that happened was that when a new commissioner was appointed he stepped into the vacant place, with hardly a ripple to show the change. All the plant, machinery, money and other assets of the concern, together with the rights of mining, built up over the years, sat there ready for the new commissioner to control with his brethren. So did the liabilities, whether for royalties or anything else.

When the first commissioners took over from the company, the contemporary documents and circumstances made it plain that the British Phosphate Commissioners were to take over not only the rights but also the liabilities; I have already read cl 1(c) of the 1920 indenture. When thereafter a new commissioner was appointed there were no documents to make this plain, but the circumstances seem to me to be to the same effect. The thought that a new commissioner was intended to take over the assets, but not the liabilities, which the outgoing commissioner, stripped of the assets, was to bear for the rest of his life, and his estate after his death, seems to me to be absurd. I shall not pursue the matter in detail, since it seems to me overwhelmingly clear that at every stage of change the whole basis was that of there being no right to enjoy the benefits without undertaking the burdens. There is no question of any British Phosphate Commissioner having intended not to accept the benefits but to commit wholesale trespasses instead. Furthermore, the connection of the defendant commissioners with the instruments creating the benefits and the burdens seems to me to be ample for them to be held liable for the burdens if they took any benefits.

That brings me to the question of taking the benefits; and here there is a diversity between the 1913 agreement and the A and C deeds. In the course of a discussion on Day 9 counsel for the plaintiffs, while opening his case, found himself in difficulties over the application of *Halsall v Brizell*[1] to the 1913 agreement. These arose because

1 [1957] 1 All ER 371, [1957] Ch 169

since 1922 no A or C deeds had been executed, and the benefit of the 1913 agreement to the company was that 145 acres should be acquired by the company under those deeds. (As I have mentioned, after 1920 no A deed was executed, but two C deeds were executed in June 1921 and one in January 1922; and that was all.) In the end counsel for the plaintiffs said that his *Halsall v Brizell*[1] point fell down in 1921 or 1922 for the 1913 agreement, and so while he still relied on it for the A and C deeds (as well as novation), for the 1913 agreement he could rely only on novation. On that footing the case proceeded until after the evidence was complete. However, on Days 87 and 88 counsel for the plaintiffs sought to revive his *Halsall v Brizell*[1] point on the 1913 agreement, and to resile from the concession that he had made on Day 9. Not surprisingly, counsel for the defendant commissioners objected, on the ground that the defendants had met the case put forward by counsel for the plaintiffs after he had made his concession and had not dealt with the evidence on the footing that the point conceded would in fact be argued.

In the end, the benefits which counsel for the plaintiffs wished to rely on, apart from the execution of the three C deeds, were the actual use of implied rights of access under the 1913 agreement; he disclaimed any reliance on the mere existence of these rights of access as a benefit. I said that I would listen to counsel for the plaintiffs' submissions on the point, and not exclude them at that stage, and if necessary rule later: and on day 93 I heard counsel for the plaintiffs' final submissions on this point, with a commentary from counsel for the defendant commissioners and counsel for the Attorney-General. Counsel for the plaintiffs took his reliance on the execution of the C deeds to the point of saying that the execution of a single C deed would expose the defendant commissioners to liability. He also urged a point on the British Phosphate Commissioners being trustees for the Crown.

I am not satisfied that there has ever been a sufficient taking of a benefit under the 1913 agreement to expose the defendant British Phosphate Commissioners to liability under that agreement. I think that counsel for the plaintiffs' first thoughts about the three C deeds were sound. These deeds concerned land which is not the subject of these proceedings, and I do not see how the execution of those deeds in 1921 and 1922 can really be brought home to the defendant British Phosphate Commissioners as being a real benefit taken by them. As it has developed, I do not think that the pure benefit and burden principle is a technical doctrine, to be satisfied by what is technical and minimal. I regard it as being a broad principle of justice, to be satisfied by what is real and substantial.

As for the actual use of implied rights of access under the 1913 agreement, I am far from satisfied that any relevant access enjoyed by the defendant British Phosphate Commissioners was enjoyed under and by virtue of the 1913 agreement. Of course, this point illustrates the difficulty of reaching a proper conclusion on a subject that had not been raised before the evidence was heard, and on a contention which had been abandoned. I very much sympathise with counsel who, in a case of this complexity, seeks to assist the court by abandoning a point which he feels he cannot sustain, and then later finds that second thoughts appear to make the point arguable. However, sympathy for counsel must not override justice to the other side; and if I had to rule on the point I should hold, with a little hesitation, that it was not open to counsel for the plaintiffs. But my primary holding is that if the point is open to him it fails.

The A and C deeds are another matter. They produced a substantial stock of mining rights which successive British Phosphate Commissioners exploited over the years; and these cannot be brushed aside as being irrelevant or trivial. Nor can there be any question of successive British Phosphate Commissioners being unaware that it was by virtue of these deeds that they enjoyed substantial mining rights. In this connection I should mention the position of the individual plots in the present case. The

1 [1957] 1 All ER 371, [1957] Ch 169

claim for replanting is made by the first ten plaintiffs, who between them allege that they own, wholly or in part, 17 plots of land. Four of these plots were the subject of P and T deeds alone, and not A or C deeds. Of these, counsel for the plaintiffs in the end wholly abandoned the claims in respect of plots 143 and 294, made by the 9th plaintiff and the 2nd plaintiff respectively, since these plots were wholly outside the 250-acre area. For the same reason he abandoned part of the claims for plots 263 and 316, made by the 8th plaintiff and the 10th plaintiff respectively, leaving those claims in being only to the extent of about half and three-quarters of an acre respectively.

The other 13 plots out of the 17 were all the subject of A or C deeds. Their status as regards working was much clarified by a document marked DA2, coupled with the evidence of Mr Chapman. Of the 13 plots, four were worked out before 1st January 1965, when the 1st defendant became a British Phosphate Commissioner, and they have not been used in his time. These four are plots C17, C109, C162 and C219. Two more plots (A248 and A282) would be in the same category but for the fact that phosphate from adjoining plots rilled over into them and was not removed until 1972. Four plots (C101, C179, C183 and A292) have been wholly or partly worked in the 1st defendant's time; two (C120 and A233), though partly worked before his time, remained in February 1973 still to be further worked (with C120 in fact being fully worked in 1975); and one (A287), though said to have been fully worked in 1913, was retained for further working until 1973, when it was decided that it was no longer required.

Counsel for the defendant commissioners not unnaturally stressed that the obligation to replant under the A and C deeds was a plot-by-plot obligation, so that if no mining or other use of a particular plot had been made in the time of a defendant commissioner, he could not be said to have taken the benefit of the A or C deed for that plot, and so ought not to be subject to the burden of it. That, of course, has considerable logical force, and if each of the plots had remained distinct, I think it would have carried much weight. However, the acquisitions made by the company under the A and C deeds were plainly made with the object of building up large areas that could conveniently be mined as a whole; and it was these large areas that were handed over to the first and successive British Phosphate Commissioners. The acquisitions were in effect pooled, and operations were carried out on a pooled basis.

In those circumstances, I do not think that it is open to the defendant commissioners to point to a particular portion of the pooled area and say that as that portion had never been used by them, they were not subject to the burdens relating to it. What their predecessors treated globally and what they succeeded to globally must, I think, be dealt with on a global basis. The defendant commissioners have plainly taken the benefit of these pooled areas; it is not as if they had segregated the worked-out plots and returned them to their owners as contemplated by the A and C deeds. Furthermore, it is clear that in many cases plots were partly worked, or regarded as being fully worked, and then later, with improved methods of extraction, the British Phosphate Commissioners of the day have returned and extracted more phosphate under the rights conferred by the A or C deed. Where a right to mine has been exercised by predecessors, and successors who acquire that right remain able to exercise it in circumstances which give reality to the right, I think that the successors take a sufficient benefit to invoke the principle. I do not consider that it is, or should be, open to a successor commissioner to say of a plot: 'That was worked in the time of my predecessors. True, under the A or C deed I now have the right to work it further if I wish; but not unless I actually do so am I to be treated as taking a benefit under the deed. If instead of returning the plot to its owner I do nothing with it for years, thus keeping open any decision whether to work it further, and in the end I decide to work the plot no more, I have taken no benefit under the deed.'

I do not find this an easy matter, and I can well see that there may be other views on it. However, after some hesitation I have reached the conclusion that this, when

coupled with what I have said about the relationship of individual commissioners to the undertaking as a whole, is enough to establish that the defendant British Phosphate Commissioners took a sufficient benefit under the A and C deeds in issue to make the pure principle of benefit and burden capable of applying to them.

The next question is 'What burden?'. This case squarely raises the questions of the application of the pure principle of benefit and burden to unitary burdens, a question which does not seem to have appeared in any previous case. In the case of continuing benefits and burdens, the *Ives* case[1] supports the proposition that if the benefit is given up, the burden ceases; and of course if that applied to unitary burdens, questions might arise in each case whether the benefit was still being taken. But in the case of a unitary burden such as this, I do not think that it can be the case that a person taking the benefit can, when challenged, cease to take it, and then say that he is no longer subject to the burden of restoring the land, or paying compensation for the damage done, or doing whatever else there is to be done.

There is little enough help to be found in the cases. *Aspden v Seddon (No 2)*[2] was, as I said, a case of a conditional benefit, and so not within the scope of the pure principle of benefit and burden; it was an 'all or none' case. Nevertheless, in the Exchequer Division Cleasby B did, as happened in some of these cases, discuss benefit and burden. In his view[3], the defendants were liable under the licence to pay compensation for damage to the land on the footing that, 'During the time that you enjoyed it this burden—that is, the obligation to make compensation for what you have done—has come into existence.' The indication is very slender; but it seems to me to point in what I think is the right direction. I bear in mind, too, that the two old technical rules which at least have a place in the pedigree of the principle clearly seem to involve acceptance of the whole burden.

When the full features of the principle have been worked out, it may well be that if, as I think, any person who takes a sufficient benefit, for however short a period, is held liable for the whole burden, including future unitary burdens, it will also be held that there are implied rights of indemnity which will ensure that, whoever is held initially liable, the liability will ultimately be borne by the right persons. Where there is a terminal liability, such as the obligation of replanting in this case, it seems right that the burden should ultimately be borne by the latest in the chain of persons liable at the time when the burden accrues. Certainly this should be so in the case of an undertaking such as that of the British Phosphate Commissioners, where normal commercial methods contemplate some sinking fund or other provision for meeting future liabilities of this kind. On that footing, the two defendant British Phosphate Commissioners, being now in office, are in my judgment properly subject to the whole of the liability.

Next, does the liability exist only in equity, or is there liability at law? In the *Ives* case[1] it clearly appears that the right of way that arose under the principle of benefit and burden was merely equitable; but, of course, whether rights in land in England are legal or equitable depends to a considerable extent on the peculiarities of English land law. In *Halsall v Brizell*[4] there is no express statement on the point: but what was in issue was an obligation to pay money, and in holding that in taking the benefit the defendants became liable to pay the money I think that Upjohn J must have been contemplating an obligation at law. I can see no suggestion that there was any equitable obligation under a trust or, indeed, under any other concept of equity. Whether an obligation at law would depend on an implied contract or on some form of quasi-contract I shall not pause to enquire: Goff and Jones on The Law of Restitution[5], I may say, considers neither of the cases that I have just mentioned.

1 [1967] 1 All ER 504, [1967] 2 QB 379
2 (1876) 1 Ex D 496
3 1 Ex D 496 at 508
4 [1957] 1 All ER 371, [1957] Ch 169
5 (1966)

In *Aspden v Seddon (No 2)*[1] Bramwell B found it unnecessary to consider whether the correct form of action in the conditional benefit type of case was assumpsit, or an action on the case, or even tort. The pure principle of benefit and burden, if it applies at law, seems to be no less uncertain. It may be founded on acceptance, so that he who accepts the benefit is taken also to have accepted the burden, or it may be a rule of law, so that he who accepts the benefit is bound by the burden, irrespective of any acceptance of it. In the conditional benefit type of case it may perhaps be easier to rest the doctrine on acceptance than in cases of the pure principle of benefit and burden: if you accept the benefit you cannot escape the consequence that you have accepted what forms part of the benefit, or is annexed to it, whereas under the pure principle the burden may be the price the law compels you to pay for taking the benefit. However, on the facts of this case I do not think that I need attempt to resolve these problems when considering whether liability under the pure principle exists at law or only in equity. As I have mentioned, there is *Halsall v Brizell*[2]; there is also the common law basis of the two old technical rules; and, more important, there is the nature of the burden, to which I must now turn.

