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GUIDE TO USE

Volume 3 - Taxation

TAXATION

GUIDE TO USE:-

The cases reported in these volumes appear under their main subject at final instance and/or at all levels.

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RICHARD CHURCH .....APPELLANT;

AND

WILLIAM JOHN FENTON .....RESPONDENT.

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*March 23.

*June 21.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of lands for taxes—Indian lands—Liability to taxation—Lists of lands attached to warrant—32 Vic., ch. 36, sec. 128, O., and sec. 156, ch. 180 R. S. O.

In September, 1857, a lot in the Township of *Keppel*, in the County of *Grey*, forming part of a tract of land surrendered to the Crown by the Indians, was sold, and in 1869, the Dominion Government, who retained the management of the Indian lands, issued a patent therefor to the plaintiff. In 1870, the lot in question, less two acres, was sold for taxes assessed and accrued due for the years 1864 to '69 to one *D. K.*, who sold to defendant; and as to the said two acres, the defendant became purchaser thereof at a sale for taxes in 1873. The warrants for the sale of the lands were signed by the warden, had the seal of the county, and authorized the treasurer "to levy upon the various parcels of land *hereinafter mentioned* for the arrears of taxes due thereon and set opposite to each parcel of land," and attached to these warrants were the lists of lands to be sold, including the lands claimed by plaintiff. The lists and the warrant were attached together by being pasted the whole length of the top, but the lists were not authenticated by the signature of the warden and the seal of the county.

By sec. 128 of the Assessment Act, 32 *Vic.*, ch. 36, *O.*, the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him, &c., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county, &c.

Held, affirming the judgment of the Court below (1), that upon the lands in question being surrendered to the Crown, they became

*PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

(1) 4 Ont. App. Rep. 159.

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ordinary unpatented lands, and upon being granted became liable to assessment.

2. That the list and warrant may be regarded as one entire instrument, and as the substantial requirements of the statute had been complied with, any irregularities had been cured by the 156th sec., ch. 180 Rev. Stats. *Ont.* (*Fournier* and *Henry*, J. J., dissenting.)

THIS was an appeal from the judgment of the Court of Appeal for *Ontario*, affirming the judgment of the Court of Common Pleas (1), discharging a rule *nisi* to set aside a verdict for the defendant, and to enter a verdict for the plaintiff.

The facts appear in the judgments.

Mr. *Boyd*, Q. C., for appellant:—

The sales were not legal, there having been no proper authority to the treasurer to sell. Both sales were had under the Assessment Act of 1868-9. Sec. 128 of the Act requires the warden to authenticate the lists of lands in arrears with his signature and the seal of the corporation, &c. Here there was no authenticated list, and all the warrant directs is the sale of "the land hereinafter mentioned," and there is no lands in it; the warrant is a complete instrument in itself, it makes no reference to any list attached, and the list that is attached, which is without seal or signature, makes no reference to any warrant. You cannot prove by parol evidence that the statutory provisions have been complied with. Where the statute requires a particular thing to be done, you cannot deprive a man of his property until it is done. *Hall* v. *Hill* (2); *in re Monsell* (3); *in re McDowell* v. *Wheatly* (4).

The warrant was the foundation of the sale, and we contend that the authentication of the list as required by the statute is a condition precedent to and the

(1) 28 U. C. C. P. 384.
(2) 2 Grant's E. & A. R. 569.
(3) 5 Ir. Ch. Rep. 529.
(4) 7 Ir. C. L. R. N. S. 569.

foundation for the warrant. *Kenney* v. *May* (1); *Greenstreet* v. *Paris* (2).

The English authorities with regard to the poor rates are also very applicable. *Re Justices of North Staffordshire* (3).

The 156th section of the Assessment Act is relied on as to the first deed. This section does not make valid all deeds. See *Harrison's* Manual 4 ed., p. 748, and authorities there collected.

Then the lands in question were Indian lands, or lands held in trust for the Indians by the Crown, and were not liable to sale for taxes.

In *Street* v. *The County of Kent* (4) it was held that there was no law rendering liable to assessment Crown lands in *Upper Canada*, except such provisions as were contained in the Acts relative to the assessment of property. 16 *Vic.*, ch. 159, sec. 24, Con. Stat. Can., ch. 22, sec. 27, and 23 *Vic.* ch. 2, sec. 27 only applied to *Lower Canada*, and crown, clergy and school lands, although sold or agreed to be sold, were not liable to taxation unless a lease or license of occupation had been issued to the purchaser, and the section of the Public Lands Act, authorizing the issue of leases and licenses of occupation, was mandatory and imperative; also see *Austin* v. *Co. Simcoe* (5).

The Act 27 *Vic.*, ch. 19. upon which respondent relies, was passed to meet the case of *Street* v. *Co. Kent.*

It is admitted by the Courts below that, prior to this Act, Indian lands, whether sold or unsold, were not liable to taxation; but the learned judges were of opinion that the language of sec. 9 of this Act was broad and general enough to cover them. The appel-

(1) 1 Moo. & R. 56.
(2) 21 Grant 226.
(3) 23 L. J. Mag. C. 17.
(4) 11 U. C. C. P. 255.
(5) 22 U. C. Q. B. 73.

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lant, however, contends that sec. 9 of the Act in question was only intended for public lands, and must be read in connection with the exemption clause of the Assessment Act, to which it is an exception, and this view is supported by sec. 11 of the same Act which amended sec. 108 of the Assessment Act (ch. 55 Con. Stat., U. C.) so as to include the lands made liable by the 9th sec.; and the 108th sec. of the Assessment Act refers only to the Commissioner of Crown Lands and not to the Chief Superintendent of Indian Affairs.

The object was to make these lands free from taxation in order to get a larger amount when sold.

I also contend that the land, by the Confederation Act, was in the Crown as represented by the Dominion Government, and was granted by the Crown after the alleged taxes accrued; the Crown therefore could disregard the taxes, and the patent from the Crown must, in a court of law, prevail against the tax title until the patent has been cancelled or vacated in a proceeding to which the Crown is made a party.

Then my last point is that, as to the two acres, appellant has a statutory right to have a finding in his favor. Until the sheriff executes the conveyance and gives deed, the title remains in the patentee of the Crown.

Evidence that he was purchaser at the tax sale is no title; he was bound to produce the certificate of sale. As a matter of law, our case was complete when we put in our patent from the Crown, and it is for him to prove title.

Mr. *Reeves* for respondent:—

As to this last point, if the objection had been made at the trial, then the defendant would have been entitled to an equitable plea. Here we have a valid deed, and it must be presumed there was a certificate of sale. The deed can only be issued after the certificate has been issued.

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The principal point on which my learned friend relies is, that because the list of lands was not authenticated by the signature of the warden and the seal of the corporation, the sale is invalid, and they say sections 156 and 131, ch. 180 Rev. Stats, *Ont.*, cannot cure an invalid warrant. The cases of *Morgan* v. *Perry* (1) and *Fenton* v. *McWain* (2) show such a defect or irregularity would be cured by sec. 156; but the manner in which the warrant and list of lands were incorporated made them one instrument, and the list was, under the circumstances, authenticated by the affixing of the seal to the warrant, and there has been a substantial compliance with the statute. The object of the legislature in requiring the seal of the corporation to be affixed to the list, was to identify the list as being the list of lands liable to be sold, and if it is established, either from the construction of the warrant or from other evidence, that the list in question was the list of lands liable to be sold which had been forwarded by the treasurer to the warden, and by him returned to the treasurer with the warrant, this will be sufficient.

The learned counsel also referred to *Cooley* Const. Limit. (3), and to *Torrey* v. *Milbury* (4).

Now, as to the question raised, whether these lands, having been held in trust by the Crown, as Indian lands, should not be liable to taxation, it has been sought to limit the words *public* lands in the Act 27 *Vic.*, ch. 19; but why not give a full meaning to these words? This Act was expressly passed for the purpose of doing away with all such distinctions. These Indian lands were present to the mind of the legislature when this Act was passed, and surely some limitation would have been made as to this interest, if they had intended it to be exempted.

(1) 17 C. B. 334.
(2) 41 U. C. Q. B. 239.
(3) 4th ed. p. 648.
(4) 21 Pick. 67.

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The argument based on the fact that the patent was issued by the Dominion Government after the accrual of the taxes, and, therefore, in a court of law, must prevail against the tax title until the patent has been cancelled in a proceeding to which the Crown is made a party, can have no weight, for the patent was issued more than a year before the sale. At the time the taxes were properly assessed, and there was no reason to suppose the land would be sold for the payment of taxes

Mr. *Boyd*, Q. C., in reply.

RITCHIE, C. J.:—

This was an action of ejectment brought to recover possession of lot No. 22, in the 13th concession of the Township of *Keppel* in the County of *Grey*.

The writ issued on the 28th September, 1877, and was served 13th same month. Plaintiff claims title under letters patent issued by Dominion Government, dated 4th June, 1869.

The defendant appeared, 28th September, 1877, defended for the whole of the land, denied plaintiff's title, asserted title in himself, except as to two acres by virtue of a deed dated 26th September, 1873, from *David Keltie*, who claimed under a tax deed from Warden and Treasurer of the County of *Grey*, dated 10th February, 1872; and as to the two acres, as purchaser thereof at a sale for taxes by the treasurer of the County of *Grey*, on the 18th November, 1873.

The cause was tried on the 11th October, 1877, when verdict was rendered for the defendant. In Michaelmas Term, November 21, 1877, plaintiff obtained a rule *nisi* to set aside the verdict as being contrary to law and evidence, and to enter a verdict for plaintiff. In Hilary Term, February 4, 1878, the rule *nisi* was discharged.

The plaintiff appealed from the judgment of the Court of Common Pleas to the Court of Appeal for *Ontario*,

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and on 22nd March, 1879, that court dismissed the appeal with costs. Against this judgment plaintiff now appeals

As to the first sale, if it had been irregular for the cause assigned, I think the 155th section, 32 *Vic.*, c. 36, Ont., applies and cures the irregularity. As to the second deed: as to the want of the corporate seal and signature of the warden, while it is much to be regretted that officers who have plain and explicit directions given them do not follow the terms of the statute and literally fulfil its injunctions, still I think, in the case where the statute has been unquestionably substantially complied with, I am not prepared to differ from the Court of Common Pleas and the Court of Appeal and to say that the warrant and list are not to be regarded as one entire instrument, and that the words "hereinafter mentioned" is not such a reference to the list as to incorporate it in the warrant, and so make it form part of the warrant, and so be under the corporate seal and signature of the warden. For the reasons given by the Court below, I am of opinion that, although the lands in question had been Indian lands, they were in the hands of grantees liable to be sold for taxes.

The appeal should be dismissed with costs.

FOURNIER, J.:

Les faits de cette cause donnent lieu aux deux questions suivantes: 1o Le lot de terre en question en cette cause, faisant partie des terres reservées et détenues par la couronne en fidéicommis pour le bénéfice des sauvages, était-il sujet à être vendu pour taxes?

2o La vente qui en a été faite en cette cause était-elle légale et conforme aux dispositions du statut à cet égard?

Quant à la première question je n'hésite pas à déclarer que je concours pleinement dans les raisons données

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par l'honnorable juge en chef *Moss* pour en arriver à la conclusion que le terrain en question était cotisable et partant sujet à être vendu pour arrérages de taxes. Sur la seconde question concernant la légalité des procédés adoptés pour effectuer cette vente, j'ai le malheur de ne pas être du même avis.

En cas de vente pour arrérages de taxes, les procédés à suivre sont indiqués par la sec. 128, 32 Vict., ch. 36 (1). Le trésorier doit d'abord d'après cette section faire une liste en double de toutes les propriétés qui doivent être vendues pour taxes, avec le montant dû par chaque lot mis en regard de tel lot.

Chaque double de cette liste doit être authentiquée par la signature du préfet et le sceau de la corporation, l'un doit être déposé au bureau du greffier du comté et l'autre renvoyé au trésorier avec un warrant y annexé ; ce warrant doit aussi être sous la signature du préfet et le sceau du comté. Ainsi, deux conditions sont impérativement exigées avant de pouvoir procéder à une vente pour taxe—la 1ère, la préparation de la liste qui doit être authentiquée par la signature du préfet et le sceau de la corporation—la 2me, la préparation d'un warrant authentiqué de la même manière par la signature du préfet et le sceau de la corporation. Ce sont deux documents distincts et séparés qui après leur complète confection doivent être annexés l'un à l'autre pour être remis au trésorier. Mais chacun d'eux doit être complet suivant la disposition du statut. Ces formalités sont essentielles pour la validité de chaque document, et elles ne sont pas moins importantes pour l'un que pour l'autre. Un warrant qui ne serait pas

(1) And the warden *shall authenticate each of such lists by affixing thereto the seal of the Corporation and his signature,* and one of such lists shall be deposited with the Clerk of the County, and the other shall be returned to the treasurer, with a warrant thereto annexed, *under the hand of the Warden and the seal of the County,* commanding him to levy upon the land for the arrears due thereon, with costs.

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revêtu de la signature du préfet et du sceau du comté serait sans doute considéré comme absolument nul. Pourquoi n'en serait-il pas de même pour la liste qui doit être faite absolument de la même manière et dont la confection doit précéder la préparation du warrant ? Il y a de fort bonnes raisons pour qu'il en soit ainsi. C'est afin sans doute qu'il ne puisse être fait aucune addition quelconque à cette liste et pour protéger les contribuables contre la fraude que la loi exige cette formalité importante de l'apposition de la signature du préfet et du sceau du comté. La loi ayant imposé la même formalité à ces deux documents, dans des termes précis qui n'admettent point de doute, je n'ai pas le droit de faire une distinction et de dire, que nécessaire pour le warrant elle ne l'est pas pour la liste.

Dans le cas actuel la liste des propriétés qui devaient être vendues n'a pas été faite conformément aux dispositions de la sec. 128 ; elle n'est ni signée par le préfet ni revêtue du sceau du comté. Ces formalités n'ont été accomplies que pour le warrant, la liste des propriétés n'est ni signée ni scellée comme le veut le statut,—mais comme elle est annexée au warrant on veut considérer les deux comme ne faisant qu'un seul document. Cette annexion étant aussi une formalité requise par le statut—il m'est impossible de comprendre comment son accomplissement peut dispenser de remplir une autre formalité plus importante exigée par le langage impératif de la loi. Lorsqu'il s'agit de procéder à l'expropriation des individus toutes les formalités nécessaires pour constituer l'autorisation de vendre doivent être remplies. On ne peut y substituer des équivalents. En vain argumenterait-on qu'il arrive souvent que les tribunaux admettent comme valables des écrits privés dont les signatures ont été irrégulièrement apposées,—que même des documents solennels,

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comme les commissions des plus hauts fonctionnaires publics, sont attestés par la signature de Sa Majesté ou du Gouverneur-Général, mise le plus souvent au commencement de ces documents ; la loi n'ayant pas dans ces cas prescrit un mode particulier, il n'y a pas de raison pour déclarer illégale ces sortes d'attestations. Mais la pratique suivie dans ces cas ne saurait justifier une violation aussi manifeste de la loi que celle qui a été commise dans la confection de la liste des propriétés qui devaient être vendues par la municipalité du comté de *Grey*.

Cette liste est la preuve exigée par la loi de l'existence d'une taxe pour laquelle la propriété peut être vendue ; elle tient lieu d'un jugement, et avant de lui en donner l'effet, la loi a voulu qu'elle fût non seulement préparée par le trésorier, mais qu'elle ne pût être mise à exécution par warrant qu'après avoir reçu l'attestation du plus haut officier municipal, afin, sans doute, de mettre les intérêts des contribuables sous la protection de cet officier. Ce n'est pas le trésorier qui est responsable de l'exactitude de cette liste—ce n'est pas à lui que le contribuable lésé, parce que sa propriété y aurait été mal à propos insérée, pourrait s'adresser pour une réparation, mais bien au préfet auquel la loi a imposé ce devoir. C'est lui qui serait tenu responsable des conséquences de toute faute ou négligence à cet égard. La liste en question, est suivant moi, la base de l'autorité pour vendre, c'est le jugement, et le warrant tient lieu du *fi. fa.* dans les cas ordinaires. Le warrant, bien que régulier dans sa forme, ne peut pas plus dispenser d'une liste authentiquée comme le veut la loi, qu'un bref de *fi. fa.* parfait dans sa forme ne pourrait dispenser d'un jugement avant de pouvoir exécuter les biens d'un défendeur.

En l'absence de la liste exigée, il n'y a pas de preuve légale de l'existence d'une taxe, et par conséquent point

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d'autorité pour vendre. Cette cause de nullité se rencontre dans les deux ventes qui ont été faites du lot No. 22. Dans la cause de *McKay vs. Chrysler* (1) cette cour a décidé qu'une vente pour taxe était nulle, parce qu'il n'y avait pas de preuve que la propriété vendue avait été cotisée. Le principe de cette décision est applicable à cette cause. Il n'y a pas ici, non plus, de preuve de l'existence d'une dette pour taxe, parce que la seule preuve faite n'est pas celle que la loi requiert pour autoriser une vente. Quant à la nécessité de faire cette preuve, je me borne à référer aux autorités citées dans la cause mentionnée plus haut de *McKay vs. Chrysler* comme parfaitement applicables à celle-ci. Je me fonde aussi sur les autorités citées dans la même cause pour établir que la sec. 156 du ch. 180, R. S. O. ne peut être invoquée pour couvrir la nullité résultant du défaut d'autorisation de procéder à la vente, autorisation qui ne peut résulter que de la préparation d'une liste en la forme imposée par la loi.

Pour ces raisons, je serais d'opinion d'admettre l'appel, mais la majorité de cette cour est d'un avis contraire.

HENRY, J.:—

In consequence of the conclusion which I have arrived at in regard to the warrants under which the lands of the appellant were sold, it is unnecessary for me to discuss the question whether, under the circumstances, they, having been at one time Indian lands, were, when in his possession before his patent, liable to be taxed. I have, however, considered the subject, and have discovered strong reasons why they were not so liable, but as to that part of the case I need give no opinion.

Without the operation of the validating acts the common law throws upon the claimant under a tax deed

(1) 3 Can. Sup. C. R. 436.

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the onus of proving every link in the chain of legal provisions to divest the title of the owner. It is, however, necessary for me to refer but to some of them. The warrants for the sale of the lands were signed and sealed by the warden as prescribed; but they, to my mind, are void for a patent ambiguity on the face of them. They are both in the same form, and each is written on a page of foolscap paper, and bears at the foot the signature of the warden and the seal of the corporation of the County, and

> Authorize, require, empower and command you (the Treasurer) to levy upon the various parcels of land *hereinafter* mentioned for the arrears of taxes due thereon and set opposite to each parcel of land with your costs.

These documents in no other way point to the lands to be levied on, and are, therefore, imperfect. There is no reference in them to any other paper or writing by which the lands could be identified, and the warrants are therefore defective. No lawyer would claim that a warrant for the arrest of a criminal, so referring to the charge made against him, would be good merely by annexing the information to it. No oral testimony can be admitted to supply such a patent defect. The same rule is applicable to the warrants in this case, and the wardens could no more be permitted to say they meant, in them, to refer to the lands mentioned in the lists, than a justice to say he referred in his warrant to the charge made in the information annexed to the warrant. But even if such evidence were admissible, it was not given in this case. Neither of the wardens was examined, and there is no evidence that at the time the warrants were signed or issued the lists were annexed to them. The only persons who could satisfactorily state whether or not, are the wardens themselves—all else is mere hearsay. The treasurers who were the only witnesses examined as to this point

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were incompetent to speak to it. There is, too, another fatal objection. No lists as required by the statute were authenticated, and therefore there was no authority at all to issue a warrant.

Section 128 of the Assessment Act of *Ontario*, 32 *Vic.*, ch. 36, required that the treasurer of the county should

> Submit to the warden of such county a list in duplicate of all the lands liable under the provisions of this Act to be sold for taxes with the amount of arrears against each lot set opposite to the same, and the warden *shall* authenticate each of such lists by affixing thereto the seal of the corporation and his signature, and one of such lists shall be deposited with the town clerk, and the other shall be returned to the treasurer with a warrant thereto annexed under the hand of the warden and the seal of the county, commanding him to levy upon the land for the arrears due thereon with his costs.

Before then, the warden had authority to issue a warrant, his duty was first to authenticate the lists. To give himself jurisdiction the statute provided that he should so authenticate them. He had no right to question the wisdom or necessity of the peremptory legislative direction, nor have we. Many good and sufficient reasons might be shown for the provision, but that is unnecessary, for we have no right to speculate as to the sufficiency of them. That was for the legislature to decide, and having done so, it is not permissible for any one to question the decision. To give life or vitality to the lists as records on which to found subsequent proceedings the legislature has provided for doing so in a particular manner, otherwise the lists are in themselves no better than waste paper. They may be correct, or grossly the opposite; and may be the production of an unauthorized person. They are not vouched by any responsible officer, and the legislature has wisely provided that before lands shall be sold the lists must be authenticated in a particular way and the highest official in the county held responsible for its correctness. This is necessary, and was intended for

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the due protection of property from the errors, negligence or frauds of municipal officers. The act of previous authentication of the lists by the warden is as necessary to give him jurisdiction to issue a warrant as if the statute had required that authentication by the act of another—just as necessary as if the provision had been for it to have been by the treasurer, in which case without it the issue of a warrant by the warden would be wholly unauthorized and unjustifiable. Before authentication in the solemn manner prescribed, a duty was thrown upon the warden by a proper inquiry to ascertain the correctness of the list; but that legislative check was wholly withheld in regard to the warrants in this case. Did the legislature intend to leave it as a duty to be performed or not? If it was intended to leave it optional, why require it at all? Independently of the accepted construction of "shall," when employed in a statute by which it is held to be imperative, we are in this case bound by the statutable provision. In sub-sec. 2 of sec. 8 of ch. 1 of the Revised Statutes of *Ontario*, the legislature plainly guides us. It provides that:

> The word "shall" shall be construed as imperative, and the word "may" as permissive.

To make a good and valid list it therefore became necessary to be authenticated as the imperative provision requires, and if not so authenticated a warrant might as legally be issued without any list at all. An execution extended on land without being founded on any judgment would be quite as effectual to sell and convey a man's property as the warrants in this case without the lists being authenticated. I feel bound to say that the warrants in this case gave no authority to sell. It is, however, urged that by sec. 155 of ch. 36 of 32 *Vic.* a title passes by the deed alone, or, at least, that the validity of the deed cannot be questioned after two years from the sale. That section provides that:

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Whenever lands are sold for arrears of taxes and the treasurer has given a deed for the same, such deed shall be to all intents and purposes valid and binding, except as against the Crown, if the same has not been questioned before some court of competent jurisdiction by some person interested in the land so sold within two years from the time of sale.

It has been judicially settled in *Ontario* and by this Court in *McKay* v. *Chrysler* (1), that arrears of taxes must be shown before the sale, and that the provision does not include a case wherein it is not shown such arrears existed. I refer particularly to the judgment of my learned brother *Gwynne* in that case, where in addition to his own views forcibly expressed he cites judgments from the appeal and other courts in *Ontario*. He cites approvingly at page 473 this language used by *Draper*, C.J., in a judgment delivered by him in reference to this statute.

The operation of this statute is to work a forfeiture. An accumulated penalty is imposed for an alleged default, and to satisfy the assessment charged, together with this penalty, the land of a proprietor may be sold, though he be in a distant part of the world and unconscious of the proceeding.

To support a sale under such circumstances *it must be shown that those facts existed which are alleged to have created a forfeiture, and which are necessary to warrant the sale.*

I hold that the perfecting the lists by the authentication prescribed and a valid warrant are necessary. *Blackwell*, in his treatise on tax sales on the subject of similar validating statues, and after discussing the constitutionality of such statutes, says (2):—

Whatever may be the decision upon the question of power, when it properly arises the moral injustice of such legislation cannot be denied, and it will be seen upon an examination of the authorities that when such arbitrary power has been exercised by the legislature, the courts have given a *strict construction* to the law and not extended its unjust operation beyond the very words of the statute (3).

(1) 3 Can. Sup. C. R. 436. (2) P. 103 Ed. 1855.
(3) *Moulton* v. *Blaisdell*, 24 Maine R. 283.

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See also *Hughes* v. *Chester & Holyhead Railway* (1); and the remarks of *Turner*, L. J., in the same direction:

> This is an act which interferes with private rights and private interests, and ought, therefore, according to all decisions on the subject, to receive a strict construction, so far as those rights and interests are concerned. This is so clearly the doctrine of the court that it is unnecessary to refer to cases on the subject. They might be cited almost without end.

I shall hereafter apply this doctrine, and particularly when I come to refer to section 155, and the absence of evidence of a sale within the purview of that section.

By an Act of the *Illinois* Legislature it was declared that the deed should vest a *perfect title* in the purchaser, *unless* the land shall be redeemed according to law, or the former owner shall show that the taxes were paid, or that the land was not subject to taxation; but the Supreme Court of that state, in giving a construction to that statute, state the rule of the common law as to the burthen of proof and the strictness required in this class of cases, and that under that statute several preliminary facts to a legal sale are to be inferred by the deed, and the responsibility of proof shifted from the purchaser to the original owner, but the court deny that that statute will by any fair construction warrant the opinion that the auditor (here the Treasurer) selling land *without authority*, could by his conveyance transfer the title of the rightful owner.

In that case it was not shown that the land had been advertised as prescribed by the statute. The court held that "the publication of notice of sale as required by law was not one of those facts inferred from the deed, nor is the proof thereof thrown upon the former owner. Without proof of this fact, the auditor's deed was not evidence of the regularity and legality of the sale, and consequently conveyed no title to the purchaser." The

(1) 7 L. T. N. S. 203.

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case before us is a much stronger one, for, if my contention as to the warrant is right, there is not merely the absence of proof of some necessary fact, but a deed from a party without legal authority to convey. To conclude that a deed of land in the words of the section "sold for arrears of taxes" is not to be questioned at all after two years is, to my mind, a monstrous proposition. I can imagine dozens of cases where the most unjust and improper results would necessarily flow from such a conclusion. It will be only necessary to state one case. It is largely the interests of non-resident owners that have been, or will be, affected. Without any knowledge of arrears existing a sale for (alleged) arrears of taxes takes place by no one authorized to make it, and the treasurer subsequently gives a deed. It would certainly be monstrous to hold that such a conveyance would pass the title, and still the clause in the statute, if literally construed, would make the conveyance available for that purpose. The clause must mean a sale as provided for, and it therefore becomes necessary to show by extrinsic evidence that a sale took place. To invoke the aid of the statute, such is necessary, but here we have no evidence at all that any sale took place. The only witness who refers to the sales says he was not treasurer in 1870, when the first is alleged to have taken place; does not say he was present; no date given or purchaser named, or who the land was sold by. There is no evidence to show the sale took place at the time and place named in the advertisements, and it is equally defective as to the second alleged sale. The newspapers to show the advertisements required by the statute were not put in evidence, except four numbers of the "Gazette" in 1873. No paper or advertisement for the sale in 1870 was produced. No assessment rolls were put in to show the land was taxed, and, in fact, little but hearsay and improperly received evi-

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dence of any taxing at all. In my opinion, it would be a mockery of justice to deprive a man of his real estate by such evidence.

In addition to the objections I have suggested, I think it is necessary to show a legal sale by extrinsic evidence, that is, that it was made by the proper officer at the time and place mentioned in the advertisements, and that the grantee or his assignee became the purchaser. The statute provides that the deed shall be made to the purchaser at the sale or his assigns. The conveyance of the 98 acres is to *David Keltie*, who is represented in the deed as the assignee of *Fenton*, who in it is alleged to have been the purchaser. To this there are two objections. If *Fenton* was the purchaser, that fact should have been proved, otherwise than by the mere statement of it in the deed, and secondly no assignment from him to *Keltie* was shown in compliance with the statute.

If, however, the appellant is considered as not entitled to recover for the 93 acres, I can see no reason why he should not recover for the remaining two acres. At the commencement of the suit he was entitled to recover for those two acres. Until the subsequent deed to the respondent, he had no defence for them. By the common law, as well as by the statute of *Ontario*, he was entitled to a judgment for his costs; and how he can be deprived of them I must say I have failed to discover.

By section 31, c. 51, of the Revised Statues of *Ontario*, it is provided that:

> In case the title of the plaintiff, as alleged in the writ, existed at the time of service thereof, but had expired before the trial, the plaintiff shall notwithstanding be entitled to a verdict according to the fact, that he was entitled at the time of serving the writ and to judgment for his costs of suit.

This was adopted from C. S. U. C. c. 27, sec. 22. Clause

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155 does not in any way affect his right to recover *pro tanto*, and as, I think, the necessary proof of the legality of the sale or of the rating was not given, and the warrant and list were defective, he is, under any circumstances, entitled to recover for the two acres.

The views I entertain and have expressed as to the operation of section 155 are in accordance with principles laid down by *Blackwell* on Tax Titles before alluded to in the third chapter, founded on and derived from judgments and decisions of the Supreme Courts in the States of *New York*, *Illinois*, *Michigan*, *Tennessee* and *Ohio*. Those judgments are cited as unanimous in every instance, and are recommended by the able manner in which the cases were considered and disposed of, and in the absence of authorities to the contrary I feel quite safe in following the decisions.

After full and mature consideration I think the appellant is entitled to recover for his whole claim; that the appeal should be allowed and judgment given in his favor with costs.

TASCHEREAU, J., concurred in dismissing the appeal.

GWYNNE, J.:—

I concur that the appeal should be dismissed, but I desire to add, that I am unable to perceive any bearing that my judgment in *McKay* v. *Chrysler* can have upon the present case. I should be very much surprised if anything could be found in that judgment in support of the position that it is competent for this court to suggest, and to act upon the suggestion, that the case of either a plaintiff or defendant was defective for insufficiency of evidence upon a point, not only not made a ground of appeal, but not suggested even in argument as an existing fact in any of the courts through which the case was passed, nor at the trial; if there had been

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any foundation for the suggestion, no doubt, counsel would have made the point. As to the quotation which has been made from my judgment in *McKay* v. *Chrysler*, those observations were applied by me to a point which did arise in that case, and obviously they can have no bearing upon this case, wherein no such point has been made.

Appeal dismissed with costs.

Solicitors for appellant: *Jackes & Galbraith.*

Solicitors for respondent: *James Reeves.*

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*June 7.

*Dec. 12.

THE PROVINCIAL INSURANCE COMPANY OF CANADA..... } APPELLANTS;

AND

JAMES CONNOLLY..... .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

The appellants issued a marine policy of insurance at *Toronto*, dated the 28th November, 1875, insuring, in favor of the respondent, $3,000 upon a cargo of wood-goods laden on board of the barque *Emigrant*, on a voyage from *Quebec* to *Greenock*. The policy contained the following clause: "*J. C.*, as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make insurance, and cause three thousand dollars to be insured, lost or not lost, at and from *Quebec* to *Greenock*, vessel to go out in tow." The vessel was towed from her loading berth in the harbour into the middle of the stream near *Indian Cove*, which forms part of the harbour of

*PRESENT.—Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, J.J.

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Sale of land for taxes—Indian lands—B. N. A. Act sec. 91, clause 24—Liability to taxation—List of lands not attached to warrant—32 Vic. ch. 36, sec. 128, O.

In 1854, a tract of land was surrendered to the Crown by the Indians, to whom the interest arising from the sales thereof by the Crown was to to be paid. The lands were retained under the management of the Indian Department, and were called Indian lands: and after the passing of the B. N. A. Act still continued under the management of such department, which was under the control of the Dominion Government "Indian and lands reserved for Indians," being by section 91, clause 24 of that Act, exclusively assigned to the Dominion. In September, 1857, the lot in question, being a portion of such lands, was sold by the Crown, the first instalment of the purchase money being paid on the 15th February, 1858, and the last on the 29th July, 1867, when the lot was paid for in full: and on the 14th June, 1869, the patent from the Dominion government issued therefor. In 1870, the lot in question was sold for the taxes assessed and accrued due for the years 1864-9.

Held, that such lot was liable to taxation, under 27 Vic. ch. 19, re-enacted in 1866, and in subsequent statutes, and that the assessment and sale was therefore valid.

It was contended that the Ontario Legislature, having repealed the Act of 1866, had, after confederation, no power to levy these taxes, the land having been withdrawn from their jurisdiction; but *Held*, that sec. 91, clause 24, of the B. N. A. Act, applied only to Indian lands not surrendered and reserved for their use; and moreover that this land being ratable and assessed at the time of confederation, such liability was not affected thereby.

By the 128th section of the Assessment Act, 32 Vic. ch. 36, the warden is required to return one of the lists of the lands to be sold for taxes transmitted to him, &c., to the treasurer, with a warrant thereto annexed, under the hand of the warden and seal of the county, &c.

Held, that the section was merely directory, and was sufficiently complied with by the list being embodied in the warrant, instead of being annexed thereto.

EJECTMENT to recover possession of lot No. 22, in the 13th concession of the township of Keppel, in the county of Grey, containing one hundred acres.

The plaintiff claimed title as patentee of the Crown under letters patent of the Dominion of Canada, bearing date the 4th of June, 1869.

The defendant, besides denying the plaintiff's title, claimed title in himself in manner following: excepting as to two acres of the said lot 22, which immediately adjoined lot 23, having a frontage of four chains, and a depth of 5 chains, the defendant claimed title to the lot under and by virtue of a deed, bearing date 26th September, 1873, from

one David Keltie, who claimed under and by virtue of a tax deed from the Warden and Treasurer of the county of Grey, dated 10th February, 1872. And as to the said two remaining acres of said lot, the defendant claimed title thereto as purchaser at a sale for taxes by the Treasurer of the county of Grey, on the 18th of November, 1873.

The cause was tried before Patterson, J. A., without a jury, at Owen Sound, at the Fall Assizes of 1877.

It appeared that in 1854, a tract of land, of which the lot in question formed a part, was surrendered by the Indians to the Crown.

The instrument of surrender, a copy of which was produced and admitted to be correct, recited as follows:

"We, the Chiefs, Sachems, and Principal men of the Indian tribes resident at Saugeen and Owen Sound, confiding in the wisdom and protecting care of our Great Mother across the Big Lake; and believing that our Good Father, His Excellency the Earl of Elgin and Kincardine, Governor General of Canada, is anxiously desirous to promote those interests which will most largely conduce to the welfare of his Red Children, have now, being in full Council assembled, in presence of the Superintendent General of Indian affairs and of the young men of both tribes, agreed that it will be highly desirable for us to make a full and complete surrender unto the Crown of that Peninsula known as the Saugeen and Owen Sound Indian Reserve, subject to certain restrictions and reservations to be hereinafter set forth. We have therefore set our marks to this document after having heard the same read to us, and do hereby surrender the whole of the above named tract of country bounded," &c., "with the following reservations, to wit":

Then followed three distinct paragraphs describing three several blocks of land reserved out of the tract, one for the special occupation of the Saugeen Indians, another for the special occupation of the Owen Sound Indians, and the third for the occupation of the Colpoy's Bay Indians.

The instrument then proceeded: "All which Reserves we hereby retain to ourselves and our children in perpetuity.

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And it is agreed that the interest of the principal sum arising out of the sale of our lands be regularly paid so long as there are Indians left to represent our tribe without diminution at half yearly periods. And we hereby request the sanction of our Great Father the Governor General to this surrender, which we consider highly conducive to our general interests. It is understood that no islands are included in this surrender."

This instrument was executed under the respective hands and seals of the Chief Superintendent of Indian affairs and the several Chiefs, Sachems, and Principal men of the tribe.

The lands were retained under the control and management of the Indian Department, and were designated Indian Lands. Under the British North America Act, "Indians, and lands reserved for Indians" was one of the subjects retained under exclusive control of the Dominion, and these lands were retained under the management of the Dominion Government.

In September, 1857, the land in question was sold by the Crown to one John Blaine, who assigned to one James Drew, who assigned to the plaintiff.

The first payment of the purchase money was made on the 15th February, 1858, and the last upon the 29th July, 1867, when the lot was paid for in full.

On the 4th of June, 1869, the patent from the Dominion of Canada issued to the plaintiff.

In November, 1870, the 98 acres were sold for the taxes due for the years 1864, 5, 6, 7, 8, 9, and the deed was issued on the 26th September, 1873.

On the 18th of November, 1873, the two acres were sold for the taxes due thereon for the years, 1870, 1, 2, and the tax deed was issued on the 26th September, 1877.

The writ was issued on the 10th September, 1877.

The plaintiff's contention was, that the sales for taxes, and the deeds made in pursuance thereof, were invalid, because the lands being Indian lands were not liable to taxation.

The sales were also objected to as being invalid as not being in compliance with the 128th section of the Assessment Act, 32 Vic. ch. 36, O. The treasurer produced the respective certificates of the lists of lands to be sold for taxes for both sales signed by him, not having the signature of the warden, nor the seal of the county thereto. The warrants, however, which were respectively executed under the signature of the warden and the seal of the county, had expressed in the body of them respectively the lists of the lands for sale, and of the respective amounts of the arrears.

It was contended that this mode of authenticating the lists of lands to be sold was not sufficient, not being in accordance with the requisites of the section: that the lists, signed and sealed, must be attached to, and not embodied in the warrants, although the warrants be, as they were, authenticated by the signature of the warden and the seal of the county.

The learned Judge was of opinion that both the tax sales were good, and he entered a verdict for the defendant.

In Michaelmas term, November 21, 1877, *M. C. Cameron*, Q. C., obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict for the defendant and to enter a verdict for the plaintiff.

In the same term, December 3, 1877, *J. Reeve* shewed cause, and cited *Mayor of Essenden* v. *Blackwood*, L. R. 2 App. Ca. 574; *Morgan* v. *Parry*, 17 C. B. 334; *Cotter* v. *Sutherland*, 18 C. P. 357; *Fenton* v. *McWain*, 41 U. C. R. 239.

M. C. Cameron, Q. C., contra.

The arguments sufficiently appear from the judgment.

February 4, 1878. GWYNNE, J., delivered the judgment of the Court.

The question upon which our judgment in this case depends, is, was or not the lot in question, which is a part of a tract of land surrendered by the Indians to the Crown

in 1854, ratable for taxes, and liable to be sold for arrears of taxes, at the date of the first sale, of which evidence was given and which took place in the month of November, 1870? If it was, our judgment must be for the defendant.

The British Crown has invariably waived its right by conquest over all the lands in the Province until the extinguishment of what the Crown has been pleased to recognise as the Indian title, by a treaty of surrender of the nature of that produced in this case; until such extinguishment of that title the Crown has never granted any of such lands.

Hence has arisen the expression, not, as it appears to me strictly accurate, but which has been sanctioned by Acts of the Legislature, to the effect that certain lands are vested in Her Majesty *in trust* for the Indians; but whether Her Majesty be or be not a trustee of those lands cannot affect our determination of this case, for, undoubtedly, the legal estate in these lands, as in other Crown lands, until sold in accordance with the provisions of the law affecting them, is vested in Her Majesty.

Prior to the execution of this treaty or surrender, Her Majesty was seised of the lands therein mentioned in right of her Crown, but by a usage which never had been departed from the Crown had imposed upon itself this restriction, that it never would exercise its right to sell or lease those lands, or any part of them, until released or surrendered by the Indians, for the purpose thereby of extinguishing what was called the Indian title; but when, as in the case of this surrender now before us, the consideration to be paid for it was in the nature of an annuity by way of interest accruing from the proceeds of the sale of the lands, the lands, being still retained under the control and management of the Indian Department, became designated "Indian lands," to distinguish them from other Crown lands, the proceeds arising from the sale of which being applicable to the public uses of the Province, and constituting part of the provincial revenue, came to be designated "Public lands."

As early as 1837 was passed the Act 7 Wm. IV. ch. 118, entituled "An Act to provide for the disposal of the public lands in this Province," &c. That was an Act passed for regulating the management and sale of that portion of the lands vested in Her Majesty which consisted of Crown lands, clergy reserves, and school lands, the proceeds arising from the sale of which were to be accounted for as forming part of the public revenue through the commissioner of Crown lands and the receiver-general.

This Act did not affect the lands vested in Her Majesty in which the Indians were interested, either as lands appropriated for their residence, as to which there had been no treaty of surrender for the purpose of extinguishing the Indian title, nor lands as to which there had been a surrender of such title, but in the proceeds arising from the sale of which the Indians being interested, the sale and management of them was retained in the Indian Department.

This term or designation "Public Lands," as applied to those lands the proceeds arising from the sale of which constituted part of the public revenue of the Province, has ever since been maintained in various Acts of the Legislature, viz., 2 Vic. ch. 14; 4 & 5 Vic. ch. 100; 16 Vic. ch. 159, and 23 Vic. ch. 2.

By the 24th section of 16 Vic. ch. 159, passed in 1853, it was enacted that the commissioner of Crown lands should transmit in the month of January in each year to the registrar of every county a list of the clergy, crown, and school lands theretofore or thereafter sold, or for which licenses of occupation should be granted in such county, and upon which a payment has been made, *which said crown, clergy, and school lands shall be liable to the assessed taxes* in the townships in which they respectively lie from the date of such license or sale.

The 6th section of the Act declared that it should be lawful for the commissioner of Crown lands to issue under his hand and seal, to any person wishing to purchase and become a settler on any public land, an instrument in the

form of a license of occupation, under which such settler might take and occupy the land therein mentioned, subject to the terms and conditions mentioned in the license, and might maintain actions or suits at law or in equity against any wrongdoer or trespasser as fully and effectually as he could under a patent from the Crown, and the said license of occupation should be *prima facie* evidence of possession by the settler or his assignee for the purpose of such action, and every settler or his assignee, upon the fulfilment of the terms and conditions of his license, should be entitled to a deed in fee simple for the land comprised therein.

Locatees of public land being by this Act placed, as against all the world but the Crown, upon the footing of full and beneficial owners to the same extent as if the land was granted to them by letters patent, it was but reasonable that the lands themselves, after the issuing of a location ticket or license of occupation, should be liable to local assessment, although the licensee should not occupy the land. And accordingly in the Assessment Act, passed in the same session, 16 Vic. ch. 182, although the lands themselves so located were in the terms of the 2nd and 6th sections exempted from taxation, still being by the 24th section of 16 Vic. ch. 159 made liable to taxation, provision is made by the 48th section of ch. 182 that the commissioner of Crown lands should during the month of January in every year, after the passing of the Act, transmit to the treasurer of every county, a list of all the lands within the county granted or leased or in respect of which a license of occupation had issued during the preceding year, and of all ungranted lands of which no person has received permission to take possession, and also of all lands on which instalments of purchase money or rent or any other sum of money should be overdue and unpaid, a copy of which the treasurer was required to furnish to the clerk of each municipality in the county as far as regards lands in such municipality, and that the clerks should furnish to the assessors a statement shewing

what lands were liable to assessment within their assessment districts, respectively.

And by the 56th section it was enacted that the treasurer, in the warrant required by the Act to be issued by him for the sale of lands in arrears for taxes, should distinguish such lands as had been patented from those under lease or license of occupation, and of which the fee still remained in the Crown; and that the sheriff in the advertisements of sale required to be made by him should similarly distinguish the lands patented from those the fee of which was in the Crown, and that if he should sell any of the latter lands, he should only sell the interest therein of the lessee or locatee, and that it should be so distinctly expressed in the conveyance to be made by the sheriff, and that such conveyance should give to the purchaser the same rights in respect of the land as the original lessee or locatee enjoyed.

16 Vic. ch. 159, sec. 24 is consolidated verbatim in the Consolidated Statutes of Canada ch. 22, sec. 27, and although the exemption clause of the Assessment Act, 16 Vic. ch. 182, is still continued in the Consolidated Statutes of Upper Canada ch. 55, yet in secs. 108, 109, 125, 128, and 138 of the latter Act are consolidated the provisions of secs. 48 and 56 of 16 Vic. ch. 182.

By the 15th sec. of 16 Vic. ch. 159, it was provided that it should be lawful for the Governor in Council from time to time as he should deem expedient to declare that "The provisions of this Act or any of them shall extend and apply to the Indian lands under the management of the Chief Superintendent of Indian affairs, and the said Chief Superintendent shall, in respect to the lands so declared to be under the operation of this Act, have and exercise the same powers as the Commissioner of Crown Lands may have and exercise in respect to Crown Lands."

In this Act a distinction is expressly drawn between what are called Crown Lands, which term, as other sections of the Act shew, comprehended Crown Reserves, Clergy Reserves, and School Lands as distinguished from those

lands which, although vested in Her Majesty and in that sense Crown Lands, being under the management of the Chief Superintendent of Indian affairs, were called Indian Lands.

This 15th section of 16 Vic. ch. 159, is consolidated in sec. 6 of the Consolidated Statutes of Canada ch. 22.

This latter statute was repealed by 23 Vic. ch. 2, the 9th sec. of which re-enacted in substance the 15th sec. of 16 Vic. ch. 159, and the 26th and 27th secs. of 23 Vic. ch. 2 re-enacted with slight variations the 16th and 24th secs. of 16 Vic., the chief variation being that what in the latter Act are termed Crown, Clergy, and School Lands," are in 23 Vic. termed "Public Lands."

None of those Acts passed respecting the sale and management of the Public Lands affected lands vested in Her Majesty in the sale or management of which the Indians were in anywise interested, save in so far as the clauses provided which enabled the Governor by order in council to apply the provisions of those Acts or any of them to those Indian Lands.

In the same session as was passed the Act 23 Vic. ch. 2, was passed also an Act, 23 Vic. ch. 151, entitled "An Act respecting the management of the Indian Lands and property," which was reserved for the signification of Her Majesty's pleasure, and Her Majesty's assent to which was published in the *Canada Gazette* of the 13th of October, 1860.

By this Act the Commissioner of Crown Lands for the time being was declared to be thenceforth the Chief Superintendent of Indian affairs.

By the 7th section it was also provided, as it had been in the above recited Acts regulating the sale and management of the public lands, that the Governor-in-Council might from time to time declare the provisions of the Act respecting the sale and management of the public lands, passed in the present session, to apply to Indian Lands, "and the same shall thereupon apply and have effect as if they were expressly recited or embodied in this Act."

This legislation seems to place beyond doubt that up to the year 1860, those lands vested in Her Majesty and known as Indian lands were not subject to the provisions of the Acts relating to the sale and management of the public lands, by which Acts alone it was declared that public lands *agreed* to be sold, but for which no patent had yet issued, were subject to municipal taxation.

By an order in council, made on the 7th of August, 1861, it was ordered that so much of the provisions of the Act 23 Vic. ch. 2 as are contained in the following sections thereof do apply to the Indian Lands under the management of the Commissioner of Crown Lands as Chief Superintendent of Indian affairs, that is to say, sections 5, 7, 16, 18 with sub-sec. 2, secs. 19, 20, 21 with sub-secs. 2 and 3, and secs. 22, 23, 24, 25, 28, 30, 31, 32 and 33.

Now we find that in this order sec. 27 is omitted from the enumeration of those sections whose provisions are made applicable to the lands known as Indian Lands, and it is this 27th sec. thus omitted which in express terms renders liable all public lands *leased or appropriated or set apart* to any person, or for which licenses of occupation should be granted, to the assessed taxes in the townships in which the land should lie from the date of such license or appropriation, although no patent deed should be yet issued.

Whether this omission arose from inadvertence or design we have no means of determining, nor would it make any difference in the result of the judgment we should have to form upon the fact itself.

The omission seems singular, however, if it was by design, for we find the 16th, 18th, 19th, 20th, and 21st sections of the Act made applicable, and these sections give to the purchaser or locatee of lands agreed to be sold, full title against all wrongdoers and trespassers as effectually as if Letters Patent had issued, and make the title so vested in such purchaser, locatee, &c., transmissible by deed, devise, or descent, so that upon an agreement being entered into for sale of Indian lands, (which by the application of the

above sections made those lands when agreed to be sold, transmissible in like manner) there seems no reason or justice whatever in exempting or continuing exempt from taxation such lands more than there would be in exempting or continuing exempt from taxation "Public Lands" similarly situated. But whether by inadvertence or design, the fact remains that the section referred to was omitted, and upon its omission is now based the contention that as these Indian lands, the title to which still remains vested in the Crown, although agreed to be sold, seem to come within the exemption clause contained in the Assessment Act in force when this order in Council was passed in August, 1861, the omission of the above section from the order shews an intention to keep those lands exempt from taxation until granted by Letters Patent.

The Assessment Act then in force, Consol. Stat. U. C. ch. 55, sec. 9, sub-sec. 1, being a consolidation of 16 Vic. ch. 182, secs. 2 and 6, exempted from taxation all property vested in or held by Her Majesty, or vested in any public body or body corporate, officer or person in trust for Her Majesty, or for public uses of the Province; and also all property vested in or held by Her Majesty or any other person or body corporate in trust for or for the use of any tribe or body of Indians; but sub-sec. 2 provided that when any property mentioned in the preceding sub-section is occupied by any person, otherwise than in an official capacity, the occupant shall be assessed in respect thereof, but the property itself shall not be liable.

The same exemption clause in substance is re-enacted in the amended Assessment Act of 1866, and again in that of the Ontario Legislature of 1869. All in the same terms seem to exempt from taxation lands made liable to taxation in express terms by the Acts regulating the sale and management of the public lands, and also other lands set apart for the residence of the Indians and which had never been surrendered by the Indians to the Crown in extinguishment of the Indian title, portions of which were in certain cases subjected to taxation by a statute passed in 1857, 20 Vic. ch. 26, consolidated in the statutes of Canada ch. 9.