Put shortly, it seems to me that whether the liability under the pure principle is legal or is merely equitable must primarily depend on whether the burden itself is legal or equitable. If the burden is merely equitable, so will be the liability. If the burden is legal, then I do not see why the liability should not also be legal. Whether the process that requires the burden to be assumed is legal or equitable, and whether it is based on acceptance or operates as a rule of law, what has been assumed should retain its quality of being legal if it is legal and equitable if it is equitable. If you take a burden, you must take it as you find it. If it be assumed that the pure principle operates only in equity (an assumption that I would not readily make), I do not see why equity should not say to the person seeking to take the benefit: 'Unless you assume the burden at law, you will be restrained by injunction from taking the benefit.' That, of course, would apply to the active form of the principle. In the passive form, some or all of the benefit has already been taken, and the question is whether the burden has to be borne. If some of the benefit still remains, an injunction could be granted, as in the active form; but if all of it has been taken, this could not be done. It may be that declaratory relief could be obtained, or possibly the principle of equity treating as done that which ought to have been done might be invoked. At all events, I think it would be most undesirable if the result were to be any different from that in the case of the active form.

My conclusion on the benefit and burden point is thus that the defendant British Phosphate Commissioners are liable at law on the replanting obligations in the A and C deeds, and so are subject to the normal remedies (including damages) for any breach of that obligation. That, of course, is subject to other matters dealt with in this judgment. This liability could also be supported, if necessary, by the liability to pay damages in substitution for specific performance under Lord Cairns' Act 1858[3], if this is a case in which specific performance could be decreed.

I can deal quite shortly with one last matter, namely, whether the plaintiffs are entitled to enforce the obligations. This arises because they are not, of course, original contracting parties. Subject to one point, I can see no difficulty. There is no reason why the benefit of the replanting obligations should not run with the land both at law and in equity. The obligations could hardly more clearly touch and concern the land, and the benefit of them must have been intended to run with the land and be enforceable by the owner for the time being. The present owners of the land are therefore the persons entitled to enforce the obligations.

The one point that I mentioned by way of reservation is of that jurisdiction. Counsel

1 (1876) 1 Ex D 496 at 504
2 [1957] 1 All ER 371, [1957] Ch 169
3 Chancery Amendment Act 1858

for the Attorney-General submitted that where a plaintiff could establish his right to sue only by showing that he owned his plot of land, that brought the case within the doctrine of *British South Africa Co* v *Companhia de Moçambique*[1], and so the court had no jurisdiction because the action concerned foreign land. I have already considered this doctrine to some extent in *Ocean Island No 2*, and also in relation to the sand. Of course, in *Ocean Island No 2* the issue was somewhat different. Nevertheless, much the same point arises, namely, whether the ownership of the land is something that merely arises 'incidentally' or 'as a collateral incident', and so is outside the *Mozambique*[1] doctrine, or whether that doctrine applies to it on the ground that the ownership of the land is an essential ingredient of the plaintiff's case, or the whole basis of it, and that this suffices.

It will be remembered that in the passage that I quoted from *St Pierre v South American Stores (Gath and Chaves) Ltd*[2], Scott LJ said that he understood the words of Lord Herschell LC in the *Mozambique* case[3] to have meant that 'it is the action *founded on* a disputed claim of title to foreign lands over which an English court has no jurisdiction'. In the present case I cannot see what 'disputed claim of title' the plaintiffs' action is 'founded on'. What the claim is founded on is the obligation to replant that the plaintiffs contend is binding on the defendant commissioners; and the main battleground has been on whether the burden of the obligation binds the commissioners. There has been no contention that the benefit of that obligation has not passed to the present landowners, whoever they are: indeed, it was counsel for the Attorney-General who cited *Reid v Bickerstaff*[4] as part of his submission that it was because the benefits had passed in this way that the *Mozambique*[1] doctrine barred the plaintiffs' path.

As in *Ocean Island No 2*, I would hold that where, as here, there are no rival claimants to the land, a plaintiff who adduces evidence of his title to foreign land as a means of establishing that he is entitled to enforce some obligation or assert some right is not thereby brought within the *Mozambique*[1] rule. Such a question seems to me to arise 'incidentally' or 'as a collateral incident', even though it may form a necessary link in the plaintiff's path to success. A rung on a ladder may be essential for progress to the top, but it is not itself the top. The claim of want of jurisdiction fails.

With that, I have reached the end of the question of benefit and burden. In a sentence, I hold the defendant British Phosphate Commissioners liable at law on the replanting obligations in the A and C deeds by virtue of the pure principle of benefit and burden. I know that I shall not be alone in regretting the length of my judgment on these points; but difficult questions are involved, and the subject was argued over many more days than had been devoted to it in other cases. I am conscious that there is much that remains unresolved and open for decision in the future; but that is inevitable in a developing branch of the law. My task, too, is to decide the case before me rather than to attempt a comprehensive rationalisation of this or any other branch of the law. Insofar as I have considered matters, whether of principle or otherwise, that do not directly arise for decision, I have done so in an attempt to understand how the principles do or should operate.

(7) Failure to prescribe trees

I shall now consider the question of prescription by the resident commissioner. The obligation to replant under the A and C deeds is to replant the land as nearly as possible to the extent to which it was planted when the company's operations commenced 'with such indigenous trees and shrubs or either of them as shall be prescribed by the Resident Commissioner for the time being in Ocean Island'. It is common ground that there never has been any such prescribing. Furthermore, there has been

1 [1893] AC 602, [1891-94] All ER Rep 640
2 [1936] 1 KB 382 at 397, [1935] All ER Rep 408 at 413
3 [1893] AC 602 at 626, [1891-94] All ER Rep 640 at 645
4 [1909] 2 Ch 305 at 319, 320, [1908-10] All ER Rep 298 at 300

no resident commissioner in Ocean Island since the last war when Tarawa became the seat of government. Nor has there been any resident commissioner at all since 1st January 1972, when, under the Gilbert and Ellice Islands (Amendment) Order 1971, the office of resident commissioner was replaced by that of Governor.

The obligation to replant contained in the A and C deeds is, of course, to do so when the land should 'cease to be used by the Company for the exercise of the rights hereby granted'; and counsel for the plaintiffs contended that a letter dated 2nd March 1971 from the Secretary of State for Foreign and Commonwealth Affairs to the chairman of the Council of Leaders showed that the Secretary of State then knew that much of the land in question could be returned to the Banabans. The extent of this land is shown by a British Phosphate Commissioners' memorandum dated 16th April 1969, which stated that 50 per cent of the land in the eastern mining area and 50 per cent of the land in the central mining area could be surrendered at that stage. (The memorandum, incidentally, illustrates the practice of the British Phosphate Commissioners in dealing with the land on a block basis, rather than on a plot-by-plot basis.) This knowledge of the land no longer needed by the commissioners meant, said counsel for the plaintiffs, that the duty of the resident commissioner to prescribe the trees and shrubs arose at some time during the period 1969 to 1971.

Counsel for the defendant commissioners, who also relied on other defences, said that if all else failed the defendant British Phosphate Commissioners contended that the claim was premature because there had been no prescribing by the resident commissioner. At that, counsel for the plaintiffs said he would claim damages for anticipatory breach; but he had difficulties in this on the pleadings, and ultimately he dropped the contention. The point cropped up in various forms at various stages of the proceedings. One point was whether in replacing the resident commissioner by the Governor the 1971 Order in Council had in effect simply substituted 'Governor' for 'Resident Commissioner' in the replanting obligation. The answer to that appeared to be No. What art 5(3) of the Order did was to provide that:

> 'In the existing laws any reference to the High Commissioner or to the Resident Commissioner shall in their application to the Colony be construed as a reference to the Governor . . .':

and whatever else the A and C deeds may be, they are not 'existing laws'. By art 5(5), I may say, that expression was defined as meaning laws having effect as part of the law of the colony immediately before the appointed day, and not revoked by the Order.

On Day 106, however, there was an important development. In this, counsel for the defendant commissioners and counsel for the Attorney-General concurred in accepting, on behalf of the British Phosphate Commissioners and the Attorney-General respectively, that the Governor could prescribe the trees and shrubs in place of the resident commissioner. This was accepted not under any express provision of the Order, but on the footing that the Governor was now discharging the functions of the resident commissioner in Ocean Island, and that as he was now lawfully exercising the same governmental functions in the same governmental structure, he could do what the resident commissioner could have done in this respect. This came late in the day, but it seems to me entirely proper, and, for that matter, inescapable. I cannot think that the courts would readily accept any concept of duties ceasing to exist merely because of changes in offices, duties, or locations.

That, however, is not the end of the matter. Let the duty of prescribing rest with the Governor, and there yet remains the difficulty, among others, that there has not yet been any prescribing. How, then, can an action for specific performance (or, perhaps, damages) succeed when what is to be done has not yet been defined? Counsel for the defendant commissioners urged that it could not. When a contractual obligation was dependent on the decision of a third party, he said, the court would not

decree specific performance when the third party had not defined the obligation by his decision. The primary submission by counsel for the Attorney-General was wider: he said that the proper prescription of the trees and shrubs was a condition precedent to any obligation to replant. He further contended that there was a general principle that if an essential term of a contract was left to the discretion of a third party, the contract was incomplete unless the court could infer an agreement that the term left to the third party was to be ascertained by reference to some objective standard capable of being applied by the court. In that case the reference to the third party would be treated as being inessential machinery.

The basic submission by counsel for the plaintiffs, made after counsel for the defendant commissioners had advanced his argument, but before counsel for the Attorney-General advanced his, was that the provision for the trees and shrubs to be specified by the resident commissioner was merely incidental; it was not an essential part of the contract, but merely part of the means of carrying it into effect. The relationship of this proposition to the qualification in counsel for the Attorney-General's proposition that I have just set out will be obvious. Counsel for the plaintiffs further contended that in addition to striving to avoid holding a contract void for uncertainty, the court would also strive to hold valid any contract that had been partly performed. In litigation on this scale it was, perhaps, not surprising to find that these rival contentions were buttressed by nearly 20 authorities. Though I have considered all of them in some detail, I am glad to say that I do not think that I need discuss them seriatim.

First, I think I may leave on one side the cases about contracts being void for uncertainty. It seems clear that the court strains against holding a contract void on this ground; and I think that the authorities to this effect are sufficiently referred to in *Brown v Gould*[1]. Second, there is a substantial line of cases, sometimes known by the name of *Milnes v Gery*[2], to the effect that if there is a contract for sale at a price to be fixed by valuers or arbitrators, and the price is not fixed, the court will not decree specific performance; but it is otherwise if the contract provides no machinery for fixing the price, in which case the court will fix it if a sufficient formula is provided, such as 'at market value'. Again, *Brown v Gould*[1] refers to a number of the authorities on this point.

On this, however, I think that I should add a reference to *Vickers v Vickers*[3]. In that case Page Wood V-C[4] made plain something that is not explicit in all the cases, namely, that in his view the question was not merely that of the circumstances in which the court will grant the discretionary remedy of specific performance; the point is based on there being no contract at all until the price has been fixed. The decision itself encountered some criticism from counsel for the plaintiffs, in which I see considerable force; I hope today that the courts would, by means of an implied term or otherwise, prevent a party from escaping from his contract by instructing his valuer not to proceed. But that does not affect the point that I have just mentioned. In *Hart v Hart*[5] Kay J pointed out that in these cases what the court was being asked to enforce was not a complete contract, but an agreement that a contract should be made.

I ought also to mention *Babbage v Coulburn*[6]. That was not a specific performance case, and none of the *Milnes v Gery*[2] line of cases was cited. A tenant of a furnished house agreed that at the expiration of his tenancy he would deliver up possession of the house and furniture in good order, and that in the event of loss, damage or breakage he would make it good or pay for it, the amount, if in dispute, to be settled by two

1 [1971] 2 All ER 1505, [1972] Ch 53
2 (1807) 14 Ves 400, [1803-13] All ER Rep 369
3 (1867) LR 4 Eq 529
4 LR 4 Eq 529 at 536
5 (1881) 18 Ch D 670 at 688
6 (1882) 9 QBD 235

valuers or their umpire. A Queen's Bench Divisional Court held that the landlord could not sue for the money until the amount had been fixed in the prescribed manner, for there was no independent covenant not to do damage, but merely a covenant to pay a sum ascertained by the valuers. A bleak little note in the report[1] says 'Affirmed on appeal, May 8'; but the Law Reports contain no report of the appeal.

I have now ascertained that the appeal was in fact reported in another series of reports: see *Babbage v Coulbourn*[2]. This shows that the appeal was heard on 8th May and, after judgment had been reserved, it was decided on 11th May. The decision was affirmed only because the two Lords Justices who heard it differed. Cotton LJ was for reversing the decision, while Brett LJ 'with great hesitation and doubt', inclined to think the decision right, and said that he was certainly not satisfied that it was wrong. This treatment in the Court of Appeal does not add to the weight of the decision, which in any case I do not find of great assistance. The slender citation of authority in each court did not embrace any of the cases that I have cited, nor, which is more important, any of the cases that I am about to cite. The real point of the decision seems to me to be this: that if the contract is for the tenant to pay whatever is fixed by two valuers, one appointed by each party, and the landlord sues for the sum fixed by his valuer without, it seems, attempting to operate the contractual provision for determination by two valuers or their umpire, his claim will fail. I have not found, either in the reports that I have cited or in the report at first instance[3], anything to suggest that it was not a simple case of the landlord ignoring the contract and suing without attempting to comply with it, with no question of the contractual machinery having given rise to difficulties or having broken down. This sharply contrasts with the present case, where the plaintiffs, far from ignoring the contractual provision for prescribing, are claiming that it should be complied with.

Third, there is a distinction where what remains undetermined goes not to the entirety of the contract but only to some subsidiary part of it. In *Jackson v Jackson*[4] the contract was to sell some land and bleach works at a fixed price, but with the plant and machinery at a valuation; and Stuart V-C held that the need for a valuation was no bar to a decree for specific performance of the contract. This decision was not cited to Kindersley V-C in *Darbey v Whitaker*[5], a similar case, which concerned the valuation of fixtures in a public house; and specific performance was refused. *Milnes v Gery*[6], I may say, was cited in both cases; and all three were cited in *Richardson v Smith*[7].

That case concerned a contract to sell an estate at a fixed price, with some furniture and other articles to be taken at a valuation. The vendor refused to appoint a valuer, and at the suit of the purchaser Stuart V-C decreed specific performance. On appeal, his decision was affirmed with a variation, the variation being the omission of any mention of the furniture and other articles. Lord Hatherley LC and Giffard LJ refused to accept that *Milnes v Gery*[6] applied to such a case. *Darbey v Whitaker*[5] was distinguished on the ground that the fixtures in the public house were an essential part of the contract, whereas the furniture and articles in the case before them were comprised in a minor and subsidiary part of the agreement which was not at all essential. In *Axelsen v O'Brien*[8] Dixon J distinguished between what is an essential part of the contract and what is merely a subsidiary means of carrying it into effect.

Fourth, it is clear that where a contract has been partly performed, the court is far

1 (1882) 9 QBD 235 at 237
2 (1882) 52 LJQB 50
3 (1882) 51 LJQB 638
4 (1853) 1 Sm & G 184
5 (1857) 4 Drew 134
6 (1807) 14 Ves 400, [1803-13] All ER Rep 369
7 (1870) 5 Ch App 648
8 (1949) 80 CLR 219 at 226

more reluctant to hold that some provision in it that depends on an act or decision of a third party is void or ineffective than if there has been no performance and the contract is still wholly executory. Thus in *Dinham v Bradford*[1] a partnership agreement contained a provision that on the determination of the partnership one partner should purchase the share of the other at a valuation to be made by two arbitrators. The agreement made no provision for an umpire, and when the partnership had run its course and determined, difficulties in making the valuation not surprisingly arose. The vendor partner then claimed that the provision for purchase was not binding, and that he was entitled to have the partnership wound up in the usual way; but both Stuart V-C and, on appeal, Lord Hatherley LC rejected this claim. Lord Hatherley said[2]:

> 'This case is not like that of the sale of an estate the price of which is to be settled by arbitration, but is a case in which the whole scope and object of the deed would be entirely frustrated if the Court were to apply the well-known doctrine to the present state of circumstances. In cases of specific performance the matter is very plain and simple. One person agrees to sell his estate in a given way, and no rights are changed by the circumstance of that method of selling the estate having failed. The estate remains where it was, and the money where it was. But here is a man who has had the whole benefit of the partnership in respect of which this agreement was made, and now he refuses to have the rest of the agreement performed, on account of the difficulty which has arisen. It is much more like the case of an estate sold, and the timber, on a part, to be taken at a valuation, the adjusting of matters of that sort forming part of the arrangement, but being by no means the substance of the agreement; and in such cases the Court has found no difficulty. If the valuation cannot be made *modo et formâ*, the Court will substitute itself for the arbitrators. It is not the very essence and substance of the contract, so that no contract can be made out except through the medium of arbitrators. Here the property has been had and enjoyed, and the only question now is, what is right and proper to be done with regard to settling the price?'

In *Hordern v Hordern*[3], a similar case, this decision was approved by the Judicial Committee.

With these considerations in mind, I turn to the A and C deeds. The only difficulty arises in relation to a provision which was to be carried out in the future, namely, the replanting obligation; and machinery was provided for the operation of that provision which, at the time when the deeds were executed and for many years afterwards, was perfectly certain and capable of being operated according to its tenor. The deeds have been acted on and apart from the replanting they have in most cases been either fully or partly performed by the Banabans and by the company or the British Phosphate Commissioners. The obligation to replant is defined as to its extent, and the only difficulty on the documents arises as to the types of trees and shrubs to be planted. In one sense that difficulty was at least potentially removed on day 106, when counsel for the defendant commissioners and counsel for the Attorney-General made their concession about the Governor being able to do what the deeds provide for the resident commissioner to do. But, of course, neither the resident commissioner nor the Governor has in fact done any prescribing. Furthermore, the concession operates only in the sphere of governmental capacity, and not of obligation, whether governmental or contractual; it is merely that the Governor can do it, not that he must or will.

There is always difficulty in applying expressions such as 'minor' or 'subsidiary' when used in apposition to 'essential' or 'entirety'. However, it seems to me that the

1 (1869) 5 Ch App 519
2 5 Ch App 519 at 523
3 [1910] AC 465

prescription of the types of shrubs and trees is not only a minor or subsidiary part of the A and C deeds as a whole, but a minor or subsidiary part of the replanting obligation itself. That is a conclusion that I think I should reach without resort to the attitude displayed by the courts in the case of contracts partly performed; but with that aid I have no doubt in reaching my conclusion. It seems to me to be quite wrong that liability on the replanting obligation should be escaped or postponed by reason of difficulties over the resident commissioner. If a lessee had covenanted to redecorate the premises at the end of the term in a colour and style prescribed by X, it could not be right to allow the lessee to avoid or postpone liability merely by reason of some failure in the prescribing.

I think that the court has ample powers to devise means of surmounting the difficulty, which does not seem very great: for the range of trees and shrubs which are indigenous to Ocean Island and suitable for being prescribed is very far from being extensive. In *Gourlay v Duke of Somerset*[1] there was an agreement for a lease which was to contain all such usual and proper terms as should be judged reasonable and proper by X. Grant MR held that under a decree for specific performance at the suit of the lessee, the court would, where X had not prescribed the terms, substitute a reference to the master to settle them. In that case, which was discussed in *Hart v Hart*[2], the lessee's act in seeking specific performance was held to disable him from objecting that X had not prescribed the terms. Here, of course, it is not the British Phosphate Commissioners who are seeking specific performance; but I do not see why those who have already taken the benefit of an agreement should be any better off than those who are merely seeking to enforce it. Nor do I think that this is a case where, as in *Richardson v Smith*[3], the court should simply omit the disputed matter. Where a contract is wholly executory, the omission of furniture to be taken at a valuation may well do no injustice; the vendor keeps his furniture, the purchaser keeps his money. But the position is very different when the contract has been partly performed; the omission of part of the consideration for what has already been taken would plainly be unjust.

In the result I consider that on this branch of the case counsel for the plaintiffs' contentions are right in their essentials. I hold that the absence of any prescription of trees and shrubs is no bar to the plaintiffs' success. If specific performance is decreed, the court will, in the continued absence of any proper prescribing, make suitable provision for the trees and shrubs to be specified: if damages are awarded instead, probably no such specifying will be needed, at all events as a separate matter. Whether any order can or should be made which will result in any trees and shrubs being prescribed by the Governor is, of course, another question. Although it is primarily a matter for the Attorney-General rather than the British Phosphate Commissioners, I think it would be convenient if I dealt with it now.

(8) Prescription by the Governor

What is claimed against the Attorney-General is a declaration that the United Kingdom government, acting by the Governor of the Gilbert and Ellice Islands Colony, is bound to prescribe the trees and shrubs which should be planted in accordance with the A and C deeds. Against this claim counsel for the Attorney-General offered a variety of defences. The Attorney-General of England has nothing to do with the action and should not have been sued; there is no jurisdiction to make any order against him, declaratory or otherwise; even if the plaintiffs are suing the right Attorney-General and there is jurisdiction, declarations are discretionary remedies and the discretion of the court ought to be exercised against making a declaration; and the resident commissioner undertook no contractual liability under the A and C

1 (1815) 19 Ves 429
2 (1881) 18 Ch D 670 at 690, 691
3 (1870) 5 Ch App 648

deeds, but only a governmental duty. I think the right course is for me first to consider the nature of the duty before I consider questions of jurisdiction and discretion.

The starting point is that each A and C deed is expressed to be made between the landowner of the first part (sometimes with, and sometimes without, the addition of the words 'his heirs executors or assigns'), the company of the second part, and 'Edward Carlyon Eliot, His Majesty's Resident Commissioner in Ocean Island (hereinafter called the Resident Commissioner) of the third part'. Pausing there, it is plain that the third party to the deed is a particular person holding the office of resident commissioner at the time of the deed. Unlike the C deeds, the A deeds then embark on three recitals. The first recites the existing P and T deeds, and the second recites the agreement between the landowner and the company to extend the term of years under the P and T deed. This is in terms of the company having requested the landowner to do this, and the landowner having consented to do it 'in the manner and upon the terms and conditions hereinafter appearing and subject to the concurrence of the Resident Commissioner being obtained to the transaction'. The third recital then runs 'AND WHEREAS the Resident Commissioner has agreed to join in this deed for the purpose of signifying his concurrence as aforesaid'. Up to this point, it will be observed, no future resident commissioner is in contemplation: 'the Resident Commissioner', of course, has been defined as meaning Mr Eliot, and it is Mr Eliot who is joining in the deed for the purpose of signifying his concurrence to the replacement of the P and T deed by the A deed.

When one comes to the company's obligation to replant, the reference to the resident commissioner is in terms of 'the Resident Commissioner for the time being in Ocean Island', and 'the said Resident Commissioner', so that although this is capable of including Mr Eliot, it is by no means confined to him. The company's duty to replant is expressed in plain words of obligation ('shall replant'), but there are no such words for the resident commissioner's prescribing of trees and shrubs, or forming an opinion as to a lack of prejudice to the company's operations for the purposes of reverter. Mr Eliot does not contract that he or future resident commissioners will prescribe or form an opinion; there is simply an assumption that this will be done.

Again I pause. If there were still a resident commissioner in Ocean Island, I find it impossible to see how the courts could hold him bound as a matter of contract to prescribe trees and shrubs. He has never agreed to do so, and the fact that Mr Eliot was a party to the A deed could not impose on the present resident commissioner any contractual obligation. The resident commissioner is not incorporated, and even if the replanting clause were to be construed as implying that the resident commissioner for the time being was to be under a contractual obligation to prescribe trees and shrubs, the only person contracting to this effect would be Mr Eliot. X may, of course, contract that Y will do something, just as he may contract that it shall rain tomorrow; and if the event does not occur he must pay damages. But the contract makes only X liable, not Y or the source of the weather.

I cannot see any escape from this for counsel for the plaintiffs by contending that Mr Eliot contracted on behalf of the Crown, or the Crown in right of the United Kingdom, or the United Kingdom government. There is no trace of any such basis in the A deeds, or, for that matter, outside them. The extent to which the deeds were evolved in London can have nothing to do with that. In short, not only is there no contractual obligation at all, but also such obligation as there is does not seem to me to be one which subjects the United Kingdom government to the liability of having a declaration made that, acting by the Governor of the colony, it is liable to prescribe the trees and shrubs.

If that is not the effect of the replanting clause of the A deeds, what is it? It seems to me that a simple and entirely adequate explanation is that the function of the resident commissioner is to be purely governmental. The clause is drafted on the footing that 'the Resident Commissioner for the time being in Ocean Island' will, as part of his

duties in providing for the good government of the colony, carry out the requisite prescribing and the forming of his opinion. The deed imposes no obligation, but assumes its existence. The obligation to do these acts is governmental or administrative, not contractual, and as such does not give the court jurisdiction to make the declaration claimed. In my judgment, this ground alone compels the rejection of this claim.