The 10th sec. of 20 Vic. ch. 26 enacted that Indians enfranchised under that Act might have allotted to them portions of the lands set apart for their residence—that is to say, parts of the Indian Reserves which the Indians had never surrendered to the Crown—in which portions the respective Indians to whom they should be allotted should have a life estate, with power to dispose thereof by will to any of their children.

And the 14th section enacted that lands so allotted should be liable to taxes, as also the Indian himself should personally be in respect of them, and to all other obligations and duties under the municipal and school laws, and that his estate therein should be liable for his *bonâ fide* debts, and that, if such lands should be legally conveyed to any person, such person or his assignee might reside thereon, whether of Indian blood or not, or intermarried with an Indian.

What object there could be, while such lands as are here described were made liable to taxation in express terms, in exempting or continuing exempt from taxation Indian lands vested in the Crown for the purpose of sale, and which the Crown, acting through its proper officer, had already agreed to sell, it seems impossible to conceive; however it certainly does seem that at the time of and after the making of the order in council of August 1861, lands of the description of the lands to recover which this action is brought were, as it is contended they still are, within the exemption clause contained in the Assessment Acts, although the occupants, if there were any, were personally assessable in respect of the lands so occupied.

This legislation is, I confess, to my mind very embarrassing, for if it were not for the terms in which these exemption clauses continued from time to time to be framed, and for the express provision made for rendering public lands when agreed to be sold liable to taxation before the patent should issue, I should have thought when the Legislature, by the clauses relating to agreements for sale, gave to a contracting purchaser complete control over the lands agreed to be

purchased against all persons whomsoever, saving only the rights of the Crown, and gave to such purchaser the right to transmit such title by deed, devise, or descent, that such an estate and property became vested in such person as should with the utmost propriety have been held liable to taxation, without any special clause providing that it should be; and this is all that for the purpose of the defendant's contention it is necessary to establish, namely, that the land was liable to taxation, but that, until the patent should issue, all that could be sold for arrears of taxes is the estate of the person for the time being entitled in virtue of the agreement for sale; however, it must be confessed that the language of the Acts of Parliament would seem to shew the opinion of the Legislature to be that a special clause subjecting such lands to taxation was necessary in order to make them so.

In 1863 the statute 27 Vic. ch. 19 was passed, entituled "An Act to amend the Consolidated Assessment Act of Upper Canada, in respect to arrears of taxes due on non-resident lands, and for other purposes respecting assessments."

The 9th section of this Act enacts that "*Unpatented* land, vested in, or held by, Her Majesty, which shall hereafter be sold, or agreed to be sold to any person, *or* which shall be located as a free grant, shall be liable to taxation from the date of such sale or grant, *and* any such land which has been already sold or agreed to be sold to any person or has been located as a free grant, shall be held to have been liable to taxation since the 1st January 1863, and all such lands shall be liable to taxation thenceforward, under the Act respecting the assessment of property in Upper Canada, in the same way as other land, whether any license of occupation, location ticket, certificate of sale, or receipt for money on such sale has or has not been, or shall or shall not be issued, and * * whether any payment has or has not been, or shall not be made thereon, and whether any part of the purchase money is or is not overdue and unpaid; but such taxation shall not in any way affect the rights of Her Majesty in such lands."

Provided also, by the 10th section, that the 138th section of the said Act, respecting the assessment of property in Upper Canada, shall apply to all sales and conveyances which may hereafter be made under the authority of this Act.

The effect of this section was to provide that if the sheriff should sell any lands of which the fee was in the Crown, in virtue of the authority to sell lands brought under municipal taxation by the 9th section, he should only sell the interest therein of the person to whom the lands were so agreed to be sold or located, and it should be so distinctly expressed in the conveyance to be made by the sheriff, as was provided by the 138th section of ch. 55 of the Consolidated Statutes of Upper Canada in respect of lands of which the fee was in the Crown, which were then assessable for municipal taxes.

Then by the 11th section the 108th section of ch. 55 is amended, so as thereafter to comprehend all lands "sold or agreed to be sold by the Crown," in addition to those mentioned in such 108th section, which, as amended, reads: "The commissioner of Crown lands" (who, it is to be remembered, was at the time of the passing of this Act *virtute officii* chief-superintendent also of Indian affairs), "shall, in the month of January in every year, transmit to the treasurer of every county, a list of the lands within the county granted, '*sold or agreed to be sold*,' or leased, or in respect of which a license of occupation issued during the preceding year, and of all ungranted lands of which no person has received permission to take possession, and also of all lands on which an instalment of purchase money, or rent or any other sum of money, remains overdue and unpaid."

Now it is to be observed that these provisions are made by way of amendment of the Assessment Act, and are not inserted in an Act expressly limited to a particular portion of the lands vested in Her Majesty, known as "public lands," as was 23 Vic. ch. 2, the 27th section of which Act, and which is the section which subjects to taxation lands vested in Her Majesty, relates in express terms to those "public lands."

Then it is to be observed how general is the expression made use of in the 9th section of 27 Vic. ch. 19. It extends to all "unpatented land" vested in Her Majesty which shall hereafter be, or have already been, sold or agreed to be sold to any person.

Moreover, it is to be observed that if the object of the Act was not that it should apply to all unpatented lands of every description agreed to be sold, there would have been no occasion for the Act at all, for the unpatented "public lands," when agreed to be sold, had already been subjected to taxation from a period long anterior to 1st January, 1863.

When then we find an expression made use of ample enough to comprehend the particular piece of land sought to be recovered in this action, and all lands of the class to which it belongs, and when we consider the reason of the thing, and the justice and propriety of placing lands of this description upon precisely the same footing, as to taxation, as unpatented public lands, I cannot doubt that the express object and intent of the Act was to place all unpatented lands, whether called "Indian lands," "Crown reserves," "Clergy reserves," "School lands," or by whatever name known, when once agreed to be sold, upon the same footing as to taxation.

The Assessment Act of 1866, while retaining the inaccurately framed exemption clauses of previous Acts, incorporates and re-enacts these provisions of 27 Vic. ch. 19, and therefore I entertain no doubt that the land for which this action is brought, which was patented in June, 1869 in pursuance of a contract of sale entered into in 1853, was liable to taxation as non-resident land ever since the passing of the Act 27 Vic. ch. 19.

But it is further contended that by the British North America Act, 1867, "Indians and lands reserved for Indians" being one of the subjects retained under the exclusive control of the Dominion Government, the local Legislature had no power by the Assessment Act of 1869 to subject land of the nature of the land in question to taxation for municipal purposes. The point of this argu-

ment, as I understand, is, that these lands being retained under the management of the Dominion Government, and the local Legislature having repealed the Act of 1866, by which they may have been subjected to taxation, deprived itself of all power to levy such taxation, inasmuch as it had not, as is contended, any authority to re-enact clauses, although similar to those repealed, so as to affect lands which were, as it is said, withdrawn from their jurisdiction.

But lands surrendered by the Indians for the purpose of being sold, although under an understanding that the proceeds arising from their sale shall be applied for the benefit of the Indians, do not, in my judgment, come within the expression used in the 24th item mentioned in the 91st section of the British North America Act "Lands reserved for the Indians." That is an expression appropriate to the unsurrendered lands reserved for the use of the Indians, described in different Acts of Parliament as "Indian Reserves," and not to lands in which, as here, the Indian title has been wholly extinguished. True it is that Letters Patent for the land in question here, and for lands of that class, are issued by the Dominion, and not by the local Government; but the necessity for that arises, in my judgment, not in virtue of or by force of the 24th item of the 91st sec. of the British North America Act, but because lands of this description have not in terms been transferred by the Act to the control and management of the provincial authorities by sec. 92, the 5th subject enumerated in which as transferred to the Provincial jurisdiction is the management and sale only of the Public Lands belonging to the Province, and the 91st sec. reserves exclusively under the jurisdiction of the Dominion all matters not coming within the class of subjects by the Act assigned exclusively to the Legislature of the Province.

But the 92nd section places under the exclusive control of the Provincial Legislature Municipal institutions, Property and civil rights, and all matters of a merely local and private nature in the Province. It is only under these heads that the jurisdiction to assess or pass an assessment

law for municipal purposes arises. At the time of the passing of the British North America Act, the land sought to be recovered in this action was agreed to be sold; the agreement for sale vested in the contracting purchaser an estate and property in the land; incident to this estate and property arose certain civil rights which were placed under the exclusive control of the Provincial Legislature. Assessment is but a mode of exercising that control. The purchaser's estate in that land was as much liable to the maintenance of municipal institutions, which are also placed under the exclusive control of the Provincial Legislature, as the estate of any other person in the Province holding real estate. It is only such estate that the assessment law really affects. The estate of the Crown is not sought to be prejudiced at all. Rating the land is but the *modus operandi*. If no contract for sale has been entered into, nothing can be sold. If a contract has been entered into and Letters Patent have not yet issued, the estate of the person for the time being entitled by virtue of the contract may be sold, and by the law in force at the time of confederation the Crown was obliged to recognize the title so acquired by a purchaser at the sale for the arrears of taxes. So soon as the land is granted by letters patent to the purchaser, or to his assignee by deed *inter vivos* or by will, or to his heir, the land itself might be absolutely sold.

Now when the British North America Act passed this particular piece of land was and had been since January, 1863, liable to assessment as non-resident land, and was so assessed. There was nothing in the Imperial Act which repealed the Act or Acts in virtue of which such liability arose, although the title was in the Crown; and although the the sale and management of Indian Lands remained in Dominion Government, and the power to grant letters patent, still those lands in so far as the right to levy rates was concerned, from the date of a contract of sale came under the authority of the local Legislature. That was a matter affecting property and civil rights as they then existed; that liability therefore still continued after confederation equally as before.

The condition of the lot, with reference to the contract of sale was this. The sale took place in September, 1857. The first payment was made on the 15th February, 1858, and the last upon the 29th July, 1867, when the lot was paid for in full. From that time until the 4th day of June, 1869, when the patent issued to the plaintiff as the person representing then the original purchaser, although technically the fee was in the Crown, yet it was so only for the purpose of being conveyed by letters patent to the party entitled under the contract of sale. So that since the 29th July, 1867, the Crown had no interest whatever beneficially in the land in question. The land was sold in 1870 for assessment made, and accrued in, and since, 1864, so that at the time of confederation there was a liability incurred for taxes which, even if, as is urged, the Local Legislature had no right to impose or collect rates upon this land subsequently to confederation, the estate, nevertheless, of the person for the time being entitled under the contract of purchase would in time have become liable to have been sold for the arrears due at the time of confederation. But I must say that I entertain no doubt that the Local Legislature after confederation had the right to amend and alter the assessment law without any prejudice to their right to assess and enforce payment of rates out of this particular ratable property, any more than out of any other ratable property. The land at the time of confederation was liable to assessment for purposes—namely, the purposes of municipal institutions—which were placed under the exclusive control of the Local Legislature; and, in my judgment, involved in this control is the right to amend and alter the assessment law for municipal purposes, and so as to affect the rights and interests of every one having any estate in or title to land situate in the Province, saving always the estate and rights of the Crown. As to such right the Local Legislature is successor of the old Legislature of Canada, and has in respect of this matter the same jurisdiction as that Legislature, while it existed, had.

If at the time of the sale, in 1870, for arrears of taxes no

patent had yet issued, a difficulty might possibly have arisen, notwithstanding that the Crown had no beneficial interest after the final payment on 29th July, 1867, if the deed, executed to the purchaser at the sale for taxes, had not correctly stated the title which was purported to be conveyed; but there is no place for such a difficulty here, for the land being patented since June, 1869, and having been liable for taxes assessed in and since 1864, it was the land itself which at the time of the sale was liable to be sold, as in all cases of patented lands sold for arrears for taxes.

As to this first sale—the only question having been, whether the land, being Indian land and under the management of the Dominion Government, was liable to assessment at all, or, if liable before, did not cease to be upon confederation—I am of opinion that the land was liable before confederation, and continued to be so afterwards, and that the sale in 1870 effectually extinguished the plaintiff's title to the land then sold, unless the objection taken under the 128th section of the Act of 1869 for non-compliance with that section, and which is the sole objection to the sale of the two acres in 1873, invalidates both sales.

The 128th section of the Assessment Act of 1869 enacts that whenever a portion of the tax on any land has been due for and in the third year, or for more than three years preceding the current year, the treasurer of the county shall, unless otherwise directed by a by-law of the county council, submit to the warden of such county a list in duplicate of all the lands liable to be sold for taxes, with the amount of arrears against each lot set opposite to the same, and the warden shall authenticate each of such lists by affixing thereto the seal of the corporation and his signature, and one of such lists shall be deposited with the clerk of the county, and the other shall be returned to the treasurer with *a warrant thereto annexed*, under the hand of the warden and the seal of the county, commanding him to levy upon the land for the arrears due thereon with his costs. The treasurer did submit these lists to the warden, but upon the warrants being produced there did not appear

to be such lists annexed to it. The treasurer produced one duplicate of the respective lists, signed by the treasurer, but not having the signature of the warden, nor the seal of the county thereto. The warrants, however, which were respectively executed under the signature of the warden and the seal of the county, had expressed in the body of them respectively the lists of the lands and the respective amounts of arrears in the form directed by the 128th section to be inserted in the lists. It was contended that this mode of authenticating the lists of lands to be sold was insufficient, not being in compliance with the special form directed by the 128th section, by which, as was contended, the lists signed and sealed must be *attached to*, not *embodied* in, the warrants, although the warrants be, as they were, authenticated by the signature of the wardens and the seal of the county. This mode of authenticating the lands in the warrant instead of in a separate list attached thereto, has been always the practice in the county where the land sold lies.

Fenton v. *McWain*, 41 U. C. 239, was cited on the one side for the position that this mode of authenticating the lands to be sold was insufficient, and that sales had, under such circumstances, were defective; and upon the other side, for the position that the defects were cured by section 155.

Referring to *Fenton* v. *McWain*, we do not find that the first point was decided by the Court, or that the point arose as here. The list there does not appear to have been embodied in the warrant, which, when produced, had a list attached, not however authenticated by the signature of the warden and seal of the county. Moreover the Court gave no opinion as to whether or not in that case the sale was for the above reason defective, for, assuming it to be, the Court was of opinion that the objection involved only such a defect as was cured by section 155.

As to the first sale, namely, that of 1870, this judgment is sufficient, for a much longer period than two years from the execution of the deed given to carry into effect the

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sale elapsed before the bringing of this action. As to the ninety-eight acres therefore described in the deed of the 10th day of February, 1872, the defendant is entitled to recover; but as to the two acres sold in 1873, but for which a deed was given only upon the 26th of September, 1877, after the commencement of this action, section 155 cannot be set up as against the plaintiff's right to recover as to the two acres.

We have decided in *Hutchinson* v. *Collier*, 27 C. P. 249, that the two years mentioned in section 155 is to be computed from the date of the execution of the deed, although the words used in the section are "Within two years from the time of sale, when the sale shall take place after the passing of this Act."

What the section deals with is, the validity of a deed made in pursuance of a sale; and it enacts that the deed shall be good unless questioned within two years, &c.; and the section is declared to come into effect "*whenever* lands shall be sold for arrears of taxes, *and* * * *the treasurer* * * *shall have* given a deed for the same, *such deed* shall be to all intents and purposes valid unless questioned," &c.

It seems plain that there was to be a period, viz., of two years, within which the person to be affected had the right of questioning the validity of the thing which, unless questioned, shall be valid, and to be questioned, that thing, viz., the deed, should have existence. If then the sale is defective as to the two acres for the objection taken, we do not think the defendant can rest upon section 155 as to that piece.

We think, however, that to hold the objection in this case fatal would be to adhere to the letter rejecting the substance. The object of annexing an authenticated list to the warrant is to provide that there shall be an authority given under the hand of the warden and the seal of the county authorizing the sale. Authentication of the land to be sold is the substance. Now if the list be set out and embodied in the warrant instead of being merely attached

to it, in which case it might become detached and lost, it does seem that evidence is better secured for the authenticity and propriety of the sale, than by *annexing* the list to the warrant, not setting out the lands in the warrant, but referring in it simply to the list attached; and there does not seem any necessity for both setting them out in a warrant and also in a list attached.

We think therefore that we should treat the direction in the 128th section to be directory merely, and that where the substance is complied with by setting out the lands in the warrant, the authority to sell under it, in so far as the objection taken is concerned, should be upheld.

No objection was taken founded upon the fact, nor was our attention at all drawn to the fact, which appears certainly to be, that the deed for the two acres was not executed until after the commencement of this action, counsel resting the plaintiff's case as to the two acres wholly upon the point urged as to the insufficiency of the sale by reason of there being no authenticating list *annexed to the warrant.* And as we are against him upon that point, and we think the deed good, there seems to be no object, nor would we be justified, in directing a verdict for the plaintiff for the two acres upon a point not raised, and which could have no effect except as to costs.

We think, therefore, that the defendant must have judgment upon the whole record.

Rule discharged.

I do not see any sufficient reason for disturbing the judgment given in the County Court, and for entering either a nonsuit or verdict for defendant as asked in the rule *nisi*.

The appeal must be dismissed, with costs.

BURTON and MORRISON, JJ.A., concurred.

Appeal dismissed.

CHURCH V. FENTON.

Sale of lands for taxes—Indian lands—B. N. A. Act, sec. 91, clause 24—Liability to taxation—Lands not mentioned in warrant, 32 Vic. ch. 36, sec. 128, O.—Lists not properly authenticated—Sec. 155.

In 1854, a tract of land was surrendered to the Crown by the Indians, to whom the interest arising from the sales thereof by the Crown was to be paid. The lands were retained under the management of the Indian Department, and were called Indian lands, and after the passing of the B. N. A. Act, still continued under the management of this department, which was under the control of the Dominion Government, "Indians and lands reserved for Indians," being by sec. 91, clause 24 of that Act, exclusively assigned to the Dominion. In September, 1857, the lot in question being a portion of such lands, was sold by the Crown, the first instalment of the purchase money being paid on the 15th of February, 1858, and the last on the 29th of July, 1867, when the lot was paid for in full, and on the 14th June, 1869, the patent from the Dominion Government issued therefor. In 1870, the lot in question was sold for the taxes assessed and accrued due for the years 1864–9.

Held, affirming the judgment of the Common Pleas, 28 C. P. 384, that upon the lands in question being surrendered to the Crown, they became ordinary unpatented lands within the meaning of the Assessment Acts, and liable to taxation under 29 Vic. ch. 19, re-enacted in 1866, and the sale was therefore valid.

It was contended that the Ontario Legislature having repealed the Act of 1866, had after Confederation no power to levy these taxes, the land having been withdrawn from their jurisdiction; but

Per MOSS, C.J.A., that this objection was completely met by the remarks of GWYNNE, J., in the Court below.

Per BURTON, J.A.—Assuming the lands to come within the definition of Indian reserves, the Local Legislature had not attempted to tax lands placed under the control of the Dominion Government, but has treated the purchaser of such lands as the owner, and declared them liable to assessment in his hands.

Held, also, that the fact that the patent was issued to the plaintiff after the accrual of the taxes did not entitle him to succeed in this action,

leaving the purchaser to proceed for a cancellation of the patent, making the crown a party to the suit, because the patent was issued before the sale, and this passed the patentee's interest to the purchaser; but *semble*, that such a course would have been necessary if the patent had been issued to the locatee after the sale.

The warrant authorized the sale of "the lands hereinafter mentioned." The lands were not mentioned in the warrant, but were contained in a list attached thereto which made no reference to the warrant; nor were the lists authenticated with the seal of the corporation and the signature of the warden as required by sec. 128 of 32 Vic., ch. 36.

Held, that the description of the lands was a sufficient compliance with the above section, and that the want of the seal and signature on the lists was cured by the 155th section.

THIS was an appeal from the judgment of the Common Pleas discharging a rule *nisi* to set aside a verdict for the defendant, and to enter a verdict for the plaintiff, reported 28 C. P. 384.

The case was argued on the 10th September, 1878 (*a*).

M. C. Cameron, Q. C. (*G. H. Watson* with him), for the appellants. The lands in question were Indian lands, or lands held in trust for the Indians by the Crown, and were not liable to sale for taxes: 16 Vic. ch. 182, secs. 2 and 6; Con. Stat U. C. ch. 55, sec. 9, sub-secs. 1 and 2; 29 & 30 Vic. ch. 53, sec. 9, sub-secs. 1 and 2; 32 Vic. ch. 36, sec. 9, sub-secs. 1 and 2; B. N. A. Act, sec. 91, sub-sec. 24, sec. 125; Indian Act of 1876, sec. 3, sub-sec. 8, secs. 4 and 65; *McCulloch* v. *State of Maryland*, 4 Wheat. 317; *Osborne* v. *Bank of the United States*, 9 Wheat. 738, 859, 860; *Brown* v. *State of Maryland*, 12 Wheat. 435, 436; *Weston* v. *City of Charleston*, 2 Peters 449, 467; *Bank of Commerce* v. *New York City*, 2 Black 620; *Pomeroy's Constitutional Law*, 305; *Cooley's Constitutional Limitations*, 2nd ed., 482; *Cooley* on Taxation, 56; *Hilliard* on Taxation, 148; *Sedgwick* on Constitutional Law, 2nd ed., 507, and notes; *Hamilton* v. *Eggleton*, 22 C. P. 636; *Proudfoot* v. *Austin*, 21 Gr. 566; *Jones* v. *Bank of Toronto*, 13 Gr. 74; *Ridout* v. *Ketchum*, 5 C. P. 50, 7 C. P. 464; *McGill* v. *Langton*, 9 U. C. R. 91; *Allan* v. *Fisher*, 13 C. P. 63; *Street* v. *County of Kent*, 11 C. P. 255; *Street* v. *County of Simcoe*,

(*a*) *Present.*—MOSS, C.J.A., BURTON and MORRISON, JJ.A., and BLAKE, V. C.

22 U. C. R. 7, 2 E. & A. 211; *Leprohon* v. *Ottawa*, 2 App. R. 522; *Young* v. *Scobie*, 10 U. C. R. 372. The sales were not legal, there having been no proper authority to the treasurer to sell: *Hall* v. *Hill*, 22 U. C. R. 578; Assessment Act of 1868-9, section, 128; Consol. Stat. U. C. ch. 2, sec. 18, sub-sec. 2, sec. 19; R. S. O., ch. 1, sec. 8, sub-sec. 2, sec. 10; *Morgan* v. *Quesnel*, 26 U. C. R. 539; *Canada Permanent Building and Savings Society* v. *Agnew*, 23 C. P. 200; *Dormer* v. *Thurland*, 2 P. Wms. 506; *Sugden* on Powers, 247; *Chance* on Powers, 329; *Bell* v. *Orr*, 5 O. S. 433: *Townsend* v. *Elliott*, 12 C. P. 217; *Laughtenborough* v. *McLean*, 14 C. P. 175; *Allan* v. *Fisher*, 13 C. P. 63. The lands authorized to be sold were not properly authenticated under the hand of the warden and corporate seal of the county: *Hutchinson* v. *Collier*, 27 C. P. 249. It was not shewn that certificates of sale were given in accordance with the Assessment Act, secs. 141, 146; *Williams* v. *McColl*, 23 C. P. 189; *Hall* v. *Hill*, 22 U. C. R. 578, 2 E. & A. 569. It does not appear that the lot was ever returned by the Commissioner of Crown Lands to the county treasurer as being sold, located, leased, or agreed to be sold by the Crown: *doe d. Bell* v. *Reaumore*, 3 O. S. 245; *doe d. Bell* v. *Orr*, 5. O. S. 433; *doe d. Upper* v. *Edwards*, 5 U. C. R. 594; *Peck* v. *Munro*, 4 C. P. 363. The land by the Act of Confederation, was in the Crown as represented by the Dominion Government, and was granted by the Crown after the alleged taxes accrued; the Crown, therefore, disregarded the taxes, and the patent from the Crown must in a Court of law prevail against the tax title until the patent has been cancelled or vacated in a proceeding to which the Crown is made a party. At the time of suit the plaintiff was entitled to a portion of the lands at all events, viz., the land sold at the second sale, and the verdict should be for plaintiff: C. S. U. C. ch. 27, sec. 22; ch. 2, sec. 17, sub-sec. 2; R. S. O., ch. 51, sec. 31; ch. 1, sec. 8, sub-sec. 2; *Junkin* v. *Strong*, 28 C. P. 498.

Reeve, for the respondents. From and after the date of the surrender by the Indians to the Crown of the lands in

question, they ceased to be lands held by Her Majesty in trust for or for the use of the Indians, and were therefore properly chargeable with taxes, and liable to be sold in default of payment thereof. The warrants under which the sales of the lands were made had affixed thereto the corporate seal of the county and the signature of the warden, and the lists of the lands liable to be sold thereunder; and the warrants were intended to form, and did form respectively, one instrument, and were so framed that although the lists had not affixed to them such seal and signature, they were sufficiently authenticated as the lists of lands so liable to be sold under the warrants, and as the lists returned with the warrants to the treasurer. It was established by other and sufficient evidence that the lists were the lists which formed part of the warrants when the same were returned to the treasurer, commanding him to sell the lands. The want of such seal and signature was in any event a defect or irregularity which would be cured by 32 Vic. ch. 36, sec. 155. He cited *Ryckman* v. *VanVolkenburgh*, 6 C. P. 385; *Charles* v. *Dulmage*, 14 U. C. R. 585; *Morgan* v. *Perry*, 17 C. B. 334; *Cotter* v. *Sutherland*, 18 C. P. 357; *Fenton* v. *McWain*, 41 U. C. R. 239; *Mayor of Essenden* v. *Blackwood*, L. R. 2 App. Cas. 574; Indian Act, 1876; 27 Vic. ch. 19, sec. 9; 29 & 30 Vic. ch. 53, sec. 128.

March 22, 1879. (a) Moss, C. J. A.—I agree with the contention that upon the lands in question being surrendered by the Indians to the Crown, they were no longer lands held for or in trust for Indians, but became ordinary, unpatented lands within the meaning of the Assessment Acts. The history of the legislation upon this subject has been so lucidly traced, and its effect so fully explained, in the judgment pronounced by Mr. Justice Gwynne, that it would be unprofitable to review it at any considerable length. It will be quite sufficient to state concisely the

(a) *Present.*—Moss, C.J.A., Burton and Morrison, JJ.A., and Blake, V.C.

conclusions at which I have arrived. I accede to the correctness of the appellant's position that prior to the enactment of the Statute respecting the management of Indian Lands (23 Vic. ch. 151), property held by the Crown under that designation, whether surrendered or unsurrendered, and whether sold or unsold, was not liable to taxation. The prior legislation had only subjected to that liability Crown, Clergy, and School lands, which were sold, or for which licenses of occupation were granted. Nor did 23 Vic. ch. 151 make Indian lands assessable. It authorized the Governor in Council to declare the provisions of the Public Lands Act passed during the same session to be applicable to Indian lands, and in the following year an Order in Council was made extending certain sections of the Act to Indian lands, but among these the very section, the 27th, which made public lands when sold or licensed liable to taxation, was not included. The order, however, introduced the other clauses, which may in a general sense be said to have attached to Indian lands the incidents belonging to public lands. As a matter of policy it is not easy to perceive any reason why they should not have been subjected to taxation under similar circumstances. However, I take the substantial result to have been that they were placed on the same footing as the public lands of the Province, and were thenceforth properly describable as unpatented lands vested in or held by her Majesty. Two years afterwards the Assessment Act of 1863 dealt with the liability of unpatented land to assessment in terms of great generality, by providing that such land, when sold or agreed to be sold, or located as a free grant, should be liable to taxation, and that the interest of the person to whom the land was agreed to be sold or located might be sold for satisfaction of arrears of taxes. I think there is no room for doubt that lands surrendered by the Indians were unpatented lands within the meaning of this legislation. The obvious intent was, to give effect to the sound policy of subjecting purchasers or locatees of any lands which the Crown had to sell or locate to their share

of the burden of municipal taxation from the date of their interest being acquired, instead of leaving them exempt until the patent was actually issued. If they failed to discharge this duty, their interest was justly made transferable to a purchaser, who assumed their position with regard to the Crown. I am prepared, therefore, to hold that the land now in dispute having been sold prior to the 1st of January, 1863, was from that date liable to assessment and to sale for payment of arrears of taxes.

But it is contended that because the British North America Act has entrusted the exclusive management and control of Indians and lands reserved for Indians to the Government of the Dominion, this sale is ineffectual. So far as that argument is founded upon a want of authority in the Provincial Legislature to re-enact after Confederation the provisions under which such lands might have been previously assessable, it is completely met by the remarks of Mr. Justice Gwynne, which I willingly adopt. But it was strenuously urged before us that, conceding the existence of this authority, and the consequent liability of the land to assessment under the Provincial Act, yet the Crown, as represented by the Government of the Dominion, had issued the patent after the accrual of the taxes, and in disregard thereof, and that therefore the patentee must succeed in ejectment, the purchaser's only remedy (if any) being to proceed for the cancellation or vacating of the patent, and to bring the Crown into Court for that purpose. That argument would not be without plausibility if the patent had been issued after the sheriff's deed, but it seems to me to be deprived of all weight by the simple consideration that the patent had been issued more than a year before the sale. The effect of the sale was to transfer all the interest of the locatee under the Crown, to the purchaser from the sheriff. If the locatee had then paid all his purchase money, but had not received his patent, the purchaser would only have gained the right to obtain a patent to himself; and if the patent had nevertheless been issued to the original locatee, I presume that the legal

estate would have been vested in him, and the only remedy would have been that which the appellant now indicates. But that course of reasoning is manifestly inapplicable where the tax sale followed the patent. Then the interest which the original locatee had, and which was liable to be divested, was the fee simple absolute. The patent was rightly issued, because although taxes were then in arrears, there was no reason to assume that the land would be sold for their payment, and in fact there was no other person than the appellant who had then the least claim to the patent; but if taxes were properly assessed against the property, and the sale was legally made, the fee simple passed to the purchaser as effectually as if the sale had been made under a writ of *fieri facias*.

The next point urged by the appellant is, that there was no legal warrant authorizing the sale of this land. In the Court below the objection was understood to mean that the lands to be sold were embodied in the warrant, instead of being in a list attached to the warrant.

It now appears that this description was not embodied in the warrant itself, and that there was a list attached, but the irregularity complained of is that this list was not authenticated by the seal of the corporation and signature of the warden, as required by the 128th section of the Assessment Act of 1869, and that the warrant simply empowers the treasurer to sell the lands "*hereinafter* mentioned," while there is no reference in the warrant to the list, nor in the list to the warrant. The printed case states that there is a list, or rather lists of lands in each township attached to or bound up with the warrant; that the warrant is written on one side of a half sheet of foolscap paper, and is at the front that the lists are also written on half sheets of foolscap paper, and the half sheets comprising the same follow each other after the warrant in alphabetical order; that the sheets comprising the lists and the warrant, are attached together by being pasted the whole length of the top; and that none of these sheets have the signature of the warden or seal of the county, except the first which contains the

warrant only. The want of the seal and signature to the lists was held in *Fenton* v. *McWain*, 41 U. C. R. 239, to be cured by sec. 155, and I see no reason to doubt the correctness of that decision.

The other objection seemed more formidable, but upon consideration I do not think that we are bound to give it effect. The statute requires one of the authenticated lists to be returned to the treasurer with a warrant thereunto annexed under the hand of the warden and seal of the county commanding him to levy upon the land for the arrears due thereon, with his costs. The land referred to is that included in the list. The instrument, therefore, which is contemplated, is an authenticated list with a warrant thereto annexed. The annexation of a warrant is the special feature prescribed. I think it reasonable to hold that when it is annexed the list and warrant are incorporated into a single instrument, so that the lands "hereinafter mentioned" describe with appropriateness the lands in the list.

For my own part I do not think that we are bound to resort to any nice criticism of the language of the instrument. The lands have been sold for arrears of taxes legally imposed, and a deed has been given. The sale was under a warrant given by the proper officer to the proper officer, and intended to authorize the sale of this land. A single instrument passed from the one to the other, and it comprised this land in such a way that to common apprehension it was one of the parcels which the treasurer was directed to sell. Having regard to the language of the Statute, and the liberal interpretation which we are required to give it in view of the policy of this curative legislation, I think the objection should not be allowed to prevail.

The manner in which the Court below dealt with the two acres seems to me to be in accordance with reason and justice.

In my opinion the appeal should be dismissed, with costs.

BURTON, J. A.—The learned Judge who delivered the judgment in the Court below has relieved us of a very laborious duty in tracing up and reading the various enactments relating to Indian lands and their management, and the Assessment Laws previous to the 27 Vic., ch. 19, 1863, which the learned counsel for the appellants admitted was the enactment which must govern this case, if the objection as to the jurisdiction of the Local Legislature since Confederation to pass Acts for the enforcement of taxes against lands of the nature of the land in question be not well founded; but he contended that this Act applied only to those lands which in the 23 Vic., ch. 2, are termed "Public Lands," and in the enactment previously are styled "Crown, Clergy, and School Lands."

As to these lands, so far back as 1853, provision was made in the Act for the sale and management of the public lands, for furnishing a list of such portions as were sold, or for which a license of occupation was issued, to the Registrar, in order that they might be assessed; and by the Assessment Act of the same session the Commissioner of Crown Lands was required to transmit to the Treasurer of every county a list of such lands to carry out such assessment.

Provision was made in the same Act enabling the Governor in Council to extend to the Indian lands under the management of the Chief Superintendent any of the provisions of that Act, and in subsequent amendments under which the management of the Indian lands was placed under the control of the Commissioner of Crown Lands, similar power is given.

Regulations were subsequently made by Order in Council, 7th of August, 1861, extending and making applicable to Indian lands certain provisions of the Public Lands Act, but the 27th section—which rendered all public lands, leased, appropriated, or set apart for any person, or for which licenses of occupation should be granted, liable to the assessed taxes of the township, although no patent was issued—was not included among them; and so matters continued until the passing of the Act of 27 Vic., ch. 20,

already referred to, which is entitled An Act to amend the Asssesment Act in respect of arrears of taxes on non-resident lands, and for other purposes respecting Assessments.

This Act enacted, That "*unpatented land* vested in or held by Her Majesty, which shall hereafter be sold or agreed to be sold to any person, &c., shall be liable to taxation, and any such land which has already been sold or agreed to be sold shall be held to have been liable to taxation since the 1st of January, 1863;" and the 108th section of the Consolidated Assessment Act was amended by providing that the Commissioner of Crown Lands, who *virtute officio* had then charge of the Indian lands, should transmit a list of such lands to the municipal officials.

But it is said that this amendment cannot apply to these lands, which it is contended are exempt from taxation under the latter part of sub-sec. 1 of section 9 of the Act to which it is an amendment.

It being a well established rule, speaking generally, in the construction of Acts of Parliament, that the Sovereign is not included unless there be express words to that effect, and that lands therefore vested in the Crown were not liable to taxation under the general words used in this Assessment Law, it is difficult to understand why the framer of that Act should have thought it necessary to introduce the so-called exemption contained in that subsection, unless it was intended by the introduction of these words to raise an implication that in all cases where lands were not so vested *for the general uses of the Province or for the Indians*, they were not to be exempt. I must confess that I find it difficult to perceive how lands can be said to be vested in Her Majesty for the public uses of the Province or in trust for Indians, after the Crown through its proper officer has contracted to sell them.

But the Courts did hold that lands, though agreed to be sold, were not subject to assessment, as no license of occupation, lease, or patent had been granted, and this decision led to the passage of the Act of 1863, which contained the clauses I have already cited as to unpatented lands vested

in Her Majesty which should thereafter be sold or agreed to be sold.

I have already expressed an opinion that, if the Statute can be treated as by implication admitting that lands though vested in Her Majesty were not exempt except in the two classes of cases specially referred to in sub-section 1 of section 9, these lands, not being within either of those classes, but being in equity the property of the purchaser, were liable to assessment without the aid of the amendment; but if that view be incorrect, I admit that it is difficult to sustain it consistently with the decision in *Street* v. *The Corporation of Kent*, 11 C. P 255; still, a construction has to be placed on section 128, which, as Mr. Justice Gwynne has pointed out, appears to be in conflict with the language of section 9 as re-enacted after the passing of the amendment in 1863. I think, notwithstanding the awkwardness which he refers to as to that mode of legislation, that section 128 may be regarded as an exception to the exemption contained in section 9; and that clause would then read :—

"All lands vested in or held by Her Majesty for the public uses of the Province, and all property so vested in Her in trust for any tribe of Indians, shall be exempt from taxation, except those portions which have been sold, or may be sold, or agreed to be sold, to any person; and as to these, in cases of past sales they shall be held to have been liable to taxation since the 1st of January, 1863."

No good reason has been assigned for placing a restricted meaning on the words "unpatented lands hereafter sold or agreed to be sold," and to confine them to public lands, other than those intended for the benefit of the Indians. Neither the Crown nor the Indians are affected by the lands becoming assessed; the purchaser is regarded in equity from the time of the sale to him as the owner, and his interest alone can be sold. The assessor merely satisfies himself that the lands have been sold by the Crown; he is not called upon to enquire and has no means of ascertaining whether the proceeds of the sale are to be applied

for school or general purposes, or for the benefit of Indians, and no grounds of public policy have been suggested why the Legislature should have drawn a distinction between one portion of the public lands and another after the use and enjoyment of them have passed to a purchaser under a contract of sale.

I do not understand the objections founded upon the Confederation Act; the local Legislature has not attempted to tax lands placed under the exclusive control of the Dominion Government and Legislature, assuming these lands since the surrender to come within the definition of "Indian Reserves," but treats the purchaser of such lands as the owner, and in his hands declares it liable to assessment.

The local Legislature had this power before Confederation, and it is confirmed to them by the British North America Act, the only distinction being that it is prohibited from taxing the property of the Dominion, or either of the other Provinces.

The learned Chief Justice has dealt with the points taken in the reason of appeal as to the issue of the patent by the Crown after these taxes had accrued, and the consequent right of the plaintiffs to recover in the action whatever might be the ultimate rights of the parties on a proper proceeding for the cancellation of the patent, and I fully concur in his reasoning and conclusion.

It remains to consider the objection urged against the validity of the sale for defects in the warrant or proceedings.

The objection which was raised at the trial was confined, as I understand the notes, to the fact that the lists required to be submitted by the treasurer to the warden were not authenticated by the seal of the corporation and his signature, as required by section 128 of the Assessment Act; but it is shown that those lists were submitted to the warden and attached by him to the warrants and returned, one to the treasurer and the other to the clerk. The substantial requirements of the Statute in this respect were therefore complied with, and the omission to authen-

ticate them in the mode pointed out is, I should say, cured by the 155th section.

But the point taken before us, and apparently argued in the Court below, was, that the warrant did not authorize the sale, no lands being mentioned in it or mentioned in a schedule referred to in it. The learned Judge who delivered the judgment of the Court below appears to have supposed that the objection was, that the lands were described in the body of the warrant, instead of being set forth in a list attached; and assuming that the lands were set forth in the body of the warrant, held it, and I should think properly, to be a sufficient compliance with the Act; but that is not the point which was intended to be urged. The point taken by Mr. Cameron was, that the warrant was contained in a half sheet of paper, and ended with the signature and seal of the warden; and what that warrant authorized was the sale of the lands "hereinafter mentioned," that is to say, mentioned in the warrant: no lands being mentioned. I did not understand Mr. Cameron to contend that if the warrant had referred to the lands "as the lands mentioned in the lists hereunto attached," that would not have been sufficient; but that there being no reference in the warrant to the lists, nor in the lists to the warrant, it did not authorize the sale of any lands whatever. It must be immaterial whether the lands are embodied in the warrant or in a list attached, so long as it appears from the warrant that it authorizes the sale of those lands; if it does not, the defect is one which would not be cured by the 155th section.

It certainly is a very loose way of preparing so important a document, and we must look at the section of the statute to ascertain if it can be upheld as a valid warrant.

That section provides that when taxes have been due for a certain period the treasurer shall prepare a list in duplicate of all the lands liable to be sold, with the arrears set opposite to each lot, and submit the same to the warden, who shall authenticate them as above indicated; and one of such lists shall be deposited with the clerk,

and the other returned to the treasurer, with a warrant thereto attached, commanding him to levy, &c.

What was done here was, that the lists were duly prepared and sent to the warden, who in each case attached a warrant to them, and signed and sealed the warrant and returned them in that state to the designated official. The Statute intends that the list so prepared shall in fact form part of the warrant, and when we find that there is evidence that the lists were prepared in accordance with the Act and sent to the warden, and that they were attached to a warrant bearing the corporate seal and the warden's signature, at the time when the treasurer received them from the warden, I think that it may be regarded as one entire instrument, and thereby gives effect to the words "hereinafter mentioned," which would otherwise be futile and inoperative.

On the whole I think the warrant may in this way be upheld, and as in the main question I agree with the Court of Common Pleas, I think this appeal should be dismissed, with costs.

BLAKE, V. C.—For the reasons assigned in the Court below, and in this Court, I think it is reasonably clear that the lands in question, being lands agreed to be sold, were liable to assessment. I am also of opinion that, although the lists of lands were merely attached to the warrant, duly authenticated, the Act has been substantially complied with, and thereby sufficient authority was given to the Treasurer to sell. I think the appeal should be dismissed, with costs.

MORRISON, J. A., concurred.

Appeal dismissed.

MAN.
1941

IN RE VACANT PROPERTY ACT

IN RE IMP. CAN. TRUST CO.

Appeal

Trueman, J.A.

companies which were parties to the 1924 agreement may still have a legal right to claim the moneys in question as a surplus above the purposes for which they were set aside. I think there should be reserved to the petitioner the right by amended or new petition to claim as against them or any one who may appear to have an interest in the moneys which have been allowed to remain in an unclaimed condition since at least May, 1930."

The judgment order "reserves to the petitioner the right to file and present another petition if and when he may see fit."

The Attorney-General for Canada cross-appeals from this reservation. The learned Judge determined and dismissed the action on its merits following a trial upon the issue raised by the province. The judgment is therefore final and cannot be left in a state of suspense. See 19 *Halsbury*, 2nd ed., pp. 206, 207.

The appeal is dismissed. The cross-appeal is allowed.

BRITISH COLUMBIA

COURT OF APPEAL

Before Sloan, O'Halloran and McDonald, JJ.A.

City of Vancouver (Plaintiff) Respondent
v. **Chow Chee** (Defendant) Appellant

Taxation — Indian Lands — Assessment of Lands Rented from Indian.

The *Vancouver Incorporation Act, 1921*, 2nd sess., ch. 55, exempts from taxation "lands held by His Majesty in trust for a band of Indians and occupied officially or unoccupied." *Held* that this provision does not exempt from taxation the interest of a person who rented land from an Indian. The occupier in that case may be assessed and taxed, although the land itself would not be subject to the tax nor to any lien in respect thereof. *Montreal (City) v. Atty.-Gen. for Can.* [1923] A.C. 136, 92 L.J.P.C. 10, followed.

[Note up with 2 C.E.D. (C.S.) *Indians*, sec. 8; 3 C.E.D. (C.S.) *Taxation*, secs. 54, 56.]

Appeal by defendant from a judgment by Ellis, C.C.J. Appeal dismissed.

D. E. McTaggart, K.C., for plaintiff, respondent.

A. J. B. Mellish and *P. J. McIntyre*, for defendant, appellant.

December 12, 1941.

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VANCOUVER
v.
CHOW CHEE

Appeal

SLOAN, J.A. — I am in agreement with the conclusion reached by the learned trial Judge and would dismiss the appeal.

O'Halloran, J.A.

O'HALLORAN, J.A.—The appellant Chinese truck-gardener rents and occupies lands which form part of an Indian Reserve. In my view the fact that the occupied lands form part of an Indian Reserve does not exclude the application of *Montreal v. Atty.-Gen. for Can.* [1923] A.C. 136, 92 L.J.P.C. 10, which this Court (Martin, C.J.B.C., Macdonald, McQuarrie, Sloan and O'Halloran, JJ.A.) followed on April 28, 1939, in the unreported decision of *Can. Soaps Ltd. v. Vancouver Board of Assessment Appeals.*

I would dismiss the appeal.

McDonald, J.A.

MCDONALD, J.A. — In this appeal I am in full agreement with the conclusion reached by His Honour Judge Ellis. In his reasons for judgment he states the facts fully and applies the appropriate law. There is very little that I can usefully add to his judgment, but in view of the argument presented to us I shall try to make the matter a little more simple.

Under the *Vancouver Incorporation Act, 1921,* 2nd sess., ch. 55, certain lands within the city are exempt from taxation, and one exemption is land held by His Majesty in trust for a band of Indians *and* occupied officially *or* unoccupied. That does not apply to the land in question for it is occupied, though not officially. It is occupied by a Chinaman under an agreement made with an Indian of the Reserve through the Indian Department, and hence the occupant by virtue of the said Act may be assessed and taxed. The land itself is not subject to the tax, nor to any lien in respect thereof.

Now coming to the amendment of 1937, about which so much has been said, this amendment relates only to the method of assessment of an occupant of land held for commercial purposes, and hence to the *quantum* of the tax. As pointed out in the plaint the appellant was duly assessed for the year 1939, and no appeal was taken against the said assessment, but the same was duly passed and confirmed by the Court of Revision, and rates and taxes were duly imposed and levied thereon by the respondent.

These facts are not in dispute, and the question of the amount of the tax was not before the trial Judge nor is it

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before us. That question was already settled by the Court of Revision. The complaint that the learned Judge in his reasons made no reference to the amendment of 1937 is thus explained.

As to the validity of the provincial statute, I agree with the learned Judge that the matter is concluded by the decision on which he relied, *Smith v. Vermilion Hills R.M.* (1914) 6 W.W.R. 841, 49 S.C.R. 563; [1917] 1 W.W.R. 108, [1916] A.C. 569, 86 L.J.P.C. 36.

To the contention that the lands in question would necessarily bring a lower rental, if the occupant is subject to taxation, than they would otherwise bring, and that hence the rights of an Indian would be prejudiced, the simple answer is that, even if this were material (and I think it is not) the agreement for occupation had been made, and the rental fixed, long before the assessment had been made, or the tax levied.

I am of opinion to dismiss the appeal with costs here and below.

BRITISH COLUMBIA

COURT OF APPEAL

Before McQuarrie, Sloan and O'Halloran, JJ.A.

Rex v. Pavalini

Criminal Law — Joint Trial of Appellant and Another — Evidence of Other Accused Referring to Previous Conviction of Appellant — Whether Accomplice Evidence — Whether Conviction Should Be Set Aside — Effect of Appellant's Failure to Call Evidence in His Own Defence.

The appellant and one P.L. were tried jointly for illegal possession of morphine, but were defended by separate counsel. The Crown's evidence against the appellant, if believed, constituted complete proof of all the elements necessary to convict. The appellant called no evidence. His co-defendant P.L. however, gave evidence in her own defence. In the course of her evidence she referred to a previous conviction of the appellant on a similar charge. The appellant was convicted. He now appealed, the grounds of his appeal being that the admission of P.L.'s evidence as to his previous conviction was wrongful because, (1) P.L. was an accomplice and the trial Judge had not given the jury the usual caution as to the evidence of accomplices; (2) Such evidence was likely to prejudice the jury.

produire une rente annuelle de $100 à un homme de l'âge du demandeur, savoir 32 ans, serait de $1480.68;

Considérant que le demandeur n'a pas prouvé les allégués essentiels de sa déclaration;

Considérant que dans une action sous la loi des accidents du travail, il incombe au demandeur d'établir un accident déterminé, que ce mot "accident" dans la loi de compensation s'entend d'une lésion déterminée par un effort violent et subit au cours du travail; la preuve à faire sous la loi des accidents du travail est régie par les mêmes règles que dans toutes autres causes (1923, St-Aubin v. Canadian Benedict Stone Ltd., 29 R. J., 238, Rinfret, J.);

Vu les autorités citées de part et d'autre;

Maintient la défense et renvoi l'action avec dépens.

Montréal
1927
Odesse
v.
Quinlan Robertson & Janin Ltd.

COMMISSAIRES D'ECOLES DU CANTON DE MANIWAKI *v.* BRADY.

Hull
1928
11 janvier.

Droit scolaire — Imposition de taxes — Droit d'imposer les terres des sauvages — Réserve non comprise dans municipalité mais dans arrondissement scolaire — S. R. C., 1909, *ch.* 81, *s.s.* 4, 19, 33, 47, 89, 99, 58 et 101.

Les taxes scolaires imposées sur les terres des sauvages, dont la réserve fait partie de l'arrondissement scolaire, sinon de la municipalité, peuvent être collectées par les commissaires d'écoles de cette dernière.

La Cour, sur le mérite:—

Attendu que:—

Les demandeurs réclament du défendeur comme occupant des lots 17, 18, 19, 24 et 26 du rang de front de la rivière Gatineau, dans le canton de Maniwaki, situé dans son arrondissement, la somme de $358.84 pour taxes d'écoles;

M. le juge Boyer.—Cour supérieure, Hull.—No 376.—11 janvier 1928.—J. W. Ste-Marie, C. R., avocat des demandeurs.—J. B. Major, avocat du défendeur.

Hull

1928

Commissaires d'Ecoles du Canton de Maniwaki.

Le défendeur plaide qu'il a loué ces terrains du gouvernement fédéral représenté par le surintendant des affaires des sauvages, qu'ils sont en conséquence exempts de toutes taxes, qu'il ne peut être porté au rôle comme locataire et il nie les autres allégations de la demande;

Considérant en fait que:—

Les lots en question constituant une ferme avec bâtisses font partie de la réserve des sauvages de Maniwaki, mais se trouvent dans les limites de la municipalité scolaire sur laquelle les demandeurs ont juridiction;

Le défendeur qui n'est pas un sauvage, ainsi qu'admis et constaté par la Cour, les occupe en vertu d'un bail à lui consenti par le surintendant des affaires des sauvages, au décès de son père;

Les bâtisses qui s'y trouvent, 8 en nombre, ont été construites par le père du défendeur et autres membres de sa famille qui ont occupé la terre successivement avant lui;

Les bâtisses deviennent la propriété du locateur à l'expiration du bail, de sorte que le défendeur n'est pas propriétaire des bâtisses;

Considérant en droit que:—

Il est vrai que les biens de la Couronne et ceux possédés en fidéi-commis pour la Couronne sont exempts de taxes, mais les terres en question en cette cause n'appartiennent pas à la Couronne et ne sont pas détenues en fidéi-commis pour elle, mais sont la propriété des sauvages pour lesquels la Couronne les détient en fidéi-commis; S. R. C. 1909, ch. 81, s.s. 4, 19, 33, 47, 89;

Les sauvages ne peuvent être taxés sur les biens situés dans une réserve (section 99), mais la loi des sauvages permet la vente pour taxes des terres ainsi situées lorsqu'elles sont en d'autres mains, sauf que la vente ne confère que le même titre que l'occupant avait (section 58 et 101);

L'obligation est imposée au défendeur par son bail de payer toutes les taxes qui pourraient être préle-

Hull
1928
Commissaires d'Ecoles du Canton de Maniwaki.

vées sur les terres louées et l'économie de la loi scolaire est telle que les taxes peuvent être perçues non seulement du propriétaire mais de celui qui occupe un bien-fonds à quelque titre que ce soit;

La taxe a été régulièrement imposée et le rôle de perception régulièrement fait après évaluation spéciale des terres détenues par le défendeur, vu qu'elles n'étaient pas portées au rôle d'évaluation municipale, ainsi que les demandeurs avaient droit de le faire, la réserve des sauvages ne faisant pas partie de la municipalité mais étant comprise dans l'arrondissement scolaire;

L'action des demandeurs est donc bien fondée pour trois ans, les autres années étant prescrites en vertu d'une courte prescription que la Cour est tenue d'appliquer d'office;

Pour ces motifs, condamne le défendeur à payer aux demandeurs la somme de $126.46 avec intérêt du 26 février 1927 sur $118.15, montant dû en capital, et les dépens.

Montréal
1927
31 janvier.

LORTIE *v.* CANADIAN GOVERNMENT MERCHANT MARINE, LIMITED.

Accident du travail — Salaire fixe — Salaire à tant de l'heure — Base de calcul — S. R. Q. 1925, *ch.* 274, *par.* 3, *sect.* 9 *et* 7, *et sect.* 3 (*b*), 3 (*c*).

Dans l'application de la Loi de compensation, au cas d'indemnité pour incapacité provisoire, pour déterminer le salaire servant de base au calcul de cette indemnité, si le salaire est variable par le fait qu'il est de tant de l'heure et non pas fixe, il faut prendre en considération le salaire moyen qu'ont pu produire les journées régulières de travail voisines du jour où s'est produit l'accident.

M. le juge Surveyer.—Cour supérieure.—Montréal.—No 9696.—31 janvier 1928.—Lavery et Demers, avocats du demandeur.—Beckett et Harwood, avocats de la défenderesse.

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1. Trudel v. Rhéaume, 52 C. S., 207 C. rev.; Grow v. Dominion Engineering Works, Limited, 61 C. S., 246, Rinfret, J.; McCarthy v. Canadian Vickers, 60 C. S., 386, Duclos, J.

the vendor until returned, sold on account of the vendor, or some new contract be made in respect to them. While this is the condition of things I think it must be held that the goods are still *in transitu*.

The last case as to stoppage *in transitu* is *Ex parte Watson, Re Lone*, Weekly Notes, February 24, 1877, p. 42.

I agree in affirming the decision of Mr. Justice Galt, with costs.

WILSON, J., was not present at the argument, and took no part in the judgment.

Judgment affirmed.

REGINA v. GUTHRIE.

Tax sale of land vested in the Crown—Memorial—Admissibility of under 39 Vic. ch. 29, O.—Surrender to the Crown—Enrolment.

Land vested in her Majesty in trust for the Indians was exempt from taxation under 13 & 14 Vic. ch. 67; and the defendant here claiming such land under a sale for taxes imposed in 1852 and 1853, was held not entitled.

A memorial, over thirty years old, executed by the grantor, was held admissible evidence and sufficient proof of the deed, in an action of ejectment, under 39 Vic. ch. 29, sec. 1 subsec. 3, and sec. 7, O.

Enrolment of a surrender to the Crown is unnecessary in this country in order to perfect the title of the Crown.

THIS was an action of ejectment, tried before Patterson, J. A., at the last Fall Assizes, at Whitby, to recover possession of lot 15 in the 2nd concession of Mara.

Her Majesty claimed title by deed of surrender from Wm. B. Robinson, the defendant merely asserting title in himself.

At the trial, in proof of the plaintiff's title, patent to Henry Fry, dated the 21st of March, 1843, for the lot was put in; also an original memorial from the registry office of a deed from Fry, dated 18th of November, 1843, to Wm. B. Robinson in fee. The memorial was executed by Fry, the grantor, dated the same day, and registered 23rd of

November, 1843, A deed of surrender of the lot in question from W. B. Robinson to Her Majesty in trust for the Chippawa Indians, dated 29th November, 1843, was also put in.

The defendant at the trial rested his defence on two grounds: 1st. That the title set up as being in Her Majesty by the surrender was defective—the memorial was no proof of the execution of the deed from Fry. 2nd. That the land in question had been sold for taxes in arrear from 1852 to 1859, and that he held title under the sheriff's deed, dated the 3rd of December, 1861, to one Hugh James McDonell, reciting a sale in 1860 for taxes. The defendant also put in deed of transfer from McDonnell to himself.

The taxes alleged to be due and in arrear, were from 1852 to 1859. On the part of the plaintiff it was contended that there was no evidence of taxes in arrear in 1852 and 1853, the only proof being that of a memorandum which the treasurer said he believed was a memorandum of taxes imposed by the county of York prior to the separation of Ontario. But assuming they were proved for those years the lands were exempt in 1854 under 16 Vic. ch. 182.

The learned Judge before entering a verdict, stated the grounds of his decision at length. He was of opinion, as to the defendant's title under the deed from the sheriff, that the lands were exempt under the Assessment Act, 16 Vic. ch. 182, and if they were liable before that Act, which he was inclined to think they were, the sale would then rest on the taxes for 1852 and 1853, but that even these were open to objection that the arrears for taxes for those years were not proved. The learned Judge, however, said he would hold that the conveyance from Fry to Robinson was not established by the proof of the memorial signed by Fry the grantor, and let the question be settled by this Court, as he did not think the 7th sec. of 39 Vic. ch. 29, O., applied, as in his opinion it did not substantially enact that those old memorials should be *primâ facie* evidence—they were only made so with reference to the provisions respecting vendors

and purchasers, which were limited to sales made after the Act, and on that ground he entered a verdict for defendant.

During last term, November 24, 1876, *Bethune*, Q. C., acting for the Attorney-General of Canada, obtained a rule *nisi* to enter a verdict for Her Majesty, on the ground that Her Majesty was entitled to recover the lands in question.

During this term, February 12, 1877, *M. C. Cameron*, Q. C., shewed cause. The Crown at the trial put in a patent to one Fry, and then claimed under a surrender in trust for the Indians by the Hon. W. B. Robinson. The Crown has therefore shewn title out of itself in the first instance, and it has not re-acquired title, for the surrender is insufficient, not being made by deed enrolled. The enrolment since verdict cannot avail the Crown, for the defendant cannot be put in a worse position than when the action was brought. The defendant claims under a sale for taxes, and the fact that the surrender was in trust for Indians does not relieve the land from assessment or make the sale invalid. 50 Geo. III, ch 7, sec. 2, exempts Crown lands only. The memorial of the deed from Fry to Robinson was no proof of a grant. He referred to *Chitty's* Prerog. 391; 13-14 Vic. ch. 27, sec. 7.

Bethune, Q. C. The memorial being over thirty years old was sufficient proof: *Gough* v. *McBride*, 10 C. P. 176; *Smith* v. *Nevilles*, 18 U. C. R. 473; *Lynch* v. *O'Hara*, 8 C. P. 259; *Rose* v. *Cuyler*, 27 U. C. R. 270; *Covert* v. *Robinson*, 24 U. C. R. 282; *Russell* v. *Fraser*, 15 C. P. 375; *Re Higgins*, 19 Grant, 393; 39 Vic. ch. 29, O. The enrolment dates back to the grant. There was no objection at the trial. [*M. C. Cameron.*—There was no consent to put in this enrolment.] *Chitty's* Prerog. 133; 17 *Vin.* Abr. Prerogative," 172 (A. *d.*) The defendant cannot say Her Majesty did not accept the surrender, for the bringing this action is an answer to it. The sale for taxes was invalid. No arrears of taxes were shewn. There was no evidence of any warrant. He referred to *Hall* v. *Hill*, 22 U. C. R. 578; *Hamilton* v. *Egleton*, 22 C. P. 536; *Munro* v. *Grey*, 12 U. C. R. 647.

March 10, 1877. MORRISON, J.—I am of opinion that Her Majesty is entitled a verdict with reference to the alleged arrears of taxes for the years 1852 and 1853.

It appears to have been assumed at the trial that lands held by Her Majesty in trust for the Indians were not exempt from taxation prior to 1854, but were liable during 1852 and 1853. The attention of the learned Judge was not directed by the parties to the state of the assessment law previous to the 16 Vic. ch. 182. The Assessment Act in force at the passage of that Act, the 13-14 Vic. ch. 67, 1850, expressly and in the same terms exempted all property vested in Her Majesty in trust for the Indians. So that the lands in question were not liable to be rated and sold for arrears of taxes for 1852 and 1853, and consequently the tax title under which the defendant claims is of no avail.

But it is contended that the plaintiff failed to shew title in Robinson, who executed the deed of surrender to Her Majesty. The plaintiff put in the original memorial of a deed from Fry to Robinson, dated the 18th of November, 1843, conveying the fee in the premises to Robinson. The memorial was executed on the same day and registered on the 23rd of the same month in the proper county, and the plaintiff relied on that memorial (being over 30 years old) as *primâ facie* evidence of the conveyance from Fry to Robinson, under sec. 7 of 39 Vic. ch. 29, O.

By the first section of that Act it is provided, that in the completion of any contract of sale of land made after the passing of the Act, the rights and obligation of vendors and purchasers shall be regulated by rules therein mentioned. The 3rd sub-section is, "In case of registered memorials twenty years old, of other instruments, if the memorials purport to be executed by the grantor, the memorial shall be sufficient evidence without the production of the instruments to which the memorials relate, except so far as such memorial shall be proved to be inaccurate, and the memorials shall be presumed to contain all the material contents of the instruments to which they relate." And

by the 7th section it is enacted: "In suits at law or in equity it shall not be necessary to produce any evidence which, by the first section of this Act, is dispensed with as between vendor and purchaser; and the evidence therein declared to be sufficient as between vendor and purchaser shall be *primâ facie* sufficient for the purposes of such suits."

I agree with Mr. Justice Patterson that there is some difficulty in arriving at a clear conclusion as to the intention of the Legislature in enacting the 7th section. I am inclined to think, however, that it was the object of the Legislature, with a view to facilitate and simplify the proof of titles in ordinary suits, to extend the provisions of the first section to any suit at law or equity. The tendency of legislation is in that direction, and I think properly so. The language of the seventh section is wide and general enough for such a construction. There is nothing in the section restricting the rules mentioned in the first section to any particular class of suits or litigation, and I see no injurious consequences to result from giving such proof, as it is only received as *primâ facie* evidence. If the section is not open to such a construction, I cannot see for what other object it was introduced.

In the fifth and sixth sections we find provision made for matters quite distinct from matters relating to vendors and purchasers, and by the fourth section in proceedings in Chancery to quiet a title. The rules in the first section are also made applicable, and it appears that in suits in Chancery, under the seventh section, such memorials are received as *primâ facie* evidence. Such is the view taken of that section and acted upon by Blake, V. C.

On this objection I think the plaintiff is entitled to our judgment.

During the argument it was said that Her Majesty could only take the surrender by deed enrolled. No such objection appears to have been taken at the trial. The surrender appears to have been registered in the county registry office in January, 1864, and since the trial it has

been enrolled and put on record in the office of the Registrar General for the Dominion, where all grants by and to the Crown are registered, and an exemplification of the surrender under the great seal of the Dominion has been produced and filed in this Court as well as the original deed of surrender, and Mr. Bethune, on the part of the Attorney-General, has asked if it is necessary that it should be enrolled of record in this Court, and he has referred us to the authorities mentioned in 17 *Vin.* Abr. 172 (A. d). The question as to how a grant to the King may be made effectual or what should be a sufficient record of it, is far from being clear. The point is discussed in the notes to the case of *The Duke of Somerset*, Dyer 355–37. According to Dyer a deed was made by the Duke to King Edward VI., and was acknowledged to be enrolled and delivered to the Master in Chancery and delivered in Court. It was put into a chest and not enrolled, and it was held not to vest any interest in the Queen.

This is denied.

The note states that Sir Thomas Egerton, Master of the Rolls, said when he was attorney he had occasion to ask the opinion of Wray and Manwood, Chief Justice and Chief Baron, who denied that their opinions were as Dyer reported, and they said that there is no foundation that the King cannot take but by matters of record; for he said that the King is entitled in many things which are in files on the rolls and in the memorandums in the Exchequer; and yet these are sufficient titles for the King.

About 35 Eliz. this same case came in question between the Dean and Canons of Windsor, cited Mo. 676, and one Middlemore, and by the resolution of all the Judges of England it was agreed that the deed may be enrolled at this day, and so it was, and therefore Middlemore was ousted of his term, and it was also debated in the Parliament house and there also agreed accordingly. And it was also resolved by all the Justices that the acknowlegment of the deed before the Master in Chancery and delivering of it in the Augmentative Court do not make it a sufficient

record before enrolment to vest the interest in the King, but when it is now enrolled with the other date it vests the interest in the King with relation, for all men are estopped to say that it is not enrolled according to the date. The contrary, the note says is holden, for if it be on the files, or in any place among the memoranda of the Exchequer, it is sufficient for the King, and in Easter 30 Eliz. in the Exchequer the case of Dyer was denied to be law, and Manwood denied his opinion to be so, for after the acknowledgment the delivering of the deed to be enrolled in Court makes it a record, and in *Abraham* v. *Wilcox*, Yelv. 30 adjudged the King takes not by enrolment but by the deed, so that the deed is the principal and the enrolment but testimony that the deed is of record; and though it is usually said in the books that the King cannot take but by deed enrolled this is to be intended only that the deed made to the King be recorded.

On the whole, upon this point we see no ground for holding that Her Majesty is not entitled to succeed. This deed of surrender is recorded in the usual registry office of the county. It is now enrolled and on record, as the exemplification under the great seal of the Dominion shews, in the record office where all patents and deeds to Her Majesty are recorded, and it is brought into Court to be enrolled here if necessary.

The rule will be absolute to enter a verdict for the plaintiff.

HARRISON, C. J.—The first question is, as to the title of the Queen.

The Crown is *primâ facie* seized of all the land in the Province: *Attorney-General* v. *Harris*, 33 U. C. R. 94. The Queen has, upon the information of intrusion, the prerogative right of putting the defendant on shewing his title specially: *Chitty's* Prerogatives of the Crown 332; *Manning's* Ex. Prac. 198. The first innovation on this rule was made by 21 Jac. I. ch. 14, which provided that whensoever the King, &c., have been out of possession by the

space of twenty years, &c., the defendant shall retain the possession he had, &c., until the title be tried, found, or adjudged to the King: *Attorney-General* v. *Stanley*, 9 U. C. R. 84. Unless it appear that the Crown having had possession was out of possession for twenty years, the Crown without proof of title on the part of the defendant must, on an information of intrusion, recover: *Regina* v. *Sinnott*, 27 U. C. R. 539. Where the statute 21 Jac. I. ch. 14, is inapplicable the Crown is not barred unless there be sixty years possession against the Crown: *Regina* v. *McCormick*, 18 U. C. R. 131.

Now the Queen has the power, if she think fit, instead of filing an information of intrusion, to bring an action of ejectment: 35 Vic. ch. 13 sec. 18, O. It is among other things argued that the effect of an appearance in such an action is, to put the plaintiff to actual proof of title, and therefore that the presumptions which would arise in favour of the Crown on an information of intrusion are inapplicable. This is one of the difficulties of the Crown waiving prerogative remedies and adopting the remedies of the subject. It is not necessary for us in this case to settle the difficulty if we are of opinion that there was independent evidence of the title of the Crown.

This depends on whether the memorial of the conveyance under which the Crown claims was admissible in evidence, and this in its turn depends on whether the memorial was in this suit admissible in evidence under 39 Vic. ch. 29, O.

It is entituled "An Act to amend the law of vendor and purchaser and to simplify titles." This would be an appropriate title to the Act if it had stopped at the end of the third section. But the remaining sections of the Act carry the original purpose much beyond the mere object of simplifying titles as between vendor and purchaser. The title should be "An Act to amend the law of vendor and purchaser, and to simplify titles, *and for other purposes*."

The Act is divisible into three distinct parts.

1. Provisions necessary "in the completion of any con-

tract of sale of land," as between vendor and vendee. For this purpose in case of memorials twenty years old, if the memorials were executed by the grantor, or in other cases if possession has been consistent with the registered title, the memorials are sufficient evidence without the production of the instruments to which the memorials relate, except so far as such memorials shall be proved to be inaccurate: Sec. 1, sub-sec. 3.

2. "In proceedings in Chancery to quiet a title" it is unnecessary to produce any evidence by the previous part of the Act dispensed with as between vendor and purchaser: sec. 4.

3. "In suits at Law or in Equity," it is also unnecessary to produce any evidence, dispensed with as between vendor and purchaser: Sec. 7.

Then follow sections 5 and 6, which are foreign to rules of evidence, but still germane to the purposes of the Act.

The idea originally was to simplify evidence necessary in the completion of a contract as between vendor and purchaser. That idea was in section 4 expanded so as to apply to proceedings in Chancery to quiet a title. And in section 7 it is still further expanded, and so expanded as to apply to all suits at "Law or in Equity."

In my opinion, therefore, the memorial was admissible evidence, if necessary, on the part of the Crown in this suit to prove title.

I cannot think enrolment in this country is necessary to perfect the title of the Crown. See *Hambly* v. *Fuller*, 22 C. P. 141.

It appears that the title of the Crown was proved, and the Crown entitled to recover unless the title of the defendant was proved.

I think, for the reasons given by my brother Morrison, that the title set up by the defendant failed.

I concur in making the rule absolute to enter a verdict for the Crown.

WILSON, J., was not present at the argument, and took no part in the judgment.

Rule absolute.

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*Oct. 15. 16.
*Dec. 21.

TOWN OF KAMSACK (PLAINTIFF).....APPELLANT;

AND

THE CANADIAN NORTHERN TOWN PROPERTIES COMPANY, LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Municipal Corporation—Assessment and taxation—Crown land—Contract —Construction—B.N.A. Act, s. 125—"The Town Act," R.S.S. [1909] c. 85, ss. 2 and 301.

Certain land had formed part of an Indian reservation and was surrendered in trust for disposal by the Crown. Under a contract with the Crown the respondent paid an advance of $10 per acre and the Indians were to share equally with it in the proceeds of sale of the townsite lots after the respondent had recouped itself for the advance and subdivision expenses; title to be retained in the Crown and patent to issue from it direct to each purchaser from the respondent.

Held, Davies C.J. dissenting, that the respondent had no beneficial or proprietary interest in the land which would render it liable to assessment under "The Town Act." (R.S.S. [1909] c. 85); and that the land was at the time of the assessment Crown land and as such exempt from assessment.

Judgment of the Court of Appeal (16 Sask. L.R. 429) affirmed, Davies C.J. dissenting.

APPEAL from a decision of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge (2) and dismissing the appellant's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Chrysler K.C. and *J. G. Banks* for the appellant.

D. H. Laird K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—After hearing the argument in this case and reading the judgments in the Court of Appeal I incline to the opinion that the order in council, when properly read in connection with the existent facts when it was made, as I gather them from the record and from the exhibits and plans submitted, did convey some "interest"—an interest in the land—to Mackenzie & Mann, (to which the present respondents have succeeded)

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1922] 16 Sask. L.R. 429; [1923] 1 W.W.R. 161. (2) [1922] 3 W.W.R. 1.

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The Chief Justice.

though the Crown did retain to itself the legal title to such lands as trustees for the Indians on whose behalf the lands were to be held. When sold one half of the proceeds of such sales were to be given to the Indians.

I am inclined to agree with the trial judge and would concur in the argument and substantive contention of the plaintiff. So I come to the conclusion, though not without some doubt, that the appeal should be allowed with costs and the judgment of the trial judge restored.

IDINGTON J.—The appellant sued respondent to recover taxes alleged to be due by virtue of assessments made upon lands which, in my opinion, were clearly vested in the Crown at the time when such assessments were made and hence void, by virtue of section 125 of the B.N.A. Act; and as they were unoccupied lands and hence not assessable against anybody under the Assessment Act of Saskatchewan, which expressly exempts the interest of the Crown in lands, including any such held in trust for the Crown, could not properly be assessed against respondent.

A fair way to test the arguments put forward by appellant would be, to see what the legal result would be of attempting to sell the lands for non-payment of the said taxes in question.

Let any one try to follow out anything, probable or possible, in the way of the results of such an attempted sale and ascertain what they would be and, I submit, he must see how futile such a proceeding would be on the facts presented herein.

Presumably it is because someone has applied that test to the facts in question and realized the absurd results such an attempt would produce, that resort has been had to this suit.

Occupants such as Smith, a lessee of the Crown, in the case of *Smith* v. *Vermilion Hills* (1), might be assessed as such and become under such an assessment debtor of the municipality and be sued as Smith was. In the facts presented herein there is nothing resembling the facts there in question.

There is simply presented by the order in council relied upon by the appellant a recital therein of a proposed sale

(1) [1914] 49 Can. S.C.R. 563.

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by the superintendent of Indian Affairs who had no authority to sell, nor did he pretend to have, and on these facts thus presented to the Minister he discarded any such proposition, as he had a perfect right to do, and proceeded to recommend something else constituting Mackenzie & Mann sales agents on the terms set forth, and that constitutes the order in council which did not give them any interest in the lands which would be taxable.

The other cases cited arising out of Alberta legislation are quite irrelevant herein.

I agree so fully with the reasoning of the learned judges in the Court of Appeal below, reaching the conclusion that the lands never were assessable and hence the assessments void, that I need not repeat same here.

I think, therefore, this appeal should be dismissed with costs.

DUFF J.—This appeal, I think, should be dismissed. I have been unable to come to the conclusion that the transaction evidenced by the order in council of the 28th September 1904, had the effect of constituting Messrs. Mackenzie & Mann either the purchasers or the holders of any beneficial interest in the lands. The fact which appears to me to be fatal to the contention of the appellants upon this point is that the price at which the lands were to be sold is not fixed, nor is there any evidence that the arrangement included any procedure for determining the price which Messrs. Mackenzie and Mann had a legal right to insist upon being followed. No doubt the arrangement was made in the full expectation that as the policy of selling the lands had been decided upon and as both the department and Messrs. Mackenzie and Mann were interested in selling them to the best advantage, no difficulty would be experienced in agreeing upon prices. I think it must be taken from the material before us that in this most important particular the parties proceeded upon reciprocal faith in one another's reasonableness. In the circumstances an agreement that the price should be such as a court of justice should regard as reasonable cannot, I think, be implied.

That being so there was not, I think, in point of law either a contract or a trust legally enforceable vesting in

Messrs. Mackenzie and Mann any right which could be described as a right or interest in the land.

I think there is nothing in the Saskatchewan Assessment Act which prevents this point being raised in answer to the appellants' action. Section 389 is in identical terms with section 65 of the Ontario Assessment Act (R.S.C. c. 193) that was in question in *Toronto Railway Co.* v. *City of Toronto* (1) where that section was held to be without effect when the assessment is a nullity by reason of the absence of jurisdiction.

Admittedly the lands assessed are, as regards the legal title, vested in the Crown, and the evidence does not indicate that they were in the occupation of the respondents except, perhaps, as agents for the department of Indian Affairs. *Prima facie*, therefore, they were not subject to assessment, and I think it was open to the respondents to show that the lands were the property of the Crown within the meaning of section 125 of the British North America Act.

ANGLIN J.—The Court of Appeal unanimously held that the respondent had no such proprietary interest in the lands in question as would render it liable to assessment under the Saskatchewan Assessment Act. The lands are vested in the Crown in right of the Dominion of Canada and, as such, are exempt from assessment under the Saskatchewan statute and by virtue of the paramount authority of section 125 of the British North America Act.

The reasons for these conclusions are so fully and so clearly stated by Mr. Justice Turgeon in his opinion, concurred in by the learned Chief Justice of Saskatchewan and Mr. Justice MacKay (Martin J.A. reached the same conclusions), that it is quite unnecessary to do more than say that I accept them as the basis of my judgment dismissing this appeal.

MIGNAULT J.—The validity of the assessment which the appellant seeks to enforce depends on the answer to the question whether the respondent or the Crown in the right of the Dominion is owner of the property assessed. The learned trial judge decided this question in favour of the

(1) [1904] A.C. 809.

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appellant, holding that the ownership of these lands was vested in the respondent. This judgment was unanimously reversed by the Court of Appeal for Saskatchewan, which was of the opinion that the Crown was the owner of the lands assessed. The appeal is from the latter judgment.

To determine this question of ownership, it is necessary to construe the order in council of the Dominion Government, dated the 28th of September, 1904. The lands assessed were part of an Indian reserve and were surrendered to the Crown by the Indians. An agreement was then made between the Government and Messrs. Mackenzie, Mann & Co., whom the respondent now represents, the terms of which—for there is no other contract—are set forth in the order in council.

This order in council is based on a memorandum from the superintendent of Indian Affairs stating that Messrs. Mackenzie, Mann & Co., representing the Canadian Northern Railway Co.,

> are purchasers from the Department of Indian Affairs of what is known as the Kamsack Townsite comprising an area of 241.94 acres in Cote's Indian Reserve in the Pelly agency, Assiniboia. An advance of ten dollars per acre has been paid by the company, and the Indians are to share equally in the proceeds of the sales of lots after the company has recouped itself $5,000 made up of the $2,419.40 advance, and the cost of laying out the townsite, dedicating streets, etc.
>
> The Minister further states that the company has applied for patent for the land in the townsite; but as owing to the circumstances that the Indians are to share with the company in the proceeds of the sales and that the sale of the townsite is necessarily incomplete, patent cannot issue therefor, it is considered that it would be well to provide for the issue of a patent to each purchaser from the company of land in the townsite on report of the sales agent.

Notwithstanding the use of the word "purchasers" in the order in council, I am of opinion that the ownership of these lands remained in the Crown. This is shown by the express statement in the order in council that

> the sale of the townsite is necessarily incomplete

and that patent cannot issue therefor. It was recognized that the Indians, for whom the Crown was trustee, were to share with the company in the proceeds of the sales to be made and it was proposed to issue a patent to each purchaser from the company of land in the townsite on report of the sales agent.

The Crown therefore remained the owner of the lands until patents were issued to purchasers from the company.

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Mr. Chrysler for the appellant referred to section 101 of the Indian Act (R.S.C. c. 81) excepting from the general exemption from taxation of Indian lands

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.

There is here no sale or agreement of sale of these lands to the company. The most that can be said is that the order in council gave selling rights as agents to Messrs. Mackenzie, Mann & Co., their remuneration to be one-half of the proceeds, after they had recouped themselves their expenses. The company had an interest in the price to be obtained on the sale of lots, but this is not an estate or interest in the lands themselves.

Mr. Chrysler also referred to the recent decision of the Judicial Committee in *City of Montreal* v. *Attorney General for Canada* (1). The question there was as to a provincial statute, amending the Montreal charter and providing that persons occupying for commercial or industrial purposes Crown buildings or lands should be taxed as if they were the actual owners, and should be held liable to pay municipal taxes. It was held that as the tenant was only liable as long as his occupancy continued, the taxation was in respect of his interest as lessee and accordingly was not a tax on Crown lands so as to be *ultra vires* under section 125 of the British North America Act.

Reference was also made to the judgment of their Lordships in *Smith* v. *Rural Municipality of Vermilion Hills* (2), where it was held that persons holding Dominion land under grazing leases could be assessed in respect of their interest in the land under such leases, "land," in the taxing statute, being defined as including any estate or interest therein.

I do not think that these cases help the appellant. The lands in question were not sold or leased to the respondent, and it has no interest or estate therein under the order in council. When it disposes of lots, the necessary patent issues to the purchaser from it but the sale would be a direct purchase by the purchaser from the Crown,

(1) [1923] A.C. 136.

(2) [1916] 2 A.C. 569.

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even though an agreement to purchase the lots might have been made between the purchaser and the company.

I do not attach any importance to the numerous letters written in connection with the assessment of these lands by Mr. Nichol, the representative of the respondent. Although these letters refer to the respondent as owner of the land, it is obvious that no such expression could give it a title or interest which it did not possess under the order in council. And there is no room here for the application of the doctrine of estoppel.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Banks & Stewart.*

Solicitors for the respondent: *Patrick, Doherty & Cumming.*

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*Oct. 22, 23.

*Dec. 21.

THE FIDELITY & CASUALTY CO. OF NEW YORK (DEFENDANT)..... APPELLANT;

AND

VICTOR MARCHAND (PLAINTIFF).....RESPONDENT.

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

Insurance—Automobile—Insured injuring own child—Action by tutor against father—Damages paid without consent of company—Right to recover—Arts. 165, 250, 1053 C.C.

The appellant company issued in favour of the respondent an automobile insurance policy against loss from liability imposed by law upon him for damages resulting from any accident caused by reason of the use of the respondent's automobile. The respondent, while backing his car from his residence to the public highway, ran over and injured his minor son. The respondent took the necessary steps to have a tutor appointed to enable an action to be brought by his son against himself for damages and was condemned to pay $5,000. The respondent paid this amount to the tutor before the delay for appealing had expired and while the appellant company was considering the advisability of so appealing. The liability of the appellant under the policy was subject to certain conditions amongst which were condition A. which provided that the assured should "at all times render to the company all co-operation and assistance within his power," and condition E. which provided that "the assured shall not * * * settle any claim * * * without the written consent of the company previously

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

COURT OF APPEAL

Before Haultain, C.J.S., Turgeon, McKay and Martin, JJ.A.

Town of Kamsack (Plaintiff) Respondent
v. Canadian Northern Town Properties Company, Limited (Defendant) Appellant

Taxation—Land Assessed to Defendants—Land Exempt as Crown Property—Construction of Contract Between Crown and Defendants' Predecessors in Interest—Defendants Not Purchasers from Crown and Not "Owners" under Town Act—Defendants' Acts as to the Land Not Affecting Clear Meaning of Agreement as to Their Interest Thereunder—Defendants' Conduct as to Assessments—Doctrine of Estoppel Not Applicable.

Under a contract between the Crown and defendants' predecessors in interest, evidenced by a certified copy of a report of the Privy Council for Canada, it was *held*, reversing judgment of Bigelow, J. [1922] 3 W.W.R. 1, that defendants had not acquired any taxable interest in certain land and were therefore not liable to plaintiff municipality for taxes assessed against them.

The land had formed part of an Indian Reservation and was surrendered in trust for disposal by the Government. Under their contract defendants paid an advance of $10 per acre and the Indians were to share equally in the proceeds of sale of the townsite lots after defendants had recouped themselves for the advance and subdivision expenses; title to be retained in the Crown and patent to issue from it direct to each purchaser from defendants. It was *held* that it was not a sale to defendants, their only right was to have their relationship of agency maintained, and therefore they had no interest which brought them within the definition of "Owners" under *The Town Act*, and the land was at the times of the assessments Crown land and as such exempt from taxation.

The use of the word "purchasers" in the document could not affect this construction, as it was accompanied by sufficient language to show the relationship really established. And evidence of certain acts of defendants in regard to portions of the land (as a lease made) could not be admitted to contradict or in any case could not be taken to affect, the clear meaning of the document; nor could defendants' conduct with regard to assessments (receiving notices from year to year, complaining of the amount before the Court of Revision, etc.) create an estoppel against them; the only result of their repudiation of ownership was to show that the property was Crown property and exempt, and plaintiff had suffered no loss by not having assessed the true owner.

[Note up with 3 C.E.D., *Estoppel*, secs. 4, 7, 27.]

Appeal by defendant from judgment of Bigelow, J. ([1922] 3 W.W.R. 1) in an action to recover taxes. Appeal allowed with costs.

D. H. Loird, K.C., for defendant, appellant.

G. H. Barr, K.C., and *J. G. Banks*, for plaintiff, respondent.

December 20, 1922.

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TOWN OF KAMSACK
v.
C.N. TOWN PROPERTIES CO., LTD.

Appeal.

Turgeon, J.A.

HAULTAIN, C.J.S. concurred with Turgeon, J.A.

TURGEON, J.A.—In this appeal we have to determine whether the appellants are liable to the respondent municipality for taxes assessed against them for the years 1915, 1916, 1917, 1918, 1919 and 1920, in respect of certain lands situated within the town. The lands in question comprised originally an area of 241.94 acres and formed part of an Indian reservation known as the Cote Reserve. On June 21, 1904, the Indians surrendered these lands to the Dominion Government in trust to be disposed of by the Government to such person or persons and upon such terms as the Government might deem most conducive to the welfare of the Indians. Subsequently a contract affecting these lands was entered into between the Superintendent General of Indian Affairs, acting for the Government, and Mackenzie, Mann & Co., the predecessors in interest of the appellants, and the first point to be determined is whether the appellants can be said, by virtue of this contract, to have acquired a taxable interest in the lands. The respondents have assessed the appellants as "owners" of the lands. *The Town Act*, R.S.S., 1920, ch. 87, sec. 2, clause 16, defines "owner" to include any person who has any right, title, estate or interest in land other than that of a mere occupant.

The only evidence before us of the nature and the terms of the contract consists of a certified copy of a report of the Privy Council for Canada, approved by his Excellency the Governor-General on September 28, 1904. It will be necessary to cite this report in full:

> On a memorandum dated 14th September, 1904, from the Superintendent General of Indian Affairs stating that Messrs. Mackenzie, Mann and Company representing the Canadian Northern Railway Company, are purchasers from the Department of Indian Affairs of what is known as the Kamsack Townsite comprising an area of 241.94 acres, in Cote's Indian Reserve in the Pelly Agency, Assiniboia. An advance of ten dollars per acre has been paid by the Company and the Indians are to share equally in the proceeds of the sales of the lots, after the Company has recouped itself $5,000.00 made up of the $2,419.40 advance, and the cost of laying out the townsite, dedicating streets, etc.
>
> The Minister further states that the Company has applied for patent for the land in the townsite; but as owing to the circumstances that the Indians are to share with the Company in the proceeds of the sales and that the sale of the townsite is necessarily incomplete, patent cannot issue therefor, it is considered that it would be well to provide for the issue of a patent to each purchaser from the Company of land in the townsite on report of the sales agent.
>
> The Minister recommends that the above arrangement be sanctioned so that the plan of subdivision of the townsite may be placed of record in the local Land Titles Office.
>
> The Committee submit the same for approval.
>
> [Sgd.] RUDOLPH BOUDREAU,
> Clerk of the Privy Council.

The appellants contend that the contract in question conferred no "right, title, estate or interest," in the land upon Mackenzie, Mann & Co. or upon themselves. They say that it had no other effect than to constitute them the agents of the Government for the sale of these lands to third parties. The respondents contend that the contract constituted a sale of the land from the Government to the appellants through Mackenzie, Mann & Co., and that the appellants have therefore a purchaser's interest, which is a taxable interest, in the lands. The learned trial Judge ([1922] 3 W.W.R. 1) says as to this: "I am of opinion that the document shows a sale." Further in his judgment he says at p. 6:

> The evidence shows that the defendant was assessed as if it owned all the land. I am of the opinion that the interest of the defendant is only a half interest, the other one-half being held by the Crown in trust for the Indians.

These two statements appear to me to be somewhat inconsistent, but in the result the trial Judge finds that the appellants have a taxable interest as purchasers. I have reached the conclusion, and I state it with all respect, that this finding is erroneous, and that the appellants have no interest in the lands which brings them within the definition of "owner" under the provisions of *The Town Act*, and that these lands were, at the time of the various annual assessments, Crown lands, and exempt, as such, from taxation.

An analysis of the aforesaid report of the Privy Council would appear to bring out the following features:

(1) Mackenzie, Mann & Co. are first referred to as "purchasers";

(2) It is stated that the company has "advanced" $2,419.40;

(3) The company is to bear in the first instance the cost of laying out the townsite and dedicating the streets;

(4) The "advance" of $2,419.40 and the cost referred to in connection with the townsite are to be refunded to the company by payment to it of $5,000 out of the proceeds first received from the sale of lots to third parties;

(5) After the reimbursement of this $5,000 the company and the Indians (apparently through the Government) are to share equally in the proceeds of sales;

(6) After making the contract with the Superintendent General of Indian Affairs the company applied to have the patent in the townsite issued to them; the evident intention being that the company would then issue title directly to each purchaser of the lots;

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(7) The Government, out of solicitude for the interest of the Indians, refused this application and decided to retain title in the Crown, and to issue the patent in each case directly to the purchaser.

A perusal of this analysis convinces me that the elements of a sale from the Government to the company do not exist. There is no purchase-price fixed between them, the intention clearly is that the title to the various lots is to be acquired by third parties, and that the company is never to acquire in respect of the lands or of any part of them the right to hold them, or the right to dispose of them otherwise than upon terms requiring an accounting to the Government on behalf of the Indians. For the services rendered, the company are to receive one-half of the proceeds of sales effected by them.

It cannot be contended, I think, that the company would have the right to sacrifice any of this land or to do anything other than to exercise, in the interest of the Government for the Indians, the diligence which an agent is required to exercise on behalf of his principal. Of course a party may be the agent of his partner, and it is argued that, in reality, such a partnership does exist in this case between the Government and the company in respect of the land itself. I cannot agree to this. I cannot read into this contract any interest in land accruing to the company. I think the only right they acquired against the Crown was the right to have their relationship of agency maintained, with damages to look to in the case of an unwarranted breach. In so far as the land itself is concerned, this contract does not make them "owners" within the meaning of *The Town Act*.

The use of the word "purchasers" as applied to the company in the report of the council is referred to as indicating the intention to effectuate a sale. I do not think any importance can be attached to the use of this word, accompanied as it is by sufficient language to show the relationship really established. It is laid down in *7 Halsbury*, at p. 512, that

> greater regard is paid to the intention of the parties as appearing from the instrument when construed as a whole than to any particular words they may have used to express their intention.

It was also urged on behalf of the respondents at the trial, and on the argument before us, that the acts of the appellants in regard to portions of this land were such as to show that they considered themselves in reality the purchasers and owners of the land. In support of this contention a written lease was put in evidence, granted by the appellants, who are described in the instrument as "lessors," to one George Moore.

described as "lessee," and covering 100 acres of this land. This lease is dated March 20, 1918, and is for a term of five years at a rental of $100 per year. The circumstances which will justify the admission of evidence of this nature and the effect of such evidence when admissible is summed up in the following paragraph in 10 *Halsbury*, at p. 451, which I think, correctly embodies the rules laid down in *Doe d. Pearson v. Rics*, 8 Bing. 178, 1 M. & Scott 259, and *Chapman v. Bluck*, 4 Bingham (N.C.) 187, 5 Scott 513:

> If, after other methods of interpretation have been exhausted, there remains a doubt as to the effect of the instrument, it is permissible to give evidence of the acts done under it as a guide to the intention of the parties; in particular, of acts done shortly after the date of the instrument. But evidence of the acts done cannot be admitted to contradict the clear meaning of the instrument.

Accepting, as I do, and as the trial Judge did, the report of the Privy Council above set out as an embodiment of the essential terms of the contract between the Government and the company, I do not think that the necessary condition of "other methods of interpretation having been exhausted and a doubt still remaining" exists to render this instrument admissible in evidence. But in any event it appears to be of no avail except to contradict the clear meaning of the report of the council by placing in evidence acts done by the parties, the very thing which must not be done according to the above rule. The learned trial Judge says in his judgment, at p. 4:

> The main question in this case [that is, the liability of the land to taxation] depends on the construction to be placed on this document [the report of the Privy Council]—the plaintiff claiming it shows a sale of the land, and the defendant claiming that the defendant is only a sales agent.

In my opinion he was not driven by any doubt in the language of the report to admit and consider the evidence in connection with the lease.

If the act of the appellants in granting this lease is to be taken into consideration at all, I can only say that their authority to grant it does not appear to be founded upon anything contained in the report of the Council, unless it can be said that their position as sales agents entitled them to assume that, in certain instances, they might arrange for revenue to be derived from portions of the land by lease where possibly none could be derived by sale. In any case the mere granting of this lease, standing as it does not by itself, but side by side with the other and better evidence of the true nature of the rights of the appellants under their contract with the Dominion Government, cannot be held to prove that they had a taxable interest in the lands as "owners" under *The Town Act*.

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The question of estoppel has also been raised. The appellants received notices of assessment from year to year, and in some instances appeared before the Court of Revision to complain of the amount of the assessment, and in some other circumstances, as well, acted as if they really were the taxable "owners" of the property. Notwithstanding this, I do not think that the doctrine of estoppel can be applied against them here. If land is the property of A. and properly taxable against him, and B. acts in such a manner as to authorize the municipality to assume that the land is his and stands by and allows it to be assessed to him and accepts the notices of assessment as binding upon him as owner, in all probability he could not, after the time had gone by for making A. liable, come in and repudiate his ownership, because the municipality would thereby suffer a specific loss, A. not being assessed in due time. But in this case the only result of the appellants' repudiation of ownership is to show that the property is Crown property and exempt from all taxation during the whole period of years, and the respondent municipality has suffered no loss by not having assessed the true owner.

I would allow the appeal with costs. The judgment in the Court below should be set aside and the respondents' action dismissed with costs.

McKay, J.A.

McKAY, J.A. concurred with Turgeon, J.A.

Martin, J.A.

MARTIN, J.A.—This is an action to recover taxes and penalties for non-payment thereof, amounting in all to $2,668.55, alleged to be due by the defendants on lands within the townsite of the town of Kamsack. By way of defence the defendants plead: (1) That the defendants are not and never have been the owners of the lands in question, and have never had any right, title, estate or interest therein; (2) That the lands belong to His Majesty in the right of the Dominion of Canada, and, as such, are exempt from all assessment and taxation; (3) That the assessor of the plaintiff did not prepare or complete an assessment roll for any of the years 1915 to 1920, inclusive, which are the years for which payment of taxes is claimed; (4) That the council of the plaintiff did not appoint two of its members to check over the assessment roll in any of the said years; (5) That the council did not pass any by-law for assessing and levying any rate or rates in any of said years.

The learned trial Judge gave judgment for the plaintiff in the amount of $2,605.26 and costs, holding that the defendants had purchased the lands from the Dominion of Canada and had a half interest therein, and that, in so far as the irregularities in the assessment were concerned, they were covered

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by the curative sections of *The Town Act*, R.S.S., 1920, ch. 87, namely, secs. 411 and 441. From this judgment the defendants appeal.

The main question to be determined in the action is the construction to be given to an order in council of the Government of the Dominion of Canada, P.C., 1841, dated September 28, 1904. It was admitted at the trial that the lands in question are included in the area covered by the order in council, and abstracts of all the lands referred to in the statement of claim were put in evidence and show that at a date after the taxes were levied the title was still in the Crown. The land was originally part of the Cote Indian Reserve, and on June 21, 1904, the chief and principal men of the Cote band of Indians, acting on behalf of the whole band, released, surrendered, and quit claimed the lands in question, amounting in all to approximately 240 acres, to His Majesty the King,

> to have and to hold the same unto His Majesty the King, his heirs and successors forever in trust to dispose of the same to such person or persons and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

On September 28, 1904, the following report of a Committee of the Privy Council was approved by his Excellency the Governor General: [See *ante*, p. 162].

This order in council constitutes the contract between the Government of the Dominion of Canada and the Canadian Northern Railway Company and their successors in interest, the defendants in this action.

The defendants contend that "no right, title, estate or interest" in the land was conferred upon them, and that the order in council has no other effect than to constitute the Canadian Northern Railway the agents for the sale of the lands in question to third parties. The plaintiff contends that a sale was made of the lands by the Government of the Dominion of Canada, acting on behalf of the Indians, to the Canadian Northern Railway through Mackenzie, Mann & Company, and that, as the defendants are the successors in interest to the Canadian Northern Railway, they have the interest of a purchaser in the lands, which is subject to taxation.

"Owner" is defined in *The Town Act*, sec. 2, subsec. 16, as follows: "'Owner' includes any person who has any right, title, estate or interest other than that of a mere occupant."

If the land belongs to the Crown, it is not assessable (*The B. N.A. Act*, sec. 126; *The Town Act*, R.S.S., 1920, ch. 87, sec. 390; *The Indian Act*, R.S.C., 1906. ch. 81, sec. 101). No

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action of the plaintiff in assessing the land would make a valid and binding assessment if the land were not assessable, and this notwithstanding the provisions of secs. 411 and 441 of *The Town Act* (*North Battleford v. Brehaut*, 13 Sask. L.R. 202, [1920] 1 W.W.R. 1053; *City of London v. Watt & Sons*, 22 S.C.R. 300; *Toronto Ry. v. Toronto Corpn.* [1904] A.C. 809, 73 L.J.P.C. 120; *City of Victoria v. Bishop of Vancouver Island* [1921] 2 A.C. 384, 90 L.J.P.C. 213, [1921] 3 W.W.R. 214).

On the other hand, if the defendants have any "right, title, estate or interest" in the land, that interest is subject to taxation notwithstanding the fact that the title of the land is still in the Crown. (*Smith v. R.M. of Vermilion Hills*, 49 S.C.R. 563, 6 W.W.R. 841, affirmed [1916] 2 A.C. 569, 86 L.J.P.C. 36, [1917] 1 W.W.R. 108; *Calgary and Edmonton Land Co. v. Atty.-Gen. for Alberta*, 45 S.C.R. 170; *G.T.P. Ry. v. City of Calgary*, 55 S.C.R. 103, [1917] 3 W.W.R. 259, 21 Can. Ry. Cas. 200; *Southern Alberta Land Co. v. R.M. of McLean*, 53 S.C.R. 151, 10 W.W.R. 879.

It is contended that the word "purchasers" as used in the order in council of September 28, 1904, should be given its ordinary meaning, and that for this reason it should be held that a sale was made of the lands covered by the order in council. The word "purchasers" occurs in the order in council in the following statement:

> In a memorandum dated the 14th of September, 1904, from the Superintendent General of Indian Affairs stating that Mackenzie, Mann & Company representing the Canadian Northern Railway Company are purchasers from the Department of Indian Affairs.

It should be pointed out that the Superintendent General of Indian Affairs, under the provisions of *The Indian Act*, has no power to make sale of such lands; the terms of the surrender of June 21, 1904, also clearly state that the Crown could dispose of the lands to such person or persons and upon such terms as the *Government of the Dominion of Canada* may deem most conducive to the welfare of the Indians. The word "purchasers," therefore, was not properly used in the report of the Superintendent General. In my opinion, however, apart altogether from the above consideration, the word is entirely inconsistent with other provisions of the document.

In *Blackstone*, vol. 2, sec. 446, the learned author says with respect to a sale of property:

> Sale or exchange is a transmutation of property from one man to another, in consideration of some price or recompense in value; for there is no sale without a recompense; there must be a *quid pro quo*.

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Bouvier, vol. 3, p. 277, states:

> In its more limited sense, purchase is applied only to such acquisitions of lands as are obtained by way of bargain and sale for money or some other valuable consideration.

Considering the provisions of the whole document, it appears to me that the word "purchasers" is not used in its ordinary sense. This conclusion, I think, is borne out by the fact that further on in the order in council the statement is made that "the sale is necessarily incomplete," and the phrase "sales agent" is used. It was argued that the words "sales agent" do not refer to the Canadian Northern Railway Company, but to some third party. As to this I can only say there is no evidence of the employment of any third party as sales agent, and a perusal of the terms of the document justifies the conclusion that the Canadian Northern Railway Company were to lay out the townsite and look after the sales of property.

Price is a necessary ingredient of purchase. What is the price to be paid by the so-called "purchasers" under the terms of the order in council? There is no price fixed. The Canadian Northern Railway paid the Superintendent General of Indian Affairs "an advance of ten dollars per acre," but the railway company was to be recouped out of the proceeds of the sale of lots in the amount of $5,000, which included the advance of $2,419.40 and the cost of laying out the townsite. After the amount of $5,000 was recouped, the proceeds of sales were to be equally divided, one-half going to the Canadian Northern Railway Company and the other half to the Government of the Dominion of Canada for the benefit of the Indians. The price of the lands could not be arrived at till all the lots or parcels were sold, and when that time arrived the liability of the Canadian Northern Railway Company or their successors in interest, the defendants in this action, would be, to account for the proceeds of sale.

The order in council also states: "The Minister further states that the Company has applied for a patent to the land in the townsite."

While it is difficult to understand a request being made for the issue of a patent to the railway company under the circumstances, still the object may have been to facilitate the handling of the lands, and, in any event, the patent did not issue for the reason stated as follows: "That the Indians are to share in the proceeds of the sales and that the sale of the townsite is necessarily incomplete." The patent was withheld in order to protect the Indians, for whom the Government of Canada are

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trustees, and it was deemed proper that patents should issue for the various parcels as they were sold, and on the report of the "sales agent."