As regards the C deeds, there is an absence of the recitals that appear in the A deeds, and so there is no recital that the resident commissioner 'has agreed to join in this deed for the purpose of signifying his concurrence as aforesaid', that is, his concurrence in the transaction whereby the P and T deed is replaced by the A deed. However, for both the A and C deeds the requirements of the King's Regulations provide ample reasons for the resident commissioner joining in the deed; and those reasons were governmental in nature. The recital in the A deeds plainly strengthens the conclusion that in the replanting clause there is nothing contractual in relation to the resident commissioner, though I do not think that any such strengthening is needed. I therefore reach the same conclusion on the C deeds as I reach on the A deeds. This part of the claim accordingly fails.

In those circumstances I do not propose to consider at any length the other obstacles in the path of counsel for the plaintiffs, although they were extensively argued and were the subject of much authority. The resident commissioner was an officer not of the United Kingdom but of the High Commission and the colony, appointed by the High Commissioner under the Pacific Order in Council 1893, art 9(2). The term 'Deputy Commissioner' in the Order seems in practice to have been superseded by 'Resident Commissioner' as an abbreviation of the term 'Resident and Deputy Commissioner' which appears in an appointment made in 1893. Mr Eliot's appointment in 1913 shows the full form: it was made by the High Commissioner and consisted of a letter appointing Mr Eliot resident commissioner of the Gilbert and Ellice Islands Protectorate, and a commission, enclosed with the letter, appointing him a Deputy Commissioner for the Western Pacific. Though not independent, the government of the Gilbert and Ellice Islands Colony was a separate government, with its own obligations, duties and funds. I have already considered this to some extent in my judgment in *Ocean Island No 2*, and I shall not repeat here what I said there.

Counsel for the Attorney-General relied on *Buck v Attorney-General*[1] as showing that the Attorney-General of England cannot be sued in England save in respect of the Crown in right of the United Kingdom or the government of the United Kingdom. In that case, the action concerned the newly independent country of Sierra Leone; and, of course, the position of an independent sovereign state in this respect is by no means necessarily the same as that of a dependent colony. But counsel for the Attorney-General said that this made no difference to his point: the only question was whether or not the action was in respect of the government of the United Kingdom, or the Crown in right of the United Kingdom.

I do not think that the decision either of Wilberforce J[2] or of the Court of Appeal[1] carries counsel for the Attorney-General's point, though some of the reasoning gives it some support. I fully appreciate, of course, that much that happened in relation to the A and C deeds happened as a result of what was decided in London; but in putting into effect what had been decided, Mr Eliot and his predecessors were acting as officers of the protectorate or colony, and not as officers of the United Kingdom government. In the world of company law the act of many a subsidiary company has been decided on or advised by the parent company; but the act is still the act of the subsidiary.

In those circumstances it seems to me an allegation that there is a duty to prescribe trees and shrubs under the A and C deeds ought to be pursued in the jurisdiction in

1 [1965] 1 All ER 882, [1965] Ch 745
2 [1964] 2 All ER 663, [1965] Ch 745

which the obligation is said to exist. The obligation was an obligation of the resident commissioner and is now said to be an obligation of the Governor. Let it be assumed that the government of the United Kingdom has sufficient power to direct the Governor to do the prescribing; assume that power, and yet where is the obligation? How has the government of the United Kingdom made itself liable to have a declaration made that it is obliged, through the Governor, to prescribe the trees and shrubs? I do not think that it is open to a litigant to say, 'X is under an obligation to me. I will not sue him in the jurisdiction to which he is subject, but instead I will sue Y in another jurisdiction because, even though Y has not entered into any obligation, he has the power to compel X to carry out his obligation.' In substance, I think counsel for the Attorney-General was right in saying that the wrong Attorney-General had been sued: the claim ought to have been made against the Attorney-General of the colony and not the Attorney-General of England. *Chaney v Murphy*[1], I may say, sufficiently indicates the difficulties in suing the Attorney-General of a colony in England, and also shows why, as a matter of discretion, the Attorney-General of a colony ought normally to be sued in the courts of that colony.

As might be expected, counsel for the plaintiffs relied on the proposition that the Crown is one and indivisible, a proposition that I have already mentioned. His submission, coupled with *Attorney-General v Great Southern and Western Railway Co of Ireland*[2], carried him to the contention that although there could be litigation between the Attorney-General of England and the Attorney-General of a self-governing Dominion on behalf of their respective governments, the proposition made it impossible for there to be litigation between the Attorney-General of England and the Attorney-General of a colony. Thus a dispute on a contract between the two governments could not, he said, be litigated. Fortunately, I do not have to decide whether this contention is right: it seems unreasonable. In Canada and Australia litigation between the Attorney-General of a Province or State and the Attorney-General of the Dominion or Commonwealth is plainly possible; and my impression was that the Attorney-Generals of the various Provinces and States enjoyed a similar freedom inter se. I do not know how such manifestations fit in with the proposition; they may merely be modern facets of the ancient maxim rex est persona mixta, or they may be part of the mysteries of federation. At all events, if the proposition produces the inconvenient result for which counsel for the plaintiffs contends, that provides good reason for restricting the ambit of theory in the interests of the practical. Without good reason, abstract propositions ought not in these days to be allowed to fetter the court's powers to produce fair and sensible results.

There was also much discussion on other subjects that I have already considered, namely, the effect of the Crown Proceedings Act 1947, s 40(2)(*b*), and the ambit of the court's jurisdiction to grant declaratory relief. I do not propose to go over the ground again. I shall say only this. If under this head the points arose for decision, I would hold that the proposition that the Crown is one and indivisible does not suffice to carry counsel for the plaintiffs to the relief that he seeks. Further, on the Crown Proceedings Act 1947, s 40(2)(*b*), I think that so far as the claim is based on some liability of Her Majesty's Government in the United Kingdom, it would fail because no liability of that government has been established, and in so far as the claim is based on some liability of the resident commissioner or the Governor, that claim arises 'otherwise than in respect of Her Majesty's Government in the United Kingdom'. I cannot accept the contention of counsel for the plaintiffs that s 40(2)(*b*) does not exclude proceedings unless they have 'no connection' with the United Kingdom government. However widely the phrase 'in respect of' is construed (a question that I have already considered), the phrase must be construed in relation to 'alleged liability', so that connections in relation to matters other than liability are prima facie of no avail.

1 [1948] LJR 1301
2 [1925] AC 745 at 779

Finally, as regards declaratory relief, I would unhesitatingly exercise my discretion against making the declaration sought, or any modification of it that I can conceive. The real substance of the plaintiffs' claim is that formerly the resident commissioner, and now the Governor, have been bound to prescribe the trees and plants, and have not done so. By the oblique method of suing the Attorney-General of England as representing the United Kingdom government the plaintiffs are seeking to litigate the obligation of another person in another country who is not a party to the proceedings, without providing any adequate reason for trying to do indirectly what could be done directly. It seems to me that, in those circumstances, quite apart from other matters (including the inconveniences mentioned in *Chaney v Murphy*[1]), it would be wrong for me to grant a declaration. It follows that the claim against the Attorney-General fails and will be dismissed.

I must now return to the claim against the British Phosphate Commissioners. The effect on that claim of what I have just decided is as follows. First, there will be no declaration of the Governor's obligation to prescribe the trees and shrubs, either on behalf of the United Kingdom government or otherwise. Second, there is nothing to prevent the Governor prescribing the trees and shrubs in accordance with the concession made by counsel for the defendant commissioners and counsel for the Attorney-General, if he thinks fit. Third, whether the Governor should now prescribe the trees and shrubs is a governmental matter, and not a matter for this court. No doubt if he were requested by the parties to do so, he would give great weight to the request. Equally, if they requested him to abstain from doing so, he would doubtless give great weight to that request also. If he receives no request, or conflicting requests, he might well find greater difficulty in reaching a decision. But whatever happens, the decision is his to make, in relation to the duties of government. Fourth, the fact that I have held that the absence of any prescription of trees and shrubs is no bar to the plaintiffs' success against the British Phosphate Commissioners is no doubt another matter that the Governor will consider; and if the point arises, it may make it less difficult for him to decide.

(9) Specific performance

I now come to the remedy of specific performance. Is this a case in which an order for specific performance can and should be made? This raised a number of issues.

(a) Unsuitability. I will take first a contention by counsel for the defendant commissioners that the obligation to replant is a type of obligation that is unsuitable for a decree of specific performance. He put this on the ground that the work was too complicated and experimental, and that while it was being carried out over the long period that it would take it would repeatedly raise questions of whether the complex operations were being properly carried out. On this he cited the well-known case of *Wolverhampton Corpn v Emmons*[2]. Counsel for the plaintiffs met this in two ways. First, he put forward the draft order that I have already set out, thereby giving a considerable degree of greater certainty to what the court was being asked to order. Second, he cited a line of cases, beginning with *Pembroke v Thorpe*[3] and running down to *Jeune v Queen's Cross Properties Ltd*[4], as tending to show that such a contract was specifically enforceable.

In cases of this kind it was at one time said that an order for the specific performance of the contract would not be made if there would be difficulty in the court supervising its execution: see, e g, *Ryan v Mutual Tontine Westminster Chambers Association*[5]. Smith MR subsequently found himself unable to see the force of this objection

1 [1948] LJR 1301
2 [1901] 1 QB 515
3 (1740) 3 Swan 437 n
4 [1973] 3 All ER 97, [1974] Ch 97
5 [1893] 1 Ch 116 at 123, 125, 128

(see *Wolverhampton Corpn v Emmons*[1]); and after it had been discussed and questioned in *C H Giles & Co Ltd v Morris*[2], the House of Lords disposed of it (I hope finally) in *Shiloh Spinners Ltd v Harding*[3]. The real question is whether there is a sufficient definition to what has to be done in order to comply with the order of the court. That definition may be provided by the contract itself, or it may be supplied by the terms of the order, in which case there is the further question whether the court considers that the terms of the contract sufficiently support, by implication or otherwise, the terms of the proposed order.

I have, of course, considered all the cases cited on this point, but I do not think that I need say much about them. In *Storer v Great Western Railway Co*[4] Knight Bruce V-C adopted what I think is the modern approach on difficulties of supervision. He said[5]: 'The Court has to order the thing to be done, and then it is a question capable of solution whether the order has been obeyed'. However, what is here of greater importance is the attitude of the courts when specific performance is claimed against defendants who have had some or all of the benefit to which they were entitled under the contract. In such a case, said Wigram V-C in *Price v Penzance Corpn*[6], 'the Court will go to any length which it can to compel them to perform the contract in specie.' 'The Court', said James V-C in *Wilson v Furness Railway Co*[7], 'would struggle with any amount of difficulties in order to perform the agreement'. In such cases the court may direct a reference to the master to determine what is necessary and proper to be done, and where and by what means it is to be done: *Sanderson v Cockermouth and Workington Railway Co*[8]; *Lytton v Great Northern Railway Co*[9].

In this field, however, I must consider the warning to be found in *Wilson v Northampton & Banbury Junction Railway Co*[10]. There, a railway company contracted with a landowner, whose land they were taking, to construct on his land 'a station'. The landowner sued for specific performance, but both Bacon V-C and the Court of Appeal in Chancery held that justice required that instead of a decree of specific performance there should be an inquiry as to damages. The basic difficulty lay in the crude simplicity of the words 'a station', with nothing to indicate the nature, materials, style, dimensions or anything else; and it was these difficulties which seemed to have been decisive with Bacon V-C.

On appeal, a number of the authorities that I have mentioned on the court struggling with difficulties were duly cited; but in addition to the indefiniteness of 'a station', the court referred to the futher difficulty of there being nothing in the contract which obliged the company to use the station when constructed. The main significance of the decision is, I think, that the court will decree specific performance only if this will do more perfect and complete justice than an award of damages. In assessing damages the court could consider a number of reasonable probabilities, both as to the size and quality of the station and as to its use, whereas a decree for specific performance must either require a thing to be done or else omit it; the order cannot be made on the basis of resonable probabilities. The decision also seems to me to show that uncertainties which make the court hesitate to order specific performance may well be no bar to an award of damages, especially as damages may be awarded on the footing of resolving uncertainties in favour of the innocent party and against the wrongdoer.