After the fullest consideration of all the provisions of the order in council, the conclusion is forced upon me that the word "purchasers" was not intended to be used in its ordinary sense, and that such a construction should be placed upon the word as will bring it into harmony with the intention as it appears from the whole instrument.

In *Halsbury*, vol. 7, p. 512, the learned author says:

> (2) Where the context itself shows that words were not intended to be used in their ordinary sense, such words are construed in harmony with the context, and greater regard is paid to the intention of the parties as appearing from the instrument when construed as a whole than to any particular words they may have used to express their intention.

What interest in the land passed to the Canadian Northern Railway Company under the terms of the order in council? The legal estate remains in the Crown, where it is held in trust for the Indians pursuant to the provisions of *The Indian Act* and the terms of surrender. What interest in the land has the railway company and its successors in interest, the defendants in this action, which could be enforced in a Court of Equity? I do not think they have any. Supposing the Government of Canada—after the passing of the order in council in question and after the railway company had laid out the townsite and sold some of the lands in question—had actually sold the property covered by the order in council to some third party, could the railway company, or the defendants, succeed in an action for specific performance? I think not. The only remedy under such a state of facts would be an action for damages. There was, therefore, no sale of the lands or of any interest in the lands; the Canadian Northern Railway were to lay out the townsite, sell the lots or parcels of land, recoup themselves first for the advance (which was simply an earnest of good faith, and for the protection of the Indians) amounting to $2,419.40, and the cost of laying out the townsite, and the proceeds of the sales after such recoupment were to be divided equally; one-half to the railway company and one-half to the Government of Canada for the benefit of the Indians. All that the railway company or the defendants have obtained under the terms of the contract is an interest in the moneys, the proceeds of the sales of the lands. They had no interest in the lands. An interest in money the proceeds of the sale of lands is not an interest in lands.

In *Stuart v. Mott*, 23 S.C.R. 384, the plaintiff brought an action for the performance of an alleged verbal agreement on

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the part of the defendant to give him one-eighth of an interest in a gold mine; but he failed to recover, as the Court held that the alleged agreement was within the provisions of *The Statute of Frauds*. At the trial, however, the defendant admitted that he had agreed to give the plaintiff one-eighth of his interest in the proceeds of the mine when sold, and as the mine was afterwards sold the plaintiff brought another action for payment of such share of the proceeds. At p. 388, Sir Henry Strong, C.J. says:

> Then it was said that *The Statute of Frauds* was a defence. The answer to this is that the agreement which is now sought to be enforced was not, as in the former case, one conferring an interest in land but exclusively relating to an interest in money; it is true this money is to arise from the sale of land or of a mining interest, but that on authority can, I conceive, make no difference after the land or money interest has been actually sold. It is not sought to enforce any trust or contract to sell the land; that would have been a different case; here the sale has taken place and the only question is as to a share of the price received.

The defendants are not the owners of the land in question; they at no time have had any "right, title, estate or interest" which could be assessed; the land belongs to His Majesty in the right of the Dominion of Canada, and, as such, is exempt from all assessment or taxation.

There may be no doubt that the Canadian Northern Railway Company, and later the defendants, thought that they were the purchasers of the townsite of Kamsack. Through a course of dealing spread over many years the defendants acted as if they were the owners of the townsite, or at least had a taxable interest therein. Appeals were taken against assessment to the Court of Revision from year to year, and the grounds of appeal stated were generally that the assessment was too high; in some of the notices of appeal the statement is made that the property is owned by the defendants; in fact the only notice of appeal where the ground is taken that the property is not owned by the defendants is that given in the year 1920. Large sums of money were paid by the defendants as taxes from time to time, and for a time at least, from the year 1915 onwards, the defendants appeared willing to pay one-half of the taxes assessed against the lands.

On March 20, 1918, the defendants as "lessors" made a lease of the north-east quarter of sec. 34, tp. 29, rge. 32, west of the first meridian, a part of the townsite and containing 100 acres more or less, to one George Moore, for a period of five years, at an annual rental of $100 per annum. The lease contains a provision that the lessors might dispose of any part or all of the land at any time, and that in the case of a sale of the land or any part thereof the lessee would vacate the same on

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written notice within sixty days. The leasing of land is scarcely consistent with the lack of any interest therein, and yet the making of the lease would not operate to make the defendants the purchasers of the land if, in fact, they were not the purchasers, and there is no evidence as to whether or not the Department of Indian Affairs was consulted as to the making of the lease.

The conduct of the defendants is only important if the doctrine of estoppel can be applied to prevent the defendants from now saying that the lands are not liable to taxation. I am of the opinion that estoppel cannot be successfully raised against the defendants in this case. Had the defendants by their words and conduct induced the plaintiff to believe that the defendants were assessable for the lands in question, when, in fact, some other person should have been assessed who was in law assessable for the property, the defendants' course of conduct would have been important in determining whether or not the doctrine of estoppel should be applied. But this is not the case here; the Crown could not be assessed, and there was no person or corporation other than the defendants from whom the plaintiff could even attempt to assess. The conduct of the defendants can, therefore, have no effect on the question of the liability to pay the taxes claimed. Having determined that the defendants acquired no interest in the lands under the order in council, and that the lands are, therefore, not assessable under the provisions of *The Town Act*, I do not think it necessary to deal with the other questions raised on the appeal, including the irregularities complained of with respect to the assessments, and the effect of the curative sections of *The Town Act*, namely, 411 and 441.

The appeal should be allowed with costs. The judgment in the Court below should be set aside and the plaintiff's action dismissed with costs.

caused by its failure to perform its duty was not limited by cl. 5 in the written agreement.

By the time the tank float signal went in, there was already some damage. The defendant is liable for some of the damage caused to the plaintiff's premises. It was agreed that damage assessment would not be dealt with at this time. The plaintiff will have its costs to date.

MANITOBA QUEEN'S BENCH

Wison J.

Provincial Municipal Assessor v. Rural Municipality of Harrison

Taxation — Liability for taxes of lessees of Indian lands and lands municipally owned.

While Indian reserve lands, title to which is vested in Her Majesty in right of Canada, are not liable to taxation as such, the interest of a lessee of such lands is subject to assessment and taxation. The same principle extends to lands owned by a municipality but occupied by mobile homes or house trailers: *Smith v. Vermillion Hills*, [1916] 2 A.C. 569, [1917] 1 W.W.R. 108, 30 D.L.R. 83; *Crosskill v. Sarnia Ranching Co.* (1901), 5 Terr. L.R. 181; *Spy Hill v. Bradshaw* (1912), 2 W.W.R. 399, 7 D.L.R. 941 (Sask.); *Calgary & Edmonton Land Co. v. Attorney General of Alberta* (1911), 45 S.C.R. 170 applied.

[Note up with 20 C.E.D. (2nd ed.) *Taxation*, ss. 54, 56.]

B. F. Squair, for applicant.

A. F. James, Q.C., for respondent.

30th March 1971. WILSON J.:—Applicant challenges the action of the respondent Municipality in according certain tax exemptions. These relate to two categories of lands, the first being portions of an Indian reserve lying wholly within the respondent Municipaity, and the second being lands owned by the Municipality itself. In each case, however, the concerned parcels are occupied by lessees for purposes unrelated to the owner, otherwise than by way of the income springing from the lease.

Exhibits 2, 3 and 4 were filed as typical of disposition of lands on the Rolling River Indian Reserve. The tenants, 67 in number and none of them an Indian, in each case occupy land under a formal lease from Her Majesty, presumably under the authority of the Indian Act, R.S.C. 1952, c. 149, s. 58 [am. 1956, c. 40, s. 14]. It could have been done by way of "sur-

render" under s. 37 of the Act: and see *Corpn. of Surrey et al. v. Peace Arch Enterprises Ltd. et al.* (1970), 74 W.W.R. 380 (B.C. C.A.). In any event, the council of the band are in complete agreement with the creation and existence of such leases, the tenants occupying the concerned lands for grazing or farming.

Respondent apparently adopted the practice of addressing to each lessee a demand for tax, Ex. 5, reading in part as follows:

"The Department of Indian Affairs states, quote 'The Indian Affairs Branch will not be responsible for the collection of taxes.' Each lease form of the lessee contains the following clause 'that the lessee will pay and discharge all rates, taxes, duties and assessments whatsoever now charged or to be charged upon the said demised premises or upon the lessee or occupier in respect thereof or payable by either in respect thereof.'

"The Department of Municipal Affairs of the Province of Manitoba, rules that the *lands* of the Indian Reserve are exempt from all taxation, but that the 'Right, Interest, or Estate in such land' *is liable to taxation.* In other words, we are not trying to tax the land(s) but only the *interest* in it, as allowed under the Act. The interpretation of this is that we *must* 'tax', as we are doing."

While not in the language cited, each of the leases before me contains a clause whereby the lessee agrees to pay taxes. By s. 86(1) of the Indian Act, subject to exceptions not here applicable, exempt from taxation are:

"(*a*) the interest of an Indian or a band in reserve or surrendered lands, and

"(*b*) the personal property of an Indian or band situated on a reserve,

"and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property;"

Title to the reserve is in Her Majesty in right of Canada and, of course, by s. 125 of the B.N.A. Act, 1867, "No Lands or Property belonging to *Canada* or any Province shall be liable to Taxation." (The italics are mine.) Section 2(2)(*b*) of The Municipal Assessment Act, R.S.M. 1970, c. M226, exempts from municipal taxation "Lands held in trust for any tribe or

body of Indians". Nevertheless, and no doubt relying upon the opinion exhibited to the taxpayer with Ex. 5, supra, the Municipality assessed tax, but, owing to the storm of protest that followed, the lands described in the leases in question were transferred to the "Exempt" section of the tax roll.

So also were certain lands, owned by the Municipality itself, but occupied by mobile homes — "house trailers" — some on and some off the wheels. The owners having been assessed for tax, this, too, was protested, the tax payers in this instance pointing to s. 2(3)(a) of The Municipal Assessment Act, which exempts from taxation "Lands belonging to, or held in trust for, the municipality the council of which levies the taxation".

Broadly, the argument turns upon the construction of the taxing statute to determine whether the interest of the Crown is being taxed, or the interest of a private person, to borrow from Laskin J., in his Canadian Constitutional Law, 3rd ed., p. 768. Earlier, at p. 767, he remarks that the tax immunity given by s. 125 of the B.N.A. Act to "lands or property belonging to Canada" is an immunity in favour of lands vested in the Crown, and that s. 125 does not operate to confer immunity upon private persons who have some interest in Crown land. By analogy, the same may be said of the immunity created by s. 2 of The Municipal Assessment Act, in favour of municipal lands.

Applicable, too, are the following provisions of The Municipal Assessment Act:

By s. 7(1):

"7. (1) The right, interest, or estate, of an occupier in Crown land or land exempted from taxation under this or any other Act, whether used by the occupier in an official capacity or as a servant or otherwise, is liable to assessment and taxation from the date of the occupancy or claim of the occupier, who may be assessed therefor."

and s. 17(1):

"17. (1) Subject to subsection (2) of section 7 (not here applicable) in the assessment of the right, interest, or estate, of an occupier in Crown land or in land exempted from taxation under this Act or any other Act, the occupier shall be deemed to be the owner of the right, interest, or estate, and the assessor shall assess the right, interest, or estate to him; and it is not necessary to set forth correctly or at all the particular nature of the right, interest, or estate so assessed."

Section 1(g):

"1. In this Act . . .

"(g) 'land' means land, messuages, tenements, and hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein and whether legal or equitable . . . and includes . . .

"(ii) . . . the right, interest, or estate, of an occupier to or in Crown or tax exempted land, or in any building thereon whether or not it is affixed to the land; but excepting also the right or interest of an employee of the government in Crown lands that he is occupying as his residence . . .

"(i) 'occupier' as used with relation to Crown lands includes lessee, licensee, permittee, purchaser, homesteader, preemption entrant, and squatter and a person claiming through or under any of them; and as used with relation to other land exempt from taxation, includes any such person and also the employee of any of them who is in occupation of the lands;"

These definitions are not signifiantly different from those before the Privy Council in *Smith v. Vermillion Hills*, [1916] 2 A.C. 569, [1917] 1 W.W.R. 108, 30 D.L.R. 83, of which, at p. 574, Viscount Haldane said they:

"make it easy to interpret the expression 'land' as excluding any interest which still remains in the Crown. Their Lordships agree with this reasoning. They are of opinion that, although the appellant is sought to be taxed in respect of his occupation of land the fee of which is in the Crown, the operation of the statute imposing the tax is limited to the appellant's own interest. It appears to them that not only can the statutes be read as meaning this, and no more than this, when they use the word 'land,' but that they ought to be so read in order to make them consistent with s. 125 of the British North America Act, 1867, and not a nullity."

Starting with *Crosskill v. Sarnia Ranching Co.* (1901), 5 Terr. L.R. 181, the courts have consistently distinguished between taxation of an owner, or the interest of an owner, of lands, and the beneficial enjoyment of the use of such lands by an occupier, so that the matter of such taxation is "a drafting problem rather than a constitutional issue", to borrow again from Laskin J., op. cit., at p. 770. In every such case the liability for tax is personal, a debt owed by the tax payer to the taxing authority enforceable by suit or distress under The Municipal Act: *Re Spring Creek School District* (1904), 7 Terr. L.R. 259.

Indeed, the term "occupier" takes in the interest of a mere squatter, an interest in fact taxed in *Spy Hill v. Bradshaw* (1912), 2 W.W.R. 399, 7 D.L.R. 941 (Sask.) where, although in different language, the effect of the Saskatchewan legislation was, I think, the same.

The question reached the Supreme Court of Canada with *Calgary & Edmonton Land Co. v. Attorney General of Alberta* (1911), 45 S.C.R. 170, when the Court were at one in dismissing an appeal against the taxation of lands occupied by the appellant, but for which patent from the Crown had not yet issued. Davies J. said at p. 179, "The interest of the Crown whatever it might have been could not be taxed, but the beneficial interest of the appellants certainly was not exempted under or by virtue of . . . " (s. 125). Idington J., at p. 185, "the estate or interest of the appellants is all that is touched and all that becomes forfeitable or forfeited if not redeemed"; and Anglin J., at p. 191,

" . . . it is within the power of a province to authorize the taxation of the beneficial or equitable interest of a subject in lands of which the Crown in right of the Dominion holds the legal title and in which it has some beneficial interest as well. I think that full effect is given to section 125 of the 'British North America Act, 1867,' by holding that it precludes the taxation of whatever interest the Crown holds in any land or property and that so long as such interest subsists, the taxation of any other interest in the land and any sale or other disposition made of it to satisfy unpaid taxes, while valid, is always subject to the rights of the Crown which remain unaffected thereby."

This last case was approved by the Privy Council in *Smith v. Vermillion Hills,* supra, where the tax payer was the lessee of two parcels of Crown lands, using them for grazing. The principle there affirmed — that the tax is not one imposed on the land itself, which would conflict with s. 125, but rather it is a tax imposed only on the "interest" of the tenant of such lands — was applied by their Lordships in *Montreal v. Attorney General of Canada et al.,* [1923] A.C. 136, 70 D.L.R. 248, and in *Bennett & White (Calgary) Ltd. v. Sugar City,* [1951] A.C. 786, 3 W.W.R. (N.S.) 111, [1951] C.T.C. 219, [1951] 4 D.L.R. 129.

As to the basis for assessment, in *Montreal* Lord Parmoor said, p. 143:

"Their Lordships in this respect agree with the reasons given in the judgment of Meredith C.J.O. in *Re Cochrane and*

Cowan (1921), 50 O.L.R. 169, 173, 64 D.L.R. 209 (C.A.). He said: 'I see no reason why a Provincial Legislature may not provide that, in assessing the interest of an occupant of Crown lands or of any other person in them, it shall be assessed according to the actual value of the land, or in other words that the taxes payable by him shall be based on that value; the manifest injustice that would otherwise exist, at all events in the case of an occupant or tenant, is obvious. He would be assessed only for the value of his interest, which might be little or nothing, while his neighbour, who is an occupant or tenant of property owned by a private person, would be taxed on the actual value of the land.' "

In British Columbia the basis is set out with some particularity in The Municipal Act, R.S.B.C. 1960, c. 255, and see *Re Lynn Terminals Ltd.'s Appeal* (1963), 44 W.W.R. 604, 40 D.L.R. (2d) 925 (B.C.).

With *Halifax v. Fairbanks*, [1928] A.C. 117, [1927] 3 W.W.R. 493, [1927] 4 D.L.R. 945, the Privy Council rejected the plea that such taxation offended against s. 92(2) of the B.N.A. Act as being an indirect tax, falling upon the lessor in the way of a reduction in the rental income from the land. Of that argument, Viscount Cave L.C. said at p. 124:

"Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

And (at p. 126) while it may be true to say as to any impost that the taxpayer would very probably seek to pass it on to others, it may none the less be a tax on property, and so remain within the category of direct taxes. "It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity".

So the possibility that rentals might be reduced did not defeat the tax in *Vancouver v. Chow Chee*, [1942] 1 W.W.R. 72, 57 B.C.R. 104 (C.A.), where the taxpayer was a truck farmer raising his produce on land leased from an Indian reserve, a case on all fours with that before me. Of course, if in fact what occurs is clearly an attempt to tax reserve land as such, the tax must fail: *Kamsack v. Canadian Northern Town Properties Co.*, [1924] S.C.R. 80, [1924] 4 D.L.R. 824, but that is not the case before me.

And see *North West Lumber Co. v. Lockerbie*, [1926] S.C.R. 155, [1926] 1 D.L.R. 20; *Attorney General of Canada et al. v. Vancouver*, [1944] S.C.R. 23, [1944] 1 D.L.R. 497; *Phillips and Taylor v. Sault Ste. Marie*, [1954] S.C.R. 404, [1954] 3 D.L.R. 81; and *Re Halifax City Charter* (1966), 53 M.P.R. 22 (N.S.). In *Phillips*, where the taxpayer was the employee/occupant of premises owned by the Crown, Taschereau J. rejected the argument that the tax was indirect because a tax so levied would be "passed by the Crown servants, from whom it is demanded, to the Crown".

And so there will be a declaration that the interest of the several lessees in the subject lands is liable to assessment and taxation, to be removed from the "exempt" column and placed in the "taxable" column of the assessment and tax rolls. The order of the Court of Revision granting the exemption so denied is set aside. Applicant is entitled to costs.

ALBERTA SUPREME COURT

[APPELLATE DIVISION]

Cairns, Allen and Clement JJ.A.

Hundt v. The Queen

Criminal law — Negative averments in information — Onus of proof — The Criminal Code, 1953-54, c. 51, s. 702.

An information charged an offence of unlawfully supplying contact lenses contrary to s. 36, amended by 1969, c. 84, s. 5, of The Ophthalmic Dispensers Act, 1965 (Alta.), c. 66, and set out four negative averments, namely, that the accused, "not being a member of the Alberta Guild of Ophthalmic Dispensers. and not being a holder of a Certificate of Competency in dispensing contact lenses and not supplied in accordance with a complete prescription of and subject to the directions of and under the supervision of an Ophthalmologist or Optometrist."

Held that it was unnecessary for the Crown to set out in the charge anything other than that the accused unlawfully supplied contact

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Ontario Divisional Court, Falconbridge, C.J.K.B., and Riddell, and Lennox, JJ. November 20, 1912.

1. TAXES (§ III F—145)—TAX SALE OF INDIAN LANDS—LIMITATION OF TIME FOR ATTACKING—INDIAN ACT (CAN.).

The limitation as to time, contained in the Indian Act, R.S.C. 1906, ch. 81, sec. 59, during which the original purchaser of Indian lands may claim the assistance of the courts in having a tax sale of his lands declared invalid, is applicable only to a case where the Superintendent-General has actively intervened between the tax purchaser and the original purchaser, by taking under consideration the tax deed, and approving it as a valid transfer by endorsement thereon; but there is no such limit of time in attacking an illegal tax sale and deed, if no action in respect of the tax deed by way of approval has been taken by the Superintendent-General.

2. TAXES (§ III F—145)—TAX SALE—LEGAL IMPOST OF TAXES ESSENTIAL —ASSESSMENT ACT (ONT.).

The statutory protection afforded by sec. 209, Assessment Act (Ont.), to the effect that where lands are sold for arrears of taxes, and the treasurer has given a deed for the same, that deed shall be to all intents and purposes valid and binding, if the same has not been questioned before some court of competent jurisdiction by some person interested, within two years from the time of sale, does not apply if there has been no legal impost of taxes.

[Sec. 209, Assessment Act, R.S.O. 1897, ch. 224, consolidated by 4 Edw. VII. (Ont.) ch. 23, referred to.]

3. TAXES (§ III F—145)—TAX SALE—THREE YEARS' ARREARS PRECEDING FURNISHING OF LIST UNDER SEC. 152, ASSESSMENT ACT (ONT.).

The provision of sec. 209, Assessment Act (Ont.), to the effect that where lands are sold for arrears of taxes, and the treasurer has given a deed for the same, the deed shall be to all intents and purposes valid and binding, if the same has not been questioned before some court of competent jurisdiction by some person interested, within two years from the time of sale, does not apply where the tax has not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Act or where no such list was furnished.

[Secs. 152 and 209, Assessment Act, R.S.O. 1897, ch. 224, consolidated by 4 Edw. VII. (Ont.) ch. 23, referred to.]

4. STATUTES (§ II D—125)—RETROACTIVE, WHEN—SUBSTANTIVE RIGHTS DISTINGUISHED FROM PROCEDURE, AS TO RETROACTIVE EFFECT.

In a matter of substantive rights, as distinguished from mere matters of procedure or practice, a statute is not presumed to be retroactive. (*Per* Riddell, J.)

[Assessment Act, 4 Edw. VII. (Ont.) ch. 23, sec. 176 (1), considered.]

5. EQUITY (§ III A—59)—EQUITY PRINCIPLES—"HE WHO SEEKS EQUITY MUST DO EQUITY."

Where the court is called upon under equitable pleas to set aside a tax sale which is equally void at law and in equity, the court does so, only on such terms as are equitable, upon the principle of equity, "He who seeks equity must do equity," so that where the plaintiffs might have brought a simple action in ejectment, but, instead, asked and received equitable relief, they come under the obligation to do equity. (*Per* Riddell, J.)

[*Paul* v. *Ferguson*, 14 Gr. 230, 232, referred to.]

Statement

APPEAL by the defendant and cross-appeal by the plaintiffs from the following judgment of Boyd, C. (3 O.W.N. 1479).

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The appeal was dismissed.

BOYD, C.:—An objection not on the pleadings was raised ore tenus, that, by reason of some provisions of the Dominion Indian Act, this action was not well-founded.

The Indian Act, as found in R.S.C. 1886 ch. 43, sec. 43, was amended in 1888 by 51 Vict. ch. 22, sec. 2, now found in the revision of 1906, as ch. 81, secs. 58, 59, and 60, and brings in an entirely new provision as to dealing with Indian lands which have been sold for taxes. The substance of this new legislation appears to be, that, when a conveyance has been made by the proper municipal officer of the Province, purporting to be based upon a sale for taxes, the Superintendent-General may "approve of such conveyance and act upon it and treat it as a valid transfer" of the interest of the original purchaser: sec. 58 (1).

When the Superintendent-General has "signified his approval of such conveyance by endorsement thereon," the grantee shall be substituted (in all respects in relation to the land) for the original purchaser: sec. 58 (2).

The Superintendent-General may cause a patent to be issued to the grantee named in such conveyance, on the completion of the original conditions of sale, unless such conveyance is declared invalid by a Court of competent jurisdiction, in a suit by some person interested in such land, within two years after the date of the sale for taxes, and unless, within such delay, notice of such contestation has been given to the Superintendent-General: sec. 59.

These provisions are, I think, to be read as applicable to a case where the Superintendent-General has actively intervened as between the tax purchaser and the original purchaser: where the Superintendent-General has taken under consideration the tax deed, and has approved of it as a valid transfer, by endorsement thereon. This primâ facie ruling of his may be brought into question and disputed in the Court by suit brought within two years after the date of the tax deed. But, in my view of these sections, there is no such limit of time in attacking an illegal tax sale and deed, if (as in this case) no action in respect of the tax deed by way of approval has been taken by the Superintendent-General. If the Superintendent-General remains silent and inactive, there is no restriction as to time placed upon the right of the original purchaser to claim the assistance of the Courts so far as the Indian Act is concerned. He may otherwise lose his legal status by delay and adverse possession, but in this case no such barrier exists.

This case rests under the general law as to tax sales then in force, namely, that where lands are sold for arrears of taxes, and the treasurer has given a deed for the same, that deed shall be,

to all intents and purposes, valid and binding, if the same has not been questioned before some Court of competent jurisdiction by some person interested, within two years from the time of sale: sec. 209, R.S.O. 1897 ch. 224.

This statutory protection does not avail if there has been no legal impost of taxes, and if these, though legally imposed, have not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Assessment Act, and if there has been no such list furnished at all. Each one of these necessary preliminaries appears to be absent in the case in hand, as may now be briefly noted.

The action relates to certain conflicting claims made to the possession of an interest in land situate in the district of Manitoulin, part of an Indian reserve, and as such subject to the control of the Department of Indian Affairs for the Dominion of Canada. Lot 21 in the 12th concession of the township of Howland, in that district, containing 147 acres, was sold in June, 1869, to Thomas F. Richards, and a certificate of sale was duly issued. This land was so dealt with that a patent from the Crown was issued for the westerly 100 acres in 1879 to Jane Mackie, and that part is not in controversy. The easterly 47 acres was assigned in 1876 to David Richards by his son Thomas, and that was duly registered in the Indian Department, and that part still stands in the name of David Richards, and has not been patented.

David Richards died in February, 1890, leaving a will by which he left all of his belongings to his wife to hold for her life. He gave her power to sell a part or all of the real estate and personal, and declared that, at her death, what remained was to be equally divided between his sons Thomas and Luther. These two are the plaintiffs; and I see no reason to question that they take directly through their father. I do not give effect, therefore, to the contention that the widow made a valid disposition of the 47 acres by will so as to give a life estate to her second husband, Moore, and a remainder to the plaintiffs.

The disability of the original purchaser to hold or to transfer, on the ground of infancy, is raised by the pleadings. It appears that he was born in 1854, and he was of age in 1875, when he assigned to his father, and that assignment has been recognised and acted on by the Indian Department; and I think any controversy as to his status will have to be decided by that Department, if and when he applies for a patent. He has sufficient locus standi, with his brother, to seek the intervention of this Court.

The intervention is sought in respect of a tax sale held in 1901, and a certificate of purchase obtained by the defendant.

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That certificate sets out that a sale was had on the 4th September, 1901, of the right, title, and interest of the owner in the patented lot, being lot 21 in the 12th concession of Howland, containing 48 acres, more or less, and that Collins became the purchaser, for the sum of $8.65.

That sum was directed to be levied by warrant of the reeve, dated the 27th May, 1901, of which $7.85 was for arrears of taxes alleged to be due up to the 31st December, 1900.

On this state of facts, the tax deed was executed by the proper officer of the township on the 17th September, 1902, which has been duly registered upon the land and in the Indian Department. By this deed the defendant claims that he has cut out any right of the plaintiffs to the land, and is alone entitled to claim a patent from the Indian Department. The validity of the tax sale is, therefore, the main issue in this litigation.

Evidence is given as to the taxes for the years 1897, 1898, and 1899, and which appear to form the aggregate of the arrears alleged to be sufficient to support the sale. But I have seldom seen a case where the evidence was so limping and unsatisfactory, and where so many flagrant mistakes and omissions are manifest in all the proceedings.

The radical error appears to be this, that the 100 acres patented, being the westerly part of the whole lot, was treated as being lot 21 in the 12th concession of Howland, and all the taxes on that part have been duly paid. The officers appear to have assessed the easterly 47 acres as lot 21 in the 13th concession of Howland—as an entirely different lot in another concession, which concession has no existence. Among other mishaps, the assessment rolls of 1898 have been lost; but, on production of the assessment rolls of 1897 and 1899, it clearly appears that lot 21 in the 13th concession is assessed as belonging to Richards and as containing 48 acres. I cannot suppose that this mistake was remedied in the missing roll of 1898, though some reliance is placed upon the collector's roll of 1898, as shewing taxes of $2.47 on 48 acres, concession 12, lot 21, owned by Thomas Richards; yet it does not seem to be clear that this is not the roll of 1899. But, even in the roll of 1898, Richards was not notified of the tax till the 10th October, 1898, which would be less than three years before the sale in September, 1901. Besides, by the tax deed the sale purports to be for arrears alleged to be due up to the 31st December, 1900. Upon the evidence, I can find no valid assessment of the land intended to be sold for the years 1897 or 1899; and I much doubt the validity of that in 1898.

The lands were assessed as "resident," and no list of lands containing these as liable to be sold for taxes was prepared by

the treasurer; this statutory warning, which is an indispensable prerequisite to a valid sale, was not in this case given: sec. 152.

What was substituted is frankly told by the treasurer: "The clerk and I found that this lot had been missed in being assessed, and we went back three years and computed the taxes; I do not remember notifying anybody; they would see it when it was advertised. I had no authority to fix the amount in this way.".

This summary ascertainment of what ought to have been assessed from year to year appears to be the only foundation upon which this land was confiscated by enforced sale for taxes. Apart from all other objections (which need not be further discussed), those I have mentioned are fatal to the validity of the tax sale, which has to be vacated upon proper terms.

The defendant has counterclaimed for his outlay in taxes, statute labour, and improvements by way of clearing and fencing in the lands. These should be ascertained and declared to be a lien on the land, and against this should be set off any profit derived from the land, or which could reasonably have been derived from it, by the purchaser.

The plaintiffs should get the costs of action, and the defendant the costs of counterclaim, to be set off. The amount of the lien to be ascertained by the Master, if the parties cannot agree; and he will say how the costs should go in his office of the reference.

A. G. Murray, for the defendant.
F. E. Titus, for the plaintiffs.

Riddell, J.

RIDDELL, J.:—This is an appeal from the judgment of Boyd, C., 3 O.W.N. 1479; the plaintiffs also cross-appealing.

Upon the argument, we dismissed the defendant's appeal, entirely agreeing with the Chancellor's view of the law. The plaintiffs' cross-appeal is as follows:—

The defendant counterclaimed for $400 for improvements and for money expended for taxes and statute labour, for an account to take the same, and for an order declaring a lien on the lands for such amount. The formal judgment declared that the defendant "is entitled to . . . a lien upon the lands . . . for the amount of the purchase money paid by him . . . and interest . . . and for taxes and statute labour paid or performed by him, and for the value of any improvements made by the defendant upon the said lands . . . before this action was commenced and for the costs of his counterclaim . . . after deducting . . . the rents and profits received . . . or which might have been received . . . ." and it is referred to the Master at North Bay to determine the amount, leaving the costs of the reference in the discretion of the Master. The plaintiffs contend that this is not justified by the law.

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The judgment is said to be based on the Act of 1904, 4 Edw. VII. ch. 23, sec. 176 (1), considered in *Sutherland* v. *Sutherland*, 22 O.W.N. 299: but this Act did not come into force till 1st January, 1905—see sec. 229. And this is not a mere matter of procedure or practice, but of substantive rights. I therefore think the statute is not retroactive.

We must see how the law stood when the rights of the plaintiffs accrued, which may for the purposes of this action be considered as 1901 or 1902, at any rate before January, 1905. The statute then in force was R.S.O. (1897), ch. 224, sec. 212, but that applies only when the sale "is invalid by reason of uncertain and insufficient designation or description"—which is not the case here. We may, however, apply the statute R.S.O. 1897 ch. 119, sec. 30, if necessary. This comes from (1873), 36 Vict. ch. 22, sec. 1.

" In every case in which any person has made or may make lasting improvements on any land under the belief that the land was his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of such land is enhanced by such improvements. . . ."

This statute very much extends the application of the principle of remuneration by the true owner of the land to one who under a mistake of title has made permanent improvements upon it—the former Act going as far back as 1819, 59 Geo. III. ch. 14, by sec. 3 providing for the case of mistake in boundaries occasioned by unskilful surveys, which were by no means uncommon in those days of dense forest, deep morasses, and cheap whiskey. This statute is in substance repeated as R.S.O. 1897 ch. 119, sec. 31.

The relief granted by sec. 30 however is much more restricted than that given by the Act of 1904. But I think in the present instance we are entitled to go beyond sec. 30 in aid of the defendant.

It is a well recognised principle of equity: "He who seeks equity must do equity." In many instances this contains a pun on the word "equity," and means nothing more than: "He who seeks the assistance of a Court of Equity must, in the matter in which he so asks assistance, do what is just as a term of receiving such assistance." "Equity" means "Chancery" in one instance, and "Right" or "Fair Dealing" in the other.

Accordingly while a plaintiff asserting a legal right in a common law Court would receive justice according to the common law, however harsh or unjust the law might be—yet if he required the assistance of the Court of Chancery to obtain his rights according to the common law, he would—or might—not be assisted unless he did what was just in the matter toward the defendant.

This case was represented, on the argument, as a simple case of ejectment—and it might well be a simple action in ejectment. Had it been such, I think we would have had great, if not insuperable, difficulty in giving the defendant any relief beyond what the statute, sec. 30, gives him—and that is why one of us said on the argument that had he been solicitor for the plaintiff, he would have brought the action in that way. There could on the facts have been no defence at law, the deed under which the defendant claims being void at law as well as in equity. The action however is not a simple ejectment, as it might have been. The statement of claim sets out the facts as in ejectment, indeed, but in the prayer, in addition to possession, etc., a claim is made for "5. Such further relief as the nature of the case may require." This is ambiguous, and might mean only relief as at the common law, or it might mean equitable relief. We accordingly look at the judgment the plaintiffs have taken out and are insisting upon holding. Clause 2 of the judgment declares "that the sale for taxes . . . and the deed . . . made to the said defendant . . . are and each of them is invalid, and that the same should be set aside and vacated and doth order and adjudge the same accordingly." No appeal is taken by the plaintiffs against this clause, but on the contrary they attend to support it in this Court. This relief the plaintiffs asked for and received could not have been granted by a Common Law Court, but the plaintiffs must have come into equity for it.

They cannot now be allowed to change their position: and they have come into a Court of Equity for equitable relief not grantable in a Common Law Court.

They must therefore do equity. *Paul* v. *Ferguson* (1868), 14 Gr. 230, is directly in point. The head note reads: "Where the Court is called upon to set aside a tax sale which is equally void at law and in equity the Court does so, if at all, only on such terms as are equitable." At p. 232 the Chancellor (Van Koughnet) speaking of putting the machinery of the Court in motion to aid a harsh legal right, says that in certain cases this will not be done, and continues thus: "and when the Court in its discretion does interfere, it does so only on such terms as it deems equitable . . . . The Court says 'You need not have come here at all. The deed is void at law and here, and cannot be enforced against you in any tribunal; but if you wish for your own purposes to have your title cleared of the cloud which this deed casts upon it, we will aid you only on terms.'" It is not at all necessary to cite other cases to establish the principle, but if desired the many cases may be looked at referred to in Story's Equity Jurisprudence, 2nd Eng. ed. sec. 64(e); Snell, 16th ed. p. 14 (6); Josiah W. Smith's Manual of Equity Jurisprudence, 14th ed., p. 30 IX; and notes in the several works.

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What is equitable in this case; fair play? justice? I can find nothing inequitable, but on the contrary what is wholly equitable, in the statutory rule laid down in 1904. The Legislature in definite and unmistakable terms have said what they thought was fair—with that commendable tenderness for vested rights which characterizes a responsible and representative Parliament, they have refrained from making the statute retrospective, but there is no reason why the Court, untrammelled by authority, should not adopt the statutory rule as its own. I think, therefore, this ground of appeal without merit.

It is also complained of by the plaintiffs that the judgment contains no order for possession—that is the fault of the plaintiffs themselves so far as appears—they take out an order and judgment which should be such as satisfies them. If there be any omission, e.g. if the trial Judge has not passed upon any matter which it is thought should be passed upon, the matter should be brought to his attention before being made a ground of appeal. There can be no objection to the judgment containing an order for possession, not however to be made effective "until the expiration of one month thereafter, nor until the plaintiff has paid into the Court for the defendant the amount" for which the defendant is declared to have a lien: 4 Edw. VII. ch. 23, sec. 176(2) first clause. It is also objected that the judgment should not have left the costs of the reference in the discretion of the Master, and R.S.O. 1897 ch. 224, sec. 217 (1), (2), is cited in support of that proposition.

This section was repealed as of 1st January, 1905, by 4 Edw. VII. ch. 23, sec. 228, Schedule M. first item. What is provided for in this sec. 217 (1), (2), is practice and procedure, and not substantive right—and accordingly the section must go; but it is found repeated in the new Act, sec. 181. Sub-sec: 2 provides that "if on the trial it is found that such notice (i.e. a notice which the defendant is by sub-sec. 1 authorised to give at the time of appearing") or (adding other cases) the Judge shall not certify, and the defendant shall not be entitled to the costs of the defence, but shall pay costs to the plaintiff . . . ."

The prerequisite for the application of this section is that, on the trial, it must be found that such notice was not given. The Chancellor did not so find; he was not asked to so find: there was no scrap of evidence offered upon which he could so find—the plaintiffs claiming some right following such a finding, the onus was upon them to establish the fact and they failed to do so. De non apparentibus et de non existentibus eadem est ratio. It is of no avail for counsel to tell us on the argument that no such notice was served—that is not evidence, and we do not even have an affidavit of the fact, if it is one.

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In any event, the plaintiffs have been awarded the costs of the action—the statute does not compel the Court to award all costs of reference, etc. to the plaintiff—the word used is "costs." The defendant is literally ordered to (I use the words of the statute) "pay costs to the plaintiffs"—and in my view, awarding the costs of the action to the plaintiffs as has been done, sufficiently complies with the statute, without awarding also the costs of a reference which, it is possible, may be caused or rendered necessary by the unreasonable demands or conduct of the plaintiffs themselves.

Both appeal and (with the trifling modification spoken of) the cross-appeal fail; both must be dismissed. And as success has been divided, there should be no costs of the appeal or cross-appeal.

Of course we express no opinion as to the effect (if any) of any action by the Superintendent General under the provisions of the Indian Act, R.S.C. (1906), ch. 81.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B.:—I agree in the result.

Lennox, J.

LENNOX, J.:—I agree in the result.

Appeal dismissed.

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Nov. 11.

TEMISCOUATA DOMINION ELECTION.

PLOURDE (petitioner, appellant) v. GAUVREAU (respondent, respondent.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 11, 1912.

1. APPEAL (§ II A—35)—SUPREME COURT (CAN.)—DOMINION ELECTIONS APPEALS.

An order made by an election court constituted under the Dominion Controverted Elections Act, R.S.C. 1906. ch. 7, refusing an enlargement of the time for commencement of the trial, which would expire on the next day, or to fix a day for hearing of preliminary objections remaining undisposed of, is not an order of a final and conclusive nature within sec. 64 of that statute, so as to permit of an appeal being taken therefrom to the Supreme Court of Canada.

[*L'Assomption Election Case*, 14 Can. S.C.R. 429, and *Halifax Election Case*, 39 Can. S.C.R. 401, followed.]

Statement

APPEAL from the judgment of Mr. Justice Cimon, in the Controverted Elections Court (Que.), in the matter of the controverted election of a member for the electoral district of Temiscouata in the House of Commons of Canada, dismissing motions by the petitioner (*a*) for enlargement of the time for the commencement of the trial, and (*b*) to fix a day for the hearing of certain preliminary objections remaining undisposed of.

The motions were made on the day before the expiration of

[DIVISIONAL COURT.]

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June 22.
Nov. 20.

RICHARDS v. COLLINS.

Assessment and Taxes—Tax Sale—Indian Lands—Indian Act, R.S.C. 1906, *ch.* 81, *secs.* 58, 59, 60—*Action to Set aside Sale and Deed—Statutory Time-limit—Application of—Action of Superintendent General—R.S. O.* 1897, *ch.* 224, *sec.* 209—*Essential Preliminaries to Validity of Sale not Observed—Right to Attack after Expiration of two Years—Locus Standi of Plaintiffs—Lien of Purchaser for Improvements and Money Expended—Assessment Act,* 4 *Edw. VII. ch.* 23, *sec.* 176 (1)—*Non-retroactivity—Adoption of Statutory Rule notwithstanding—"He who Seeks Equity must Do Equity"—Right to Possession — Condition — Costs—Notice—Evidence—Sec.* 181 *of Act of* 1904.

The provisions of secs 58, 59, and 60 of the Indian Act, R.S.C. 1906, ch. 81, are to be read as applicable to a case where the Superintendent General of Indian Affairs has actively intervened as between the tax purchaser and the original purchaser of Indian lands. Where the Superintendent General has considered a tax deed and approved of it as a valid transfer, his ruling may be questioned by an action, which must be brought within two years after the date of the tax deed. But there is no such limit of time, so far as the Indian Act is concerned, in attacking an illegal tax sale and deed, if no action by way of approval has been taken by the Superintendent General; and, where that is the case, the general law of the Province as to tax sales applies.

The statutory protection of sec. 209 of R.S.O. 1897, ch. 224—the Assessment Act in force at the time of the tax sale and tax deed in question in this action (1901-02)—does not avail, if there has been no legal impost of taxes, and if these, though legally imposed, have not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Act, and if there has been no such list furnished at all.

And *held*, upon the evidence, that each one of these necessary preliminaries was absent in regard to the sale for taxes of unpatented Indian lands and the deed made pursuant to the sale, attacked in an action brought after the expiry of two years from the date of the deed; and the sale and deed should be set aside.

Held, also, that the plaintiffs had a sufficient *locus standi* to seek the intervention of the Court.

Held, also, that the defendant, the purchaser at the tax sale, under the particular frame of this action was entitled to a lien upon the lands for improvements and for money expended for taxes and statute labour; but not under the Assessment Act of 1904, 4 Edw. VII. ch. 23, sec. 176 (1), as that Act did not come into force till the 1st January, 1905, and was not retroactive; nor under the Assessment Act in force when the rights of the plaintiffs accrued, R.S.O. 1897, ch. 224, sec. 212, for that applied only when the sale was invalid by reason of uncertain and insufficient designation or description; the statute R.S.O. 1897, ch. 119, sec. 30, under which the relief is more restricted than under the Act of 1904, might be applied; but the Court was entitled to go beyond that in aid of the defendant: the plaintiffs, having come into a Court of Equity and obtained equitable relief—a declaration and adjudication that the sale and deed were invalid and should be set aside—must do equity; and the Court might well adopt as equitable the statutory rule laid down in sec. 176 (1) of the Assessment Act, 1904.

Held, also, that the plaintiffs were entitled to judgment for possession of the lands, not, however, to be made effective until the expiration of one month nor until the plaintiffs had paid into Court the amount for

which the defendant was declared to have a lien: Assessment Act, 1904, sec. 176 (2), first clause.

Held, also, that the prerequisite for the application of sec. 217 (1), (2), of R.S.O. 1897, ch. 224 (sec. 181 of the Act of 1904), is that, at the trial, it must be found that a certain notice was not given; and, as it was not so found and there was no evidence upon which it could be so found, the section did not apply; and, at any rate, awarding the costs of the action to the plaintiffs was a sufficient compliance with the section, without awarding also the costs of a reference, which were left to be disposed of by the Master.

Judgment of BOYD, C., affirmed.

ACTION to recover possession of land and to set aside a tax sale. Counterclaim by the defendant for money expended in taxes, statute labour, and improvements.

The action was tried before BOYD, C., without a jury, at Gore Bay.

F. E. Titus, for the plaintiffs.

R. R. McKessock, K.C., for the defendant.

June 22. BOYD, C.:—An objection not on the pleadings was raised *ore tenus*, that, by reason of some provisions of the Dominion Indian Act, this action was not well-founded.

The Indian Act, as found in R.S.C. 1886, ch. 43, sec. 43, was amended in 1888 by 51 Vict. ch. 22, sec. 2, now found in the revision of 1906 as ch. 81, secs. 58, 59, and 60, and brings in an entirely new provision as to dealing with Indian lands which have been sold for taxes. The substance of this new legislation appears to be, that, when a conveyance has been made by the proper municipal officer of the Province, purporting to be based upon a sale for taxes, the Superintendent General may "approve of such deed or conveyance, and act upon and treat it as a valid transfer" of the interest of the original purchaser (sec. 58 (1)).

When the Superintendent General has "signified his approval of such deed or conveyance by endorsement thereon," the grantee shall be substituted (in all respects, in relation to the land) for the original purchaser (sec. 58 (2)).

The Superintendent General may cause a patent to be issued to the grantee named in such conveyance, on the completion of the original conditions of sale, unless such conveyance is declared invalid by a Court of competent jurisdiction, in a suit by some person interested in such land, within two years after the date

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of the sale for taxes, and unless within such delay notice of such contestation has been given to the Superintendent General (sec. 59).

These provisions are, I think, to be read as applicable to a case where the Superintendent General has actively intervened as between the tax purchaser and the original purchaser: where the Superintendent General has taken under consideration the tax deed and has approved of it as a valid transfer, by endorsement thereon. This *primâ facie* ruling of his may be brought into question and disputed in the Court by suit brought within two years after the date of the tax deed. But, in my view of these sections, there is no such limit of time in attacking an illegal tax sale and deed, if (as in this case) no action in respect of the tax deed by way of approval has been taken by the Superintendent General. If the Superintendent General remains silent and inactive, there is no restriction as to time placed upon the right of the original purchaser to claim the assistance of the Courts, so far as the Indian Act is concerned. He may otherwise lose his legal status by delay and adverse possession; but in this case no such barrier exists.

This case rests under the general law as to tax sales then in force, namely, that, where lands are sold for arrears of taxes, and the treasurer has given a deed for the same, that deed shall be to all intents and purposes valid and binding, if the same has not been questioned before some Court of competent jurisdiction, by some person interested, within two years from the time of sale: sec. 209, R.S.O. 1897, ch. 224.

This statutory protection does not avail if there has been no legal impost of taxes, and if these, though legally imposed, have not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Assessment Act, and if there has been no such list furnished at all. Each one of these necessary preliminaries appears to be absent in the case in hand, as may now be briefly noted.

The action relates to certain conflicting claims made to the possession of an interest in land situate in the district of Manitoulin, part of an Indian Reserve, and as such subject to the

control of the Department of Indian Affairs for the Dominion of Canada. Lot 21 in the 12th concession of the township of Howland, in that district, containing 147 acres, was sold in June, 1869, to Thomas F. Richards, and a certificate of sale was duly issued. This land was so dealt with that a patent from the Crown was issued for the westerly 100 acres, in 1879, to Jane Mackie, and that part is not in controversy. The easterly 47 acres was assigned in 1876 to David Richards by his son Thomas, and that assignment was duly registered in the Indian Department, and that part still stands in the name of David Richards, and has not been patented.

David Richards died in February, 1890, leaving a will by which he left all of his belongings to his wife to hold for her life. He gave her power to sell a part or all of the real estate and personal, and declared that at her death what remained was to be eqully divided between his sons Thomas and Luther. These two are the plaintiffs, and I see no reason to question that they take directly through their father. I do not give effect, therefore, to the contention that the widow made a valid disposition of the 47 acres by will so as to give a life estate to her second husband, Moore, and a remainder to the plaintiffs.

The disability of the original purchaser to hold or to transfer on the ground of infancy is raised by the pleadings. It appears that he was born in 1854, and he was of age in 1875, when he assigned to his father, and that assignment had been recognised and acted on by the Indian Department, and I think any controversy as to his status will have to be decided by that Department if and when he applies for a patent. He has sufficient *locus standi,* with his brother, to seek the intervention of this Court.

The intervention is sought in respect of a tax sale held in 1901, and a certificate of purchase obtained by the defendant. That certificate sets out that a sale was had on the 4th September, 1901, of the right, title, and interest of the owner in the patented lot, being lot 21 in the 12th concession of Howland, containing 48 acres more or less, and that Collins became the purchaser for the sum of $8.65.

That sum was directed to be levied by warrant of the Reeve,

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dated the 27th May, 1901, of which $7.85 was for arrears of taxes alleged to be due up to the 31st December. 1900.

On this state of facts, the tax deed was executed by the proper officers of the township on the 17th September, 1902, and has been duly registered upon the land and in the Indian Department. By this deed, the defendant claims, he has cut out any right of the plaintiffs to the land, and is alone entitled to claim a patent from the Indian Department. The validity of the tax sale is, therefore, the main issue in this litigation.

Evidence is given as to the taxes for the years 1897, 1898, and 1899, which appear to form the aggregate of the arrears alleged to be sufficient to support the sale. But I have seldom seen a case where the evidence was so limping and unsatisfactory, and where so many flagrant mistakes and omissions are manifest in all the proceedings.

The radical error appears to be this: that the 100 acres patented, being the westerly part of the whole lot, was treated as being lot 21 in the 12th concession of Howland, and all the taxes on that part have been duly paid. The officers appear to have assessed the easterly 47 acres of lot 21 in the 13th concession of Howland as an entirely different lot in another concession, which concession has no existence. Among other mishaps, the assessment rolls of 1898 have been lost; but, on production of the assessment rolls of 1897 and 1899, it clearly appears that lot 21 in the 13th concession is assessed as belonging to Richards and as containing 48 acres. I cannot suppose that this mistake was remedied in the missing roll of 1898, though some reliance is placed upon the collector's roll of 1898 as shewing taxes of $2.47 on 48 acres, concession 12, lot 21, owned by Thomas Richards; yet it does not seem to be clear that this is not the roll of 1899. But, even if the roll of 1898, Richards was not notified of the tax till the 10th October, 1898, which would be less than three years before the sale in September, 1901. Besides, by the tax deed the sale purports to be for arrears alleged to be due up to the 31st December, 1900. Upon the evidence, I can find no valid assessment of the land intended to be sold for the year 1897 or 1899, and I much doubt the validity of that in 1898.