1 [1901] 1 QB 515 at 523
2 [1972] 1 All ER 960 at 969, 970, [1972] 1 WLR 307 at 318
3 [1973] 1 All ER 90 at 101, 102, [1973] AC 691 at 724
4 (1842) 2 Y & C Ch Cas 48
5 2 Y & C Ch Cas 48 at 53
6 (1844) 4 Hare 506 at 508, 509
7 (1869) LR 9 Eq 28 at 33
8 (1850) 7 Ry & Can Cas 613
9 (1856) 2 K & J 394
10 (1874) 9 Ch App 279

For the reasons that I have given, I think that there is considerably less uncertainty about the meaning of the word 'replant' in the A and C deeds than about the meaning of 'a station' in the *Wilson* case[1]. I certainly do not consider that the case against decreeing specific performance on this score is nearly so strong in the present case as it was in that case; and if in the circumstances it is right to do so, I should certainly seek to struggle with any amount of difficulties to compel the British Phosphate Commissioners to replant in accordance with the A and C deeds under which they have taken the benefit. The complexities of specific performance are weighty and discouraging, but by themselves I do not think that they suffice to induce the court to refuse specific performance. At the same time, I can see considerable advantage in making an award of damages instead. In that state of affairs I think that I must consider the other circumstances of the case before reaching any conclusion on this matter.

(*b*) *Part ownership.* I now come to an obstacle to specific performance in the case of some but not all of the plots concerned. It will be remembered that in the draft order that counsel for the plaintiffs put forward, a distinction was drawn between plots for which he sought an unqualified declaration that the replanting obligation ought to be specifically performed and carried into execution, and the plots for which the declaration was sought 'should all the owners of such land wish it'. Six of the 15 plots fell into this latter category.

This distinction arose out of the difficulty that counsel for the plaintiffs encountered when it appeared that in the case of certain plots of land the plaintiffs who had claimed them admittedly had not shown prima facie evidence that all the persons who owned the plots, or were or might be interested in them were before the court as plaintiffs or defendants. Counsel for the plaintiffs put his procedural house in order on Day 101 by seeking an order under RSC Ord 15, r 4(2), giving liberty to the plaintiffs concerned to continue the action notwithstanding that they might be entitled to the relief claimed jointly with others, whether or not they were those specified in the schedule to the order. The application encountered no opposition in substance, though counsel for the defendant commissioners entered caveats in relation both to specific performance and to damages; and I made the order. With one exception, the plots of land coincide with those for which counsel for the plaintiffs sought the qualified decree for specific performance; but plot A233 appears in the former but not in the latter, and C120 in the latter but not in the former. I do not understand why this is so, but doubtless this point can if necessary be cleared up in discussing the order to be made.

The point of substance that arises in these circumstances may be expressed as follows. Can one of several co-owners of a plot of land obtain a decree for the specific performance of a contract relating to that land when the other co-owners are not only not seeking specific performance but have not even been joined as defendants? Counsel were not able to put before me any reported authority which bore on the point either directly or indirectly. There is a sentence in Fry on Specific Performance[2] which states the general rule as being that 'all the parties to the contract should be parties to the suit and no one else'; but although the authorities cited support the last four words of the proposition, they provide little or no support for the remainder of it.

In the resourceful attempt by counsel for the plaintiffs to meet the difficulty by seeking the qualified order that I have mentioned, the proposed order acquired the name of a 'conditional *Hasham* order'; for in effect it consisted of a conditional version of the order made in *Hasham v Zenab*[3]. This form of order, used in a case where the plaintiffs sued for specific performance before the date on which the contract was to

1 (1874) 9 Ch App 279
2 6th Edn (1921), p 75
3 [1960] AC 316

be performed, declares that the contract ought to be specifically performed and carried into execution, but omits the consequential directions as to the steps to be taken to perform it. As has been seen, the adaptation by counsel for the plaintiffs consisted of adding to the declaratory words the phrase 'should all the owners of such land wish it'. The result, counsel said, was to leave it to each of the plaintiffs who succeeded in obtaining an order in this form to take the appropriate steps to obtain the concurrence of the other co-owners of the particular plot.

I feel no doubt that it would be wrong to make such an order. It may be that in exceptional circumstances such an order could properly be made, though I doubt it. But as a matter of principle it seems to me that no order for specific performance, even in the limited *Hasham*[1] form, should be made at the suit of one co-owner in proceedings to which any other co-owner is not a party. Quite apart from the position brought about by the 1925 property legislation in the case of co-ownership in England, it seems to me that the order proposed is objectionable in at least two respects. First, what are the views of the absent co-owners? The plaintiff may desire specific performance; but the other co-owners might prefer damages, or even not wish to sue at all. Why should the court be set in motion and make an order at the behest of one co-owner when the other co-owners, who may have a majority interest, may desire nothing of the sort? It makes it no better to say that one is merely seeking a declaration as to the rights of all.

Second, the conditional nature of the proposed order which would flow from the words 'should all the owners of such land wish it' seems to me to be most undesirable. The order provides no machinery for the ascertainment of the other co-owners, or the expression of their wishes. Further, even if such machinery were to be provided, I think that it would be wrong for the court to sanction the conduct of proceedings for specific performance on the footing that at the conclusion of the case the defendant would still not know whether the contract was to be specifically performed, and would have to await the working of the machinery. At the end of it all the result might be that the defendant would find that the specific performance that he had been resisting was no longer being sought, and that instead the plaintiffs were together seeking the damages that, perhaps, he had all along been willing to pay. On these two grounds alone I would refuse any order for specific performance in relation to all land in this category.

In my judgment, the law is as follows. First, a plaintiff who seeks specific performance can obtain it only if there is before the court every other person entitled to join with him in enforcing the contract. Second, if that is not the case, he cannot cure the defect by seeking a form of order which leaves the views of those whom he ought to have brought before the court to be ascertained after he has involved the defendant in contesting an action for specific performance.

(c) *Individual plots.* I now come to a wider issue. It will be remembered that in counsel for the plaintiffs' draft order, 15 plots of land appeared in the schedules, the claim for the other two of the 17 plots in this part of the case having been abandoned. Two of the 15 plots in the schedules are plots which were never the subject of A or C deeds, and the plaintiffs' claim is now admittedly for only a part of these plots, being about a half acre in one case and three-quarters in the other. The remaining 13 plots are all the subject of A or C deeds. The two largest are each over one and three-quarter acres, while the six smallest are each a mere quarter or third of an acre. Their total area is about 11¼ acres.

As may be seen from plan A, which is annexed to the statement of claim, these plots are scattered about in various parts of the island, with none of them contiguous to any other of them. The owners of the contiguous plots may themselves wish to have the replanting obligation specifically performed, or they may prefer damages; they are not parties to these proceedings, and I do not know what they want. Indeed,

1 [1960] AC 316

it is not at all clear that even the plaintiffs to this action understand about the replanting obligations. Five of them (the 2nd, 3rd, 6th, 7th and 10th plaintiffs) all said in evidence that they thought that if they won the action, the whole island would be levelled and replanted. In fact, as I have emphasised, the most that has been contended for is that there is an obligation to level and to replant nearly one-sixth of the island; and this action relates only to a dozen acres or so at most. Nor do I think that the plaintiffs all really appreciated that what was being claimed for them was an order that would necessarily result in a massive road construction programme. The attractions to the owner of a plot which is a mere one-third or one-quarter of an acre in extent in having a large part of it made into segments of roadways cannot be very great.

However that may be, the main point seems to me to be inescapable. Let me ignore the difficulties arising from the plots affected by the conditional *Hasham*[1] order, and let me assume (contrary to my judgment) that the obligation to replant goes the full width claimed by counsel for the plaintiffs for the whole area for which he contends. How, at the suit of ten plaintiffs owning scattered plots with a total area of a dozen acres or so, could it be right to make the order sought? The scheme put forward treats the whole area of the claim globally, and not plot by plot. The British Phosphate Commissioners, of course, treated the area globally, as I have already said, but that cannot deprive the owners of individual plots of the right of each to decide for himself or herself what remedy to seek. Let a mere handful of the landowners who are not parties to these proceedings say that they want damages and not specific performance, and the global proposals for replanting put forward in evidence become impossible of achievement. If all the landowners had been plaintiffs, or if, to avoid that, they had all transferred their rights and their land to the Council of Leaders on suitable trusts, and the council had sued for specific performance, matters would have been very different. But that is not the case.

If the draft order is construed on the plot-by-plot basis which it literally expresses, I do not see how the evidence of global restoration can sensibly be adapted to it, or how it can be carried out according to its tenor. Thus para (f) requires the defendant British Phosphate Commissioners to 'provide sufficient access' to the plots in the fifth schedule to enable the coconuts, pandanus and almonds to be planted and harvested, and also to 'demolish all pinnacles necessary for this purpose'. Plots C109 C179 and C183 are all in this schedule; each is about one-third of an acre, and each is surrounded by other plots which are not included in the claim for specific performance. How are the defendants to comply with the order? It cannot be suggested that they must buy enough of the surrounding plots to enable them to demolish pinnacles and construct a road to these island sites. The draft order, if I may say so, seems to me to be an ingenious attempt to link the evidence on the global proposal to proceedings brought on a plot-by-plot basis; but the linkage is, in my judgment, far too tenuous and unreal to bear examination.

I have said enough to make it clear that in my judgment this is not a case for specific performance on the basis claimed by the plaintiffs. If, as I have held, the obligation to replant is one that does not involve any levelling of pinnacles, construction of roads or importation of soil, but merely involves planting in a few feet of phosphate beside the pinnacles, it could be contended that this should be ordered to be done. I would not accept that contention. It is old law that in specific performance cases 'the court will not make any order in vain': see *New Brunswick and Canada Railway and Land Co Ltd v Muggeridge*[2], per Kindersley V-C. The usual instances of cases of the courts refusing to make orders that would be useless are cases where the interest that will be obtained by the decree is a very short tenancy, or a partnership which could promptly be determined by the other party.

1 [1960] AC 316
2 (1859) 4 Drew 686 at 699

I do not, however, think that the refusal of equity to make futile orders is limited to cases of transient interests. In this case I cannot see what utility there would be for anyone in providing that a small number of isolated plots should be replanted with coconut and other trees in the hollows beside the pinnacles. It is highly improbable that the coconuts would ever fruit, and the plots would be surrounded by other plots not replanted in this way which would make access difficult or impossible for the owner. It would be a sheer waste of time and money to do this; and I do not think that the court ever should, in its discretion, make an order which it is convinced would be an order of futility and waste. Indeed, in view of the decision in *Wilson v Northampton and Banbury Junction Railway Co*[1] that I have already considered, I think that damages would be not only a perfectly adequate remedy, but also far more suitable. If the owners of the plots want to spend the money in having them replanted, then of course they can do so; but this expenditure will be of their one volition, and not by order of the court. In short, if I leave on one side the cases of part-ownership, my conclusion is that although the court could decree specific performance, in the exercise of a proper judicial discretion it ought not to do so.

(*d*) *General replanting.* In view of the pendency of *Ocean Island No 3*, it might be of assistance if I reverted to the problems of replanting, and said something more about them, though of course this will in no way be binding in that case. If I assume that the true obligation of the defendant British Phosphate Commissioners is to replant the whole 250 acres in the manner claimed, the result would be that in the end a little less than one-sixth of the island would have been levelled and replanted. That one-sixth would consist of a criss-cross pattern of some 80 miles of roadway, nine feet wide, with the circular baskets of earth beside them in which coconuts would be growing; and there would also be almonds and pandanus.

How long it would take to reach that state of affairs is a matter of considerable doubt, even assuming no difficulty in the importation of the vast amount of soil required. Mr King, the engineering expert called by the defendant British Phosphate Commissioners, put in a detailed estimate which showed that the engineering tasks would take over 17 years and cost a little under $A50 million: see exhibits D15 and the revised version of D16. As I have indicated, these figures were based on the baskets containing a two-foot depth of soil and not the six feet now claimed. As a result of skilful cross-examination by counsel for the plaintiffs and the making of favourable assumptions, (including the continuance of phosphate operations on Ocean Island for long enough to ensure that phosphate ships which had discharged their loads in Australia would be available throughout to bring the requisite earth back), the cost was reduced to some $A32 million, and the period to a little over four years. Plainly there are very large margins for error in all these figures, and I think that both these reduced figures would in the event be increased quite substantially. However, if they are accepted as they stand, due allowance would also have to be made for the time required for the coconuts to grow and begin to fruit. That involves the unpredictable frequency of droughts on an island which Senator Walker accepted as having an annual rainfall which, even if evenly spread through the year, was at the bottom end of the rainfall requirement for coconuts. Droughts, of course, might either kill the trees, or else postpone their fruiting. In a normal year, he said, the coconut trees growing naturally on the island could possibly produce one-fifth of a good yield; they had a very low yield.

One thing is clear. Even if the engineering was accomplished so that the coconuts could be planted after five years, the operation would not produce a single coconut for at least 15 years, and more probably 20 years, or more; and it would be at least another five years before the trees came into full bearing, though even then they would probably produce nuts which were only half the normal size. Senator Walker's view was that if the nuts got a good start and there were average conditions (the 'if'

1 (1874) 9 Ch App 279

is noteworthy), the trees would start bearing after 12 to 14 years and come into full bearing in 18 to 20 years; and to those periods must be added the period required for the engineering. Nor would the operation achieve a cosmetic effect that would make the island look remotely like it once did, either as a whole or in the one-sixth that is the most that would be replanted. As I have said, Senator Walker agreed that the result of carrying out his proposals would not look very beautiful, and that in terms of return for expenditure the whole exercise was absurd. Coconuts could be imported, or coconut plantations elsewhere could be bought and managed, which at a mere fraction of the cost would produce the same yield of coconuts. I may add that I have considered a number of variations that were suggested, such as halving the length of the roads; but although these of course affect important details, I do not think that they alter the substance.

I intend in no way to prejudge anything that may arise for decision in *Ocean Island No 3*; but I think that it may be helpful if I say that unless the evidence in that case is very different from the evidence in this case, I can foresee very grave difficulties in persuading any court that an order for specific performance would be in the least appropriate. On any footing that I can conceive the time and the cost would be very great, and wholly disproportionate to the meagre and long-delayed benefit that might in the end be achieved.

If I now leave this wider issue and return to the case before me, I think I have made it plain that I do not consider this to be a case for specific performance. The claim for specific performance seems to me to fail completely. Damages are an adequate remedy; and the case is one in which the court's discretion ought to be exercised against decreeing specific performance.

(10) *Damages*

The result, therefore, is that in my judgment the appropriate remedy for the plaintiffs is that of damages. Any plaintiff who has sufficiently established his or her title to land which was the subject of an A or C deed and has ceased to be used by the British Phosphate Commissioners is entitled to damages for the failure to replant that land according to the limited obligation that I have held to exist. I must accordingly consider the basis on which damages should be assessed. On this, counsel concurred in the view that it was very difficult to find any direct authority.

(*a*) *Basis.* The primary contention of counsel for the plaintiffs was that the measure of damages was the cost of doing the work of replanting, limited to $A73,140 per acre. His secondary contention was that the measure of damages was a suitable proportion of the cost of replanting, to represent the sum which the British Phosphate Commissioners would have paid in order to be released from the obligation to replant. In a helpful summary of his submissions on this part of the case which he put in on Day 101, he worked out some figures on the assumption that the one-third for which he had contended in argument was the suitable proportion. These contentions were, of course, made in relation to the extensive replanting obligation that he claimed and I have rejected; but in principle they must apply to the lesser obligation that I have held to exist.

Leading counsel for the defendant commissioners, on the other hand, contended that even if the action were not premature by reason of the failure of the resident commission to specify trees and shrubs, and was not barred on any other ground, the damages should be either nominal or minimal. His basic submission was that the proper measure of damages was not the cost of doing the work, but was the diminution in the market value of the land by reason of the work not having been done. The secondary contention of counsel for the plaintiffs, based on what the British Phosphate Commissioners would have paid for being released from the obligation to replant, had not been put forward at that stage. But second counsel for the

defendant commissioners met it on their behalf in his speech in reply; and he contended that this mode of assessment was inapplicable in cases such as this.

I shall take first the rival contentions of the cost of doing the work, and the diminution in the market value. The two approaches are exemplified by *Joyner v Weeks*[1] and *Wigsell v School for Indigent Blind*[2] respectively; both were cited to the House of Lords in *Conquest v Ebbetts*[3]. In *Joyner v Weeks*[1], the action was by a landlord against the tenant, brought not during the term but at the end of it, for damages for breach of a covenant to keep the demised premises in repair, and to deliver them up in repair. The Court of Appeal held that the ordinary rule was that the damages recoverable were the cost of doing the repairs, and that there was nothing in the facts of the case which made that rule inapplicable. The tenant had relied upon the fact that the landlord, during the term, had relet the premises as from the end of the term at an increased rent to a new tenant who covenanted to repair and to pull down and alter part of the premises; but this was held to make no difference. I know that in *Duke of Westminster v Swinton*[4] it was said that in *Joyner v Weeks*[1] it had been held that 'the cost of repairs was the measure of damages in all cases', and that in the latter case Lord Esher MR had said that he was very much inclined to think that this was an absolute rule. But he expressly refrained from holding that this was so; and what both he and Fry LJ actually decided was that it was 'the ordinary rule', or 'the ordinary prima facie rule', and that it was subject to there being no circumstances which made it inapplicable: see *Joyner v Weeks*[5].

Wigsell's case[2] related to the purchase of 12 acres of land intended for a projected asylum. In the conveyance the purchasers covenanted with the vendor that they would keep their land enclosed on all sides which abutted on the vendor's land with a brick wall or an iron railing seven feet high. The conveyance also gave the vendor, his heirs and assigns a right of pre-emption if the purchasers did not require the land for a blind school or asylum, and desired within ten years to sell all or any of it. Six years later, the purchasers decided not to use any of the land for their projected asylum, and offered it back to the executors of the vendor, who had died in the meantime; but the offer was declined. No wall or fence had been erected, and the executors then sued the purchasers for damages for breach of covenant. The cost of erecting the wall or fence was far greater than the diminution in the value of the vendor's land by reason of the breach.

In delivering the judgment of a Queen's Bench Divisional Court, consisting of himself and Cave J, Field J[6] said that if the plaintiffs had really wished to have the wall built, they would have sued for specific performance; and if the court had thought damages an inadequate remedy, it could have ordered specific performance. Instead, the plaintiffs had elected to sue for damages. They would be under no obligation to spend the money on building the wall, and probably they would never think of such expenditure, which seemed to the court to be a simple waste of money. The effect of suing for damages was to entitle them to the amount of the difference between the state of the plaintiffs on the breach of the contract and what this would have been if the contract had been performed. The case, I may say, had come before the court on a rule to set aside the verdict of a jury on a writ of inquiry; and a rule absolute for a new inquiry was made.

Conquest v Ebbetts[3], like *Joyner v Weeks*[1], was a landlord and tenant case. The plaintiff was a lessee who sued his sublessee and an assignee of the sublease for damages for breach of the repairing covenant in the sublease. When the case was heard the

1 [1891] 2 QB 31
2 (1882) 8 QBD 357
3 [1896] AC 490, [1895-9] All ER Rep 622
4 [1948] 1 All ER 248 at 251, [1948] 1 KB 524 at 533
5 [1891] 2 QB 31 at 43, 44, 47
6 8 QBD 357 at 363, 364

lease and the sublease each had some three and a half years to run. As appears from the report of the case in the Court of Appeal[1], damages had been assessed by taking the cost of doing the repairs, which was £1,500, and then discounting it to £1,305 because of the length of time that the term had to run; and this was held to represent the reduction in the value of the lessee's reversion by reason of the breach of the sublessee's covenant.

Both the Court of Appeal[2] and the House of Lords[3] held that this was right in principle. Lord Herschell, with whom Lord Macnaghten and Lord Morris agreed, considered the cost of doing the repairs and the amount of the injury to the reversion as rival methods of determining the damages; and he said in effect that each in a proper case could be the correct method. The real point of the case was the effect of the lessee's liability to the head lessor under the repairing covenants in the head lease, a matter of which the sublessee had notice. If the lessee sold his leasehold reversion, he could only sell it subject to this liability; and the difference between the premises being in repair and their being out of repair represented the diminution in the value of his reversion. It had been contended that at the end of the term the head lessor would accept a lesser sum for the non-repair because he would want to use the site for something different, and so would not want the buildings repaired; but Lord Herschell rejected such possibilities in assessing damages as between the lessee and a sublessee in breach of his obligations.

Pausing there, it is clear that in some cases of a contract to do work to the plaintiff's land the measure of damages for breach is the reduction in value of the plaintiff's interest in the land, and in other cases it is the cost of doing the work. But which? I have been unable to find any clear statement of principle in the cases or books put before me, or in other sources that I consulted. Counsel for the defendant commissioners placed some reliance on McGregor on Damages[4]. In dealing with breaches of covenant by a lessee this states that—

> 'In covenants to build, to mine or to farm, the measure of damages is the amount of the diminution in the market value of the premises, and this will be so whether the action is brought during the term or at its determination.'

The only alternative that could command any support is said to be the cost of executing the building, mining or farming that the lessee has wrongly failed to do; and the reason for rejecting this is based on what Field J said in *Wigsell's* case[5], in the passage relating to the plaintiff's failure to sue for specific performance that I have already mentioned.

I can see many difficulties in this. I should watch with interest the progress of an action for specific performance of a contract to farm or to mine; and if a plaintiff decided to sue for damages instead, I think most Chancery practitioners would ascribe his decision to prudence rather than a choice between available remedies. For contracts to build, I do not understand how or why a covenant to build and a covenant to repair can or should be distinguished for this purpose; yet *Joyner v Weeks*[6] is clear authority for the cost of repairing being the normal measure of damages at the end of the term for breach of a covenant in a lease to deliver up the premises in repair. I do not think that a footnote in McGregor on Damages[7] is sound or is supported by the authority cited. In any case, I doubt very much whether a suitable test exists or can be devised which depends on what it is that has been contracted to be done.

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1 [1985] 2 Ch 377 at 383
2 [1895] 2 Ch 377
3 [1896] AC 490, [1895-9] All ER Rep 622
4 13th Edn (1972), p 526
5 (1882) 8 QBD 357 at 363, 364
6 [1891] 2 QB 31
7 13th Edn (1972), p 528, n 69

Certainly I do not think that *Wigsell's* case[1] can be generalised into supporting the proposition in McGregor on Damages[2] that I have mentioned. In my attempts to pursue the point it emerged that *Wigsell's* case[1] seems to be surprisingly modest in in its judicial progeny. Wright J cited it in the Divisional Court in *Joyner v Weeks*[3], and I found a discussion of it by O'Connor LJ in *Hepenstall v Wicklow County Council*[4], a case that was considered and distinguished in *Murphy v Wexford County Council*[5]. But on an admittedly tenuous search that is all that I found.

For reasons that will appear, I do not think that the question falls to be determined by whether the plaintiff sues for damages or whether he sues for specific performance, even though McGregor on Damages[6] appears to put the matter on this point, at any rate to a considerable extent. Plainly it may be important whether or not the plaintiff is claiming specific performance; but I do not think it can be decisive. Suppose that a recluse sells some of his land on terms that the purchaser will erect a high wall that will enclose most of the vendor's land; the wall is not built, and so the vendor builds a wall himself and then sues for damages. His land may be worth more on the market without the wall than with it, but I cannot see that either this or the fact that he is not suing for specific performance ought to debar him from obtaining damages equal to the cost of building the wall. Whether the wall to be taken for this purpose is the actual wall, if reasonable, or the contractual wall, I need not discuss. If, without erecting the wall, he sues merely for damages, but established that he will spend the money on erecting a wall, preferring to have nothing more to do with the faithless purchaser, I do not see why the result should not be the same.

Again, some contracts for alterations to buildings, or for their demolition, might not, if carried out, enhance the market value of the land, and sometimes would reduce it. The tastes and desires of the owner may be wholly out of step with the ideas of those who constitute the market; yet I cannot see why eccentricity of taste should debar him from obtaining substantial damages unless he sues for specific performance. Per contra, if the plaintiff has suffered little or no monetary loss in the reduction of value of his land, and he has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages.

In the absence of any clear authority on the matter before me, I think I must consider it as a matter of principle. I do this in relation to the breach of a contract to do work on the land of another, whether to build, repair, replant or anything else; and I put it very broadly. First, it is fundamental to all questions of damages that they are to compensate the plaintiff for his loss or injury by putting him as nearly as possible in the same position as he would have been in had he not suffered the wrong. The question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of compensating the plaintiff. In the words of O'Connor LJ in *Murphy v Wexford County Council*[7]:

> 'You are not to enrich the party aggrieved; you are not to impoverish him; you are, so far as money can, to leave him in the same position as before.'

Second, if the plaintiff has suffered monetary loss, as by a reduction in the value of his property by reason of the wrong, that is plainly a loss that he is entitled to be recouped. On the other hand, if the defendant has saved himself money, as by not

1 (1882) 8 QBD 357
2 13th Edn (1972), p 526
3 [1891] 2 QB 31 at 38
4 [1921] 2 IR 165 at 184
5 [1921] 2 IR 230
6 13th Edn (1972), pp 493, 526
7 [1921] 2 IR 230 at 240

doing what he has contracted to do, that does not of itself entitle the plaintiff to recover the saving as damages; for it by no means necessarily follows that what the defendant has saved the plaintiff has lost.