The lands were assessed as "resident," and no list of lands

containing these as liable to be sold for taxes was furnished by the treasurer; this statutory warning, which is an indispensable prerequisite to a valid sale, was not in this case given (sec. 152).

What was substituted is frankly told by the treasurer: "The clerk and I found that this lot had been missed in being assessed, and we went back three years and computed the taxes: I do not remember notifying anybody; they would see it when it was advertised. I had no authority to fix the amount in this way."

This summary ascertainment of what ought to have been assessed from year to year appears to be the only foundation upon which this land was confiscated by enforced sale for taxes. Apart from all other objections (which need not be further discussed), those I have mentioned are fatal to the validity of the tax sale, which has to be vacated upon proper terms.

The defendant has counterclaimed for his outlay in taxes, statute labour, and improvements by way of clearing and fencing in the lands. These should be ascertained and declared to be a lien on the land, and against this should be set off any profit derived from the land or which could reasonably have been derived from it by the purchaser.

The plaintiffs should get the costs of action and the defendant the costs of counterclaim, to be set off. The amount of the lien to be ascertained by the Master if the parties cannot agree, and he will say how the costs in his office of the reference should go.

The defendant appealed from the judgment of BOYD, C.; and the plaintiffs cross-appealed.

November 12. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LENNOX, JJ.

A. G. Murray, for the defendant, argued that the trial Judge should have held that, the lands in question being unpatented Indian lands, the Court had no jurisdiction to entertain the action; that under the provisions of sec. 59 of the Indian Act, R.S.C. 1906, ch. 81, the Court had no jurisdiction to entertain an action to set aside a tax sale of unpatented Indian lands after the expiration of two years from the date of such sale. The judgment infringed upon the jurisdiction of the Superin-

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tendent General of Indian Affairs to declare such tax sale valid or invalid, under the provisions of sec. 58 of the Indian Act and the Indian Land Regulations, and was in conflict with the power conferred upon the Superintendent General to cause a patent of the lands to be issued to the tax purchaser after the expiration of two years from the date of such tax sale, upon the conditions set forth in sec. 59 of the Act.

THE COURT dismissed the defendant's appeal.

F. E. Titus, for the plaintiffs, in support of the cross-appeal, contended that the judgment should contain an order for possession. He also objected that the judgment should not have left the costs of the reference in the discretion of the Master, referring to R.S.O. 1897, ch. 224, sec. 217 (1), (2). He also complained of the defendant having been awarded the costs of his counterclaim, saying that the judgment had been wrongly based upon the Assessment Act of 1904, 4 Edw. VII. ch. 23, sec. 176 (1), which did not come into force until the 1st January, 1905. This statute was not retrospective; and the present case was governed by R.S.O. 1897, ch. 224, sec. 217. This was not a question of procedure merely, but of substantive right. On the question of the Act of 1904 not being retrospective, he referred to Maxwell on the Interpretation of Statutes, 5th ed., p. 348. He also referred to *Carter* v. *Hunter* (1907), 13 O.L.R. 310, at p. 318; *McKay* v. *Crysler* (1879), 3 S.C.R. 436, at pp. 472, 473, 476, and 481; and *Hislop* v. *Joss* (1901), 3 O.L.R. 281.

Murray, in answer to the argument on the cross-appeal, contended that the Act of 1904 was retrospective and did apply, and that the question here was one of procedure, and not of substantive right. He urged that the maxim "He who seeks equity must do equity" applied here, and he referred to *Paul* v. *Ferguson* (1868), 14 Gr. 230; Maxwell on the Interpretation of Statutes, 5th ed., p. 357; *Campbell* v. *Fox* (1867), 17 C.P. 542; and *Doe d. Earl of Mountcashel* v. *Grover* (1847), 4 U.C.R. 23.

Titus, in reply.

November 20. RIDDELL, J.:—This is an appeal from the judgment of the Chancellor; the plaintiffs also cross-appealing. Upon

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the argument, we dismissed the defendant's appeal, entirely agreeing with the Chancellor's view of the law.

The plaintiffs cross-appeal as follows:—

The defendant counterclaimed for $400 for improvements and for money expended for taxes and statute labour, for an account to be taken of the same, and for an order declaring a lien on the lands for such amount as might be found due. The formal judgment declared that the defendant "is entitled to . . a lien upon the lands . . . for the amount of the purchase-money paid by him . . . and interest . . . and for taxes and statute labour paid or performed by him and for the value of any improvements made by the defendant upon the said lands . . . before this action was commenced, and for the costs of his counterclaim . . . after deducting . . . the rents and profits received . . . or which might have been received . . ." And it is referred to the Master at North Bay to determine the amount, leaving the costs of the reference in the discretion of the Master. The plaintiffs contend that this is not justified by the law.

The judgment is said to be based on the Act of 1904, 4 Edw. VII. ch. 23, sec. 176 (1), considered in *Sutherland* v. *Sutherland* (1912), 3 O.W.N. 1368; but this Act did not come into force till the 1st January, 1905: see sec. 229. And this is not a mere matter of procedure or practice, but of substantive rights: I, therefore, think the statute is not retroactive.

We must see how the law stood when the rights of the plaintiffs accrued, which may, for the purposes of this action, be considered as 1901 or 1902, at any rate before January, 1905. The statute then in force was R.S.O. 1897, ch. 224, sec. 212; but that applies only when the sale "is invalid by reason of uncertain and insufficient designation or description"—which is not the case here. We may, however, apply the statute R.S.O. 1897, ch. 119, sec. 30, if necessary. This comes from (1873) 36 Vict. ch. 22, sec. 1: "In every case in which any person has made, or may make, lasting improvements on any land under the belief that the land was his own, he or his assigns shall be entitled to a lien upon

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the same to the extent of the amount by which the value of such land is enhanced by such improvement."

This statute very much extends the application of the principle of remuneration by the true owner of the land to one who under a mistake of title has made permanent improvements upon it—the former Act going as far back as 1819, 59 Geo. III. ch. 14, by sec. 3 providing for the case of mistake in boundaries occasioned by unskilful surveys, which were by no means uncommon in those days of dense forest, deep morasses and cheap whisky. This statute is in substance repeated as R.S.O. 1897, ch. 119, sec. 31.

The relief granted by sec. 30, however, is much more restricted than that given by the Act of 1904. But, I think, in the present instance, we are entitled to go beyond sec. 30 in aid of the defendant.

It is a well-recognised principle of equity that "he who seeks equity must do equity." In many instances this contains a pun on the word "equity" and means nothing more than that, "he who seeks the assistance of a Court of Equity must in the matter in which he so asks assistance do what is just as a term of receiving such assistance." "Equity" means "Chancery" in one instance and "right" or "fair dealing" in the other.

Accordingly, while a plaintiff asserting a legal right in a common law Court would receive justice according to the common law, however harsh or unjust the law might be—yet, if he required the assistance of the Court of Chancery to obtain his rights according to the common law, he would—or might—not be assisted unless he did what was just in the matter toward the defendant.

This case was represented, on the argument, as a simple case of ejectment—and it might well have been framed as a simple action in ejectment. Had it been such, I think we should have had great, if not insuperable, difficulty in giving the defendant any relief beyond what the statute, sec. 30, gives him—and that is why one of us said on the argument that, had he been solicitor for the plaintiff, he would have brought the action in that way. There could on the facts have been no defence at law, the deed under which the defendant claims being void at law as well as in equity.

The action, however, is not a simple ejectment, as it might have been. The statement of claim sets out the facts as in ejectment indeed, but in the prayer, in addition to possession, etc., a claim is made for: "5. Such further relief as the nature of the case may require." This is ambiguous, and might mean only relief as at common law or it might mean equitable relief. We accordingly look at the judgment the plaintiffs have taken out and are insisting upon holding. Clause 2 of the judgment declares "that the sale for taxes . . . and the deed . . . made to the said defendant . . . are and each of them is invalid, and that the same should be set aside and vacated, and doth order and adjudge the same accordingly." No appeal is taken by the plaintiffs against this clause; but, on the contrary, they attend to support it in this Court. This relief, which the plaintiffs asked for and received, could not have been granted by a common law Court, but the plaintiffs must have come into Equity for it.

They cannot now be allowed to change their position: and they have come into a Court of Equity for equitable relief not grantable in a common law Court.

They must, therefore, do equity. *Paul* v. *Ferguson*, 14 Gr. 230, is directly in point. The head-note reads: "Where the Court is called upon to set aside a tax sale which is equally void at law and in equity, the Court does so, if at all, only on such terms as are equitable." At p. 232 the Chancellor (Van Koughnet), speaking of putting the machinery of the Court in motion to aid a hard legal right, says that in certain cases this will not be done, and continues thus: "And when the Court, in its discretion, does interfere, it does so only on such terms as it deems equitable . . . The Court says . . . 'You need not have come here at all. The deed is void at law and here, and cannot be enforced against you in any tribunal; but, if you wish for your own purposes to have your title cleared of the cloud which this deed casts upon it, we will aid you only on terms.'" It is not at all necessary to cite other cases to establish the principle—but, if desired, the many cases may be looked at referred to in Story's Equity Jurisprudence, 2nd Eng. ed., p. 64 (*e*); Snell, 16th ed., p. 14 (6); Josiah W. Smith's Manual of Equity Jurisprudence, 14th ed., p. 30 (IX.); and notes in the several works.

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Riddell, J.

What is equitable in this case? fair play? justice? I can find nothing inequitable, but, on the contrary, what is wholly equitable, in the statutory rule laid down in 1904. The Legislature, in definite and unmistakable terms, have said what they thought was fair. With that commendable tenderness for vested rights which characterises a responsible and representative Parliament, they have refrained from making the statute retrospective—but there is no reason why the Court, untrammelled by authority, should not adopt the statutory rule as its own. I think, therefore, this ground of appeal without merit.

It is also complained of by the plaintiffs that the judgment contains no order for possession. That is the fault of the plaintiffs themselves, so far as appears; they take out an order and judgment which should be such as satisfies them. If there be any omission, *e.g.*, if the trial Judge has not passed upon any matter which it is thought should be passed upon, the matter should be brought to his attention before being made a ground of appeal. There can be no objection to the judgment containing an order for possession, not, however, to be made effective "until the expiration of one month thereafter nor until the plaintiff has paid into Court for the defendant the amount" for which the defendant is declared to have a lien: 4 Edw. VII. ch. 23, sec. 176 (2), first clause.

It is also objected that the judgment should not have left the costs of the reference in the discretion of the Master; and R.S.O. 1897, ch. 224, sec. 217 (1), (2), is cited in support of that proposition.

This section was repealed as of the 1st January, 1905, by 4 Edw. VII. ch. 23, sec. 228, schedule M, first item. What is provided for in this sec. 217 (1), (2), is practice and procedure, and not substantive right—and, accordingly, the section must go; but it is found repeated in the new Act, sec. 131. Sub-section 2 provides that "if on the trial it is found that such notice" [*i.e.*, a notice which the defendant is by sub-sec. 1 authorised to give "at the time of appearing"] "was not given as aforesaid, or" (adding other cases) "the Judge shall not certify, and the defendant shall not be entitled to the costs of the defence, but shall pay costs to the plaintiff . . ."

The prerequisite for the application of this section is that on the trial it must be found that such notice was not given. The Chancellor did not so find; he was not asked so to find; there was no scrap of evidence offered upon which he could so find. The plaintiffs claiming some right following such a finding, the onus was upon them to establish the fact, and they failed to do so. *De non apparentibus et de non existentibus eadem est ratio.* It is of no avail for counsel to tell us on the argument that no such notice was served—that is not evidence, and we do not even have an affidavit of the fact, if it is one.

In any event, the plaintiffs have been awarded the costs of the action—the statute does not compel the Court to award all costs, of reference, etc., to the plaintiff—the word used is "costs." The defendant is literally ordered to (I use the words of the statute) "pay costs to the plaintiff"—and, in my view, awarding the costs of the action to the plaintiffs, as has been done, sufficiently complies with the statute without awarding also the costs of a reference which it is possible may be caused or rendered necessary by the unreasonable demands or conduct of the plaintiffs themselves.

Both the appeal and (with the trifling modification spoken of) the cross-appeal fail; both must be dismissed. And, as success has been divided, there should be no costs of the appeal or cross-appeal.

Of course, we express no opinion as to the effect (if any) of any action by the Superintendent General under the provisions of the Indian Act, R.S.C. 1906, ch. 81.

FALCONBRIDGE, C.J., and LENNOX, J., agreed in the result.

Appeal and cross-appeal dismissed without costs.

SAMMARTINO v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

British Columbia Court of Appeal, Davey, C.J.B.C., Bull and McFarlane, JJ.A. October 19, 1971.

Taxation — Exemption from taxation — Imposition of tax on occupier in respect of land and improvements — Whether occupier of Crown lands on Indian reserve lands taxable by Province — Taxation Act (B.C.), s. 4(1) — Public Schools Act (B.C.).

Appellant, a non-Indian in occupation of certain Indian reserve lands held in trust by the Crown for the use and benefit of the Okanagan Band of Indians by virtue of a lease from a member of the band, which lease did not comply in certain respects with the provisions of the *Indian Act*, R.S.C. 1952, c. 149 (now R.S.C. 1970, c. I-6), was taxed under the *Taxation Act*, R.S.B.C. 1960, c. 376, and the *Public Schools Act*, R.S.B.C. 1960, c. 319, as "occupier" of the lands and brought an action for a declaration that the Acts were *ultra vires* in so far as they purported to legislate, first, in respect of the appellant's liability to taxation as an occupier, secondly, with respect to Indian lands, a field reserved for the Parliament of Canada under s. 91(24) of the *B.N.A. Act, 1867*, and thirdly, in respect to the taxation of Crown lands. On appeal from a judgment upholding the validity of the Acts, *held* (McFarlane, J.A., dissenting in part), the appeal should, subject to a declaration that the *Public Schools Act* does not impose a tax on an occupier, be dismissed.

Section 204(1) (am. 1968, c. 45, s. 30) of the *Public Schools Act* which directs that all the provisions of the *Taxation Act* apply to the assessment of taxes imposed under the *Public Schools Act* does not import the taxes imposed under the *Taxation Act* and, therefore, the question as to the liability of an occupier of land to taxes imposed under the *Public Schools Act* must be determined by reference to the *Public Schools Act* which, unlike the *Taxation Act*, does not specifically provide that a tax is exigible against an "occupier" of lands. Further, although the lease was not in compliance with the provisions of the *Indian Act* the appellant was in actual use and possession of the lands and they were "simply occupied" within the meaning of the *Taxation Act*. The words "occupier" or "simply occupied" as used in the *Taxation Act* cannot, as the appellant contended, be modified by the words "lawful" or "lawfully" respectively.

[*Re Simon Fraser University and District of Burnaby* (1968), 1 D.L.R. (3d) 427, 66 W.W.R. 684; *Cape Brandy Syndicate v. Inland Revenue Commissioners*, [1921] 1 K.B. 64; *Canadian Eagle Oil Co., Ltd. v. The King*, [1946] A.C. 119, 114 L.J.K.B. 451; *Toronto Transit Commission v. City of Toronto* (1971), 18 D.L.R. (3d) 68; *Bentley et al. v. Peppard* (1903), 33 S.C.R. 444, refd to]

Constitutional law — Validity of legislation — Application of provincial tax legislation to occupier of Indian reserve lands — Whether taxation of Crown lands — Public Schools Act (B.C.), s. 204(1) — Taxation Act (B.C.), s. 4(1).

Where a provincial statute imposes a tax on an occupier of Crown land in respect of the land and improvements thereon, its application to a person in occupation of Indian reserve lands under a lease does not constitute a tax on Indian lands contrary to s. 91(24) of the *B.N.A.*

Act, 1867, or to s. 125 of that Act. In either case the taxes are levied on the appellant personally as an occupier and with respect to his occupation and are accordingly within the legislative authority of the Province.

[*Smith v. Rural Municipality of Vermilion Hills* (1914), 20 D.L.R. 114, 49 S.C.R. 563, 6 W.W.R. 841; affd 30 D.L.R. 83, [1916] 2 A.C. 569, [1917] 1 W.W.R. 108; *City of Vancouver v. Chow Chee*, [1942] 1 W.W.R. 72, 57 B.C.R. 104; folld; *District of Surrey et al. v. Peace Arch Enterprises Ltd. et al.* (1970), 74 W.W.R. 380, distd]

APPEAL from a judgment of Wootton, J., dismissing an action for a declaration that the *Taxation Act* (B.C.) and the *Public Schools Act* (B.C.) are *ultra vires*.

L. Page, for appellant.
D. Sigler, Q.C., for respondent.

DAVEY, C.J.B.C.:—I would allow the appeal in part for the reasons given by my brother Bull.

BULL, J.A.:—The appellant, a non-Indian, was at all material times in use and occupation of two lots of land situate in the Okanagan Indian Reserve No. 1, the lands of which Reserve are held in trust by Her Majesty the Queen in the right of Canada for the use and benefit of the Okanagan Band of Indians. That use and occupation was taken by the appellant under a written lease from an Indian (a member of the band) apparently made on behalf of his mother, also a member of the band, who held the lots pursuant to a notice of entitlement under the *Indian Act*, R.S.C. 1952, c. 149, now R.S.C. 1970, c. I-6. The lease was not in compliance with the provisions of the *Indian Act*, and amendments thereto, in that, specifically: (a) the lots were not subject to being leased as they had not first been surrendered to Her Majesty by the band pursuant to s. 37, (b) it was not made by the Minister of Indian Affairs and Northern Development for the benefit of the lessor Indian (without any surrender) under s. 58(3), and (c) it was void under s. 28(1) as being made by a member of a band purporting to permit, without the Minister's permission, someone other than a member of that band to occupy or use the lots. The Surveyor of Taxes for the Province of British Columbia, pursuant to the provisions of the *Taxation Act*, R.S.B.C. 1960, c. 376, and amendments thereto, and of the *Public Schools Act*, R.S.B.C. 1960, c. 319, and amendments thereto, caused the two lots and improvements thereon (hereinafter called "the property" or "the lands in question") to be assessed and caused the appellant to be taxed as the occupier thereof as if he were the owner thereof. It was com-

mon ground that the property in question is situate in a rural area and not in a municipality.

The appellant commenced an action against the Attorney-General of British Columbia, and in his writ and statement of claim claimed declarations by the Court that the provisions of the *Taxation Act* and of the *Public Schools Act* were *ultra vires* the provincial Legislature in so far as they purported to (i) legislate in respect of the appellant's liability to taxation as an occupier of the lands in question, (ii) legislate with respect to Indian lands and lands reserved for Indians within the exclusive competency of Parliament under s. 91(24) of the *B.N.A. Act, 1867* ("Indians, and lands reserved for Indians"), and (iii) tax Crown lands contrary to s. 125 of the *B.N.A. Act, 1867* prohibiting such taxation. The appellant also claimed a declaration that the appellant was not an "occupier" within the meaning of the *Taxation Act* and the *Public Schools Act*.

The respondent Attorney-General, in turn, counterclaimed for declarations the inverse to each of those sought by the appellant. A Court order was later made permitting the appellant to act as plaintiff in a representative capacity for the numerous other non-Indian persons in like position who were occupying lands in the Okanagan Indian Reserve No. 1 under leases made directly with members of the band, but not in compliance with the provisions of the *Indian Act* as above.

The facts set out in the pleadings were admitted by the parties, and the action proceeded to trial without evidence being taken on the basis that those pleadings should be treated as a case stated for the opinion of the Court under *Supreme Court Rules, 1961*, O. XXXIV, r. 1 (M.R. 389). The appellant was unsuccessful, and judgment was given in favour of the respondent Attorney-General and declarations were made as claimed by him in his counterclaim, *viz.*, that the relevant provisions of the *Taxation Act* and of the *Public Schools Act* were *intra vires* the Legislature of the Province and that the appellant was an "occupier" of the property within definition of that word in those two statutes; and hence the appellant was liable to the taxation so levied by the Province within its competency.

The appellant has appealed, and, if I understand correctly, his three submissions are as follows:

A. Regardless of whether or not the *Taxation Act* imposes a valid general tax on the appellant as an "occupier" of the property, the *Public Schools Act* does not purport to im-

pose a school tax on the appellant as such an "occupier" of such property.

B. Although the *Taxation Act* purports to impose a tax on an "occupier" of Crown lands or lands such as the lands in question held in trust for a tribe or body of Indians with respect to his interest therein, it does not impose a valid tax on the appellant as he is not such an "occupier" because he had no legal entitlement or interest in or to the lands in question, or, if he be an "occupier" he had no interest upon which a tax could be imposed.

C. That if the *Taxation Act* and/or the *Public Schools Act* purport to tax lands in an Indian reserve they are *ultra vires* the provincial Legislature to that extent.

I propose to deal with the submissions in the above order, but before so doing, I consider it advisable to deal with two preliminary matters that were raised early in the appeal, as well as to set out, for convenience, the relevant portions of the statutory provisions of the two statutes which are germane to the arguments.

The first matter deals with the appellant's submission that the relevant sections of the two statutes should be construed as the *Public Schools Act* stood prior to certain amendments thereto assented to on April 6, 1968 [*Public Schools (Amendment) Act*, 1968 (B.C.), c. 45]. The main reason given was that only the 1968 tax assessments were before the Court at the trial, although their admission as exhibits was only over the strong objections of counsel for the Attorney-General. The respondent vigorously opposed that submission to us. The Court having indicated its view that there were no good grounds for confining the argument to the statute as it stood before April 6, 1968, the appellant did not press his submission but he did not abandon it. The Court's view was based on the following factors. The writ was issued and the pleadings delivered after the amendment came into force, and nowhere was it suggested in the pleadings (which in effect became a stated case) that the assessments impugned were those made before the amendment, or that the declarations sought had reference only to early years. In fact, to the contrary, all references were to the statutes "and amendments thereto". The point was not taken in the Court below, and the learned trial Judge, properly in my opinion, dealt with the *Public Schools Act* as it stood amended at the time of trial in February, 1970. Accordingly, in this judgment reference to that statute will be to it as it stood after 1968 at the time of the trial.

The second matter deals only with the appellant's first submission set out in "A", *supra*. During the appellant's argument on that submission, the Court pointed out that the relief claimed in the writ of summons and statement of claim (as well as the converse claims in the counterclaim) did not cover the matter of the *Public Schools Act* by its terms not purporting to impose a school tax on an "occupier" of such lands and improvements as the lands in question. Only declarations that the relevant portions of the two statutes were *ultra vires* the provincial Legislature and that the appellant was not an "occupier" were sought. Both counsel agreed that the point had been argued in the Court below and was rejected, perhaps indirectly, by the learned trial Judge in the course of his reasons for judgment. The formal judgment made no reference to the point, although it was covered in the appellant's notice of appeal and in both factums filed. Counsel for the respondent Attorney-General advised the Court that in any event the Crown was desirous that the matter be considered by the Court. In result, both parties agreed to an amendment to the relief claimed in the statement of claim and in the counterclaim, and an amending order was made *nunc pro tunc*.

For easy reference, I set out now various provisions of the *Taxation Act* and the *Public Schools Act* which are to be considered, omitting, in some instances, portions thereof that are irrelevant to the issues or proper construction:

Item
No.

(1) *Public Schools Act*, s. 2(1), defines *owner* as:

> "owner" means,
>
> (*b*) with respect to real property in a rural area, an owner as defined in the *Taxation Act*;

(2) *Taxation Act*, s. 2, defines *owner* as:

> "owner," when used in respect of any land, improvements, or mineral claim, means the registered owner, or, in case a certificate of purchase or agreement for the sale of the land or mineral claim has been registered, means the registered holder of the last registered certificate of purchase or agreement for sale; and in case a Crown grant has been issued and has not been registered, means the grantee named therein;

(3) *Public Schools Act*, s. 2(1) ["occupier" enacted 1962, c. 54, s. 2(*b*)], defines *occupier* as:

> "occupier" means an occupier as defined in the *Taxation Act*;

(4) *Taxation Act*, s. 2, defines *occupier* as:

"occupier" means the person in possession of land of the Crown which is held by him under any homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement or other record from the Crown, or which is simply occupied;

(5) *Taxation Act* proves for the imposition of taxation as follows:

(i) 4(1) To the extent and in the manner provided in this Act, and for the raising of a revenue for Provincial purposes,

(*c*) every occupier of Crown land shall be assessed and taxed on the land and the improvements thereon held by him as an occupier.

(ii) 25. Every person shall be assessed and taxed annually on his land and the improvements thereon in the assessment district in which the land is situate . . .

(iii) 26(1) Subject to subsections (2) and (3), land and the improvements thereon shall be assessed and taxed in the name of the owner.

(3) Where land belonging to the Crown in right of the Province or in right of Canada is held under any homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application for purchase, easement, or otherwise, or where land is held in trust for a tribe or body of Indians and occupied by a person not an Indian in other than an official capacity, the land, together with the improvements thereon, shall be assessed, and the occupier thereof shall be taxed as if he were the owner of the land and improvements; but no assessment or taxation in respect of land so held or occupied shall in any way affect the rights of Her Majesty in the land.

(iv) The following, *inter alia*, is exempt from such taxation (s. 24(*i*)):

(*i*) Land and the improvements thereon vested in or held by Her Majesty, or held in trust for Her Majesty, either in right of Canada or of the Province, or held in trust for the public uses of the Province; and land and the improvements thereon vested in or held by Her Majesty or any person in trust for or for the use of any tribe or body of Indians, and either unoccupied, or occupied by some person in an official capacity, or by the Indians:

(6) The *Public Schools Act* provides with respect to taxation as follows:

(i) 197(6) On or before the twentieth day of April in each year the Minister [Minister of Education] shall send to each Board [of Trustees of a school district] a notice setting forth

(*a*) the grants authorized under this Act with respect to the annual budget of the Board;

(*b*) the assessed values of land and improvements in the school district as certified under the *Assessment Equalization Act*; and

(*c*) the amounts to be raised by taxation and to be requisitioned from each constituent part of the school district.

(7) On or before the first day of May in each year, the Board of each school district shall, by by-law, adopt the annual budget and therein levy upon all taxable land and improvements within the school district according to the assessed value thereof a rate to provide the total of the amounts under clause (*c*) of subsection (6). . . . [rep. & sub. 1968, c. 45, s. 27]

(ii) 198(1) All amounts required to meet the annual budget of a Board, other than amounts provided by way of grants from the Province . . . shall be raised by taxation in the constituent parts of the school district.

(2) Notwithstanding any other Act, all moneys required to be raised for school purposes by taxation in any . . . rural area shall be levied on the assessed value of land and seventy-five per centum of the assessed value of improvements within the . . . rural area, and every person shall be taxed on the assessed value of his taxable land and seventy-five per centum of the assessed value of his taxable improvements. [rep. & sub. 1968, c. 45, s. 28]

(iii) 199(2) . . . the Provincial Surveyor of Taxes . . . shall cause to be prepared and rendered upon each assessed owner in the . . . rural area (if any) comprised within the school district a tax demand notice or a taxation notice . . . [rep. & sub. 1968, c. 45, s. 28]

(iv) 201. For the raising of a revenue for Provincial purposes to meet in part the expenditures of the Province for school purposes under this Act, all land and improvements within a rural area which does not form any part of any school district shall be assessed and taxed annually, and every owner of such land and improvements shall be taxed at a rate of not less than . . .

(v) 204(1) Subject to the provisions of this Act, all the provisions of the *Taxation Act* apply to the assessment, levy, collection, and recovery of all taxes imposed under this Act in a rural area of a school district, and to the addition of interest to such taxes when delinquent, in like manner as to taxes imposed under the *Taxation Act*; and all such taxes when levied shall, for all purposes of the *Taxation Act*, be deemed to be Provincial taxes imposed and assessed under that Act, and upon collection or recovery shall be accounted for as such. [am. 1968, c. 45, s. 30]

(vi) There is, *inter alia*, the following exemption from taxation:

207. Subject to the provisions of this Act, property in a rural area of a school district exempt from taxation under the *Taxation Act* is also exempt from taxation under this Act, except as provided in clauses (*a*) to (*d*):—

I come now to the questions raised by the appellant's three submissions to this Court, as set out above.

A. *Does the Public Schools Act purport to impose a school tax on the appellant even if he be an "occupier" as defined in that statute and the taxation Act?*

The learned trial Judge held, in effect, that the provisions of s. 204(1) of the *Public Schools Act* (item 6(v) above) brought into effect for the levy of school taxes under that Act the taxing provisions of the *Taxation Act*, which by both s. 4(1) (item 5(i) above) and, particularly, s. 26(3) (item 5(iii) above) clearly imposes a general tax on the appellant as an "occupier", not being an Indian or in an official capacity, of lands held in trust for a tribe or body of Indians. Counsel for the respondent Attorney-General submitted that that view is the proper one and stressed that the taxing provisions of the *Public Schools Act* should not be read alone as containing a code for school taxation, but together with the *Taxation Act* and *Assessment Equalization Act*, R.S.B.C. 1960, c. 18, to form an over-all real property taxation code. He endeavoured to establish by reference to the various provisions of each statute that the intent was clear that each should be read in the light of the others, not only with respect to procedural matters but with respect to the imposition of the incidence of tax and the proper construction of the provisions of each.

On the other hand, the appellant argued that s. 204(1) merely incorporates in, or makes applicable to, the *Public Schools Act*, all the machinery which is set out so fully in the *Taxation Act* for the assessment of value, the assessment or levy of a tax when the rate is struck as well as all the procedures for collection and recovery of taxes imposed.

It is apparent that the problem is one of statutory construction and the application to such construction of the proper fundamental rules of interpretation. At one time it was thought that taxation statutes should be "strictly" construed (as opposed to a beneficial construction) against the fiscus. I think the cases establish that now the distinction has largely eroded, and that the same general and proper rules of construction apply to all statutes. One fundamental rule is that referred to by Tysoe, J.A., in giving the judgment of this Court, in *Re Simon Fraser University and District of Burnaby* (1968), 1 D.L.R. (3d) 427, 66 W.W.R. 684, when at p. 430 he said:

> . . . a statute is to be expounded "according to the intent of them that made it". If the words of the statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature.

It is, of course, not open to narrow the operation of a taxing statute, once its meaning has been ascertained by the application of the ordinary rules of construction. But if it is not shown by the words used that a tax is imposed, then the strict construction must be given in the sense "that there is no room for any intendment, and regard must be had to the clear meaning of the words": see 36 Hals., 3rd ed., p. 416, para. 633. As was said by Rowlatt, J., in *Cape Brandy Syndicate v. Inland Revenue Commissioners*, [1921] 1 K.B. 64 at p. 71, and approved by Viscount Simon in *Canadian Eagle Oil Co., Ltd. v. The King*, [1946] A.C. 119, 114 L.J.K.B. 451 (H.L.): "There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." If the imposition of tax is not shown by clear and unambiguous words, and there remains doubt, the construction should be in favour of the subject. I think that it was in the sense of the foregoing that Spence, J., in giving the judgment of the Supreme Court of Canada in the recent case of *Toronto Transit Commission v. City of Toronto* (1971), 18 D.L.R. (3d) 68, said at p. 72:

> It will be seen that the taxing provision is contained in the first lines of s. 4 and, of course, one need not cite authority for the proposition that the taxing provision must be strictly construed.

I approach the search for the proper construction in the light of the foregoing.

It must be first considered whether or not the imposition of tax on an occupier has been transported into the statute by s. 204(1). It is my opinion that the answer lies in the clear words and clear phrasing of s. 204(1), which must govern. To my mind, it is plainly shown that a distinction is made between taxes *imposed* under the *Taxation Act* and those imposed under the *Public Schools Act*. The provisions of the *Taxation Act* are to be applied only to "all taxes imposed under" the *Public Schools Act* "in like manner as to taxes imposed under the *Taxation Act*". It is clear that the *Taxation Act, inter alia*, specifically imposes liability for general tax on an occupier (as defined) of Crown lands or lands reserved for Indians as well as an owner of property. Section 204(1) does not state or infer that taxes imposed under the *Taxation Act* shall be deemed to be taxes imposed under the *Public Schools Act* or that the taxes imposed under the latter Act shall be those or the same as those imposed under the *Taxation Act*. All the enumerated provisions of the *Taxation Act* have application *only* to taxes imposed under the *Public Schools Act* by its own provisions. To conclude that the appli-

cation of provisions of one statute to "taxes imposed" by another should be construed as importing into, or adding to the latter the "taxes imposed" by the former, is, in my respectful view, akin to hoisting oneself by one's bootstraps. It follows that what school taxes are imposed under the *Public Schools Act* must be defined before the enumerated provisions of the *Taxation Act* apply thereto.

Therefore, in my view, the liability for school tax of an "occupier" must be found within the *Public Schools Act* itself. The question to be determined is, does that statute impose school tax on an "occupier" as defined therein, which, as I have indicated, is the same as that in the *Taxation Act*. The scheme and incidence of school taxation appear in ss. 197(6) and (7) and 198 (items 6(i) and (ii)) as construed in the light of ss. 199(2) and 201 (items 6(iii) and (iv) above). The first subsection provides for the ascertainment of the amount to be raised by school taxes, and the next requires each Board of School Trustees to levy a tax on "all taxable land and improvements" in the district on the basis of a rate fixed by it. At this stage there is no provision as to who is liable for the tax levied with respect to such "taxable land and improvements". Then s. 198 follows, which, after enacting that the required amounts shall be raised in the district by taxation, provides that with respect to a rural area those requirements shall be levied on the whole or a portion (as the case may be) of the assessed value of the real property, and "*every person* shall be taxed on . . . the assessed value of *his* taxable land and seventy-five per centum of the assessed value of *his* taxable improvements". (My emphasis.) Although in the *Taxation Act* it was apparently felt necessary to specifically provide that a tax was exigible against an occupier of Crown lands under ss. 4(1) and 26(3) (items 5(i) and 5(iii) above) as well as to the general liability for tax against "every person . . . on his land and the improvements thereon" under s. 25 (item 5(ii) above), no similar provision appears in the *Public Schools Act*. It is obvious that the reason that it was necessary to specifically provide for taxation against the occupier of Crown lands personally is that a valid tax could not be imposed by the Legislature on Crown lands and improvements, as mentioned in detail later in this judgment. The word "occupier" was defined identically in both statutes, but was not used at all in the *Public Schools Act*. It is hard to understand that if the Legislature intended to tax an occupier as defined in the Act, it would not have clearly said so instead of patently ignoring that class completely. The result, in my

view, is that the *Public Schools Act* does not purport to tax an occupier (as defined) of Crown or Indian lands. Support for that view is given by the language of s. 199 (item 6(iii) above) which follows immediately after s. 198 (which imposes the school tax) and provides that a demand or taxation notice shall be sent to each assessed *owner* in a rural area in a school district and by that of s. 201 (item 6(iv) above) which provides for assessment for school taxes of every *owner* in a rural area outside a school district. As I have indicated, "owner" is defined (s. 2 of each of the *Taxation Act* and *Public Schools Act* — see items (1) and (2) above) and with respect to a rural area means a registered owner or a grantee of an unregistered Crown grant, and does *not* include an "occupier" as defined in both statutes. Should ss. 197(7) and 198(2) (items 6(i) and (ii) above) be construed as broad enough, by use of the general words "every person" and "his taxable land" and "his taxable improvements", to impose tax on an "occupier" as well as on an "owner", we would have the strange result that only the "owner" in a rural area would get a tax notice or demand under s. 199 (item 6(iii) above) or be subject to the provisions of s. 201 (item 6(iv) above). It is clear that "owner" in those sections does not include an "occupier". On consideration of all the foregoing factors, I have concluded that such a construction is much too broad and not justified on the clear meaning of the language used in the statute.

It follows that in my opinion the *Public Schools Act* does not purport to impose or levy a school tax on an occupier, as defined, of Crown or Indian lands in a rural area and any such imposition of school tax on the appellant, even if he be such an occupier, was invalid. I add that my conclusion does not necessarily apply to lands in a municipality as opposed to a rural area. Although not argued before us, the situation in a municipality might be different because the definition of "owner" in the *Municipal Act*, R.S.B.C. 1960, c. 255, is applied (*Public Schools Act*, s. 2(1)(*a*)) and that definition apparently includes an occupier.

B. *Although the Taxation Act purports to impose general taxes on an occupier of Crown or Indian lands, is the appellant such an occupier exigible to those taxes?*

The learned trial Judge held that the appellant was such an occupier within the definition of that word contained in s. 2 of the *Taxation Act* (item 4 above) and hence under s. 26(4) (item 5(iii) above) was taxable "as if he were the owner of

the land and improvements". In his reasons for judgment, after referring to the agreed fact that the lease under which the appellant held possession was not in compliance with the *Indian Act* as indicated above, he said that that situation or irregularity did not deny the fact that the appellant had actual occupancy of lands held in trust as referred to in s. 26(3), *supra*, and that he came within the definition of "occupier" as he was a person in possession of Crown or Indian lands which he "simply occupied". The respondent supported that view. He stressed the agreed fact that the appellant was and had been in actual possession and use of the property under the purported lease, and although the lease was void under the provisions of the *Indian Act*, the appellant was not *ipso facto* a trespasser, as he was in sole possession at least with the consent, leave and licence of the Indian entitled to possessory rights in the property.

On the other hand, the appellant's counsel strongly urged that the appellant had no legal entitlement or interest in the property and hence could not be an "occupier" because that term and even the words "simply occupied" in the definition imply the existence of some element of lawful occupation involving some legal interest. It was submitted that the authorities relied on by the learned Judge and the respondent, principally *Smith v. Rural Municipality of Vermilion Hills* (1914), 20 D.L.R. 114, 49 S.C.R. 563, 6 W.W.R. 841: affirmed 30 D.L.R. 83, [1916] 2 A.C. 569, [1917] 1 W.W.R. 108 (P.C.), and *City of Vancouver v. Chow Chee*, [1942] 1 W.W.R. 72, 57 B.C.R. 104 (both of which held that an occupier of Crown lands could be validly taxed personally in such capacity under a provincial statute), were distinguishable as the occupant in each case had some legal entitlement to an interest in the lands.

I cannot accept the appellant's submissions that because the lease was not "in compliance with the provisions of the *Indian Act*" and hence void, the lands in question were not "simply occupied" by him. No doubt proper authority could remove him at any time, but while in actual use and possession given in fact by a person who had some right to possession, he could maintain his possession against all other than those who would have a right to have him ejected. In the interim, the appellant has possession in a legal but limited sense. In *Bentley et al. v. Peppard* (1903), 33 S.C.R. 444, Sedgewick, J., in giving the judgment of the Supreme Court of Canada, had occasion to refer to the following "fundamental proposition", at p. 446, when he said:

> 3. Where a person without title and without right (in Canada we call him a "squatter") enters upon land, his possession in a legal sense is limited to the ground which he actually occupies, cultivates and evolves; it is a *possessio pedis*—nothing more.

I am quite unable to modify the word "occupier" as used and defined in the *Taxation Act* by the word "lawful", or to construe the plain words in the definition "person in possession of land of the Crown . . . which is simply occupied" so that they read as though the word "lawful" were inserted before "possession" and or the word "lawfully" were inserted between "simply" and "occupied".

In my opinion the learned trial Judge did not err when he found that the appellant was an "occupier" within the meaning of the *Taxation Act*, and hence subject to general taxes as if he were an owner of the lands in question.

C. *If the Taxation Act (and/or the Public Schools Act) purports to tax land in an Indian reserve, is it ultra vires the provincial Legislature to such extent?*

The learned trial Judge concluded that both the *Taxation Act* and the *Public Schools Act* did not purport to tax Crown or Indian lands as such, but that the taxes levied on the appellant were levied on him personally as an occupier pursuant to s. 26(3) of the *Taxation Act*, and that, under the authority of *Smith v. Rural Municipality of Vermilion Hills*, *supra*, and *City of Vancouver v. Chow Chee*, *supra*, it was within the competency of the provincial Legislature so to do. I am in agreement with that conclusion so far as the *Taxation Act* is concerned. I venture to say nothing with respect to the *Public Schools Act*, because I have already found in this judgment that that statute does not purport to tax the appellant as an "occupier" of Crown or Indian lands in a rural area. It would be wrong to speculate on whether the requisite provisions of the latter statute were *intra* or *ultra vires* if they did purport to so tax — that would largely depend on the method adopted.

The appellant endeavoured to support his proposition that the taxation of the appellant as an occupier "as if he were an owner" was *ultra vires* by two submissions. First, he attempted to dispose of the *Smith* and *Chow Chee* cases, *supra*, as being distinguishable and not applicable because the judgments both were based solely on s. 125 of the *B.N.A. Act, 1867*: "No lands or property belonging to Canada . . . shall be liable to taxation." Secondly, regardless of s. 125, he argued that in the case at bar the lands in question were part of an Indian reserve under the *Indian Act*, and that s. 91(24) of

the *B.N.A. Act, 1867* provided that the Parliament of Canada should have exclusive legislative authority over "Indians, and lands reserved for the Indians". If I understood correctly, on that basis the appellant submitted that, even if the provincial statute did not actually tax Crown lands as such contrary to s. 125, *supra*, the legislation was with respect to "lands reserved for the Indians". He relied on the judgment of this Court in *District of Surrey et al. v. Peace Arch Enterprises Ltd. et al.* (1970), 74 W.W.R. 380. In that decision it was held that certain properties forming part of "lands reserved for the Indians" but validly leased by the Crown under the *Indian Act* to developers for an amusement park were not subject to certain municipal by-laws and regulations providing for zoning and specifying building, water service, sewerage disposal and other requirements with respect to the land, and the way it could and could not be used. The Court found that the restrictions were directed to the use of the land and that the regulation of such use was an unwarranted invasion of the exclusive legislative jurisdiction of Parliament to legislate with respect to "lands reserved for the Indians".

I cannot see that that case has any application here. The Legislature has not purported to legislate in any way with respect to "lands reserved for the Indians" or their use. The tax legislation is not concerned with Indian lands but merely imposes a tax personally on an occupier thereof with respect to his occupation. In my opinion the appellant's submission is without substance and I reject it.

In result, I would vary the judgment below in view of my conclusion on the matter which was not included in the prayers of relief of either the appellant or respondent in the Court below, but which were added by amendment during the appeal. The effect is that the appellant's claim be not dismissed in its entirety but be allowed to the extent that a declaration be made in the terms of para. 1(d) of the amended prayer for relief in the statement of claim, but limited to a rural area only. This declaration can be inserted in lieu of the present (B) of the formal judgment, the other declarations (A), (C) and (D) to stand.

MCFARLANE, J.A. (dissenting in part):—I have the advantage of having read the reasons for judgment prepared by my brother Bull. I agree with him that:

(1) Section 26(3) of the *Taxation Act*, R.S.B.C. 1960, c. 376, and amendments (to 1970 [c. 44]) and ss. 198, 199 [rep. & sub. 1968, c. 45, s. 28] and 204 [am. 1968, c. 45, s. 30]

of the *Public Schools Act*, R.S.B.C. 1960, c. 319, and amendments (to 1970 [c. 41]) are not *ultra vires* the Legislature of British Columbia. They do not constitute legislation in relation to Indians or the lands reserved for the Indians: *B.N.A. Act, 1867*, s. 91(24). Further, neither statute purports to impose a tax on lands belonging to Canada or any Province: *B.N.A. Act, 1867*, s. 125. Indeed, such lands are specifically exempt from taxation by virtue of ss. 24(*i*) and 26(3) of the *Taxation Act* which also applies to taxes imposed by the *Public Schools Act* (s. 204). If there be any doubt in interpretation, and I think there is none, it must be resolved in favour of constitutional validity on the authority of decisions such as *Re Reciprocal Insurance Legislation; Craigon v. The King; Otte v. The King*, [1924] 1 D.L.R. 789, 41 C.C.C. 336, [1924] A.C. 328 *sub nom. A.-G. Ont. v. Reciprocal Insurers*. A contention that indirect taxation is imposed was abandoned by the appellant.

(2) The appellant and others in the class he is authorized to represent in this litigation are occupiers of land held in trust for Indians within the meaning of the *Taxation Act*, ss. 2 and 26(3), and cannot escape taxation validly imposed by asserting that their leases granted to them by Indian locatees contrary to the *Indian Act*, R.S.C. 1952, c. 149 [now R.S.C. 1970, c. I-6], are null and void.

(3) The appellant and others in the class so represented are liable to general taxation imposed on them by the *Taxation Act* as "occupiers". Being "occupiers" they are subject to be taxed as owners by virtue of the *Taxation Act*, s. 26(3).

I do not, however, agree with my learned brother that the members of the class which includes the appellant are free from liability for school taxes. In my opinion, school taxes are validly imposed on such persons occupying the lands in question situate in a rural district. I think the intention of the Legislature to impose school taxes on them is expressed with sufficient clarity by the *Public Schools Act* and the provisions of the *Taxation Act* which are made applicable by s. 204(1) of the former statute which for convenience I again set down:

> 204(1) Subject to the provisions of this Act, all the provisions of the *Taxation Act* apply to the assessment, levy, collection, and recovery of all taxes imposed under this Act in a rural area of a school district, and to the addition of interest to such taxes when delinquent, in like manner as to taxes imposed under the *Taxation Act*; and all such taxes when levied shall, for all purposes of the

> *Taxation Act*, be deemed to be Provincial taxes imposed and assessed under that Act, and upon collection or recovery shall be accounted for as such.

I think this section must be interpreted in such a way as to give effect to the intention to tax these occupiers which appears with sufficient clarity from a consideration of ss. 2, 4(1)(*c*), 24(*i*), 25 and 26(1) and (3) of the *Taxation Act*.

The first thing to be observed about s. 204(1) is that it does not say that the provisions of the *Taxation Act* relating to the assessment, levy, collection and recovery of taxes apply. It does say that *all* the provisions of the *Taxation Act* apply to the assessment, levy, collection and recovery of *all* taxes imposed under the *Public Schools Act* in a rural area.

I am unable to conceive of anything denoted by the word "imposed", as related to taxes, which is not included in the connotation of the words "assessment, levy, collection and recovery". It follows, I think, that on a proper interpretation s. 204(1) means that *all* the provisions of the *Taxation Act* apply to the imposition of all taxes "imposed under this Act", namely, the *Public Schools Act*. The phrase "imposed under this Act" should then be fairly interpreted to mean "school taxes", or more accurately, "all amounts required to meet the annual budget of a school board" or "all monies required to be raised for school taxes by taxation" to use the language of s. 198(1) and (2) respectively and by s. 199(1) unless a narrow or restricted meaning is given to the words "taxes imposed under this Act". It is not necessary to find elsewhere in the *Public Schools Act* itself specific provision for imposition of the tax. With respect for the contrary view, the interpretation I prefer is a reasonable and fair interpretation which gives effect to the real intention of the Legislature fairly expressed.

I think this interpretation is supported by the concluding words of s. 198(2) of the *Public Schools Act*:

> . . . every person shall be taxed on the assessed value of his taxable land and seventy-five per centum of the assessed value of his taxable improvements.

It involves no misuse of language to apply the word "his" to an occupier as well as to an owner in this context. So interpreted the subsection itself imposes "school tax" on an occupier. I think, too, it is significant that the word "his" is found in like context in s. 25 of the *Taxation Act* which I have already agreed applies to both owners and occupiers.

I think also the broad and liberal interpretation of the words "taxes imposed under this Act" in s. 204(1) is in full

accord with the concluding portion of the subsection itself which provides that all such taxes when levied shall for all purposes of the *Taxation Act* be deemed to be provincial taxes imposed and assessed under that Act.

I cannot accept the ancillary argument that there would arise the anomaly that an owner would receive and an occupier would not receive a tax notice or demand under s. 199 or the further anomaly that s. 201 would apply to an owner but not to an occupier. I think this argument is answered by the provision of s. 26(3) of the *Taxation Act* that the occupier "shall be taxed as if he were the owner of the land and improvements".

For these reasons I am of the opinion that s. 26(3) of the *Taxation Act* and all other provisions of that Act apply so as to render the appellant and others in the class he represents liable to taxation for school purposes.

The declarations ordered by Wootton, J., the learned trial Judge, should be altered to conform with the amendments agreed at the hearing of the appeal. Subject to that variation, I would dismiss the appeal.

Appeal dismissed; judgment varied in part.

CULINA v. GIULIANI et al.

Supreme Court of Canada, Martland, Judson, Ritchie, Hall and Spence, JJ. October 5, 1971.

Trusts and trustees — Trustee bringing action — Whether to be regarded as real party in cause — Whether cause of action of cestui que trust tainted by defences available against trustee personally — Whether trustee permitted locus penitentiae on behalf of innocent cestui que trust.

Practice — Parties — Trustee — Whether to be regarded as real party in the cause — Whether cause of action of cestui que trust tainted by defences availabie against trustee personally.

Although according to old common law one who brought action as a trustee was required to be treated in all respects as the party in the cause, in equity the *cestui que trust* was identified as the true party in interest. Defences which might have been available against the trustee if suing in his own right were not available against him in his capacity as trustee.

Accordingly, even though one who brings action as a trustee may be shown to have been party with the defendant and another in certain fraudulent transactions involving the general matter in litigation, the trustee's cause of action does not arise *ex turpi causa* and he is per-

[CHANCERY DIVISION.]

TOTTEN v. TRUAX ET AL.

Crown lands—Indian lands—Assessment and taxes—Tax sale—R. S. O. ch. 193 sec. 159—R. S. C. ch. 43, s. 77, sub-sec. 3—51 Vic. ch. 22, sec. 2—Reeve purchasing at tax sale.

Held, that land in which the Indian title has been surrendered to the Crown and which has been afterwards sold or located, is liable to be sold for taxes imposed by a municipality, although while the title and interest are wholly in the Crown, the land is exempt from taxation;

Church v. *Fenton*, 28 C. P. 384; 4 A. R. 159; 5 S. C. R. 239 referred to and followed.

Held, also, that a Reeve of the township in which the land so sold for taxes are situate is not disqualified, *ex officio*, from purchasing.

THIS was an action brought by William Totten against Joseph Truax and William Plews, to recover possession of lot 11, con. 5, in the township of Keppel, and mesne profits from November 16th, 1886, and damages for alleged waste committed by the defendants, and an injunction to restrain further waste.

The facts as set out in the statement of claim, showed that in 1854, the chiefs and principal men of the Indians tribes residing at Saugeen and Owen Sound, made a full and complete surrender to Her Majesty of all that peninsula then known as the "Saugeen and Owen Sound Indian Reserve," in trust to sell for the benefit of the said Indian tribes, and amongst the land so surrendered, was the lot in question: that on April 1st, 1881, the Superintendent-General of Indian affairs on behalf of the Crown agreed to sell the lot in question to one Pearson, who then became locatee and purchaser thereof: that from after that date, the land was, by the laws in force in this Province, subject to taxation for municipal purposes, and to the extent of the locatee and purchaser's interest liable to be sold for arrears of taxes: that the locatee suffered the taxes for 1882, 1883, 1884, and 1885, to be in arrear and unpaid: that the lot was offered for sale on October 29th, 1886, by the treasurer of the county of Grey, for arrears of taxes

amounting to $168.60, but no bid was received therefor: afterwards, on November 16th, 1886, the lot was sold to the plaintiff, who received a certificate from the treasurer accordingly, and the lot not being redeemed, on November 27th, 1887, the warden and treasurer of the county executed a deed to the plaintiff of the lot, which deed was duly registered in the Indian land office at Wiarton, and in the office of the Superintendent-General of Indian affairs, who duly approved of the same, and directed the plaintiff's name to be entered in the books of his office and of the Indian land office in Wiarton, as locatee and purchaser thereof: that the defendants were in possession and claimed title from the original locatee, and refused to give up possession, and were cutting timber and committing waste, and the plaintiff accordingly claimed as above mentioned.

The defendants, by their statement of defence, amongst other things set up that the lands were not at the time of the plaintiff's alleged purchase or at any time prior thereto subject to taxation for municipal purposes, or liable to be sold for arrears of taxes: that at any rate the sale was invalid, amongst other reasons because the plaintiff was at the time of his pretended purchase, reeve of the township in which the lot in question was situate, and a member of the county council by whose warden and treasurer the lot was put up for sale: that they the defendants had made lasting improvements on the land under the *bonâ fide* belief that they were the owners of the land, and claimed compensation for the same.

The action came on for trial before Boyd, C., at Owen Sound, on December 18, 1888.

Masson, for the plaintiff, referred to and relied on *Church* v. *Fenton*, 28 C. P. 384: 4 A. R. 159; 5 S. C. R. 239; 51 Vic. ch. 22 (D.)

O'Connor, for the defendant. The law has been changed since *Church* v. *Fenton*, *supra*. When these lands were taxed in 1882, they were not liable: R. S. C. ch. 43, sec.

77, sub-sec. 3; *Stevenson* v. *Traynor*, 12 O. R. 804. As to the plaintiff being reeve, he could not purchase for taxes due to his own township: *Greenstreet* v. *Paris*, 21 Gr. 229; *In re Cameron*, 14 Gr. 612; *Beckett* v. *Johnston*, 32 C. P. 301, 319; *Massingberd* v. *Montague*, 9 Gr. 92. His interest is to get the land low, and that of the township to get the largest price. Thus there is a conflict of interest. Besides, he has influence over the officials of the township. Then the Crown should be a party, because the patent has not issued.

Masson, in reply. There has been no change of the law since *Church* v. *Fenton*, *supra*. The Act of last session 51 Vic. ch. 22 D. only removed doubts and declared the law. The Crown has approved of the sale, and so it was not necessary to make it a party. As to the disqualification of the reeve, the Assessment Act prohibits no one from buying. The reeve had nothing to do with the sale or the preliminaries thereto.

November 28th, 1888. BOYD, C.—This sale appears to me to be valid, because the principle of the decision in *Church* v. *Fenton*, 28 C. P. 384, applies to it. The clause in the statute, which in that case was held to justify the sale of land held by the Dominion, in which the Indian title was extinguished by surrender, was 27 Vic. ch. 19, sec. 9, which is precisely the same as and is the original of R. S. O. ch. 180, sec. 126, (1877), and R. S. O. ch. 193, sec. 159, (1887.) The clause exempting from taxation to be found in the Indian Act, R. S. C. ch. 43, sec. 77, sub-sec. 3, is in substance the same provision which is referred to in *Church* v. *Fenton* as found in 16 Vic. ch. 182, and which is carried forward in subsequent legislation. While the title and interest are wholly in the Crown, the land is exempt from taxation, but by construction put upon the statutes, if the Crown sells or locates then the interest of the purchaser or locatee is subject to taxation by the local government. That appears to me to be a strained exegesis, but so far as I can judge, it is the one promulgated by Mr. Justice

Gwynne, which received the sanction of a majority of the Judges in the Supreme Court: 5 S. C. R. 239. The fact that the taxation in the one case began before Confederation, and was continued after it; and in this case, that the whole of the taxation was after Confederation, does not, to me, appear a material distinction. The recent legislation at Ottawa is in recognition of the right thus to sell the interest of holders of Indian lands while yet unpatented. By 51 Vic. ch. 22, sec. 3, the part of the Indian Act which exempts is repealed, and the following substituted:

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.

That affirms the right of the municipality to make sale for taxes subject to the recognition of that sale by the superintendent-general of Indian affairs. I suppose the usual course would be to accept all such sales if validly conducted, and to treat the purchaser as assignee of the original purchaser from the Crown. In this instance the superintendent-general has acted under the provisions of sec. 2, sub-sec. 5 of this late Act, and has signified his approval of the plaintiff's tax deed by endorsement thereon made on July 4th, 1888, and prior to this action.

I see no reason to invalidate the tax sale and deed for any breach of statutory requirements under the Assessment Act of Ontario. If there was the right to impose taxes at all, they were regularly levied by sale of the land.

The only remaining point is the objection that the plaintiff as reeve of Keppel in which the lands are situate, and a member of the county council of the county of Grey by

whose warden and treasurer the lands were put up for sale was disqualified from purchasing at the sale for taxes. But the plaintiff had no powers or duties with reference to the taxes, or to the sale, of a personal or official nature, and no interference in fact is proved or even suggested on his part.

On the other facts of the case, I was of opinion at its close, that the damages resulting from the user and cutting on the part of the defendants, should be set off against their claim for improvements of which the plaintiff gets the benefit, so far as the fixtures are concerned. The one may very well go against the other. The plaintiff is, however, entitled to his costs of action and injunction.

A. H. F. L.

As I read it, this provision says *only* that no part of the tax shall be considered as applicable to "property passing on death" in respect of which a deduction may be made in computing "aggregate taxable value" (eg, paragraph 7(1)(a)); and it has no application to a gift made by the deceased by his will, such as is contemplated by paragraph 7(1)(b), "by the creation of a settlement".

Deanna J Greyeyes, Plaintiff,

and

Her Majesty the Queen, Defendant.

Federal Court—Trial Division (Mahoney, J), January 19, 1978 (Court No T-4770-76), on appeal from an assessment of the Minister of National Revenue.

Income tax—Federal—Income Tax Act, RSC 1952, c 148 (am SC 1970-71-72, c 63)—2(1), (2), 56(1)(n), 81(1)(a)—Indian Act, RSC 1970, c I-6—87, 90(1)(b)—Indian—Scholarship received by virtue of a treaty—Whether exempt from income tax.

The plaintiff, an Indian, while attending university received a scholarship of $2,339 from the Government of Canada under the terms of an agreement and treaty with the plaintiff's band. The Minister of National Revenue, in assessing the plaintiff's income tax, included in income the amount of the scholarship in excess of $500 under the provisions of paragraph 56(1)(n) of the *Income Tax Act*. The plaintiff contended that the scholarship was exempt from tax under the *Indian Act*.

HELD:

The scholarship was personal property and, because it was given to the plaintiff under a treaty, it was deemed by paragraph 90(1)(b) of the *Indian Act* to be situated on a reserve for the purposes of section 87 of that Act. Although income tax is levied on persons and not on property, by including the scholarship in the plaintiff's income she was subject to a greater amount of tax with the result that it was a tax in respect of personal property situated on a reserve, within the meaning of section 87, and accordingly exempt from taxation. Appeal allowed.

Gerald F Scott for the plaintiff.

W A Ruskin and Miss *J A Williamson* for the defendant.

Cases referred to:

Sura v *MNR*, [1962] CTC 1; 62 DTC 1005;

MNR v *The Iroquois of Caughnawaga*, [1977] 2 FC 269; [1977] CTC 49; 77 DTC 5127.

Mahoney, J:—The plaintiff appeals against the inclusion in her taxable income for 1974 of the sum of $1,839.50 which she says is exempt from taxation by virtue of certain provisions of the *Indian Act*, RSC 1970, c I-6. The material facts were agreed:

STATEMENT OF AGREED FACTS

1. The Plaintiff is a full status Indian as defined by the *Indian Act*, RSC 1970 C I-6 and was at all material times a resident of Canada.

2. During the school term of 1974 the Plaintiff attended the University of Calgary in Calgary, Alberta as a student enrolled in a fulltime course of post-secondary education.

3. While attending the University of Calgary the Plaintiff received from the Department of Indian Affairs and Northern Development in Ottawa the sum of $2,339.50 to assist her in her post-secondary education pursuant to a programme of the Department of Indian Affairs and Northern Development.

4. The Plaintiff, at all relevant times, was neither living on nor attending classes on a reserve as that word is defined in the said Indian Act.

5. The said funds received by the Plaintiff were given to her pursuant to an agreement and treaty between the Plaintiff's Band and Ottawa and specifically pursuant to an agreement to assist band members in their education in compliance with the obligations of the Federal Government under Treaty No 6.

The defendant contends that the $1,839.50 was properly included in the plaintiff's 1974 taxable income by virtue of the following provisions of the *Income Tax Act*:

2. (1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year.

(2) The taxable income of a taxpayer for a taxation year is his income for the year minus the deductions permitted by Division C.

56. (1) . . . there shall be included in computing the income of a taxpayer for a taxation year,

. . .

(n) the amount, if any, by which

(i) the aggregate of all amounts received by the taxpayer in the year, each of which is an amount received by him as or on account of a scholarship, fellowship or bursary, or a prize for achievement in a field of endeavour ordinarily carried on by the taxpayer,

exceeds

(ii) $500;

The plaintiff contends that the $1,839.50 was wrongly included by virtue of paragraph 81(1)(a) of the *Income Tax Act* and section 87 and subsection 90(1) of the *Indian Act*:

[*Income Tax Act*]

81. (1) There shall not be included in computing the income of a taxpayer for a taxation year,

(a) an amount that is declared to be exempt from income tax by any other enactment of the Parliament of Canada;

. . .

[*Indian Act*]

87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 83, the following property is exempt from taxation, namely:

(a) the interest of an Indian or a band in reserve or surrendered lands; and

(b) the personal property of an Indian or band situated on a reserve;

and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, being chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, on or in respect of other property passing to an Indian.

90. (1) For the purposes of sections 87 and 89, personal property that was

(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

It is, of course, paragraph (b) of each of section 87 and subsection 90(1) that is pertinent and, further, it is the plaintiff's position that those provisions exclude the $1,839.50 from her taxable income entirely independent of subsection 81(1) of the *Income Tax Act* which is pleaded only as supplementary and alternative support for her position.

I will, for convenience, hereafter refer to the $2,339.50 payment as "the scholarship". In light of the agreed facts, the scholarship was the personal property of an Indian situated on a reserve within the meaning of section 87 of the *Indian Act*; it is deemed to be such by virtue of subsection 90(1). Nothing turns on the fact that the plaintiff did not reside on a reserve or apply the scholarship to classes conducted thereon. It is the property, not the Indian, that is required to be situated on a reserve.

Aside from the particular references to succession duties and estate tax, which have no bearing on this case, section 87 appears, on a plain reading, to make three independent provisions *vis-à-vis* the personal property of an Indian situated on a reserve, that is, in this case, the scholarship. Firstly, "the following property is exempt from taxation, namely": the scholarship. Secondly, "no Indian . . . is subject to taxation in respect of the ownership, occupation, possession or use of" the scholarship. Thirdly, "no Indian . . . is otherwise subject to taxation in respect of" the scholarship.

Counsel appear from their argument to have discarded the second provision as having any application in this case. I agree. To the extent that the terms "ownership, occupation, possession or use" can have any application to a scholarship, the inclusion of the amount of a scholarship, or part of such amount, in an Indian's taxable income under the *Income Tax Act* does not result in a tax in respect of its ownership, occupation, possession or use.

Extensive argument was directed to the first provision with the defendant taking the position that it is well settled that the *Income Tax Act* levies a tax on persons, not on property and the plaintiff urging that decisions to that effect made in cases involving very different facts ought not bind the Court in an entirely novel factual situation. The general question of the nature of the incidence of income tax has been considered on numerous occasions by the highest authorities. It is not necessary for me to go beyond the decision of the Supreme Court of Canada in *Sura* v *MNR*, [1962] CTC 1 at 4; 62 DTC 1005 at 1006,* where Mr Justice Taschereau dealt with the charging provision enacted in 1948† which was identical to the present subsection 2(1):

> Nothing in subsequent amendments of the Act changes the rule that it is not ownership of property which is taxable, but that the tax is imposed on a taxpayer, and the tax is determined by the income received by the person who is the legal beneficiary from employment, businesses, property or ownership. As Mr Justice Mignault stated in the case of *McLeod* v *Minister of Customs and Excise*, [1917-27] CTC 290, at page 296 [1 DTC 85 at page 87]:
>
> > "All of this is in accord with the general policy of the Act which imposes the Income Tax on the person and not on the property."

The defendant's position in this respect is well taken. That the *Income Tax Act* imposes a tax on the person and not on his property is too firmly established to now be questioned in this Court notwithstanding that the determination may not have been specifically made with the provisions of section 87 of the *Indian Act* in mind.

Before leaving this subject, I should refer to the decision of the Federal Court of Appeal in *MNR* v *The Iroquois of Caughnawaga*, [1977] 2 FC 269; [1977] CTC 49; 77 DTC 5127. With respect, I do not think it applies in this case. It did not deal with income tax. While the Court divided on the question of its jurisdiction, it appears to have been unanimous in its decision that employers' premiums imposed under the *Unemployment Insurance Act, 1971*, SC 1970-71-72, c 48, were not taxation of property within the contemplation of section 87 of the *Indian Act*. I do not infer from that conclusion a decision that such premiums were necessarily some other form of taxation which, in the result, section 87 did not preclude. Rather it seems open to construe the majority decision as holding that such premiums are not a form of taxation at all, a question expressly left open by the Chief Justice in his dissent.

The remaining provision of section 87 is that the plaintiff is not "otherwise subject to taxation in respect of" the scholarship. Does the inclusion of the amount of the scholarship (less $500) in the calculation of her taxable income upon which an income tax is

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* This decision was rendered in French. I have accepted the English translation in the [DTC] report cited.

† SC 1948, c 52.

assessed and levied result in her being subject to taxation in respect of the scholarship? In my opinion, it does.

The tax payable by the plaintiff under the *Income Tax Act* is determined by the application of a prescribed rate to her taxable income. The higher her taxable income, the greater her income tax. The amount by which the plaintiff's scholarship exceeded $500 was added to her taxable income. As a result her taxable income was $1,839.50 more than it would otherwise have been and, it follows, she was assessed more income tax than if it had not been so added. I do not see how, having regard to ordinary English usage, I can come to any conclusion but that she was thereby made subject to taxation in respect of the scholarship.

I do not consider it necessary in the circumstances to rely on paragraph 81(1)(a) of the *Income Tax Act*. Section 87 of the *Indian Act*, by its own terms, prevails over any contrary intention expressed in the *Income Tax Act*.

The plaintiff succeeds. Her 1974 income tax return will be referred back to the Minister of National Revenue for reassessment on the basis that the scholarship was not taxable as income in her hands. The plaintiff is entitled to her costs.

Her Majesty the Queen, Plaintiff,

and

La Clinique de Thérapie de St-Hyacinthe Inc, Defendant,

and

Les Entreprises Yameric Inc, Opposant.

Federal Court—Trial Division (Walsh, J), January 13, 1978 (Court No T-4336-75), on an opposition to seizure under a writ of fieri facias.

Income tax—Federal—Federal Court Act, RSC 1970 (2nd Supp), c 10—56(3), (4)—Quebec Civil Code—1032, 1487, 1488, 1569a, 2268—Seizure of property.

The Minister of National Revenue registered a certificate of indebtedness for income tax against the defendant clinic in November 1975 and obtained a writ of *fieri facias* in July 1977. In September 1977 a seizure was made under the writ of medical equipment and supplies in the premises of the clinic. The opposant, Y Inc, made an opposition to the seizure on the basis that it had purchased the articles in June 1975 from two individuals who in turn had purchased them from B on January 24, 1975. The Minister contended that the articles were owned by the clinic and that the alleged sale by B was a nullity and hence the clinic was still the owner. The opposant further claimed that there was prescription under Article 2268 of the Quebec *Civil Code* and that the sale could not be attacked.

HELD:

The equipment and supplies belonged to the clinic and not to B and hence the sale was null under Article 1487 and was not a commercial matter within

The National Indian Brotherhood, Appellant,

and

Minister of National Revenue, Respondent.

Tax Review Board (A J Frost), March 26, 1975.

Income tax—Federal—Income Tax Act, RSC 1952, c 148 (am 1970-71-72, c 63)—153(1)—Indian Act, RSC 1970, c I-6—87, 90—Withholding and remittance of tax by employer—Whether employees tax-exempt under the Indian Act—Whether tax withheld required to be remitted.

The appellant was a body corporate in Ottawa and withheld tax from salary payments to its Indian employees but did not remit it to the Receiver General because it considered that they were not required to pay tax. The Minister considered that the salaries were paid to non-exempt persons pursuant to the *Income Tax Act* and the *Indian Act* and assessed the appellant for the tax deducted but not remitted plus interest and penalty. The appellant contended that it was only required to remit amounts under subsection 153(1) "on account of the payee's tax" and that it assumed that the payees were non-taxable under sections 87 and 90 of the *Indian Act*.

HELD:

The salaries of the Indian employees were personal property and exempt from tax under the *Indian Act*. The appellant was not required to remit amounts withheld. Appeal allowed.

J H Wyatt for the appellant.

F J Dubruie for the respondent.

A J Frost:—This concerns three appeals, heard jointly at the City of Ottawa, Ontario, on March 17, 1975, from several income tax assessments with respect to appellant's 1970, 1971 and 1972 taxation years.

The notices of appeal only identify the assessments by date and total amounts assessed. However, on the basis of the documents furnished to the Board pursuant to section 89 of the *Income Tax Act* as it read before 1972 and pursuant to section 86 of the *Tax Review Board Act*, the Board has assumed that the appeals are from assessments dated January 26, 1972, and carrying the numbers 194795, 194794, 194797 and 194798, pertaining to the 1970 taxation year; the numbers 194793, 194791, 194799 and 194780, pertaining to the 1971 taxation year and finally from the assessments dated July 5, 1972, in the amount of $6,482.71; July 27, 1972 in the amount of $7,278.91; and October 10, 1972, in the amount of $8,179.83. These assessments were levied pursuant to the provisions of subsection 153(1) (withholding 'tax"), subsection 227(8) (liability on account of not withholding) and subsection 227(9) (penalty). The assessments for 1970 to 1972 inclusive were also based on sections 22 and 23 of the *Canada Pension Plan* and the assessment dated October 10, 1972, included a reference to the *Unemployment Insurance Act*.

At the opening of the hearing a statement of partial agreement as to facts was filed with the Board, which reads as follows:

> For the purpose of the appeal by the Appellant to the Tax Review Board only, the parties hereto agree on the following facts:

1. The Appellant is a body corporate having its head office and principal place of business at the City of Ottawa, in the Province of Ontario, Canada.

2. The Appellant employs in the City of Ottawa many employees, some of whom are Indians within the meaning of that term as used in the *Indian Act* RSC 1970, c I-6, and some of whom are non-Indian.

3. Subject to any oral evidence, the said Indian employees perform their duties on behalf of the Appellant in the said City of Ottawa at the Varette Building on Albert Street.

4. The said Varette Building is not on a reserve as that term is used in the said *Indian Act*.

5. For services rendered the Appellant pays the said Indian employees salary.

6. As between the parties, should it be held that the Appellant was required to deduct and remit tax to the Respondent, it is agreed that the assessments are correct.

7. The Appellant, believing that the said Indian employees were for various reasons not liable to taxation pursuant to the *Income Tax Act*, while deducting such amounts as required by the *Income Tax Act* from the salary paid to the said Indian employees, did not remit the amounts so deducted to the Receiver General of Canada as stipulated in the *Income Tax Act* and Regulations.

8. The Respondent, being of the view that the Appellant was paying salary, wages or other remuneration to persons who were not exempt from taxation pursuant to the *Income Tax Act*, *Indian Act* or any other Act, assessed the Appellant for the tax which it had deducted but not remitted together with interest thereon and penalty.

From the description of the nature of the assessments and the statement of partial agreement as to facts, it follows that these appeals do not concern assessments on income in the ordinary sense but are rather assessments issued against an employer who allegedly has failed in his duty as agent for the Minister of National Revenue in the collection of income tax, pension plan contributions and unemployment insurance contributions. It is for this reason that counsel for the respondent emphasized throughout his argument that these appeals are a dispute based on the provisions of the *Income Tax Act* and not the *Indian Act*.

Counsel for the respondent argued that the question in respect of the taxability of the Indian employees of the appellant will be decided when these employees are assessed personally. He referred particularly to the *Snow* case now pending before the Federal Court (Trial Division) which case was previously decided in favour of the respondent by this Board ([1974] CTC 2327; 74 DTC 1254), and contended that this decision would be binding in respect of this appeal, although the main thrust of his argument was in a different direction.

He submitted that the outcome of this appeal must depend primarily on the question of whether the appellant was in fact an agent of the Minister who as an employer had paid its Indian employees wages from which it should have withheld and remitted prescribed amounts pursuant to the *Income Tax Act*.

Counsel for the appellant, however, contended that the obligation to withhold and remit tax is conditional upon the tax being payable by the Indian employees who receive salary.

It is necessary to dispose of this issue first. Subsection 153(1) on which the respondent has based his assessment, reads as follows:

> 153. (1) Withholding every person paying
> (a) salary or wages or other remuneration to an officer or employee,
> (b) a superannuation or pension benefit,
> (c) a retiring allowance,
> (d) an amount upon or after the death of an officer or employee, in recognition of his service, to his legal representative or widow or to any other person whatsoever,
> (d.1) an amount as a benefit under the *Unemployment Insurance Act, 1971*,
> (e) an amount as a benefit under a supplementary unemployment benefit plan,
> (f) an annuity payment,
> (g) fees, commissions or other amounts for services, or
> (h) a payment under a deferred profit sharing plan or a plan referred to in section 147 as a revoked plan,
>
> at any time in a taxation year shall deduct or withhold therefrom such amount as may be prescribed and shall, at such time as may be prescribed, remit that amount to the Receiver General of Canada *on account of the payee's tax* for the year under this Part.

(Italics are mine.)

Under this section, every person (and the appellant corporation is a legal person) paying salary is required in a taxation year to deduct as agent of the Minister such amount as may be prescribed *on account of the payee's tax*. For this appeal, the important words are those in italics. If the "agent" correctly assumes that nothing had to be withheld or remitted on account of the payee's tax for the reason that the payee is a non-taxable unenfranchised Indian and does not owe the Government of Canada any tax at all, the Minister could not expect or force his statutory agent to perform such an illegal act. The respondent cannot legally take the position of saying to the appellant: "you hand the money to me and if your Indian employees prove their case, I will give it back to them", because if the respondent would be wrong, he must have been wrong *ab initio*. In that case, the Minister could not expect the appellant to assist him in collecting tax which the Minister was legally not entitled to assess. This being the case, the real heart of this dispute is the question whether or not Indian employees of the appellant were legally liable to pay income taxes. The appellant corporation can only refute the Minister's approach if its Indian employees are non-taxable, which makes this appeal an Indian case as well as a tax case. The Board therefore rejects the submission by counsel for the respondent that this is only a tax case.

Statutory law exempting Indians from taxation preceded, by many years, the *Income Tax Act*, and established the broad principle that all property of an Indian situated on a reserve is exempt from taxation, thereby raising a presumption in law that the *Income Tax Act* cannot be taken to apply to the property of Indians on a reserve unless it is spelled out in clear unambiguous language and there is no conflict. Although the language of the *Indian Act* and the *Income Tax Act* ap-

pear to be repugnant in respect of taxation, it cannct be supposed that Parliament intended to contradict itself by exempting Indians under the earlier legislation and then tearing up the earlier statutes by imposing liabilities on them under the *Income Tax Act*. Besides the question of repugnancy, the *Indian Act* is a special Act which tends to be derogatory of the *Income Tax Act*, which is a general taxing Act. To avoid collision between these two statutes, the logical construction is simply that the *Income Tax Act* as a general statute applies to Indians only in respect of those areas of taxation wherein the *Indian Act* is silent. The *Indian Act*, however, is not silent but speaks with rather a loud voice, on the subject of taxability of Indians. The appropriate sections read as follows:

> 87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 83, the following property is exempt from taxation, namely:
>
> (a) the interest of an Indian or a band in reserve or surrendered lands; and
>
> (b) the personal property of an Indian or band situated on a reserve;
>
> and no Indian or band is subject to taxation in resoect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, being chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, on or in respect of other property passing to an Indian. RS, c 149, s 86; 1958, c 29, s 59; 1960, c 8, s 1.
>
> 90. (1) For the purposes of sections 87 and 89, personal property that was
>
> (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
>
> (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,
>
> shall be deemed always to be situated on a reserve.

The language of the above provisions is broad and speaks to exclude all other tax legislation, and thereby constitutes special legislation overriding the *Income Tax Act*. It is only where the *Indian Act* is silent that other statutes can affect the rights of unenfranchised Indians.

In the present case, the facts are somewhat extraordinary, and quite different from the *Snow* case referred to by counsel for the respondent. Here a number of unenfranchised Indians temporarily leave their reserve to join the staff of the appellant, an organization of a purely non-commercial nature acting on behalf of Indians and in respect of purely Indian affairs, and financed by moneys appropriated for the Indian cause by Parliament. Their domicile is their reserve and they were certainly employed as members of their band. In no way do I consider these people as having left the reserve to seek their fortune and earn a living in the non-Indian society. One could consider them as an extended arm of their bands, operating in Ottawa at the con-

venience of Indian and non-Indian parties concerned with the well-being and interests of unenfranchised Indians. It seems to me that the *Indian Act* should be interpreted and applied in a flexible way which does justice to the underlying philosophy of that Act.

If the appellant corporation had been physically located on reserve land, no effort would have been made by the respondent to tax the Indian employees of the appellant. In my opinion, the moneys earned by the Indian employees of the appellant are personal property and exempt from taxation for the following reasons:

(a) the source of the moneys paid is comprised of funds appropriated by the Parliament of Canada for that purpose;

(b) the Indian employees are domiciled on their reserves; and

(c) the personal property consisting of wages, although strictly speaking, earned outside a reserve follows the situs of the owner and is therefore within the framework of the *Indian Act* property situated on a reserve.

I therefore allow the appeals except in so far as the assessments concern the amounts withheld or to be withheld on account of the *Canada Pension Plan* and the *Unemployment Insurance Act*, these matters being outside the jurisdiction of this Board. The matter is referred back to the Minister for reconsideration and reassessment in accordance with the above findings.

Appeal allowed.

Dr Emile S Shihadeh, Appellant,

and

Minister of National Revenue, Respondent.

Tax Review Board (The Assistant Chairman: L J Cardin, QC), March 11, 1975.

Income tax—Federal—Canada-US Tax Convention—Article VIIIA—Two-year exemption for visiting professors and teachers.

The appellant, a professor, resided in the USA until 1967 when he and his family moved to Canada where he was appointed to a post at the University of Alberta for a probationary period ending in 1969. The appellant continued to teach at the university after 1969 but claimed the tax exemption under Article VIIIA of the Convention for visiting professors because he never intended when he took up the appointment to stay beyond the two-year period specified in the Convention. The Minister assessed the appellant for 1969 because he continued to teach at the university after two years.

HELD:

The appellant's intention at the time of accepting the two-year contract had no bearing on the disqualification from tax exemption in Article VIIIA if he continued to teach after the two-year limit specified in the Convention. Appeal dismissed.

G T W Bowden for the appellant.

C D MacKinnon for the respondent.

BRITISH COLUMBIA

COURT OF APPEAL

Before Sidney Smith, Coady and Sheppard, JJ.A.

Regina v. **Point**
(No. 1)*

Criminal Code — Summary Convictions — Right of Appeal from Dismissal by County Court Judge of Appeal from Magistrate — S. 743 (1) (2) of New Cr. Code.

Indians — Duty to Pay Income Tax (Can.).

It is not intended by subsec. (2) of sec. 743 of the new *Criminal Code* (which governed the appeal to the Court of Appeal from the decision herein of the County Court judge) to limit the right of appeal given by subsec. (1).

The absence from said sec. 743 (2) of the words "in so far as the same are applicable" which were in sec. 769A of the former *Code* does not make said subsec. (2) more restrictive of the broad right of appeal given by subsec. (1) than was the right of appeal given by former sec. 769A. Therefore *Scullion v. Can. Breweries Transport Ltd.* [1956] SCR 512, 24 CR 223, 1956 Can Abr 274, is still decisive.

[Note up with 1 CED (CS) *Criminal Law,* secs. 80, 85A; 2 CED (CS) *Indians,* sec. 5A (as new section); 3 CED (CS) *Revenue,* secs. 15, 18.]

Preliminary objections to appeal from County Court dismissed.

D. McK. Brown and *R. Edwards,* for the Crown.

H. R. Bray, Q.C., for accused.

June 11, 1957.

The judgment of the court was delivered by

COADY, J.A. — The respondent was charged on the information of Albert John Dillabough, a member of the Royal Canadian Mounted Police acting on behalf of Her Majesty the Queen, that on October 24 and October 25, 1955, in the county of Vancouver, he did unlawfully fail to file a return as and when required, by or under the *Income Tax Act,* RSC, 1952, ch. 148, to wit, his income tax return on form T.1 for the taxation year 1954, following demand therefor dated September 21, 1955, under sec. 44 (2) of the *Income Tax Act,* contrary to sec. 131 of the *Income Tax Act.* On the hearing before the magistrate the charge was dismissed. From that dismissal an appeal was taken by the informant to the judge of the County Court who following a trial likewise dismissed the charge. It is from that dismissal

* For (No. 2) see, *post,* p. 527.

that this appeal is taken by the complainant Dillabough. The ground of defence before the learned magistrate, as well as before the learned County Court judge on appeal, was that there is no legal obligation on the respondent, an Indian, to file an income tax return. That too, as appears from the notice filed, is the sole ground of appeal on the appeal to this court.

Counsel for the respondent raised the preliminary objection before this court that the complainant Dillabough has no status under the *Criminal Code* to appeal from the acquittal of the learned County Court judge and, consequently, this court has no jurisdiction to hear the appeal. Following brief argument upon this preliminary objection, counsel were asked to submit further written argument and the hearing of the appeal on the merits was adjourned. Written arguments have now been submitted.

Sec. 743 which governs appeals to this court from the decision of the County Court judge, under part XXIV, provides as follows:

> "743. (1) An appeal to the court of appeal, as defined in section 581, may, with leave of that court, be taken on any ground that involves a question of law alone, against
>
> "(*a*) a decision of a court in respect of an appeal under section 727, or
>
> "[Section 727 refers to an appeal from the county court judge such as we are concerned with here.]
>
> * * *
>
> "(2) Sections 581 to 589 apply, *mutatis mutandis*, to an appeal under this section."

Two things should be observed here: First, subsec. (1) gives a right of appeal to this court with leave on any ground that involves a question of law in respect of a decision following a trial *de novo*. This is a right that can be exercised by either the accused or the complainant. The language is not restrictive but general. Second, secs. 581 to 589 are made applicable, *mutatis mutandis*, to an appeal under sec. 743. These are the sections of the *Code* dealing with appeals relating to indictable offences. The effect of subsec. (2) is to make the procedural provisions of those sections applicable to an appeal under sec. 743. It is not intended by subsec. (2) to limit the right of appeal given by subsec. (1).

The matter, it seems to me, is placed beyond argument by the decision of the Supreme Court of Canada in *Scullion v. Can.*

Breweries Transport Ltd. [1956] SCR 512, 24 CR 223. It is true that decision was made under what may be termed the corresponding sections of the old *Code*. Sec. 769A of the old *Code* which corresponds to our present sec. 743, provided as follows:

> "(1) An appeal to the Court of Appeal, as defined in section one thousand and twelve, against any decision of the court under the provisions of section seven hundred and fifty-two or section seven hundred and sixty-five with leave of the Court of Appeal or a judge thereof may be taken on any ground that involves a question of law alone.
>
> "(2) The provisions of sections one thousand and twelve to one thousand and twenty-one, inclusive, shall *mutatis mutandis* in so far as the same are applicable, apply to an appeal under this section."

Secs. 1012 to 1021 above referred to are now secs. 581 to 589 with some slight changes in language and arrangement.

It was held by the Supreme Court of Canada in this case that the unlimited right of appeal given by sec. 769A (1) was not cut down or restricted in any way by subsec. (2). It should be pointed out that subsec. (2) of the former sec. 769A contains the words "in so far as the same are applicable." These words are not found in the new subsec. (2) of sec. 743. That, it seems to me, does not affect the matter, however. The absence of these words in the present subsec. (2) of sec. 743 cannot be considered as making subsec. (2) more restrictive of the broad right of appeal given by subsec. (1).

The preliminary objection, therefore, in my view, is without merit.

BRITISH COLUMBIA

COURT OF APPEAL

Before Sidney Smith, Coady and Sheppard, JJ.A.

Regina v. Point
(No. 2)*

Revenue — Income Tax (Can.) — Duty of Indian to File Return.

[Note up with 2 CED (CS) *Indians*, sec. 5A (as new section); 3 CED (CS) *Revenue*, secs. 15, 18.]

D. McK. Brown and *R. Edwards*, for the Crown.

H. R. Bray, Q.C., for accused.

June 28, 1957.

The judgment of the court was delivered by

SHEPPARD, J.A. — This appeal raises the question of the obligation of an Indian to make a return under sec. 44 (2) of the *Income Tax Act*, RSC, 1952, ch. 148.

The accused is a registered native Indian, not enfranchised, of the Musqueam Band, Musqueam Indian Reserve, although he lives at Steveston during the fishing season. By demand of September 21, 1955, on behalf of the Minister of National Revenue for Taxation, the accused was requested to file a return in the form T.1 for the taxation year 1954. The demand was forwarded on that date by registered mail and received by the accused but he filed no return. Subsequently an information was laid under sec. 131 of the Act before His Worship R. C. Palmer, police magistrate for Richmond, and after a hearing the learned magistrate dismissed the charge. Thereupon the Crown appealed to the County Court of Vancouver and after a trial *de novo* before McGeer, C.C.J. that learned judge dismissed the appeal. From that dismissal the Crown has appealed to this court.

The accused has contended that sec. 44 (2) of the *Income Tax Act* does not apply to him, an Indian. The accused has proven that he is a native Indian and registered in the Indian Register as a member of the Musqueam Band of the Musqueam Indian Reserve. The accused, on the evidence, is an Indian within the meaning of the *Indian Act*, RSC, 1952, ch. 149, and being an Indian is a person (definition *Indian Act*, sec. 2 [1] [*g*]) and being a person is subject to the application of sec. 44 (2) of the *Income Tax Act*.

* For (No. 1), see, *ante*, p. 524.

The accused further contends that the application of sec. 44 (2) of the *Income Tax Act* is to file a "prescribed form" and there is no evidence that form T. 1, the form demanded, is in prescribed form. In the *Income Tax Act* "prescribed" is defined as follows:

> "139. (*af*) 'prescribed,' in the case of a form or the information to be given on a form, means prescribed by order of the Minister, and, in any other case, means prescribed by regulation * * *."

The demand is on behalf of the minister for a return in form T.1 and by virtue of sec. 136 (13) that form

> "shall be deemed to be a form prescribed by order of the Minister under this Act unless called in question by the Minister or some person acting for him or for Her Majesty."

The accused further contends that sec. 44 (2) of the *Income Tax Act* is excluded by "the terms of Union" and particularly by sec. 13. The "terms of Union" contain the terms and conditions by which the Colony of British Columbia became part of the Dominion of Canada and provides for the distribution of certain benefits and obligations as between Canada and British Columbia. Whatever the effect of the "terms of Union" as between Canada and British Columbia the accused is not one of these parties and his rights and obligations are determined by the common and statute law and in the circumstances under consideration are determined by sec. 44 (2) of the *Income Tax Act*.

The appeal should therefore be allowed and the accused found guilty of the offence charged. There will be a fine of $10.

which the appellant should properly be taxed, and since the onus of proving his point rests on the appellant, the Board has no alternative, though it is reluctant to do so, but to dismiss the appeal.

Appeal dismissed.

Russell Snow, Appellant,

and

Minister of National Revenue, Respondent.

Tax Review Board (Roland St-Onge, QC), November 28, 1974.

Income tax—Federal—Income Tax Act, RSC 1952, c 148—2—Indian Act, RSC 1952, c 149—86— Property of Indian on reserve exempt from taxation—Whether income earned by Indian outside reserve taxable in his hands when resident on reserve.

The appellant was resident on an Indian reserve. In assessing the appellant the Minister added $9,150 received by him for services performed on construction sites in the United States. The appellant contended that he should not be taxed because the amount received became his personal property situated on a reserve and hence exempt from tax under section 86 of the *Indian Act*.

HELD:

The *Income Tax Act* applies to all persons resident in Canada (section 2). The *Indian Act* is silent on the question of income tax and an Indian falls under the *Income Tax Act* especially when his income is earned outside the reserve. Appeal dismissed.

James A O'Reilly and *Jack R Miller* for the appellant.

Brian Schneiderman for the respondent.

Roland St-Onge:—This is an appeal from an income tax reassessment dated February 21, 1972 with respect to the 1969 taxation year.

The admitted facts show that for the year under appeal the appellant Russell Snow was an unenfranchised Indian and a member of the Caughnawaga Indian Band within the meaning of the *Indian Act*, RSC 1952, c 149; that he was a resident of Canada within the meaning of the *Income Tax Act* and also a resident of Caughnawaga; that Caughnawaga is an Indian Reserve within the meaning of the *Indian Act*; that in assessing the appellant for the above-mentioned taxation year the Minister of National Revenue, in the computation of his income, added the amount of $9,150.07 received by the taxpayer for services performed by him outside the Caughnawaga Indian Reserve for the following employers whose construction sites were located in the United States:

Whitehead & Kales Ltd (Can)	$2,269.05
Edward J O'Leary (Can)	733.25
Standard Erecting Co Inc (Can)	1,331.17
Ebasco Services Inc (Can)	1,702.23
BA Roy Steel Erectors Inc (Can)	3,114.37
	$9,150.07

In addition to the above admissions, Russell Snow testified that he was raised in Caughnawaga, has lived there most of his life, and that is where he supports his wife and his two children and where most of his recreational activities take place. During his 1969 taxation year he worked in his capacity as a steelworker in Boston and in Springfield, Massachusetts, and elsewhere in the New England States, at a net salary of $250 per week due to the fact that income taxes were deducted at the source in the United States. There was no written agreement between him and any of his five employers and the average length of his working contract was about 30 to 40 days at a time. He came back to Caughnawaga every week and that is where he spent most of his money. The only expenditures made outside the Reserve were $80 a week for his room and board in the United States and his weekly travelling expenses back and forth between his job locations and Caughnawaga.

Counsel for the appellant contended that, even if Russell Snow *is* a Canadian resident, his income earned outside the Caughnawaga Reserve should not be taxed for the following reasons mentioned in his notice of appeal:

(a) The amounts received by the appellant from employers became the property of the appellant upon receipt by him of the said amounts.

(b) Upon receipt of these amounts, these amounts acquired a fixed situs in accordance with the provisions of the *Indian Act*.

(c) This fixed situs was at the Caughnawaga Indian Reserve where the appellant had his principal establishment domicile and residence.

(d) Section 86 of the *Indian Act* (now section 87 of the *Indian Act* RSC 1970) provides that the property of an Indian situated on a reserve is exempt from tax.

(e) The tax claimed by the Department of National Revenue is moreover tax in respect of the ownership, occupation, possession or use of property or taxation in respect of properties situated on the reserve within the meaning of the said section 86.

(f) Consequently the amounts received by the taxpayer from employers became immediately exempt from tax.

(g) The *Indian Act* contains specific situs rules in respect to all property of an Indian whenever, however and wheresoever acquired and these specific situs rules override any inconsistent provisions in regard thereto in the *Income Tax Act*.

(h) The *Indian Act* is a more particular statute and governs all aspects of Indian property, including its fiscal aspects, with the consequence that the taxability of salary or other property received by the taxpayer is subject to its deemed or real location, which in the present case is the appellant's reserve.

(i) Moreover, the said receipts by the taxpayer are situated at the domicile of the appellant in accordance with the maxim "*mobilia sequuntur personam*".

(j) In respect to appellant and all registered Indians, the physical location of property outside the reserve constitutes an accidental situs which is subject to the general situs rule for Indians mentioned above.

(k) It was not the intention of the Parliament of Canada to make Indians subject to income tax and there is no specific provision in the *Income Tax Act* imposing tax on Indians whereas the *Indian Act* specifically exempts Indians.

(l) The said specific exemption in favour of Indians has existed since prior to the introduction of income tax and section 86 (now section 87) of the *Indian Act* was meant to cover exemptions from all taxes and has never been significantly changed in its text.

(m) The place where salary or income is earned is irrelevant in respect to Indians domiciled on reserves for income tax purposes.

(n) There is no legal basis for considering that salary is considered to be earned where services are performed.

(o) To give property of Indians domiciled on reserves a different situs according to whether they are physically on or off the reserve, as respondent attempts to do, would render sections 86 and 88 (now sections 87 and 89) of the *Indian Act* meaningless.

(p) Without prejudice to the foregoing, section 86 (now section 87) makes no reference to when property is received such that, if it at any time becomes property situated on a reserve, Indians enjoy the full benefit of the exemption in what is now section 87 dating from the time the property belonged to the said Indian.

(q) Constitutionally the Federal Crown is the trustee of the Indian and cannot impose a tax upon the persons for whom it acts in trust.

The relevant sections of the *Indian Act*, RSC 1952, c 149, read as follows:

86. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 82, the following property is exempt from taxation, namely,

(a) the interest of an Indian or a band in reserve or surrendered lands, and

(b) the personal property of an Indian or band situated on a reserve,

and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act* on or in respect of other property passing to an Indian.

87. 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.

88. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian.

108. (1) On the report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian

(a) is of the full age of twenty-one years,

(b) is capable of assuming the duties and responsibilities of citizenship, and

(c) when enfranchised, will be capable of supporting himself and his dependants,

the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised.

Besides these allegations in his notice of appeal, the appellant through his counsel submitted verbal and written arguments and referred the Board to substantial jurisprudence. In his verbal submissions counsel for the appellant referred the Board to *Attorney General of Canada* v *Lavell*, 38 DLR (3d) 481, in which case it was provided that Indian women who married non-Indian men lost their status as Indian women. On the other hand, Indian men who married non-Indian women not only kept their status as Indians but the non-Indian women actually acquired the status of Indians upon marriage. The Court was faced with the argument that the section of the *Indian Act* which breached the concept of equality before the law enunciated in the *Bill of Rights* constituted discrimination by reason of sex.

It was decided that Parliament in statutorily proclaiming certain fundamental rights in general terms in the *Canadian Bill of Rights* cannot have intended to override the provisions of the *Indian Act*.

Counsel for appellant commented on an extract of the above-mentioned judgment of Ritchie, J at page 490 which I would like to reproduce hereunder:

> In my opinion the exclusive legislative authority vested in Parliament under s. 91(24) (of the *British North America Act*, 1867) could not have been effectively exercised without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown 'lands reserved for Indians'. The legislation enacted to this end was, in my view, necessary for the implementation of the authority so vested in Parliament under the Constitution.
>
> To suggest that the provisions of the *Bill of Rights* have the effect of making the whole *Indian Act* inoperative as discriminatory is to assert that the Bill has rendered Parliament powerless to exercise the authority entrusted to it under the Constitution of enacting legislation which treats Indians living on reserves differently from other Canadians in relation to their property and civil rights. The proposition that such a wide effect is to be given to the *Bill of Rights* was expressly reserved by the majority of this Court in the case of *R* v *Drybones* (1969), 9 DLR (3d) 473 at pp 485-6, (1970) 3 CCC 355, [1970] SCR 282, to which reference will hereafter be made, and I do not think that it can be sustained.
>
> What is at issue here is whether the *Bill of Rights* is to be construed as rendering inoperative one of the conditions imposed by Parliament for the use and occupation of Crown lands reserved for Indians. These conditions were imposed as a necessary part of the structure created by Parliament for the internal administration of the life of Indians on reserves and their entitlement to the use and benefit of Crown lands situate thereon, they were thus imposed in discharge of Parliament's constitutional function under s. 91(24) and in my view can only be changed by plain statutory language expressly enacted for the purpose. It does not appear to me that Parliament can be taken to have made or intended to make such a change by the use of broad general language directed at the statutory proclamation of the fundamental rights and freedoms enjoyed by all Canadians, and I am therefore of opinion that the *Bill of Rights* had no such effect.
>
> The responsibility of the Parliament of Canada in relation to the international administration of the life of Indians on reserves is succinctly stated by Rand, J, in *St Ann's Island Shooting & Fishing Club Ltd* v *The King*, [1950] 2 DLR 225 at p 232, [1950] SCR 211, where he was dealing with the effect of s 51 of the *Indian Act*, RSC 1906, c 81, in relation to the "surrender" of lands on Indian reserves and said:

> "The language of the statute embodies the accepted view that these aborigines are, in effect, wards of the state, whose care and welfare are a political trust or the highest obligation."
>
> In the case of *Barker* v *Edger*, [1898] AC 748, the Privy Council was considering the effect of a New Zealand statute . . .
>
> In the course of his reasons for judgment, Lord Hobhouse had occasion to say, at p 754:
>
> "When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."

In the light of the principle enunciated in the above case, counsel for the appellant concluded that because the Indians are the only people mentioned in the *British North America Act*, they belong to a special legal régime and are not taxed like other citizens and if the *Indian Act* can override the *Bill of Rights* enacted in 1960, *a fortiori* it must override income tax legislation which has been in force since 1917.

Counsel for the appellant also argued that, because the *Indian Act* was a very special law, a code in itself, enacted by Parliament in accordance with powers granted thereto by the *British North America Act*, the expression "notwithstanding any other Act" mentioned in section 86 (now section 87) of the *Indian Act* as well as the burden of proof imposed on the taxpayer by the *Income Tax Act* do not apply to Indians. He also stated that, when income tax was introduced in 1917, it was not intended to tax the Indian, who had already a special body of rules meant to cover all kinds of taxation.

In his written submissions, counsel for the appellant dealt with section 86 of the *Indian Act*, RSC 1952, by breaking down his arguments into five points: the scope of the exemption; specific types of taxes; the meaning of personal property; the situs of the property; and the meaning of "situated on a reserve", which was further broken down under three headings: the meaning in general usage; the classification of property; and the situs rules.

According to him, the jurisprudence reveals that, where there is a broad exemption from taxation, such exemption includes income taxes. On that matter, he refers the Board to the following cases: *Stewart* v *Conservators of the River Thames*, [1908] 1 KB 893; 5 TC 297; *Pole-Carew et al* v *Craddock*, [1920] 3 KB 109; 8 TC 488; *Sinclair* v *Cadbury Bros, Ltd* (1933), 18 TC 157; and *Ancholme Drainage Commissioners* v *Weldhen*, [1936] 1 All ER 759; 20 TC 241.

He also submitted that the use of the phrase "notwithstanding any other Act of the Parliament of Canada" prima facie excludes the application of the *Income Tax Act* to Indians. With respect to section 86 and paragraph 80(f) of the *Indian Act*, RSC 1952, he stated that the latter were wide enough to authorize the imposition of an income tax by the *Indian Act* because of the mention of personal and property taxes. He made the distinction between the two above-mentioned taxes

by saying that the property tax is directed at a particular *property* and not at a particular *person* whereas personal tax is imposed directly upon the person. Referring to section 86 of the *Indian Act* (*supra*) he stated that the general exemption is followed by specific taxes, mainly estate duty, succession duty and inheritance tax, but does not cite an income tax. However, the absence of a specific reference to income tax does not exclude the application of section 86 to such taxes. All the taxes specifically mentioned therein deal with the transmission of property or the right to succeed to property and do not allude to income tax or any other personal tax such as sales tax or taxes on meals, hotels, amusements, gasoline, mining, logging, alcoholic beverages, etc. He also stated that because an Indian was considered a ward of the State (see *Lavell*, *supra*) and, by virtue of section 108 of the *Indian Act*, RSC 1952, could be enfranchised and assume the duties and responsibilities of citizenship only upon proclamation by the Governor in Council, this shows that the Indian people have been considered as a special class.