Third, if the plaintiff can establish that his loss consists of or includes the cost of doing work which in breach of contract the defendant has failed to do, then he can recover as damages a sum equivalent to that cost. It is for the plaintiff to establish; this essential question is what his loss is.

Fourth, the plaintiff may establish that the cost of doing the work constitutes part or all of his loss in a variety of ways. The work may already have been done before he sues. Thus he may have had it done himself, as in *Jones v Herxheimer*[1]. Alternatively, he may be able to establish that the work will be done. This, I think, must depend on all the circumstances, and not merely on whether he sues for specific performance. An action for specific performance is doubtless one way of manifesting a sufficient intention that the work shall be done; but there are others. Thus the plaintiff may be contractually bound to a third party to do the work himself, as in *Conquest v Ebbetts*[2]. Other cases of what may be called extraneous coercion may easily be imagined, such as the enforcement by a local authority of some statutory obligation.

I do not, however, think that this head is confined to cases of coercion. I have already mentioned the case of the plaintiff who does the work himself before he sues; I cannot see that it matters that he did it without being under any obligation to do it. After all, he contracted for valuable consideration that it should be done. Suppose, then, that he has not done it but states that he intends to do it. Of course, he may not be believed; but if he is, why should not his loss be measured by what it will cost him to do the thing that the defendant ought to have done but did not do? In some cases, the circumstances may demonstrate a sufficient fixity of intention in the plaintiff's resolve, as where the property is his home and will be highly inconvenient or nearly uninhabitable until the work is done. In such a case I cannot think that it matters that the house could be made convenient or inhabitable by doing cheaper or less idiosyncratic work; what matters is the work to which the plaintiff is entitled under the contract.

The point may be illustrated by what has come to be settled law in the case of a tenant's repairing covenant in a lease. A lessor who sues during the term for breach of such a covenant will be entitled to damages for the diminution in the value of his reversion but not for the cost of doing the repairs; he will, of course, normally have no right to enter the premises during the term to do them himself. But if he sues at the end of the term, he can usually (subject to the Landlord and Tenant Act 1927, s 18) recover the cost of doing the work that he is then able to do or have done; and usually he will do it in order to be able to relet the premises in a state to command the rent that is appropriate to premises in good repair. In other cases, if the circumstances fail to indicate sufficiently that the work will be done, the court might accept an undertaking by the plaintiff to do the work; and this, as in the business tenancy cases, would surely 'compel fixity of intention'. Whatever the circumstances, if the plaintiff establishes that the contractual work has been or will be done, then in all normal circumstances it seems to me that he has shown that the cost of doing it is, or is part of, his loss, and is recoverable as damages. Even if it is open to question whether the plaintiff will do the work, the cost of doing it may afford a starting figure, though it should be scaled down according to the circumstances, the real question being that of the loss to the plaintiff: see *Smiley v Townshend*[3], per Denning LJ. In the words of Denning J in *Duke of Westminster v Swinton*[4]: 'The real question in each case is: What damage has the plaintiff really suffered from the breach?' In the end, the

1 [1950] 1 All ER 323, [1950] 2 KB 106
2 [1896] AC 490, [1895-9] All ER Rep 622
3 [1950] 1 All ER 530 at 534, [1950] 2 KB 311 at 322
4 [1948] 1 All ER 248 at 251, [1948] 1 KB 524 at 534

question seems to me to come down to a very short point. The cost is a loss if it is shown to be a loss.

There is a fifth point. In most cases there can be no certainty about the doing of work which has not yet been done. A lessee bound by covenant to his lessor to do the work may be released from his covenant, or may have his liability compounded on payment of less than the cost of doing that work, as was envisaged by Lord Herschell in *Conquest v Ebbetts*[1]. The local authority may decide not to enforce the statutory obligation, or the court may release a litigant from his undertaking. A plaintiff who had a firm and settled intention to do the work may later find that supervening events have weakened or destroyed his resolve.

I do not think that the plaintiffs' rights are affected by any such absence of certainty. Just as Lord Herschell, in the circumstances of *Conquest v Ebbetts*[2], denied the defendant the right to 'demand that a speculative inquiry shall be entered upon as to what may possibly happen and what arrangements may possibly be come to', so I think the court should refuse to speculate on other possibilities of this sort. The court ought to be ready to act on evidence which, without assuring certainty, nevertheless carries conviction. In *Wigsell v School for Indigent Blind*[3], of course, the only conviction that could have existed was that the wall would never be built. The object of requiring the wall to be built was plainly to protect the vendor's land against the proposed asylum. The proposal to build an asylum had been abandoned, and by suing for damages and not specific performance the vendor's executors were doing little more than recognising the reality that the wall would never be erected. On that footing the executors could not establish that the cost of building the wall represented any loss that they had suffered.

These five points seem to me to be supported in parts by the authorities cited, and to be at least consistent with them. I also think that they are coherent, and, what is more, sound in principle; and they offer an intelligible explanation of what at first sight appears to be not readily explicable divergences of approach. But I must give warning that they have not undergone the testing and refinement that comes from dissection in argument, and that there may well, in so large a subject as damages, be other relevant authorities that in any such argument counsel would have cited. On the whole I do not think that I would be justified in restoring the case for further argument on the subject, and so, doing the best that I can on the material before me, I shall act on the conclusions that I have reached.

Does Lord Cairns' Act 1858[4] make any difference? Counsel for the plaintiffs submitted that where a contract was one in which the court can order specific performance but refuses to do so, the damages that would be awarded in substitution for specific performance under the Act must be a real substitute; therefore, he said, in this case they should equal the cost of doing the work. In support he cited *Leeds Industrial Co-operative Society Ltd v Slack*[5] and *Wroth v Tyler*[6]. I readily accept this proposition as far as the word 'therefore'; but I cannot see that the conclusion follows When the court refuses to order the doing of some expensive but largely futile work. the difference in the value of the property to the plaintiff with the work done and without it may be great or it may be small. He may or may not be able to establish that although on the market the difference is negligible, there are reasons, whether idiosyncratic or not, why it is a matter of great moment to him. In damages one always comes back to the fundamental question, that of the loss or injury that the

1 [1896] AC 490 at 494, [1895-9] All ER Rep 622 at 624
2 [1896] AC 490 at 495, [1895-9] All ER Rep 622 at 625
3 (1882) 8 QBD 357
4 21 & 22 Vict c 27 (Chancery Amendment Act 1858)
5 [1924] AC 851, [1924] All ER Rep 259
6 [1973] 1 All ER 897, [1974] Ch 30

plaintiff has suffered, and the sum of money that will compensate him for it. Whatever may be the position in other cases, I cannot see that on the facts of this case it makes any difference whether the damages are awarded at common law or under the Act.

I turn to the secondary contention by counsel for the plaintiff, founded on a suitable proportion of the cost of replanting as representing what the British Phosphate Commissioners would have paid to be released from their obligation to replant. This contention did not emerge until very late in the proceedings. It was on Day 96 that counsel first cited *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*[1] and *Bracewell v Appleby*[2], on which he relied. In the former case, houses had been built on land without the prior approval of the plaintiffs which a restrictive covenant made requisite. On the facts of the case a mandatory injunction to demolish the houses was refused, and damages in substitution therefor were held to be recoverable under Lord Cairns' Act 1858[3]. Brightman J resolved the difficult question of the appropriate quantum of damages by holding that the plaintiffs should recover five per cent of the defendants' expected profit from their venture. In *Bracewell v Appleby*[2], Graham J applied the same principle where the right in question was not a consent under a restrictive covenant, but an easement of way.

I find great difficulty in seeing how these cases help counsel for the plaintiffs. If the plaintiff has the right to prevent some act being done without his consent, and the defendant does the act without seeking that consent, the plaintiff has suffered a loss in that the defendant has taken without paying for it something for which the plaintiff could have required payment, namely, the right to do the act. The court therefore makes the defendant pay what he ought to have paid the plaintiff, for that is what the plaintiff has lost. The basis of computation is not, it will be observed, in any way directly related to wasted expenditure or other loss that the defendant is escaping by reason of an injunction being refused; it is the loss that the plaintiff has suffered by the defendant not having observed the obligation to obtain the plaintiff's consent. Where the obligation is contractual, that loss is the loss caused to the plaintiff by the breach of contract.

In the present case, the loss caused to the plaintiffs by the British Phosphate Commissioners' failure to replant is the diminution in the value of their land resulting from that failure, or, if it is established that the land would be replanted, the cost of replanting. In the latter case, no doubt, the British Phosphate Commissioners might well have been willing to pay something to be released from their obligation to replant, though that something would probably be rather less than the total estimmated cost of replanting. But the point is that not unless the British Phosphate Commissioners would be liable to replant or pay damages equal to the cost of replanting would there be any liability from which the British Phosphate Commissioners would seek release on the basis of paying a sum equal to the discounted cost of replanting. If counsel for the plaintiffs establishes that liability, he does not need his favourable secondary contention; if counsel fails to establish that liability, there is no foundation on which to base his secondary contention. Of course, until it has been determined whether or not some burden exists, the person who would be subject to that burden may always be willing to pay something to be relieved of the risk; but I do not think that this can affect the measure of damages in the case which determines that the burden does exist. In any case, the two authorities in question seem to me to be a long way away from a case where the issue is not one of invading the property rights of another without consent, but of breach of a contract to replant his land.

(*b*) *Quantum.* I return, then, to the primary contention of counsel for the plaintiffs.

1 [1974] 2 All ER 321, [1974] 1 WLR 798
2 [1975] 1 All ER 993, [1975] Ch 408
3 21 & 22 Vict c 27 (Chancery Amendment Act 1858)

Have the plaintiffs shown that the cost of replanting represents the loss to them caused by the failure to perform the replanting obligation? Only one answer to that question seems possible, and that is No. The plaintiffs own small scattered plots of land; there is nothing to establish that the owners of neighbouring plots of land, who are not parties to these proceedings, would procure the replanting of their plots rather than keep any damages for themselves or other purposes; the Banabans are now well established in Rabi, over 1,500 miles away; and there they have an island over ten times the size and unaffected by mining, as contrasted with the much smaller Ocean Island with some five-sixths of it mined.

Let me suppose that these circumstances had been explicitly put to each of the plaintiffs, coupled with the possibility that replanting would be held not to involve demolishing pinnacles and putting down soil, and the certainty that only a relatively small part of the island was subject to any replanting obligation. If the witness had nevertheless strongly asserted a firm intention to spend any damages on replanting his land, I should even then have been slow to accept his answer unless he gave convincing reasons for taking such a course. A mere general assertion of a desire to have the land replanted could carry very little weight in such circumstances. As it is, there was no evidence on behalf of any of the plaintiffs that came near to satisfying me that the cost of replanting represented a loss to him or her which could form the basis of an award of damages.

What loss, then, have the plaintiffs established? If I assume a plot which has ceased to be used by the British Phosphate Commissioners for the exercise of their rights under the A or C deed, the difference in that plot with the replanting obligation performed and that obligation unperformed lies in the presence or absence of coconuts, almonds and pandanus planted in the hollows beneath the pinnacles. Theoretically there might be other indigenous trees and shrubs, but that seems to me to be very unlikely. More realistically, there might be considerable difficulty in establishing the extent to which the plot had been planted when the company's operations commenced; for, of course, under the A and C deeds the extent of the replanting obligation is limited in this way. However, in some cases there are records of sums paid for trees on the plot; and in any case, as I have indicated, I think the court ought to draw reasonable inferences from the general state of the island.

Furthermore, although the general burden of proof lies on the plaintiffs, the circumstances surrounding the execution of the A and C deeds, and the time and manner in which the company acted on them and began its operations on the plot, would make it unfair for the British Phosphate Commissioners now to rely on the plaintiffs' predecessors in title not having kept proper records of what was on the plot when the operations commenced. The obligation to replant to a specified standard lay on the company, and if the company failed to maintain proper records to establish for each plot what the standard was, the company and its successors, the British Phosphate Commissioners, must, I think, accept whatever fair inferences may be drawn. 'Proper records', in my view, include making explicit statements of the negative in cases where no trees or shrubs stood on the land. The mere absence of recorded payments for trees and shrubs is not enough, for there might be trees and shrubs too small to rank for payment, quite apart from failures in recording payments.