As to the meaning of personal property, section 86 allows an exemption in favour of an Indian for any personal tax levied upon him with respect to his personal property situated on the Reserve. He referred to many English dictionaries as well as to civil treaties and even to the *Income Tax Act* in an effort to define "personal property" and he stated that, according to those definitions, there is no reason for not treating the reference to property in section 86 of the *Indian Act* as a very general concept, comprising within its purview assets of any kind, including real and personal property and interest in land.

He also submitted that section 88 of the 1952 *Indian Act* clearly shows that the term "property" as used therein includes moneys received, salaries, goods, cheques and, generally, assets of all kinds (see for example *Beaulieu Petits Pas*, [1959] RP 86, where it was held that salary was property within the meaning of the above-mentioned section). Thus, money earned as salary can also be considered an asset of a person so that, if that person died immediately after receiving his wages, the money would be taxable as income but would also be treated as an asset of that person's estate.

Counsel for the appellant argued that, because of the above-mentioned principles, salary earned outside the Reserve but received by an Indian residing in the Reserve becomes "personal property situated on the Reserve" and section 86 of the *Indian Act* allows an exemption to such personal property.

To reinforce this argument, counsel for the appellant referred to the general scheme of the *Income Tax Act* to maintain that income tax is a tax in respect of receipts aggregated over a period of time, less certain deductions and the tax is only imposed on the individual in regard to an entire taxation year. Consequently, when the taxable income for the year is ascertained, that property becomes physically located on the Reserve and is also personal property to the Indian.

Because that property is governed by the law of domicile of a province, which in the instant case is the law of the Province of Quebec, and because Article 6 of the *Civil Code* applies the doctrine of *mobilia sequuntur personam*, that property has assumed artificial characteristics (the concept of taxable income) and, alternatively, has become physically located on the Reserve or is deemed to be located on the Reserve.

He also referred the Board to the dictionary "Le Robert" to show that the verb "*situer*" has two meanings:

(1) "*placer effectivement en un certain lieu*" and

(2) "*placer par la pensée dans un lieu déterminé de l'espace*",

and he therefore concludes that the temporary physical presence of an asset outside the Reserve does not preclude it from being deemed to be situated on the Reserve.

As to the classification of property, he referred to Articles 374, 378, 384 and 387 of the *Civil Code* as authority for saying that moveable property consists of:

(1) "all bodies which can be moved from one place to another";

(2) "certain things which might be classed as immoveable by nature are regarded as moveable for legal purposes and vice versa"; and

(3) "crops uncut and fruit unplucked are also immoveable.

According as grain is cut and as fruit is plucked, they become moveable in so far as regards the portion cut or plucked. The same rule applies to trees: they are immoveable so long as they are attached to the ground by their roots and they become moveable as soon as they are felled."

The amounts received by the appellant would still be located at his domicile by virtue of the doctrine of *mobilia sequuntur personam* and taxable income, which corresponds to net income, comes to rest at the domicile of its owner in the same way as industrial equipment in a plant.

He finally submitted that the appellant has proved as a matter of fact that he brought his taxable income to the Reserve so that his taxable income was situated on the Reserve for the purposes of the *Indian Act* even though he may have received income from sources off the Reserve and even though he may have spent some of that income off the Reserve during the year.

The situs rules show that, by definition, moveable property may move or, in the case of inanimate things such as taxable income, be moved from place to place, and the authority to exercise power is invariably linked to a particular place. The civil and common law have worked out rules to determine the situs of moveable property for legal purposes.

Since the appellant is an Indian in the Province of Quebec ,the law of Quebec governs his status, and article 6 of the *Civil Code* thereof states in part that "moveable property is governed by the law of the domicile of its owner".

After putting forward all the above arguments, appellant's counsel submitted that the appeal should be allowed.

The appellant's submissions with respect to personal property situated on the Indian Reserve seem somewhat far-fetched. Even though all the principles enunciated on the subject may be true if taken separately, one cannot link such principles together in an effort to override a law made in the public interest and affecting all the residents of a country.

In general, these principles do not apply to the case at bar because the Income tax Act enacted in 1917 as the *Income War Tax Act* applies to all persons resident in Canada.

Indeed, section 2 of the present Act states:

> 2. (1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year *of every person resident in Canada at any time in the year.*

When the federal government has given its special attention to a subject as important as the taxation of "every person resident in Canada at any time in the year" and has formulated a code, the presumption is that a prior or subsequent enactment is not to interfere with the special provision unless such intention is manifested in a clear and unequivocal way. Each enactment must be construed "according to its own subject matter and its own terms", to use the words of Lord Hobhouse in *Barker* v *Edgar*, [1898] AC 748.

It is also to be noted that the enactment of the *Indian Act* was for the purpose of delineating the Indian's status and his rights. Consequently, the Supreme Court in the *Lavell* case (*supra*) decided that the *Bill of Rights* could not be used to override the *Indian Act* on the status of Indians because it would render the said law inoperative.

The fact of deciding that an Indian must pay tax on his income earned outside the Reserve would not render the *Indian Act* inoperative because the latter is absolutely silent on the important question of income tax.

Because the *Income Tax Act* taxes *all* the residents of Canada and does not exclude the Indian as an actual taxpayer, and as the *Indian Act* is completely silent on this important matter of income tax, it is self-evident that an Indian falls under the *Income Tax Act*, especially when his income is earned outside the Reserve.

Furthermore, it was mentioned by Viscount Haldane in the case of *Minister of Finance* v *Cecil R Smith*, [1927] AC 193; [1917-27] CTC 251; 1 DTC 92, that the same principle should apply to the whole of Canada and I quote the following extract from page 197 [254, 93]:

> ... Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and divergent laws of the particular provinces.

For the above reasons the appeal is dismissed.

Appeal dismissed.

ley v. Railway Co., 158 U. S. 123, 15 Sup. Ct. 786, 39 L. Ed. 919. The result is that there is perfect correspondence and harmony between the doctrines of the supreme court and this court on the subject in question. Both hold that in equity cases all the parties whose interests are affected by the appeal must join, or be given an opportunity to join, in the appeal, or the appellate court acquires no jurisdiction, and the appeal must be dismissed.

We have carefully considered all the propositions urged by counsel on these motions, and, if they are not now specifically referred to, it is because, in our opinion, they are necessarily involved in the conclusions as reached and stated. We have also considered with much care the questions relating to the merits as presented by the record, and, even if we were prepared to concede that any substantial error was committed at the trial below, we are of opinion that, for the reasons already stated, we are without jurisdiction to correct it. The motions to dismiss the appeals must be sustained.

UNITED STATES v. HIGGINS, County Treasurer.

(Circuit Court, D. Montana. July 2, 1900.)

No. 576.

TAXATION—LIABILITY OF HALF-BREEDS TO STATE LAWS.

One born of a white father and an Indian mother, and who is a recognized member of the tribe of Indians to which his mother belongs, is an Indian, and not subject to taxation under the laws of the state in which he resides.

W. B. Rodgers, U. S. Dist. Atty.
Marshall, Stiff & Denny, for defendant.

KNOWLES, District Judge. This is a suit brought by the United States against George Higgins, the treasurer and tax collector of Missoula county, to enjoin him from collecting a tax from one Alexander Matt. It appears from the evidence in the case: That said Matt is the owner of a number of horses and cattle ranging upon the Flathead Indian reservation, sometimes called "Jocko Indian Reservation," in the state of Montana. That in the year 1897 one W. R. Hamilton, the then assessor of Missoula county, listed said property as that of the said Matt for taxation, and that the amount of the taxes assessed upon the same for state and county purposes was the sum of $10.50. The said assessment was duly returned upon the proper assessment roll for said year to the then tax collector of Missoula county. The said Matt refused to pay this tax, and after the same became delinquent said George Higgins, as treasurer and tax collector of said county, seized two head of cattle, the property of said Matt, and advertised the same for sale at public auction, with a view to securing money sufficient to pay said tax, penalty, and the cost of collection thereof. The government brought this suit for the purpose of enjoining this sale, alleging that said Matt is an Indian and its ward. No contention has been made that the United States cannot maintain

this suit, if such is the fact. The defendant contends that said Matt should be classed as a white man, and not as an Indian, and that, as that part of the Flathead reservation where Matt resides lies within the exterior boundaries of Missoula county, he should list his property and be taxed in that county. The question here presented is, should Alexander Matt be classed as an Indian or a white man? If an Indian, he is not subject to taxation in said county.

From the evidence it appears: That the father of Matt is a Canadian Frenchman. That his mother was a Piegan Indian, and that Alexander Matt was born somewhere in the northeastern part of what is now known as "Montana" in the year 1853, at which time it was all known and classed as Indian country. His father moved to Colville, then in the territory of Washington, and seems to have lived there several years, and then returned to Montana some time in 1864, and lived at various places within the limits of what is now the state of Montana, coming to Stevensville, in the county of Missoula, in 1866 or 1867. At that time the Flathead Indians were the priucipal inhabitants of the Bitter Root valley. Shortly after the arrival of the father and mother of Matt in the Bitter Root valley, his mother was adopted into the Flathead tribe. She made application to be so admitted or adopted to Victor, the head chief thereof, who called a council of the leading men of his tribe; and by them, and with the consent of the chiefs of the tribe, it was declared that she was a member thereof. From that time on she and her children were recognized as members of the Flathead tribe. The father of Matt was a blacksmith, and generally followed that trade, and instructed his son therein. Subsequently the whole family moved to the Flathead Indian reservation, sometimes called "Jocko Indian Reservation," and said Matt has lived there since that time,—some 26 years. By article 2 of the treaty between the United States and the Flathead, Kootenai, and Upper Pend D'Oreille Indians, concluded July 16, 1855 (12 Stat. 976), it was provided that other friendly tribes and bands of Indians in the territory of Washington might be consolidated under the common designation of the Flathead nation, with Victor as head chief, upon the said Flathead Indian Reservation. The evidence shows that the said Matt had and has been recognized as a member of the Flathead tribe of Indians ever since his residence therein. It is claimed that notwithstanding these facts, the father of Matt being a white man, Matt would follow the condition of his father, and must be treated as a white man. It is undoubtedly true that a white man, although adopted into an Indian tribe, and treated by them in all respects as and like an Indian, cannot escape his responsibilities as a white man, and must be subject to the laws and the taxing power of a government of white men, embracing the section of country where he lives. But is it true that under our laws a child will always be classed as of the same color and race as his or her father? It is well known and settled that, if a mother is a slave, her children follow her condition. A government under which persons of the half-blood may reside can determine the status of such half-bloods,—as to whether they shall be classed as white people or as Indians. In the case of U. S. v. Holliday, 3 Wall. 419, 18 L. Ed. 182, the court held that in

the treatment of the Indians it is the rule of this court to follow the action of the executive and other political departments of the government. In the Case of The Kansas Indians, 5 Wall. 756, 18 L. Ed. 673, the court said:

"But the acts of the political department of the government settles beyond controversy that the Shawnees are as yet a distinct people, with a perfect tribal organization. As long as the United States recognize their national character, they are under the protection of treaties and the laws of congress, and their property is withdrawn from the operation of state laws."

In the case of U. S. v. Boyd (C. C.) 68 Fed. 580, it was said:

"In determining the attitude of the government towards the Indians,—all Indians,—the courts follow the action of the executive and other political departments of the government, whose more especial duty it is to determine such affairs."

In determining as to what class half-breeds belong, we may refer, then, to the treatment and recognition the executive and political departments of the government have accorded them. On August 4, 1824, the government made a treaty with the Sac and Fox Indians (7 Stat. 229), in which it was provided that certain land therein described should be set apart as a reservation for the use of the half-breeds of the Sac and Fox confederated Indian tribes. It will be observed that these half-breeds were described as belonging to said tribes. On June 30, 1834 (4 Stat. 740), these half-breeds were given permission to sell these lands. These Indians were again described as half-breeds belonging to those tribes. On April 27, 1816 (6 Stat. 171), an act of congress was passed for the relief of Samuel Manac, and he is described therein as "a friendly Creek Indian of the half blood." On March 3, 1837 (Id. 692), congress passed an act for the relief of James Brown and John Brown, half-breeds of the Cherokee nation of Indians. On September 29, 1817 (7 Stat. 163), the United States made a treaty with the Wyandot and other Indian tribes, and therein provision was made for the children of one William McCollock, and these children are described as quarter-blood Wyandot Indians. At the same time, and in the same treaty, provision was made for the children of one Isaac Willianis, who is described as a half-blood Wyandot Indian. At the same time, and in the same treaty, provision was made for one Anthony Shane, who is described as a half-blood Ottawa Indian. On October 6, 1818 (Id. 191), in a treaty with the Miami Indians, there was a reservation of lands made in favor of Ann Turner, Rebecca Hackley, William Wayne Wells, Mary Wells, and Jane Turner Wells; each of them being described as a half-blooded Miami Indian. On November 15, 1824 (Id. 233), in a treaty with the Quapaw Indians, a reservation of land is made in favor of one Saracen, who is described as a half-breed Quapaw Indian. On June 2, 1825 (Id. 240), the United States made a treaty with the Osage Indians, and therein is made a provision for half-breeds. The language and scope of the treaty show that these half-breeds were persons of that tribe. On June 3, 1825 (Id. 245), in a treaty with the Kansas Indians, a reservation of land is made for a large number of persons, named and described as half-breeds of the Kansas nation. On August 5, 1826 (Id. 291), in a treaty with the Chippewas a reservation of land is made for

the benefit of a large number of persons named therein, described as half-breeds and Chippewas by descent. On October 16, 1826 (Id. 298, 299), in a treaty with the Pottawatomie Indians, a reservation of land is made for certain persons therein, described as half-breeds and Indians by descent. On October 23, 1826 (Id. 302), in a treaty with the Miami Indians a reservation of land is made for certain persons therein, described as the children of a half-blood Miami Indian woman. Similar descriptions of half-breeds as being Indians of the tribe with whom they lived will be found in the following Indian treaties: August 1, 1829 (7 Stat. 324), treaty with Winnebago Indians; July 15, 1830 (7 Stat. 330), treaty with Sioux Indians; August 30, 1831 (7 Stat. 362), treaty with Ottawa Indians; September 15, 1832 (7 Stat. 372), treaty with Winnebago Indians; September 21, 1832 (7 Stat. 374), treaty with Sac and Fox Indians; October 27, 1832 (7 Stat. 400), treaty with Pottawatomie Indians; March 28, 1836 (7 Stat. 493), treaty with Ottawa, etc., Indians; July 29, 1837 (7 Stat. 537), treaty with Chippewa Indians; September 29, 1837 (7 Stat. 539), treaty with Sioux Indians; November 1, 1837 (7 Stat. 545), treaty with Winnebago Indians; October 4, 1842 (7 Stat. 592), treaty with Chippewa Indians; October 18, 1848 (9 Stat. 952), treaty with Menominee Indians; March 16, 1854 (10 Stat. 1045), treaty with Omaha Indians; February 22, 1855 (10 Stat. 1169), treaty with Chippewa Indians; February 27, 1855 (10 Stat. 1174), treaty with Winnebago Indians; September 29, 1865 (14 Stat. 689), treaty with Osage Indians; October 14, 1865 (14 Stat. 705), treaty with Cheyenne Indians; March 21, 1866 (14 Stat. 756), treaty with Seminole Indians. On September 24, 1857 (11 Stat. 731), in a treaty with the Pawnee Indians it is provided that the half-bloods of that tribe who remain with them shall have equal rights with the other members thereof; that those who do not reside with the tribe shall be entitled to scrip in lieu of lands. On March 12, 1858 (12 Stat. 999), in a treaty with the Ponca Indians it is provided that the half-breeds of that tribe residing with them shall have the same rights and privileges as the other members thereof, and that those residing among the whites in civilization shall be entitled to land scrip in lieu of lands.

In an act of congress approved June 5, 1872 (17 Stat. 226), the following provision is made in regard to the Flathead Indians:

"It shall be the duty of the president, as soon as practicable, to remove the Flathead Indians (whether of full or mixed blood) and all other Indians connected with said tribe and recognized as members thereof, from the Bitter Root valley in the territory of Montana to the general reservation, commonly known as the Jocko reservation, which by a treaty was set apart and reserved for the use and occupation of said confederated tribes."

The Jocko reservation, here referred to, is the Flathead reservation, named in the treaty with these Indians on the 16th day of July, 1855, above referred to. At the time this statute was passed the mother of Matt, according to the evidence, had been adopted into the Flathead tribe. Matt was undoubtedly a half-breed connected with that tribe, and was recognized as a member thereof. This statute recognized mixed bloods of the Flathead tribe as Indians. They are to be removed from the Bitter Root valley, which at the time was

being settled by whites. They were distinguished from the whites, as not being entitled to reside there. Considering the history of the Indian tribes throughout the United States, I am satisfied it will be found that the half-bloods of all tribes were the children of what was recognized as Indian marriages between white men and Indian women. But few instances can be found in which white women intermarried with Indian men. Considering, then, the treaties and statutes above referred to. I think it is evident that the executive and political departments of the government have recognized persons having at least one-half Indian blood in their veins, whose fathers were white men, which half-bloods lived and resided with the tribes to which their mothers belonged, as Indians. Considering the treaties and statutes in regard to half-breeds, I may say that they never have been treated as white people entitled to the rights of American citizenship. Special provision has been made for them,—special reservations of land, special appropriations of money. No such provision has been made for any other class. It is well known to those who have lived upon the frontier in America that, as a rule, half-breeds or mixed-blood Indians have resided with the tribes to which their mothers belonged; that they have, as a rule, never found a welcome home with their white relatives, but with their Indian kindred. It is but just, then, that they should be classed as Indians, and have all of the rights of the Indian. In 7 Op. Attys. Gen. 746, it is said, "Half-breed Indians are to be treated as Indians, in all respects, so long as they retain their tribal relations."

Entertaining these views, I hold that Alexander Matt should be treated as an Indian, and as such he is not subject to taxation under the laws of the state of Montana. The prayer of the bill will be granted. Let the injunction heretofore issued be made perpetual.

EASTERN BUILDING & LOAN ASS'N OF SYRACUSE, N. Y., v. WELLING et al.

(Circuit Court, D. South Carolina. July 25, 1900.)

1. RES JUDICATA—PENDENCY OF PROCEEDINGS FOR REVIEW.
   A judgment of the supreme court of a state cannot be pleaded as an adjudication in bar of a subsequent suit in a federal court, where it has been removed for review to the supreme court of the United States by a writ of error, and is there pending and undetermined.
2. SAME.
   Quære, whether, under a system in which code pleading prevails, a defendant who has failed to interpose and avail himself of an equitable defense in an action at law can afterwards obtain relief in equity by original proceeding.

In Equity. On rule to show cause why a restraining order previously granted should not be continued.

This is a bill filed for the foreclosure of a mortgage given by Lawrence S. Welling and Marion Bonnoitt to the Eastern Building & Loan Association of Syracuse, N. Y. The bill, after the usual averments as to persons and citizenship, alleges: That complainant is a building, mutual loan, and accumulating fund association, organized under the laws of the state of New York for cor-

A-407-76

Minister of National Revenue (*Applicant*)

v.

Iroquois of Caughnawaga (Caughnawaga Indian Band) (*Respondent*)

Court of Appeal, Jackett C.J., Pratte J. and Hyde D.J.—Montreal, December 16 and 17, 1976; Ottawa, January 21, 1977.

Judicial review — Unemployment insurance — Application for review of Umpire's decision that employers' premiums are not payable in respect of persons employed by an Indian Band on the Band's reserve — Whether premiums are taxation on property within meaning of s. 87 of Indian Act — Whether respondent an employer within meaning of s. 2(1)(e) of Unemployment Insurance Act, 1971 — Whether Court has jurisdiction to review Umpire's decision — Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, ss. 2(1)(e), 66(2) and 84 — Indian Act, R.S.C. 1970, c. I-6, s. 87 — Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28.

Applicant claims that employers' premiums are payable in respect of persons employed by an Indian Band on the Band's reserve. The respondent claims that the premiums are a tax on property within the meaning of section 87 of the *Indian Act* and that the Band is therefore exempted from the relevant provisions of the *Unemployment Insurance Act, 1971* and that in any event the Band is not an employer as defined by section 2(1)(*e*) of the *Unemployment Insurance Act, 1971*.

Held, section 87 of the *Indian Act* only exempts Indian Bands from direct taxation on property and the premiums herein, even if they are taxes, are taxes on the person. The respondent is in fact an employer within the meaning of section 2(1)(*e*) of the *Unemployment Insurance Act, 1971* and no evidence was led to show that it had no authority to be one. The Umpire's decision is referred back (Jackett C.J. dissenting).

Per Jackett C.J. (dissenting): For the reasons set out in *M.N.R. v. Dame L. H. MacDonald* the Court has no jurisdiction to review the decision of an Umpire under section 84 of the *Unemployment Insurance Act, 1971*.

Provincial Treasurer of Alberta v. Kerr [1933] A.C. 710 and *M.N.R. v. Dame L. H. MacDonald* [1977] 2 F.C. 189, applied.

JUDICIAL review.

COUNSEL:

Claude Blanchard and *W. Lefebvre* for applicant.

A-407-76

Le ministre du Revenu national (*Requérant*)

c.

Iroquois de Caughnawaga (bande indienne de Caughnawaga) (*Intimé*)

Cour d'appel, le juge en chef Jackett, le juge Pratte et le juge suppléant Hyde—Montréal, les 16 et 17 décembre 1976; Ottawa, le 21 janvier 1977.

Examen judiciaire — Assurance-chômage — Demande visant à faire annuler la décision du juge-arbitre selon laquelle les cotisations patronales n'ont pas à être versées relativement à des personnes employées par une bande indienne, sur la réserve de cette dernière — Les cotisations représentent-elles une taxation sur les biens au sens de l'art. 87 de la Loi sur les Indiens? — Le groupe intimé est-il un employeur au sens de l'art. 2(1)e) de la Loi de 1971 sur l'assurance-chômage? — La Cour a-t-elle la compétence d'annuler la décision du juge-arbitre? — Loi de 1971 sur l'assurance-chômage, S.C. 1970-71-72, c. 48, art. 2(1)e), 66(2) et 84 — Loi sur les Indiens, S.R.C. 1970, c. I-6, art. 87 — Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), c. 10, art. 28.

Le requérant déclare que des cotisations patronales doivent être versées relativement à des personnes employées par une bande indienne, sur la réserve de cette dernière. Le groupe intimé fait valoir que ces cotisations représentent une taxation sur les biens au sens de l'article 87 de la *Loi sur les Indiens* et que, par conséquent, la bande est exemptée des dispositions pertinentes de la *Loi de 1971 sur l'assurance-chômage* et que, de toute façon, la bande n'est pas un employeur comme le définit l'article 2(1)*e*) de la *Loi de 1971 sur l'assurance-chômage*.

Arrêt: l'article 87 de la *Loi sur les Indiens* ne fait qu'exempter les bandes indiennes d'une taxation ou d'un impôt direct sur les biens et les cotisations en l'espèce, bien qu'elles soient des impôts, sont des impôts personnels. Le groupe intimé est, de fait, un employeur au sens de l'article 2(1)*e*) de la *Loi de 1971 sur l'assurance-chômage*, et aucune preuve n'a démontré que ce groupe ne pouvait être considéré comme tel. La décision du juge-arbitre est renvoyée (le juge en chef Jackett étant dissident).

Le juge en chef Jackett (dissident): Pour les motifs exprimés dans *M.R.N. c. Dame L. H. MacDonald*, la Cour n'a pas la compétence d'annuler la décision d'un juge-arbitre rendue aux termes de l'article 84 de la *Loi de 1971 sur l'assurance-chômage*.

Arrêts appliqués: *Provincial Treasurer of Alberta c. Kerr* [1933] A.C. 710 et *M.R.N. c. Dame L. H. MacDonald* [1977] 2 C.F. 189.

EXAMEN judiciaire.

AVOCATS:

Claude Blanchard et *W. Lefebvre* pour le requérant.

James A. O'Reilly and *William S. Grodinsky* for respondent.

SOLICITORS:

Deputy Attorney General of Canada for applicant.
O'Reilly, Hutchins & Archambault, Montreal, for respondent.

The following are the reasons for judgment rendered in English by

JACKETT C.J.: This is a section 28 application to set aside a decision rendered by an Umpire under section 84 of the *Unemployment Insurance Act, 1971*.

The question involved in the matter before the Umpire was whether employers' premiums are payable in respect of persons employed by an Indian Band at a hospital and related facility operated by the Band on the Band's reserve. The Umpire held that such premiums are not payable.

The provision of the *Unemployment Insurance Act, 1971* that would appear to be the "charging provision" in respect of what were previously called employers' and employees' contributions and are called "premiums" under the 1971 Act is section 66(2), which reads:

(2) Every employer shall, for every week during which a person is employed by him in insurable employment, pay, in respect of that person and in the manner provided in Part IV, an amount equal to such percentage of that person's insurable earnings as is fixed by the Commission as the employer's premium payable by employers or a class of employers of which the employer is a member, as the case may be, for the year in which that week occurs.

The principal basis put forward by the respondent for supporting the correctness of the Umpire's decision was that the premiums in question are "taxation" on "property" that falls within section 87 of the *Indian Act*[1], which reads:

87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 83, the following property is exempt from taxation, namely:

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

James A. O'Reilly et *William S. Grodinsky* pour l'intimé.

PROCUREURS:

Le sous-procureur général du Canada pour le requérant.
O'Reilly, Hutchins & Archambault, Montréal, pour l'intimé.

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

LE JUGE EN CHEF JACKETT: Il s'agit d'une demande présentée en vertu de l'article 28 visant à faire annuler une décision rendue par un juge-arbitre aux termes de l'article 84 de la *Loi de 1971 sur l'assurance-chômage*.

La question soumise au juge-arbitre était de savoir si la bande indienne, à titre d'employeur, devait verser des cotisations patronales pour des employés travaillant dans un hôpital et dans un dispensaire, gérés par la bande et situés sur sa réserve. Le juge-arbitre décida que de telles cotisations n'avaient pas à être versées.

La disposition de la *Loi de 1971 sur l'assurance-chômage* qui paraît être la «disposition d'assujettissement» à l'égard de ce qu'on appelait autrefois les contributions patronales et ouvrières et qu'on appelle maintenant «cotisations» en vertu de la Loi de 1971, est l'article 66(2), qui se lit comme suit:

(2) Tout employeur doit, pour toute semaine au cours de laquelle une personne exerce à son service un emploi assurable, payer pour cette personne et de la manière prévue à la Partie IV une somme égale au pourcentage de sa rémunération assurable que fixe la Commission à titre de cotisation patronale payable, selon le cas, par les employeurs ou par une catégorie d'employeurs dont cet employeur fait partie pour l'année dans laquelle est comprise cette semaine.

Suivant l'argument principal présenté par l'intimé à l'appui de la décision du juge-arbitre, les cotisations en question représentent une «taxation» sur les «biens» au sens de l'article 87 de la *Loi sur les Indiens*[1], qui se lit comme suit:

87. Nonobstant toute autre loi du Parlement du Canada ou toute loi de la législature d'une province, mais sous réserve du paragraphe (2) et de l'article 83, les biens suivants sont exemptés de taxation, savoir:

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

(*a*) the interest of an Indian or a band in reserve or surrendered lands; and

(*b*) the personal property of an Indian or band situated on a reserve;

and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, being chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, on or in respect of other property passing to an Indian.

As it seems to me, it is not necessary, for present purposes, to express any opinion as to whether the imposition by statute on an employer of liability to contribute to the cost of a scheme of unemployment insurance such as is found in the *Unemployment Insurance Act, 1971* is "taxation" within the meaning of section 87.[2] If it is taxation, it is not, in my view, taxation on "property" within the ambit of section 87.

From one point of view, all taxation is directly or indirectly taxation on property; from another point of view, all taxation is directly or indirectly taxation on persons. It is my view, however, that when section 87 exempts "personal property of an Indian or band situated on a reserve" from "taxation", its effect is to exempt what can properly be classified as direct taxation on property. The courts have had to develop jurisprudence as to when taxation is taxation on property and when it is taxation on persons for the purposes of section 92(2) of *The British North America Act, 1867*, and there would seem to be no reason why such jurisprudence should not be applied to the interpretation of section 87 of the *Indian Act*. See, for example, with reference to section 92(2), *Provincial Treasurer of Alberta v. Kerr.*[3] When the charging section is clear, its terms must be construed to decide what is the subject matter of the

[2] In this connection, it would be necessary to consider the decision of the Privy Council in *Attorney-General for Canada v. Attorney-General for Ontario* [1937] A.C. 355, section 91(2A) of *The British North America Act*, and *Re Martin Service Station and M.N.R.* (1976) 67 D.L.R. (3d) 294 (S.C.C.).

[3] [1933] A.C. 710.

a) l'intérêt d'un Indien ou d'une bande dans une réserve ou des terres cédées; et

b) les biens personnels d'un Indien ou d'une bande situés sur une réserve;

et nul Indien ou bande n'est assujetti à une taxation concernant la propriété, l'occupation, la possession ou l'usage d'un bien mentionné aux alinéas *a*) ou *b*) ni autrement soumis à une taxation quant à l'un de ces biens. Aucun droit de mutation par décès, taxe d'héritage ou droit de succession n'est exigible à la mort d'un Indien en ce qui concerne un bien de cette nature ou la succession audit bien, si ce dernier est transmis à un Indien, et il ne sera tenu compte d'aucun bien de cette nature en déterminant le droit payable, en vertu de la *Loi fédérale sur les droits successoraux*, chapitre 89 des Statuts revisés du Canada de 1952, ou l'impôt payable en vertu de la *Loi de l'impôt sur les biens transmis par décès*, sur d'autres biens transmis à un Indien ou à l'égard de ces autres biens.

Il ne m'apparaît pas nécessaire, aux fins des présentes, d'exprimer une opinion sur la question de savoir si l'assujettissement d'un employeur au coût d'un régime d'assurance-chômage, par voie de texte législatif tel la *Loi de 1971 sur l'assurance-chômage*, est une «taxation» au sens de l'article 87.[2] S'il s'agit d'une taxation, ce n'est pas, à mon avis, une taxation sur un «bien» qui entre dans le cadre de l'article 87.

Toute taxation ou impôt est, directement ou indirectement, soit un impôt sur les biens, soit un impôt personnel. A mon avis, cependant, l'effet de l'article 87, aux termes duquel les «biens personnels d'un Indien ou d'une bande situés sur une réserve» sont exemptés de «taxation», est d'exonérer lesdits biens d'un impôt que l'on peut désigner de façon appropriée, d'impôt direct. Les cours ont dû élaborer une jurisprudence afin de distinguer les cas se rapportant à un impôt sur les biens des cas se rapportant à un impôt personnel aux fins de l'article 92(2) de l'*Acte de l'Amérique du Nord britannique, 1867*; et il n'existe aucun motif pour ne pas se référer à cette jurisprudence afin d'interpréter l'article 87 de la *Loi sur les Indiens*. A titre d'exemple, on peut consulter, en référence à l'article 92(2), l'arrêt *Provincial Treasurer of Alberta c. Kerr.*[3] Lorsque l'article d'assujettissement est clair, il doit être interprété de manière à pouvoir

[2] A cet égard, il serait nécessaire d'examiner la décision du Conseil privé dans l'arrêt *Le procureur général du Canada c. Le procureur général de l'Ontario* [1937] A.C. 355, l'article 91(2A) de l'*Acte de l'Amérique du Nord britannique* et l'arrêt *Re Martin Service Station et M.R.N.* (1976) 67 D.L.R. (3e) 294 (C.S.C.).

[3] [1933] A.C. 710.

taxation. See the same case per Lord Thankerton at pages 720-21. Section 62(1) of the *Unemployment Insurance Act, 1971* says that an employer shall pay the amount in question "in respect of" an employee in insurable employment. As already indicated, this seems to be the charging provision. That being so, in my view, the Umpire erred in holding that section 87 is applicable to exempt Indians or bands of Indians from paying premiums under the *Unemployment Insurance Act, 1971*.

A subsidiary submission of the respondent in support of the Umpire's decision is that the respondent is not an "employer" within the meaning of section 2(1)(*e*) of the *Unemployment Insurance Act, 1971*, which reads:

(*e*) "employer" includes a person who has been an employer;

In my view, it is clear that the respondent does in fact operate the institutions in question and does employ the employees in question. No evidence was led to show that there was not legal authority for it to do what it did in fact, and I find no basis for the Umpire's decision in this contention.

However, for the reasons that I have given in delivering judgment this day in *M.N.R. v. Dame L. H. MacDonald*[4] (which was heard at the same time as this application), I am of opinion that this Court has no jurisdiction under section 28 to set aside a decision of the Umpire under section 84 of the *Unemployment Insurance Act, 1971*. I am, therefore, of the view that this section 28 application should be dismissed for lack of jurisdiction.

* * *

The following are the reasons for judgment rendered in English by

PRATTE J.: I have already said in *M.N.R. v. Dame L. H. MacDonald* [[1977] 2 F.C. 189] that, in my view, this Court has jurisdiction to review and set aside a decision pronounced by an Umpire under section 84 of the *Unemployment Insurance Act, 1971*. As I agree with the Chief Justice that

[4] [1977] 2 F.C. 189.

déterminer l'objet de l'imposition. On peut consulter, dans le même arrêt, la décision rendue par lord Thankerton, aux pages 720 et 721. L'article 62(1) de la *Loi de 1971 sur l'assurance-chômage* prévoit que l'employeur doit payer la somme prévue «pour» un employé exerçant un emploi assurable. Comme je l'ai déjà indiqué, cet article paraît être la disposition d'assujettissement. Dans ces conditions, à mon avis, le juge-arbitre a erré en décidant que l'article 87 s'applique aux fins de soustraire des Indiens ou des bandes d'Indiens au paiement des cotisations visées à la *Loi de 1971 sur l'assurance-chômage*.

A l'appui de la décision du juge-arbitre le groupe intimé plaide subsidiairement qu'il n'est pas un «employeur» au sens de l'article 2(1)*e*) de la *Loi de 1971 sur l'assurance-chômage*, qui se lit comme suit:

e) «employeur» s'entend également d'une personne qui a été employeur;

A mon avis, il est clair que le groupe intimé gère effectivement les institutions en l'espèce et emploie les personnes concernées. Aucune preuve n'a été fournie afin de démontrer qu'il n'avait pas l'autorité légale d'agir comme il l'a fait en l'espèce, et je ne peux trouver, dans cet argument, le fondement de la décision du juge-arbitre.

Cependant, pour les motifs que j'ai exprimés aujourd'hui dans l'affaire *M.R.N. c. Dame L. H. MacDonald*[4] (dont l'audition a eu lieu en même temps que celle de la demande en l'espèce), je suis d'avis que cette cour n'a pas la compétence, aux termes de l'article 28, d'annuler une décision rendue par un juge-arbitre en vertu de l'article 84 de la *Loi de 1971 sur l'assurance-chômage*. Par conséquent, je rejetterais la demande présentée en vertu de l'article 28 pour défaut de compétence.

* * *

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

LE JUGE PRATTE: J'ai déjà déclaré dans l'affaire *M.R.N. c. Dame L. H. MacDonald* [[1977] 2 C.F. 189] qu'à mon avis, la présente cour a la compétence d'examiner et d'annuler une décision rendue par un juge-arbitre en vertu de l'article 84 de la *Loi de 1971 sur l'assurance-chômage*. Sous-

[4] [1977] 2 C.F. 189.

the Umpire's decision in this case is wrong, it follows that I would allow the section 28 application, set aside the decision under attack and refer the matter back so that it be decided by an Umpire on the basis that

(a) the respondent is an "employer" within the meaning of the *Unemployment Insurance Act, 1971*, and

(b) the obligation of an employer to pay premiums under the *Unemployment Insurance Act, 1971*, is not a tax in respect of property within the meaning of section 87 of the *Indian Act*.

* * *

The following are the reasons for judgment rendered in English by

HYDE D.J.: For the reasons given by Mr. Justice Pratte I would dispose of this application in the manner he suggests.

erivant à la décision du juge en chef selon laquelle la décision du juge-arbitre en l'espèce est erronée, je suis d'avis d'accueillir la demande présentée en vertu de l'article 28, d'annuler la décision contestée et de renvoyer l'affaire au juge-arbitre afin qu'il rende une décision qui tienne compte des propositions suivantes:

a) le groupe intimé est un «employeur» au sens de la *Loi de 1971 sur l'assurance-chômage*, et

b) l'obligation d'un employeur de verser des cotisations en vertu de la *Loi de 1971 sur l'assurance-chômage* ne constitue pas un impôt sur les biens au sens de l'article 87 de la *Loi sur les Indiens*.

* * *

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

LE JUGE SUPPLÉANT HYDE: Pour les motifs prononcés par le juge Pratte, je suis d'avis de trancher cette demande de la manière proposée par ce dernier.

Can.

Ex. Ct.

The claimant, upon giving to the respondent a good and valid title to the said vessels, namely the M.V. "Seaborn" or "Charles A. Dunning" and the SS. "Saukaty," free from all charges and encumbrances whatsoever, will be entitled to be paid and to recover the said sum of $128,335.37, with interest at 4% from March 1, 1941, date of the acquisition of the vessels by the respondent, to the date hereof.

Claimant will also be entitled to its costs.

Order accordingly.

Que.

Sess.

ATTORNEY-GENERAL FOR QUEBEC v. WILLIAMS.

Quebec Court of Sessions of the Peace, Guerin J.Sess. March 15, 1944.

Taxes I D—Indians—Retailer tobacconist's registration—"Tax"—"License Fee"—Whether payable by Indian.

A "tax" is a pecuniary contribution levied by competent authority in order to provide funds to insure the service of the State. A "license" is a permission to perform a certain act, exacted in order that the performance of the act may be regulated, and the fee therefor, if only accessory to the license and not primarily imposed to provide funds for the services of the State, is not a tax even though it may go to provide such funds. The money exigible from a retailer for a license or registration permitting him to sell tobacco or moveable goods is a license fee and not a tax and is therefore payable by an Indian who, with certain exceptions, is exempt from taxation under the *Indian Act*, R.S.C. 1927, c. 98.

TRIALS of charges of selling tobacco without a licence contrary to the provisions of the *Tobacco Tax Act* (Que.) and of selling moveable property without registration under the *Retail Sales Tax Act* (Que.).

F. O'Reilly, for plaintiff.

R. E. C. Werry, K.C., and *J. Helal*, for defendants.

GUERIN J. SESS. (translation*):—The complaint in this case is worded as follows: "I am credibly informed and I believe that in the village Caughnawaga, District of Montreal, on the 13th day of December 1943, Peter Williams, residing and carrying on business in the Village of Caughnawaga, District of Montreal, did sell tobacco in the Province without a license, contravening the provisions of Division II, s. 3 of the *Tobacco Tax Act*, R.S.Q. 1941, c. 87."

The parties to the case have consented that the evidence and admissions made in case No. 19973 be used in the present case.

Division II of the *Tobacco Tax Act* upon which the present charge is based enacts that:

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*Approved translation of reasons for judgment which were originally rendered in French.

"3. No person may sell tobacco in the Province unless a license therefor has been, upon his application, issued to him under authority of this act, and unless such license be in force at the time of sale.

"Such license shall remain in force until revoked for cause by the Minister.

"4. The application for the license shall be fyled with the Comptroller.

"5. Such license shall be granted by the Minister or by such officer as he may appoint, upon payment by the vendor of a fee of one dollar to His Majesty in the rights of the Province, and shall be kept in the place where the license[e] sells tobacco, or at his chief place of business in the Province."

The defendant pleads that he is not subject to the Act because it comes in conflict with s. 102 of the *Indian Act*, R.S.C. 1927, c. 98:

"102. 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."

Is the fee of one dollar required by the Government a license or a tax? I have consulted various authors who define the words "taxes" and "license".

Webster, 13th ed.:—

Tax: "A charge, especially a pecuniary burden imposed by authority; specifically a charge or burden, usually pecuniary, laid upon persons or property for public purposes; a forced contribution of wealth to meet the proper needs of a Government. (2) A sum imposed or levied upon the members of a society to defray its expenses. (Syn.) Impost, tribute, contribution, duty, tool, rate, assessment, demand exaction, custom."

License: "Authority or liberty given to do or forbear any act; permission to do something specified: especially formal permission from the proper authority to perform certain acts or to carry on a certain business which, without such permission would be illegal; also the document embodying such permission; as, a license to preach, to practise medicine, to sell gun powder or intoxicating liquors."

Winston's Encyclopedia:—

Tax: "Contribution levied by authority from people to defray the expenses of Government. A tax may be a charge made

Que.

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A.-G. QUE. v. WILLIAMS.

Guerin J. Sess.

by the national or state rulers on the income or property of individuals or on the products consumed by them."

License: "The grant of a permission to do some lawful act, also the document conferring such authority. All civilized countries require that persons should not carry on certain trades or professions or do certain acts without previous grant of license and may be imposed for the sake of regulating traffic by raising revenue. More numerous are licenses issued to empower persons to sell certain articles."

Black's Law Dictionary:—

Tax: "In a general way a tax is any contribution imposed by Government upon individuals for the use and service of the State, whether under the name of toll, tribute, tollage, gabel, impose, duty, custom, excise, subsidy aid, supply or other revenue. Taxes are the enforced proportional contribution of persons and property, levied by the authority of the State, for the support of the Government and for all public needs. As the term is generally used taxes are public burdens imposed generally upon the inhabitants of the whole State."

License: "A permission accorded by a compenent authority, conferring the right to do some act without which such authorization would be illegal."

Rapalge-Lawrence:—

Tax: "In public law, taxation signifies the system of raising money for public purposes by compelling the payment by individuals of sums of money, called taxes."

Corpus Juris:—

Tax: "Sum of money assessed on the person or property of a citizen by Government for the use of the nation or State. Burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes."

Capitant (Legal Vocabulary):—

License: "Autorisation administrative, avec ou sans incidence fiscale, necessaire pour permettre un commerce, qui n'est pas libre."

Byrne's Law Dictionary:—

License: "In its general sense a license is an authority to do something which would otherwise be inoperative, wrongful or illegal."

Abbott's:—

License: "In its general sense, permission, consent that a person may do some act which without such consent he might not lawfully do. A license is a right granted by some competent authority to do an act which without such license would be illegal."

Que.

Sess.

A.-G. QUE. v. WILLIAMS.

Guerin J. Sess

Tax: "A tax is a rate or sum of money assessed on the person, property, etc., of the citizen."

According to Words and Phrases licenses are of two characters:—

"Licenses are of two characters, one for revenue and the second conferring authority to engage in vocations which need special surveillance. A license fee is a tax when imposed mainly for the purposes of revenue."

In the light of these texts, I must come to the conclusion that tax is a general word which includes any contribution imposed by a competent authority to assure the services of the State. License would be a permission to do any act whatsoever. Although demanded with a view to regulation, it could nevertheless incidentally comprise an amount of money capable of assuring the services of the State. From this it may be realized that if a license seems to be imposed solely to assure revenue for the State, such permit is no longer a license but a tax, whatever may be the word used in the text of the Act.

In the present case, I am of the opinion that the sum of one dollar imposed by the Government for acquiring a license for the sale of tobacco, which remains in force until it is rescinded, can represent only the cost of acquisition of a license, and does not constitute a tax within the legal and constitutional meaning of the word.

The defendant is found guilty.

Case No. 19973.

The charge is that the defendant, a resident of and doing business in Caughnawaga, District of Montreal, on December 13, 1943, did sell moveable property without conforming to the provisions of s. 3 of the *Retail Sales Tax Act*, R.S.Q. 1941, c. 88. This section enacts:

"3(1). No vendor shall sell any moveable property in the Province, at a retail sale, unless a registration certificate has been, upon his application, granted to him under the authority of this act, and unless such certificate be in force at the time of the sale."

The admissions set out in the record and at the hearing reveal that on December 13th last, at Caughnawaga, the defendant, an Indian who operated a restaurant, sold moveable property without having previously obtained a certificate of registration. Is the defendant subject to the *Retail Sales Tax Act*?

Indians are subject to the general laws of the Province unless these laws legislate on "Indians, and lands reserved for the Indians." (B.N.A. Act, s. 91(24)) or they come in conflict with the *Indian Act*, R.S.C. 1927, c. 98. See *Re Cane*, [1940]

Que.

Sess.

A.-G. QUE. v. WILLIAMS.

Guerin J. Sess.

1 D.L.R. 390; *R.* v. *Groslouis*, 81 Can. C.C. 167, [1944] Rev. Leg. 12; *Crepin* v. *Delorimier* (1929), 68 Que. S.C. 36; *Feldman* v. *Jocks* (1935), 74 Que. S.C. 56; *Delisle* v. *Shawinigan Water & Power Co.*, [1941] 4 D.L.R. 556, 79 Que. S.C. 353.

These principles are recognized in an unchanging jurisprudence.

The Act upon which the charge is based was not declared to affect the Indians; on the contrary, it has a general scope and affects all citizens of this Province who wish to do business. It does not come into conflict with the *Indian Act* since that Act permits them to do business with all races living in the country.

If the defendant sells moveable property to Indians, who are perhaps exempt from paying taxes (*Indian Act*, s. 102)—which need not be decided in this case—, he will perhaps not claim the tax from them, since he need not claim it from anyone purchasing certain commodities specified in s. 12 of the Act. But for all that, he does not remain less subject to the preliminary obligation of procuring a certificate of registration for himself before effecting any sale.

The defendant is therefore found guilty.

Ont.

H.C.

R. ex rel. BOEHMER v. BOL-O-DROME Co. Ltd.

Ontario High Court, Greene J. September 5, 1944.

Sunday — Corporation having among its objects the conduct of bowling alleys—Lease of premises and equipment to club for use on Sundays—The Lord's Day Act, s. 4.

A corporation having among its objects the conduct of bowling alleys which leases its premises and equipment to a non-profit-making corporation for the exclusive use of the lessee and its members every Sunday for a definite term at a monthly rental can not be convicted of carrying on or transacting business of its ordinary calling for gain on the Lord's Day where the transaction is *bona fide*.

Cases Judicially Noted: *R.* v. *Bol-O-Drome Ltd.* (Ont.), 80 Can. C.C. 82, not folld; *Brockville* v. *Dobbie & Ritchie* (C.A.), [1929] 3 D.L.R. 583, 64 O.L.R. 75, refd to.

Statutes Considered: *Lord's Day Act*, R.S.C. 1927, c. 123, s. 4.

APPEAL by accused by way of stated case from a summary conviction on a charge of unlawfully for gain carrying on or transacting business of its ordinary calling on Sunday, February 27, 1944, contrary to s. 4 of the *Lord's Day Act*, R.S.C. 1927, c. 123. Reversed.

H. J. McNulty, K.C., for appellant; *W. F. Schroeder*, K.C.,

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Richards J.A.

On the allegations of negligence other than under the said section, I would only say that Boroski's speed does not come under the last part of s. 42(1) and did not exceed the limit set by 42(4), and that on the matter of keeping a proper look-out and the immediate circumstances of the acident, the facts are materially the same as in the following two cases where the action was dismissed.

Black v. *Veinot*, [1934] 1 D.L.R. 803, where a boy jumped off a rig and ran into the path of the defendant's automobile; and *Ksionek* v. *Wallace*, [1937] 3 D.L.R. 651, 45 Man. R. 345, where a child emerging from a ditch, ran across the road.

I would, with great deference, allow the appeal.

DENNISTOUN, TRUEMAN and ROBSON JJ.A., concurred with PRENDERGAST C.J.M.

RICHARDS J.A.:—There is no evidence that Boroski was driving too fast or in a reckless manner. He says he was not.

Smith, the driver of the sleigh, said Boroski's speed was not above the average; that Boroski gave him at least 4 ft. clearanee when passing; and that he had then no cause for feeling nervous.

Boroski had no reason to know or suspect that the boy would run out from the sleigh, or even that he was on the sleigh. An automobile driver has many things to watch and should not confine his attention to any particular object. He would see the sleigh in a general way and would not look for any detail. He was not bound to assume there would be on the sleigh anyone likely to leave it while in motion.

I would allow the appeal.

Appeal allowed.

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DELISLE v. SHAWINIGAN WATER & POWER Co.

Quebec Superior Court, Demers J. October 17, 1941.

Taxes I D—Indians—Sales tax on electricity—Order in Council authorizing equal charge to consumer—Whether Indians exempt.

The provision of Order in Council P.C. 2845 (September 25, 1939) authorizing suppliers of electricity to charge their customers an additional amount equal to the sales tax imposed by the *Special War Revenue Act*, R.S.C. 1927, c. 179 (am. 1939 (2nd Sess.), c. 8, s. 4), applies to Indians resident on a reservation in respect of electricity supplied to them for use in their dwellings. The tax is imposed not upon the consumer but upon the supplier, and hence there is no violation of s. 102 of the *Indian Act*, R.S.C. 1927, c. 98, which exempts Indians from taxation for their real or personal property.

Statutes Considered: *Special War Revenue Act*, R.S.C. 1927, c. 179,

s. 86 [am. 1936, c. 45, s. 5]; *Indian Act*, R.S.C. 1927, c. 98, s. 102; Order in Council P.C. 2845 (September 25, 1939).