If I assume a plot which is subject to an obligation to replant it with a reasonable mixture of coconuts, almonds and pandanus to something like the density claimed by the plaintiffs, so far as the bepinnacled state of the plot permits, what is the amount of the damage suffered by the owner by reason of the breach of the replanting obligation? There is nothing to suggest that there is any market in worked-out plots of land in Ocean Island, whether naked or replanted, so that it is impossible to compare the value of one with the value of the other. There is a plain aesthetic difference: trees and shrubs do much to mitigate the otherwise barren and forbidding aspect of worked-out land. On the other hand, many plants appear to be growing on some of the worked-out plots without having been planted there by man; for nature has taken

a hand. The prospects of any nuts being produced by coconuts planted in a few feet of phosphate seems remote, though the prospects of planted almonds and pandanus (as compared with self-seeded trees) appear better.

In the way that the case has developed, I do not think that I ought to attempt to quantify the damages without hearing further submissions by counsel. It may be that the parties can reach agreement on the proper amount. At present I do not think that the damages should be merely nominal; and counsel for the defendant commissioners' 'minimal' has, I think, too severe a sound. At the same time I do not think that they can be very large. In cases of this sort there are obvious objections to directing an inquiry as to damages before a master, and so, unless the parties agree the damages, I think that I ought to adjourn the question of damages for further argument in the light of this judgment. The only alternative that occurs to me is that if the parties so desire I could decide this matter without further argument in the exercise of the rusticum judicium of which Lord Wright MR spoke in *Ash v Dickie*[1]. But that is a matter on which I shall in due course hear any submissions that counsel may wish to make.

These submissions should deal with each individual plot. I am not sure whether it is accepted that all the plots have ceased to be used by the British Phosphate Commissioner. In any case I require further assistance on the position of those plots which appear to be owned by two or more persons, only one of whom is a party to the proceedings. I have already considered these plots in relation to specific performance and, as I mentioned, second counsel for the defendant commissioners made a reservation as to damages when counsel for the plaintiffs was obtaining his order under RSC Ord 15, r 4(2). The reservation was that although the court could determine the damages payable in respect of the plot, it could not make a final determination as to the share of this to which the plaintiff was entitled.

I feel some hesitation about determining the total damages payable in respect of the plot in the absence of some of the plot owners. It may well be that an order could be framed which would sufficiently preserve their rights both in relation to the relative sizes of theirs and the plaintiff's shares and also as to the total amount payable in respect of the plot; and at present I think that some such protection ought to be provided. The authorities cited do not seem to cover the point. In *Roberts v Holland*[2] a lease was granted, and the lessor's reversion afterwards devolved on six tenants in common. It was held that the lessees' covenants became in effect separate covenants with each of the tenants in common, so that one of them alone could sue on the covenants. This contrasted with cases where the covenant was initially a covenant with joint covenantees, and all must join in suing on it. The question of quantum did not arise in that case; but in *United Dairies Ltd v Public Trustee*[3] Greer J treated it as being a decision that the tenant in common who sued can recover 'such damage as he has suffered' under the breach of covenant. In *Sheehan v Great Eastern Railway Co*[4], Malins V-C held that one of the co-owners of a patent could by himself sue for an account of profits due for the use of the patent, and obtain an order for the payment to him of such part as he was entitled to. What does not appear from these authorities is how the other co-owners are protected if they wish later to contend that the aggregate damages or sums due are larger than the amount on which the plaintiff has established the claim for his share in the proceedings. It would be remarkable, too, if in three successive actions by each of three co-owners of a plot of land the evidence adduced in each case were to establish that the aggregate loss was £x, £3x and £2x respectively. I think that I must leave this point for futher submissions in relation to whatever order should be made.

1 [1936] Ch 655 at 664, cf [1936] 2 All ER 71 at 74
2 [1893] 1 QB 665
3 [1923] 1 KB 469 at 477, [1922] All ER Rep 444 at 449
4 (1880) 16 Ch D 59

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3rd December. **MEGARRY V-C** continued reading his judgment.

(11) *Title.*

[Under this heading his Lordship considered which of the plaintiffs had sufficiently established a title to one or more of the plots to enable him, or her, to sustain an action for damages for breach of the replanting obligations. In the absence of any evidence of actual division he said that it would be right to deal with the co-ownership of a plot on the basis of what in essence were tenancies in common of the whole and not sole ownership of separate parts. His Lordship then summarised his findings.] For the purposes of these proceedings—(1) The 1st plaintiff has shown a good title to plots C17, C109, C219 and A248. (2) The 2nd plaintiff has shown a good title to a half interest in plot C179, and some interest in plot C120. His claim based on plot 294 was abandoned. (3) The 3rd plaintiff has shown a good title to a one-third interest in plot C101. (4) The 5th plaintiff has shown a good title to a one-third interest in plot A282, a probability of some interest in plot C162, and no title to any interest in plot A287. (5) The 7th plaintiff has shown a good title to some interest in plot A292. (6) The 4th plaintiff and the 6th plaintiff have shown no title to any interest in plots A233 and C183. (7) The 9th plaintiff's case based on plot 143 was abandoned. (8) The 8th and 10th plaintiffs' cases, based on plots 263 and 316 respectively, were abandoned as to part of each plot; and as to the rest, I do not propose to consider their titles further unless it becomes necessary to do so.

On the further submissions concerning what order for damages ought to be made in the light of this judgment, I shall of course wish to hear submissions about damages for those plaintiffs who have established a title merely to some unspecified interest or to a probability of some such interest. I shall also wish to hear submissions about whether and how far under the present law in Ocean Island the titles established by the various plaintiffs enable them to recover beneficially the whole of the damages awarded, and, if not, how those damages should be dealt with.

I do not think that any question of limitation now arises for decision on this part of the case. The obligation to replant in the A and C deeds arises only when the land ceases to be used for the exercise of the rights under the deeds, and that, of course, is a matter which falls within the control of the British Phosphate Commissioners. The landowner cannot be expected to know when this state of affairs has come about unless the commissioners inform him. In any case, one contention of the commissioners on these deeds was that the proceedings were premature. If, however, any point remains on this, then as I have indicated I shall consider it when I hear any further argument on the question of damages in relation to those plots for which an order has to be made.

3. Overmining: the purple land

[His Lordship next considered the 8th plaintiff's claim for damages for the wrongful removal of phosphate from part of the purple land. On this claim he concluded:] . . . after making every allowance that I properly could, I found myself quite unable to hold that on the evidence put before me the 8th plaintiff had established any title to any land alleged by him to have been mined by the defendant British Phosphate Commissioners outside the areas that they were entitled to mine. I say that in respect of both location and title. Each by itself would, I think, produce this result; but cumulatively they seem to me to put the matter beyond argument.

This conclusion has the result, as counsel for the plaintiffs had to accept, that the claim in this action relating to the purple land fails in its entirety: for there is no other plaintiff who in these proceedings has made any claim in respect of any of the purple land.

[His Lordship then referred to the request by counsel that he should be ready to utter dicta that might be of assistance in reaching a settlement in *Ocean Island No 3*, and also to the reservation relating to the purple land that went with it. That reservation, made by counsel for the defendant commissioners, was to the effect that if the

8th plaintiff had no title to Rakentai (which he had claimed, unsuccessfully, to be part of the purple land), that would be the end of the claim in the action, and that it would be undesirable for his Lordship to utter dicta on the purple land for use in relation to *Ocean Island No 3*. His Lordship continued:] . . . I think that, generally speaking, it is undesirable for a judge to express views on matters that he has been told will arise in another case if he has held (as I have) that the plaintiff in the proceedings before him has no title to claim the relief that he seeks. Such views would have an uncertain weight in those other proceedings, and so far as they were adverse to the successful litigant in the case that has been decided, they would be unappealable. Whatever may be the propriety of uttering dicta of this kind at the request of all concerned, I think that in ordinary circumstances it would be quite wrong to do so in the teeth of a reasonable objection by one or more of the litigants. However, this can hardly apply to the objection of want of jurisdiction, for this is no mere matter of defence. In any case, I have already considered this briefly in relation to the sand; the objection was put forward for the red and the purple land alike, without distinction. But apart from mentioning that, I shall say nothing more about the purple land, beyond dismissing the claim of the 8th plaintiff for the reasons that I have given.

4. Conclusion

That, I think, disposes of *Ocean Island No 1*, subject to the reservations that I have mentioned. I shall add only three things. First, as counsel have already been informed, I propose that any discussion on the forms of order, or costs, or anything else should be postponed until transcripts of this judgment have become available and have been considered by the parties. If for any reason counsel consider that this would be inconvenient, then of course I will hear them; but subject to any such objection, that is the course that I shall take. This applies both to *Ocean Island No 1* and *Ocean Island No 2*: for apart from anything else there may be questions to resolve on costs in relation to the largely common documentation in the two cases.

Second, I wish to record that in the course of *Ocean Island No 2* leading counsel for the Attorney-General paid tribute to Mr Rotan as a leader of the Banabans, and as being largely responsible for bringing the Banaban community through the horrors of the war. I was indeed glad to hear what seemed to me to be a very proper recognition of Mr Rotan's stature made on behalf of the Attorney-General.

Third, I wish once more to express my very real sense of indebtedness to counsel and solicitors for all that they have done to assist me in a case which, though of great interest, has been undeniably burdensome. Although my gratitude is quite general and undifferentiated, I shall add a word about Mr Macdonald. For a long time his professional practice and, I suspect, much of his private life must have been engulfed by the affairs of Ocean Island. It may be unusual, but I hope that it will not be thought improper, if I say that however disappointed the Banabans may be at the result of this litigation, they have every reason to be deeply grateful to Mr Macdonald for all the skill and effort that he has manifestly put into his tenacious presentation of their case, both as leading for them in *Ocean Island No 1* and as supporting their leading counsel in *Ocean Island No 2*. They must have shared with me the pleasure that I felt when during the course of this litigation I was privileged to call him within the Bar on his appointment to the rank of Queen's Counsel.

Form of orders to be discussed.

Solicitors: (*Ocean Island No 1*) *Davies, Brown & Co* (for the plaintiffs); *Freshfields* (for the defendant commissioners); *Treasury Solicitor*. (*Ocean Island No 2*) *Davies, Brown & Co* (for the plaintiffs); *Treasury Solicitor*.

Diana Brahams, Barrister.

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A.G. for Canada v. Giroux, 24 Que. K.B. 433, (1916) 53 S.C.R. 172 743

Crown lands - Lands vesting in Crown - Constitutional law - "B.N.A. Act, 1867" ss. 91(24), 109-117 - Title to "Indian lands" - Surrender - Sale by Commissioner - Property of Canada and provinces - Construction of statute - "Indian Act", 39 V. c. 18 - R.S.C. 1886, c. 43, s. 42 - Words and phrases - "Reserves" - "Person" - "Located Indian" - Evidence - Public document - Legal maxim.

Sanderson v. Heap (1909), 11 W.L.R. 238 787

Indian - Sale of Land by - Prohibition of Indian Act, secs. 99-102 - Deed Executed before Issue of Crown Patent - Subsequent Deed after Patent - Rights and Obligations of Indians - Estoppel - Application of Estoppel Act to Indians - Real Property Act - Caveat - Certificate of Title - Vendor's Lien - Enforcement.

Tito and others v. Waddell and others (No. 2)
Tito and others v. Attorney General (1977), 3 ALL E.R. 129 792

Trust and trustee - Nature of trust justiciable in court - Governmental obligation - Enforcement of obligation - Criteria on which distinction drawn between trust and governmental obligation - Crown colony - Lease by colonial official to mining commissioners - Royalties to be held "in trust" for islanders - Absence of intention to create a true trust or fiduciary obligation - Whether "trust" justiciable in courts.

Contract - Stranger to contract - Benefit and burden - Connection between defendant and contract - Mining lease conferring benefit on government appointees - Lease containing an obligation to replant - Change in appointees - New appointees taking benefits of lease - Whether obligation to replant enforceable against new appointees.

Specific performance - Parties - Interested parties not all before court - Form of order - Attempt to cure defect - Form of order leaving views of absent parties to be ascertained - Whether damages a more appropriate remedy.

Contract - Damages for breach - Injury to land - Compensation for work which might not be performed - Alternative basis of assessment of damages - Mining lease containing replanting obligation - Failure to carry out obligation - Damages based on cost of carrying out replanting work if plaintiff established work would be done - Alternative damages based on diminution in market value.

Boundary - Seashore - Beach - Area of beach - Area from low-water mark to high-water mark and area to landward of high-water mark in apparent continuity with beach at high-water mark - Extraction of sand - Agreement permitting extraction of sand from "beach".