EDITORIAL NOTE: This is an unusual case, but there would appear to be no answer to the learned Judge's reasoning. If the reverse were the case and the tax held to be imposed on the consumer, the problem of the Provinces in endeavouring to bring their tax legislation within the narrow field of direct taxation would become much simpler.

ACTION by an Indian resident on a reservation for the recovery of $1.93 paid to defendant company under protest. Dismissed.

M. Gameroff, for plaintiff.

W. B. Scott, K.C., for defendant.

DEMERS J.:—The following facts are admitted:

(a) that the plaintiff is an Indian as defined by the provisions of the *Indian Act*, R.S.C. 1927, c. 98 and that he resides and is domiciled on the Indian Reservation situated in the Village of Caughnawaga, in the District of Montreal, and that he has always claimed and still claims his rights to such and has never renounced the same;

(b) that the plaintiff is a householder and has been furnished with electricity by the defendant Company for use in his dwelling;

(c) that the defendant Company has installed in the plaintiff's domicile a meter for the purpose of measuring the amount of electrical energy supplied for use in his dwelling, and that the defendant company is authorized by the Quebec Public Service Board to charge a certain rate in the said locality, in accordance with the tariff filed with the said Board and duly approved by it, the whole as provided by s. 31, c. 24 (25-26 Geo. V) of Quebec and 4 Geo. VI, c. 11;

(d) that on September 25, 1939, an Order in Council P.C. 2845 was passed by the Governor in Council (a copy of which is attached to the present "Admission of Facts") and that the defendant Company has demanded and received payment of an additional charge of 8% over and above the authorized rates, relying on the amendment of the *Special War Revenue Act* (R.S.C. 1927, c. 179) enacted by 1939 (Can.) (2nd Sess.), c. 8, s. 4 (removing electricity used in dwellings from the schedules of items exempted from the said sales tax), and also on the said Order in Council Number P.C. 2845 passed in the exercise of the powers conferred by the *War Measures Act*, R.S.C. 1927, c. 206;

(e) the said 8% additional charge mentioned in para. (d) amounts to $1.93, and was paid under protest by the plaintiff.

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In this case, the defendant filed a declaration in evocation before the Superior Court.

As the learned attorneys for the plaintiff have pointed out in their factum, this is a test case and all Indians, whether on the Reserve at Caughnawaga or any other Reserve in Canada, have an interest in the decision.

Plaintiff contends, in his factum, "that he is not obliged to pay the additional 8% tax imposed by the Order in Council of September 25, 1939, which has just been referred to, and declares that the Order in Council applies to all others except Indians, and since he is an Indian within the meaning of the Act contained in the Revised Statutes of Canada. 1927, he should not be charged with this excess tax of 8%."

Plaintiff relies on the *Indian Act*, R.S.C. 1927, c. 98, s. 102, which reads as follows: "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."

Plaintiff argues as follows: "Electricity is personal property; electricity may be the subject of ownership or sale. As in spite of its invisibility electricity is considered in law as personal property subject to ownership, sale and disposal as inanimate objects (See Curtis, The Law of Electricity, p. 7). In any case the statute and schedule and Order-in-Council all define electricity to be *goods* subject to sales tax. Applying 1474 C.C. the sale of electricity is perfected as and when measured on the meter on the premises of the Plaintiff. And as the sale is only perfected after measurement from the meter, the situs must be held to be the domicile of the Plaintiff. If, however, the tax is looked upon as being imposed not on the goods, but on the sale price, it is, therefore, a tax on monies and again the situs must be considered to be the domicile of the Plaintiff. Either such monies has situs or it has not, in any case by fiction of law, it must be considered to be the domicile of Plaintiff, *mobilia sequuntur personam.*"

And he resumes his contention this way:

(a) that the additional charge of 8% is an indirect tax imposed on the Utility Company which it is expected to collect from the consumer.

(b) that it is a tax on the personal property of plaintiff because: (1) it is either a tax on electricity which he purchases, or

(2) it is a tax on his money, *i.e.*, the purchase-price which he is compelled to pay.

(c) that the electricity purchased is the personal property of the plaintiff.

(d) that the quantity of the electricity purchased being measured by the meter, it is personal property on the reserve, or if it is tax on money its situs is the domicile of plaintiff, *i.e.*, the reserve.

(e) that if the 8% additional charge is a tax to which the plaintiff is not liable, then the defendant Company has no right to impose it as an additional charge and he would not then be protected by the Order in Council allowing exemption for the maximum amount allowed by provincial statute.

The Order in Council referred to reads as follows:

"It shall be lawful for the selling utility to add to its regular charge to the consumer or user and to collect from such consumer or user the amount of consumption or sales tax imposed by the provisions of the *Special War Revenue Act* in respect to electricity and gas and the amount so added and collected for consumption or sales tax shall not be deemed to be an increase in the rate charged for electricity or gas and such addition and collection may be made by the selling utility notwithstanding the provisions of any statute of Canada or of any Province thereof or any regulation or order made pursuant thereto relating to or purporting to relate to the rates to be charged by such selling utility."

As we have seen before, the plaintiff does not attack the validity of that Order in Council, his contention being only that it does not apply to the Indians.

The contention of counsel for plaintiff is that the words "notwithstanding the provisions of any Statute of Canada" do not refer to the *Indian Act* but rather refers to any statute existing which may relate to the rate charged for electricity by the selling Utility.

I must admit that the question is not without doubts. Of course, the main object of that disposition was to permit to the electricity company to charge over the rates fixed by the electricity Commission or statutes, but very likely the legislator at that time did not think of the Indians in particular, but his main purpose after all was to permit the electricity company to collect that tax without any obstacle from any law.

But it is not necessary to pronounce on this point, because the *Indian Act* does not apply in this case.

What does that Indian Act say? "No Indian or non-treaty

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Indian shall be liable to be taxed for any real or personal property."

I maintain that there is no tax imposed on the plaintiff. The essential characteristics of a tax, says Cooley, 4th ed., para. 3, p. 68, are that it is not a voluntary payment or donation, but an enforced contribution.

The plaintiff is not bound to take electricity. People may illumine their homes by other means. The party who is taxed by the Order in Council and the law is the defendant;—nobody else.

Section 86 of the *Special War Revenue Act* says:

"(1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods,—

"(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof." [am. 1936 c. 45, s. 5]

Then, as we see, this tax, which evidently is an indirect tax, is imposed on the defendant, not on the plaintiff. That is what Cooley, Taxation, 4th ed., vol. 1, para. 50, pp. 141-2, says: "Indirect taxes are levied upon commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, *not as taxes*, but as part of the market price of the commodity."

It is of that tax, as of the Customs Taxes or Excise Taxes—all those indirect taxes are imposed on the importer or on the manufacturer. In the end, it is the consumer or buyer who must pay for the increase of the cost of the goods imported or manufactured. Indians, when they buy imported goods subject to Customs or Excise duties, must, like the others, pay higher prices; so they must do for this indirect tax on their electricity, and they cannot pretend that any tax is being imposed on their *real or personal property*.

For these reasons, the action is dismissed with costs.

Action dismissed.

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GOODYEAR TIRE & RUBBER CO. OF CANADA LTD. *et al.* v. T. EATON CO. LTD. *et al.*

Rand J.

I would, therefore, allow the appeal, set aside the judgment below and declare the Tariff Board to have had no jurisdiction to make the declaration. There will be no costs in this Court or in the Exchequer Court.

Appeal allowed; no costs.

Solicitors for the appellants: *McCarthy & McCarthy.*

Solicitors for T. Eaton Co.: *Gowling, MacTavish, Osborne & Henderson.*

Solicitors for Simpsons-Sears Ltd.: *Tory, Miller, Thomson, Hicks, Arnold & Sedgewick.*

Solicitor for Atlas Supply Co.: *J. F. Barrett.*

Solicitors for General Tire & Rubber Co.: *Osler, Hoskin & Harcourt.*

Solicitor for Minister of National Revenue: *K. E. Eaton.*

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LOUIS FRANCIS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Petition of right—Goods imported into Canada from U.S.A. by Indian—Whether subject to duties of customs and sales tax—Exemption claimed under the Jay Treaty—An Act to amend the Income Tax Act and the Income War Tax Act, S. of C. 1949, 2nd Session, c. 25, s. 49—The Indian Act, R.S.C. 1952, c. 149, ss. 2(1)(g), 86(1)(b), 87, 88, 89.

Article III of the treaty commonly known as the Jay Treaty reads in part as follows:

"No duty on entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales or other large packages unusual among Indians shall not be considered as goods belonging bona fide to Indians".

The appellant, an Indian within the terms of s. 2(1)(*g*) of the *Indian Act*, S. of C. 1951, c. 29, resided on an Indian reserve in the Province of Quebec adjoining an Indian reserve in the State of New York, U.S.A.

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*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Cartwright, Fauteux and Abbott JJ.

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In 1948, 1950 and 1951, he brought from the United States into Canada certain articles acquired by him in the U.S.A. No duties were paid in respect thereto. The articles were subsequently seized by the Crown and the appellant, under protest, paid the sum demanded. By his petition of right, he claimed the return of this money and a declaration that no duties or taxes were payable by him with respect to these goods by reason of the above part of Article III of the Jay Treaty. The claim was rejected by the Exchequer Court of Canada.

Held: The appeal should be dismissed.

Per Kerwin C.J., Taschereau and Fauteux JJ.: The Jay Treaty was not a Treaty of Peace and it is clear that in Canada such rights and privileges as were here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation. There is no such legislation here.

S. 86(*b*) of the *Indian Act* does not apply because customs duties are not taxes upon the personal property of an Indian situated on a Reserve but are imposed upon the importation of goods into Canada.

S. 49 of S. of C. 1949, c. 25 is a complete bar in so far as the articles imported in 1950 and 1951 are concerned.

Per Rand and Cartwright JJ.: To the enactment of fiscal provisions, certainly in the case of a treaty not a peace treaty such as the Jay Treaty, the prerogative that it need not be supplement by statutory action does not extend and only by legislation can customs duties be imposed. Legislation was therefore necessary to bring within municipal law the exemption claimed here, and for over a century there has been no statutory provision in this country giving effect to it.

There is nothing in s. 102 of the *Indian Act*, R.S.C. 1927, c. 98 nor in s. 86(1) of the *Indian Act*, R.S.C. 1952, c. 149, that can assist the appellant.

Per Kellock and Abbott JJ.: The provisions of the *Indian Act* constitute a code governing the rights and privileges of Indians, and except to the extent that immunity from general legislation such as the *Customs Act* or the *Customs Tariff Act* is to be found in the *Indian Act*, the terms of such general legislation apply to Indians equally with other citizens of Canada. No such immunity is to be found in s. 86(1) of the *Indian Act*.

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J. (1), dismissing a petition of right.

G. F. Henderson, Q.C. and *A. T. Hewitt* for the appellant.

D. H. W. Henry, Q.C. and *E. R. Olson* for the respondent.

The judgment of Kerwin C.J., Taschereau and Fauteux JJ. was delivered by:—

THE CHIEF JUSTICE:—This is an appeal against a decision of the Exchequer Court dismissing the Petition of Right of the suppliant (an Indian resident in a reserve in

(1) [1954] Ex. C.R. 590.

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Kerwin C.J.

Canada) and the question is whether three articles, a washing machine, a refrigerator and an oil heater, brought by him into Canada from the United States of America are subject to duties of customs and sales tax under the relevant statutes of Canada. None was paid and in fact the articles were not brought into this country at a port of entry; they were subsequently placed under customs detention or seizure and in order to obtain their release, the appellant, under protest, paid the sum demanded by the Crown. The Petition of Right claims the return of this money and a declaration that no duties or taxes were payable by the appellant with respect to the goods.

The date of importation of the washing machine is December, 1948; of the refrigerator April 24. 1950, and of the oil heater September 7, 1951. The relevancy of the dates is that s. 49 of The Statutes of Canada, 1949, 2nd session, c. 25, relied upon by the respondent, was assented to on September 10, 1949, and was, therefore, in effect at the time the suppliant brought into Canada the refrigerator and oil heater, but was not in force when the washing machine was imported. Furthermore s. 87 of *The Indian Act*, R.S.C. 1951, c. 29, also referred to on behalf of the respondent, was first enacted in the revision of *The Indian Act* in 1949 by s. 87 of c. 29 of the statutes of that year, which chapter was brought into force on September 4, 1951, so that even if applicable, its provisions would affect only the importation of the oil heater and I find it unnecessary to express any opinion upon the matter.

The appellant falls within the definition of "Indian" in s. 2(1)(*g*) of R.S.C. 1951, c. 29 and at all relevant times he resided on the St. Regis Indian Reserve in St. Regis village in the westerly part of the Province of Quebec, which adjoins an Indian reserve in the State of New York in the United States of America,—the residents of both reserves belonging to the St. Regis Tribe of Indians. The articles were brought into Canada in the manner already described in order to lay the foundation for the present proceeding as a test case.

The first claim advanced on behalf of the appellant is that these imposts need not be paid because of the following provisions of Article III of the Treaty of Amity, Com-

merce and Navigation, between His Britannic Majesty and the United States of America, signed on November 19, 1794, and generally known as the *Jay Treaty*:—

> No Duty on Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

In view of the conclusion at which I have arrived, it is unnecessary to deal with the question raised by the respondent that the articles imported by the appellant were not his "own proper goods and effects".

The *Jay Treaty* was not a Treaty of Peace and it is clear that in Canada such rights and privileges as are here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation. This is an adaptation of the language of Lamont J., speaking for himself and Cannon J. in *Arrow River & Tributaries Slide & Boom Co. Ltd.* v. *Pigeon Timber Co. Ltd.* (1), and is justified by a continuous line of authority in England. Although it may be necessary in connection with other matters to consider in the future the judgment of the Judicial Committee in *The Labour Conventions Case* (2), so far as the point under discussion is concerned it is there put in the same sense by Lord Atkin. It has been held that no rights under a treaty of cession can be enforced in the Courts except in so far as they have been incorporated in municipal law: *Vajesingji Joravarsingji* v. *Secretary of State for India* (3); *Hoani Te Heuheu Tukino* v. *Aotea District Maoria Land Board* (4). The case of *Sutton* v. *Sutton* (5), relied upon by the appellant, dealt with the construction of another provision of the *Jay Treaty* and of the statute of 37 Geo. III, c. 97, which was passed for the purpose of carrying certain terms of the Treaty into execution. This is not a case where vested rights of property are concerned and it is unnecessary to consider the question whether the terms of the *Jay Treaty* were abrogated by the war of 1812.

(1) [1932] S.C.R. 495.
(2) [1937] A.C. 326.
(3) (1924) L.R. 51 Ind. App. 357.
(4) [1941] A.C. 308.
(5) (1830) 1 Russ. & M. 664.

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I agree with Mr. Justice Cameron that clause (*b*) of s. 86 of *The Indian Act* does not apply, because customs duties are not taxes upon the personal property of an Indian situated on a Reserve but are imposed upon the importation of goods into Canada. I also agree that, so far as the refrigerator and the oil heater are concerned, s. 49 of c. 25 of the 1949 statutes is a complete bar. This is "An Act to amend the *Income Tax Act* and the *Income War Tax Act*". While it is true that in s. 48 there are references to residents in Newfoundland and in ss. 49 and 50 to Newfoundland, most of the sections deal with income tax throughout all of Canada. The words are clear that no one is entitled to any deduction, exemption or immunity from, or any privilege in respect of any duty or tax imposed by an Act of the Parliament of Canada; and the *Customs Act of Canada* certainly provides for a duty on all the goods brought into the country by the appellant. Counsel for the appellant points to the words "notwithstanding any other law heretofore enacted" and argues that the rights upon which the appellant bases his claim under the *Jay Treaty* do not arise under any enactment. For the reasons already given, I cannot agree that any relevant rights of the appellant within that Treaty are judiciable in the Courts of this country.

The appeal should be dismissed with costs.

The judgment of Rand and Cartwright JJ. was delivered by:—

RAND J.:—The appellant, Louis Francis, is an Indian within the definition of that word in the *Indian Act*, R.S.C. 1952, c. 149, s. 2(1)(*g*) and resides on the St. Regis Indian Reserve in Quebec. The latter is part of a larger settlement of the St. Regis tribe extending into the United States and is bounded on the south by the international boundary between the two countries. Between 1948 and 1951 Francis purchased an electrical washing machine, a second-hand oil burner or heater and an electric refrigerator in the United States; two of these were brought over or from the international boundary to his home in the reserve by Francis and the other delivered by the seller. They were not reported at the customs office for the district and some time

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later were seized and held until the duty amounting to $123.66 was paid. The petition of right was thereupon brought for the return of these moneys.

The claim is based first on that clause of art. 3 of the *Jay Treaty* between Great Britain and the United States of 1794 which stipulates:

> No Duty on Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

and on the 9th article of the Treaty of Ghent, 1815, between the same states which, as regards Great Britain, reads:

> And His Britannic Majesty engages, on his part, to put an end, immediately after the Ratification of the present Treaty to hostilities with all the Tribes or Nations of Indians with whom he may be at War at the time of such Ratification; and forthwith to restore to such Tribes or Nations, respectively, all the Possessions, Rights and Privileges, which they may have enjoyed or been entitled to in 1811, previous to such hostilities: Provided always, that such Tribes or Nations shall agree to desist from all hostilities against His Britannic Majesty, and his Subjects, upon the Ratification of the present Treaty being notified to such Tribes or Nations, and shall so desist accordingly.

The contention is put as follows: art. 3 effects the enactment of substantive law not requiring statutory confirmation as being a provision in a treaty of peace, the making of which is in the exercise of the prerogative including, here, a legislative function; on the true interpretation of the treaty the article was intended to be perpetual and was not affected by the war of 1812; in any event it was restored by the 9th article of 1815.

A second ground is that the appellant is exempted from liability for the duties of s. 102 of the *Indian Act*, R.S.C. 1927, c. 98 and by s. 86(1) of c. 149, R.S.C. 1952. These read:

> 102. 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.

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86. (1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to Section 82, the following property is exempt from taxation, namely,

(*a*) the interest of an Indian or a band in reserve or surrendered lands, and

(*b*) the personal property of an Indian or band situated on a reserve, and no Indian or band is subject to taxtion in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property . . .

Cameron J., dismissing the petition, held that art. 3 required statutory confirmation to become effective as law, of which there was none; that the article was abrogated by the war of 1812; that the exemption was negatived by s. 49 of the statutes of Canada, 1949, 2nd Session; and that the sections of the *Indian Acts* quoted did not extend to customs duties. Art. 9 of the Treaty of Ghent was not, evidently, brought to his attention nor apparently the distinction in respect of the scope and power of the prerogative urged before us between a treaty of peace and other treaties.

A peace treaty in its primary and legitimate meaning is a treaty concluding a war, "an agreement"—in the words of Sir William Scott in the *Eliza Ann and others* (1)—"to waive all discussion concerning the respective rights to the parties and to bury in oblivion all the original causes of the war." The Treaty of Paris, 1783 was of that nature; it recognized the independence of the United States, fixed boundaries, secured the property of former and continuing subjects and citizens in both countries against prosecution and against confiscation of their property, provided for the withdrawal of British troops from the lands of and border points in the United States and for other matters not germane here.

The question of the Indians, however, was left untouched, and during the years that followed they presented both governments with problems of reconciliation. Generally speaking, the tribes in the east between New York state and the Ohio river, and in particular those belonging to the confederation known as the Six Nations had tended to support the British, and the bitterness then aroused continued after the peace. No clear political conception had been formulated of the relationship of the Indians either to the

(1) (1873) 1 Dods. 244, 248.

old or the new government especially in respect of rights in the lands over which the natives had formerly roamed at will; and their protest was that the British had purported to transfer to the United States, a title which they did not possess. As a measure of mitigation, the British conceived the idea of setting apart a neutral zone between the two countries for Indian settlement, but this did not, apparently, develop to the point of definite proposal. In addition to this, charges and countercharges were made by both countries of failure to carry out the terms of the treaty in such matters as the return of slaves, the confiscation of properties, the prosecution of individuals and the withdrawal of British troops from fortified border points. These, with the events developing in Europe and the need of both for the restoration of trade, induced a common desire to remove these frictions, which eventuated in the treaty of 1794: (Jay's Treaty, A Study in Commerce and Diplomacy, Bemis, pp. 109 et seq.)

Assuming, then, a broader authority under the prerogative in negotiating a peace treaty, neither the causes nor the purposes of the treaty of 1794 bring it within that category.

A treaty is primarily an executive act establishing relationships between what are recognized as two or more independent states acting in sovereign capacities; but as will be seen, its implementation may call for both legislative and judicial action. Speaking generally, provisions that give recognition to incidents of sovereignty or deal with matters in exclusively sovereign aspects, do not require legislative confirmation: for example, the recognition of independence, the establishment of boundaries and, in a treaty of peace, the transfer of sovereignty over property, are deemed executed and the treaty becomes the muniment or evidence of the political or proprietary title. Stipulations for future social or commercial relations assume a state of peace: when peace is broken by war, by reason of the impossibility of their exercise, they are deemed to be abrogated as upon a failure of the condition on which they depend. But provisions may expressly or impliedly break in upon these general considerations; the terms may contemplate continuance or suspension during a state of war. The interpretation is according to the rules that govern

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that of instruments generally; from the entire circumstantial background, the nature of the matters dealt with and the objects in view, we gather the intention of the parties as expressed in the language used. When such matters touch individuals, the judicial organ must act but a result that brought about non-concurrence between the judicial and the executive branches, say as to abrogation, and apart from any question of an international adjudication, would, to say the least, be undesirable.

Except as to diplomatic status and certain immunities and to belligerent rights, treaty provisions affecting matters within the scope of municipal law, that is, which purport to change existing law or restrict the future action of the legislature, including, under our constitution, the participation of the Crown, and in the absence of a constitutional provision declaring the treaty itself to be law of the state, as in the United States, must be supplemented by statutory action. An instance of the joint involvement of executive, legislative and judicial organs is shown by the provisions of the treaty of 1783 respecting the holding of lands in the United States by subjects of Great Britain, including their heirs and assigns, and vice versa. These were supplemented by 37 Geo. III, c. 97 which was declared to continue so long as the treaty should do so and no longer. In *Sutton* v. *Sutton* (1), the Master of the Rolls, Sir John Leach, held that this provision was not annulled by the war of 1812, that so far the statute remained in force and that "the heirs and assigns of every American who held lands in Great Britain at the time mentioned in the Act of 37 Geo. III are, so far as regards these lands, to be treated not as aliens but as native subjects."

To the enactment of fiscal provisions, certainly in the case of a treaty not a peace treaty, the prerogative does not extend, and only by legislation can customs duties be imposed or removed or can the condition under which goods may be brought into this country be affected. I agree, therefore, with Cameron J. in holding that legislation was necessary to bring within municipal law the exemption of the clause in question. Legislation to that effect was enacted, in Upper Canada by 41 Geo. III, c. 5, s. 6, repealed by 4 Geo. IV, c. 11; in Lower Canada by the enabling

(1) 39 E.R. 255.

statute, 36 Geo. III, c. 7 and the ordinance of 1796 made thereunder, the former having been continued by annual renewals up to January 1, 1813 when it lapsed. No legislation is suggested to have been passed by any other province. For over a century, then, there has been no statutory provision in this country giving effect to that clause of the article.

The particular privilege lay within a structure of settled international relations between sovereign states and from its nature was not viewed as intended to be perpetual. Following the treaty of 1783 large scale transfers of Indians belonging to the Six Nations and more western tribes took place from the United States to lands north of Lake Erie. This was a major step which was bound to affect materially the circumstances instigating the clause.

But the Indians north of the boundary were not confined to the district between Montreal and Detroit: they inhabited also the eastern maritime provinces and the territories to the west of central Canada; these were within the general language but there has been no suggestion that the treaty was significant to them, much less that they have ever claimed its privilege.

In 1794 European settlement of North America was in its early stages. In 1768 a treaty had been made with the Indians that had placed the western boundary of the advance south of the Great Lakes at the Ohio river. The lands to the north and west of those lakes were within the charter granted to the Hudson's Bay Company. The section of the international boundary from the Lake of the Woods to the Rocky Mountains was not fixed until 1818 and that beyond to the Pacific ocean until 1846. Confederation succeeded in 1867 and a few years later drew within its orbit all the territory reaching to the Pacific and the far north. Government in relation to the Indians was thus greatly extended. Continuing the administration inaugurated by Sir William Johnson in 1744 and extended to Quebec in 1763, (Canada and Its Provinces, Vol. IV, p. 695 et seq.) ordinances for the welfare of the Indians and the protection of their lands were passed in Lower Canada as early as 1777 and a partial consolidation was

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made in 1840 by 3-4 Vict., c. 44. In Upper Canada, 5 William IV, c. 9 and 2 Vict., c. 15 provided similar safeguards. Legislation of the province of Canada, 13-14 Vict., c. 42, 14-15 Vict., c. 106 and 20 Vict., c. 26 had in view the preservation of their settlements and their gradual introduction to the customs and mode of life of western civilization. Then 31 Vict., c. 42 committed the management of their lands to the Department of the Secretary of State and by 32-33 Vict., c. 6 comprehensive provision was made for their gradual enfranchisement and the management of their affairs. These enactments were consolidated by 43 Vict., 28 and this with modifications has now become the present *Indian Act*.

Indian affairs generally, therefore, have for over a century been the subject of expanding administration throughout what is now the Dominion, superseding the local enactments following the treaty designed to meet an immediate urgency. In the United States the last statutory provision dealing with duties on goods brought in by Indians was repealed in 1897. This appears from the case of *United States* v. *Garrow* (1). In that case, also, it was pointed out that under the Ghent treaty the contracting parties merely "engaged" themselves to restore by legislation the "possessions, rights and priveleges" of the Indians enjoyed in 1811 but that no such enactment had been passed. The article itself was held to have been abrogated by the war of 1812: *Karnuth* v. *United States* (2). In the last decade of the 18th century peace had been reached between the United States and the tribes living generally between Lake Champlain and the Mississippi river. There followed the slow but inevitable march of events paralleled by that in this country; and today there remain along the border only fragmentary reminders of that past. The strife had waged over the free and ancient hunting grounds and their fruits, lands which were divided between two powers, but that life in its original mode and scope has long since disappeared.

These considerations seem to justify the conclusion that both the Crown and Parliament of this country have treated the provisional accommodation as having been replaced by an exclusive code of new and special rights and privileges.

(1) 88 Fed. R. (2nd) 318 at 321. (2) 279 U.S. 231.

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Appreciating fully the obligation of good faith toward these wards of the state, there can be no doubt that the conditions constituting the raison d'être of the clause were and have been considered such as would in foreseeable time disappear. That a radical change of this nature brings about a cesser of such a treaty provision appears to be supported by the authorities available: McNair, The Law of Treaties, 378-381. Assuming that art. 9 of the Treaty of Ghent extended to the exemption, it was only an "engagement" to restore which, by itself, could do no more than to revive the clause in its original treaty effect, and supplementary action was clearly envisaged. Whether, then, the time of its expiration has been reached or not it is not here necessary to decide; it is sufficient to say that there is no legislation now in force implementing the stipulation.

There remains the question of exemption under s. 102 of c. 98, (1927) and s. 86(1) of c. 149, R.S.C. 1952, the former of which was repealed as of June 20, 1951. I can find nothing in these provisions that assists the appellant. To be taxed as by s. 102 "at the same rate as other persons in the locality" refers obviously and only to personal or real property under local taxation; it cannot be construed to extend to customs duties imposed on importation.

Similarly in 86(1), property "situated on a reserve" is unequivocal and does not mean property entering this country or passing an international boundary. On the argument made, the exemption would be limited to situations in which that boundary bounded also the reserve and would be a special indulgence to the small fraction of Indians living on such a reserve, a consequence which itself appears to me to be a sufficient answer.

The appeal must therefore be dismissed and with costs if demanded.

The judgment of Kellock and Abbott JJ. was delivered by:—

KELLOCK J.:—The appellant, who is described in the petition herein as "an Indian subject to the provisions of the *Indian Act*, Statutes of Canada 1951 Chapter 29", at all material times resided at the St. Regis Indian Reserve,

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Cornwall Island. It is contended on his behalf that contrary to Art. 3 of the *Jay Treaty* of the 19th November, 1794, between His Britannic Majesty and the United States of America, he was improperly charged customs duty on certain articles brought into Canada on or subsequent to the 19th of October, 1951. Art. 3 of the treaty reads in part as follows:

> No Duty on Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

The appellant contends (1) that this article became part of the municipal law in Canada without the necessity of any legislation either authorizing it or confirmatory thereof, and (2) that there is no legislation subsequently enacted which affects the right claimed.

In view of the conclusion to which I have come with respect to the second point, I do not find it necessary to consider the first. The appellant admits that at least since the Statute of Westminster 1931, it was competent to Parliament to legislate with respect to the right claimed.

S. 86(1) of the *Indian Act*, R.S.C. 1952, c. 149, reads as follows:

> 86(1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 82, the following property is exempt from taxation, namely,
>
> * * *
>
> (*b*) the personal property of an Indian or band *situated on a reserve*, and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act* on or in respect of other property passing to an Indian.

Before the property here in question could become situated on a reserve, it had become liable to customs duty at the border. There has been no attempt to impose any other tax.

Section 89(1) and (2) reads as follows:

89(1) For the purposes of sections 86 and 88, personal property that was

(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

(2) Every transaction purporting to pass title to any property that is by this section *deemed to be situated on a reserve*, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.

It is quite plain from this section that the actual situation of the personal property on a reserve is contemplated by s. 86 and that any argument suggesting a notional situation is not within the intendment of that section.

It is, moreover, provided by s. 87 that

87. 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.

I think it is quite clear that "treaty" in this section does not extend to an international treaty such as the *Jay Treaty* but only to treaties with Indians which are mentioned throughout the statute.

In my opinion the provisions of the *Indian Act* constitute a code governing the rights and privileges of Indians, and except to the extent that immunity from general legislation such as the *Customs Act* or the *Customs Tariff Act* is to be found in the *Indian Act*, the terms of such general legislation apply to Indians equally with other citizens of Canada.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Gowling, MacTavish, Osborne & Henderson.*

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

In assessing damages, I am faced with somewhat the same difficulties with which the Court was faced in *Nowakowski* v. *Martin*, *supra*, coupled with those additional distinguishing factors to which I have adverted. As was there said, however, at p. 78, difficulties in assessment do not bar the plaintiff's right.

The matters which are requisite and necessary to be taken into consideration in a case of this nature are well reviewed in *Bothwell* v. *Galloway*, [1950] O.R. 377 at pp. 384-5, affd [1951] O.R. 50. Considering the factors there mentioned as best I can, upon the evidence here submitted, together with the unusual contingencies involved, I have concluded that a fair and reasonable compensation to award to the plaintiff under all the circumstances is the sum of $3,500.

There will therefore be judgment for the plaintiff for the sum of $3,500 damages, together with her costs of the action.

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Exchequer Court of Canada, Cameron J. August 4, 1954.

Indians — International Law — Taxes I D — Whether Indian entitled to exemption from customs duties — Jay Treaty, 1794 —Abrogation of relevant article by War of 1812 — No implementing legislation — Indian Act, s. 86—

Article III of the Jay Treaty, 1794 which exempts from duty "Indians passing or repassing with their own proper goods and effects of whatever nature" does not entitle a Canadian Indian to exemption from customs duties on household appliances acquired by him in the United States because (1) at the time of the importation of the goods there was no legislation in force in Canada implementing this term of the Treaty; (2) this term of the Treaty was abrogated by the War of 1812; and (3), s. 49 of the *Income Tax Act Amendment Act*, 1949 (Can. 2nd Sess.), c. 25 expressly forbade any exemption unless found in a statute of the Parliament of Canada. Section 86 of the *Indian Act*, R.S.C. 1952, c. 149 which exempts from taxation "the personal property of an Indian or band situated on a reserve" does not extend to an exemption from customs duties and excise taxes payable on the importation of goods into Canada.

Cases Judicially Noted: *Re Arrow River & Tributaries Slide & Boom Co.*, [1932], 2 D.L.R. 250, S.C.R. 495, 39 C.R.C. 161; *Reference re Weekly Rest in Industrial Undertakings Act, etc.*, [1937], 1 D.L.R. 673, A.C. 326, 1 W.W.R. 299, apld; *Karnuth* v. *U.S.*, 279 U.S. 231; *U.S.* v. *Garrow*, 88 Fed. (2d) 318, aprvd.

Statutes Considered: *Jay Treaty*, 1794, [Treaties, Conventions, International Acts, etc., 1910, vol. 1, p. 592], Art. III; *Indian Act*, R.S.C. 1952 c. 149, s. 86; *Income Tax Act Amendment Act*, 1949 (Can. 2nd Sess.), c. 25, s. 49.

PETITION OF RIGHT for a declaration of a right to exemption from customs duty under the Jay Treaty, 1794.

Gordon F. Henderson, Q.C., *A. T. Hewitt* and *John MacDonald*, for suppliant.

D. H. W. Henry, for respondent.

CAMERON J.:—In this petition of right the suppliant asks for a declaration of this Court that as an Indian, subject to the provisions of the *Indian Act*, 1951 (Can.), c. 29, he is entitled to transport by land or inland navigation into the Dominion of Canada his own proper goods and effects of whatever nature, free of any impost or duty whatsoever; and also for the return of the sum of $123.66 paid by him to the respondent, under protest, for certain customs and excise duties in respect of goods imported by him into Canada.

This is a test case and in the main the facts are not in dispute. The suppliant is an Indian within the definition of that term in s. 2(1)(*g*) of the *Indian Act* and at all relevant times resided on the St. Regis Indian Reserve in St. Regis Village. That village is situated on the south side of the St. Lawrence River, about opposite Cornwall, Ontario, but is in the most westerly tip of the Province of Quebec and adjacent to the State of New York. It adjoins an American Indian Reserve, the members of which are also part of the St. Regis tribe of Indians. Like some other residents of the St. Regis Indian Reserve of Canada, the suppliant's employment has been mainly in the United States and he served for some years with the American Army in the Second World War. Following his discharge from the American Army in 1946, he returned to his home in St. Regis and has since resided there. For the purpose of this case only, certain admissions were agreed to by the parties hereto and duly filed. Thereby it was agreed that on or about October 19, 1951, the suppliant imported from the United States into Canada one washing machine, one oil heater, and one electric refrigerator, being his own property acquired by him in the United States. No duty was paid by him on the importation of the said articles either under the *Customs Tariff Act* or the *Excise Tax Act*. The three articles were seized while on the premises and in the possession of the suppliant and detained on behalf of His Late Majesty under the provisions of the *Customs Act* for failure to pay duty and taxes on the importation into Canada of the said goods under the *Customs Tariff Act* and the *Excise Tax Act*. Following the seizure, the suppliant claimed exemption from duty and taxes with respect to the said articles by reason of the provisions of Article III of the Treaty of Amity,

Commerce and Navigation, between His Britannic Majesty and the United States of America, signed on November 19, 1794, and which is commonly known, and will be hereinafter referred to as the Jay Treaty [Treaties, Conventions, International Acts, etc., 1910, vol. 1, p. 592].

The claim for exemption of duty and taxes was not recognized and the Crown demanded payment of the sum of $132.66 for duty and taxes. The suppliant thereupon under protest paid the said sum and the goods were released to him; he then filed this petition of right.

The evidence at the trial indicated that the date of entry of the said goods was not on October 19, 1951, as stated in the agreement of the parties. It showed that the suppliant imported them on the following dates—the washing machine in December, 1948; the refrigerator on April 24, 1950; and the oil heater on September 7, 1951. The petition of right was amended accordingly but the change in the date of importation, however, is not of importance in determining the main issue between the parties. It is shown by the evidence, also, that each of the articles when imported was taken directly to the home of the suppliant and was not taken to a Custom-house at a port of entry, or reported to any collector or other Customs Officer.

The main case put forward on behalf of the suppliant is that as an Indian he is entitled to the benefit of certain provisions contained in Article III of the Jay Treaty (ex. 2), the relevant part being as follows: "No duty of entry shall ever be levied by either party on peltries brought by land or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. but goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians."

At the trial the suppliant relied also on the provisions of s. 86 of the *Indian Act*, R.S.C. 1952, c. 149. Notwithstanding the fact that that Act had not been referred to in the pleadings, counsel for the respondent made no objection to its being considered, and the scope of the argument is regularized by his approval.

For the respondent it is submitted that the suppliant is not entitled to the exemptions claimed on any ground. First it is said that the Jay Treaty—or at least the relevant provisions of Article III—was terminated by the War of 1812. If it were not so terminated, then it is contended that it is enforceable by the

Courts only when the Treaty has been implemented or sanctioned by legislation rendering it binding upon the subject, and that at the time the goods here in question were imported, there was no such legislation in effect in Canada. Then it is submitted as a further alternative that even if the Treaty was in full force and effect at the relevant times, the nature of the goods imported is not such as to be within the purview of the goods mentioned in Article III. The respondent also submits that s. 86 of the *Indian Act* does not assist the suppliant. Finally, the respondent relies on the provisions of s. 49 of the *Act to amend the Income Tax Act and the Income War Tax Act*, 1949 (Can. 2nd Sess.), c. 25, as barring any right to exemption which the suppliant might otherwise have had.

The first question for consideration is this. Is the suppliant entitled to an exemption from the duties claimed by reason of that part of Article III of the Jay Treaty which I have cited above? Here I should emphasize the fact that in this opinion, my comments and conclusions—unless otherwise stated—are referable only to that part of Article III and to no other part of the Treaty.

I have given this matter the most careful consideration and after referring to the authorities cited to me, I have reached the conclusion that this question must be answered in the negative. Briefly, the reason for so finding is that at the time the goods were imported into Canada by the suppliant there was in force in Canada no legislation sanctioning or implementing that term of the Treaty.

The first authority to which I would like to refer on this point is the case of *Re Arrow River & Tributaries Slide & Boom Co.*, [1932], 2 D.L.R. 250, S.C.R. 495, 39 C.R.C. 161. The facts in that case were as follows: The appellant, which had constructed certain works upon that part of the Pigeon River which was in Ontario (the remaining part being in the United States) was desirous of charging tolls upon timber passing through such works, under the authority of the *Lakes and Rivers Improvement Act*, R.S.O. 1927, c. 43. The respondent applied for an injunction restraining the District Judge from acting on the appellant's application to fix the tolls on the ground that the Pigeon River being an international stream, its use under the Ashburton Treaty is free and open to the use of the citizens of both the United States and Canada and that Part V of the *Lakes and Rivers Improvement Act*, in so far as it purports to authorize the appellant company to charge tolls for the use of improvements on that river, is *ultra vires* of the Ontario Legis-

lature. Application for an injunction was refused by Wright J. [[1931] 1 D.L.R. 260, 38 C.R.C., at p. 66, 65 O.L.R. 575] on the ground that in British countries treaties to which Great Britain is a party are not as such binding on the individual subject in the absence of legislation. The Appellate Division of Ontario [[1931] 2 D.L.R. 216, 38 C.R.C. 65, 66 O.L.R. 577] agreed with that principle and apparently would have upheld the decision of Wright J. had there been, in their view, legislation in Ontario that authorized the construction of the works in question. In the Supreme Court of Canada, the appeal was allowed and the judgment of Wright J. restored. At pp. 260-1 D.L.R., pp. 510-11 S.C.R., Lamont J. speaking also for Cannon J. said:

"The Act must, therefore, be held to be valid unless the existence of the treaty of itself imposes a limitation upon the provincial legislative power. In my opinion the treaty alone cannot be considered as having that effect. The treaty in itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power. For a breach of a treaty a nation is responsible only to the other contracting nation and its own sense of right and justice. Where, as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are, under our law, enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject. Upon this point I agree with the view expressed by both Courts below, 'that in British countries treaties to which Great Britain is a party are not as such binding upon the individual subject, but are only contracts binding in honour upon the contracting states.'

"In this respect our law would seem to differ from that prevailing in the United States where by an express provision of the constitution, treaties duly made are 'the supreme law of the land' equally with Acts of Congress duly passed. They are thus cognizable in both the Federal and State Courts. In the case before us it is not suggested that any legislation, Imperial or Canadian, was ever passed implementing or sanctioning the provision of the treaty that the water communications above referred to should be free and open to the subjects of both countries. That provision, therefore, has only the force of a contract between Great Britain and the United States which is ineffectual to impose any limitation upon the legislative power

exclusively bestowed by the Imperial Parliament upon the Legislature of a Province. In the absence of affirming legislation this provision of the treaty cannot be enforced by any of our Courts whose authority is derived from municipal law. *Walker* v. *Baird*, [1892] A.C. 491; *Re Carter Medicine Co.'s Trade-Mark*, [1892] 3 Ch. 472; *U. S.* v. *Schooner 'Peggy'* (1801), 1 Cranch p. 103; *The Chinese Exclusion Case* (1888), 130 U.S.R. 581; Oppenheim's International Law, 4th ed., pp. 733-4.

"I am, therefore, of opinion that s. 52, in question in this appeal, must be considered to be a valid enactment until the treaty is implemented by Imperial or Dominion legislation."

Reference may also be made to *Albany Packing Co.* v. *Registrar of Trade Marks*, [1940], 3 D.L.R. 727 at p. 736, Ex. C.R. 256 at pp. 265-6, 1 C.P.R. 108 at pp. 117-8, in which the late President of the Court said: "Before proceeding to do so, however, I should perhaps here add that, I think, it is correct to say that the terms of the Convention of The Hague may be referred to by the Court as a matter of history, in order to understand the scope and intent of the terms of that Convention, and under what circumstances any of the provisions of the *Unfair Competition Act* were enacted, in order to give legislative effect to the same. But the terms of the Convention cannot, I think, be employed as a guide in construing any of such provisions so enacted, for the reason that in Canada a treaty or convention with a foreign state binds the subject of the Crown only in so far as it has been embodied in legislation passed into law in the ordinary way."

And in the case of *Reference re Weekly Rest in Industrial Undertakings Act, etc.*, [1937], 1 D.L.R. 673 at pp. 678-9, A.C. 326 at pp. 347-8, Lord Atkin said:

"It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more Sovereign states. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parlia-

ment to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament or any subsequent Parliament from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the state as against the other contracting parties, Parliament may refuse to perform them and so leave the state in default. In a unitary state whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the state by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a state where the Legislature does not possess absolute authority: in a federal state where legislative authority is limited by a constitutional document: or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures: and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible: but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive: but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures."

Following the signing of the Jay Treaty, the relevant part of Article III was in fact implemented in Canada. In 1796, the Legislature of Lower Canada by c. VII of its Statutes passed "*An Act for making a Temporary Provision for the Regulation of Trade between this Province and the United States of America, by Land or by Inland Navigation*".

Thereby power was conferred on the Government with the advice and consent of the Executive Council to give directions and make orders with respect to importation and duties, for carrying on trade between the Province and the United States.

Section II of the Act was as follows: "And be it further enacted by the authority aforesaid, that this Act shall be in force and have effect from and after the passing thereof, until the first day of January, one thousand, seven hundred and ninety-seven, and from thence to the end of the then next session of the Provincial Parliament, and no longer."

Pursuant to that authority and in conformity with the terms of the Jay Treaty, a Regulation was passed and duly gazetted on July 7, 1796 (ex. 4), such Regulation putting into effect the same exemption in respect to the goods of Indians passing between the two countries as is found in the Jay Treaty, the language used being practically identical with that in the Jay Treaty itself.

As I have said, the Act of 1796 was of a temporary nature; the Regulation appears to have been renewed from time to time, the last renewal being found in the Statutes of 1812, c. 5, by virtue of which it expired on June 1, 1813.

That part of the Jay Treaty was first implemented in Upper Canada in 1801 by s. VI of c. V of the Statutes of that year (ex. 6), the relevant part thereof being as follows: "VI. And be it enacted by the authority aforesaid. That no duty of entry shall be payable, or levied, or demanded by any Collector or deputy on any Peltries brought by land or inland navigation into this Province, and that Indians passing or repassing with their proper goods and effects, of whatever nature, shall not be liable to pay for such goods and effects any impost or duty whatever, unless the same shall be goods in bales or other packages unusual among Indians for their necessary use, which shall not be considered as goods belonging *bona fide* to Indians, or as goods entitled to the foregoing exemption from duties and imposts."

It will be noted that the wording is similar to but not precisely the same as that found in Article III. That Act remained in force until 1824, when it was repealed by c. XI, 4 Geo. IV—4th Session. The Jay Treaty was also implemented in part by the Imperial Act of 1797, c. 97. It would seem that thereby no attempt was made to implement those parts of the Treaty which concerned only the Province of Canada, and in particular that the Act did not implement that part of Article III relating to Indians which is here in question.

In so far as I am aware, there has been no legislative enactment in Canada implementing in any way this particular provision in favour of Indians other than those in Upper and Lower Canada to which I have referred, and those statutes

either lapsed or were repealed more than 125 years ago. Moreover, there is nothing to indicate that by usage, practice or custom, any Indian in Canada for that length of time has claimed or been allowed the exemption conferred by the Jay Treaty. The suppliant did give evidence that for a few years after taking up residence on the Reserve in 1946, he did bring certain small articles such as food and clothing into Canada from the United States without paying any duty. The fact, however, is that on those occasions he neglected to report the matters to any Customs Officer, and it is not shown that he was at any time authorized to import anything without declaring the goods and paying proper duties in respect thereto.

I am of the opinion, also, that notwithstanding the fact that the Legislatures of Upper and Lower Canada did for a time implement that part of Article III now under consideration, those Legislatures had full authority to alter or amend or annul such legislation at any later time, as was in fact done. Reference may be made to the case of *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board* [1941] A.C. 308, in which the following statement appears at p. 327: "If then, as appears clear, the Imperial Parliament has conferred on the New Zealand legislature power to legislate with regard to the native lands, it necessarily follows that the New Zealand legislature has the same power as the Imperial Parliament had to alter and amend its legislation at any time. In fact, as pointed out by the learned Chief Justice, s. 73 of the Act of 1852 was repealed by the New Zealand legislature by the Native Land Act, 1873. As regards the appellant's argument that the New Zealand legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the native lands, and, in any event, even the statutory incorporation of the second article of the treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactments."

My conclusion on this point, therefore, is that, as there was no legislation in effect at the time of the importation of the goods into Canada which sanctioned or implemented the particular terms of the Jay Treaty which are here under consideration, the suppliant is not entitled to exemption from the duties claimed by reason of the terms of that Treaty.

Counsel for the respondent submitted also that in any event the relevant provision of the Jay Treaty was terminated by

the War of 1812, and for the following reasons I am of the opinion that that contention must be upheld.

It is not altogether settled what treaties are annulled or suspended by war and what treaties remain in force during its continuance or revive at its conclusion. The diversity of opinion in regard thereto is very substantial as will be seen by reference to such texts as Pitt Cobbett's Leading Cases on International Law (Walker), vol. II, 5th Ed., p. 50 ff., and Hall's International Law, 8th ed. p. 453 ff. In 5 Moore's Digest of International Law, s. 779, p. 383, it is stated that the view now commonly accepted is that "Whether the stipulations of a treaty are annulled by war depends upon their intrinsic character".

Counsel for the suppliant stresses the provision of Article XXVIII of the Treaty as indicating that the terms of Article III were to be "permanent" and that therefore they remained unaffected by the outbreak of war in 1812. The relevant part of that article is as follows: "It is agreed that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years, to be computed from the day on which the ratification of this treaty shall be exchanged."

Reference was made to *Sutton* v. *Sutton*, 1 Russ. & M. 663, 39 E.R. 255. That was a decision of the Master of the Rolls in 1830 in which it was declared that under the Jay Treaty and the Act of 37 Geo. III., c. 97, American citizens who held lands in Great Britain on October 28, 1795, and their heirs and assigns, are at all times to be considered, so far as regards these lands, not as aliens but as native subjects of Great Britain.

The Act referred to provided for carrying into effect certain of the terms of the Jay Treaty, as s. 24 thereof incorporated the provisions of Article IX of the Treaty relating to the rights of American citizens who then held lands in the British Dominions, and of British subjects holding lands in the United States to continue to hold and dispose of them as if they were natives and not aliens. By s. 27 it was provided that the Act would remain in force so long only as the Jay Treaty remained in effect. The Act was continued by 45 Geo. III., c. 35, in which it is interesting to note that both in the recital and in the enactment, it is stated that "The said Treaty has ceased and determined". The Act was further continued, and finally by 48 Geo. III., c. 6, it was extended to the end of that Session of Parliament and it would appear that thereafter no Act was passed to revive or prolong the operation of the

Treaty. The judgment of the Master of the Rolls in that case was as follows (pp. 675-6):

"The relations, which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the Treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the Treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

"The act of the 37 G. 3 gives full effect to this article of the Treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article, that it was to be permanent, and independent of a state of peace or war, then the Act of Parliament must be held, in the twenty-fourth section, to declare this permanency; and when a subsequent section provides that the act is to continue in force, so long only as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but is to be understood as referring to such provisions of the Act only as would in their nature depend upon a state of peace."

Similarly, in the case of *Society for Propagation of the Gospel in Foreign Parts* v. *New Haven* (1823), 8 Wheat. 464 the Supreme Court of the United States upheld the right of a British corporation to continue to hold lands in Vermont. It was held that the title to the property of the Society was protected by the 6th Article of the Treaty of 1783; was confirmed by Article IX of the Jay Treaty, and was not affected by the War of 1812. The applicable rule was stated at pp. 494-5 in the following words:

"But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in

their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

"We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."

Both these cases were considered by the Supreme Court of the United States in *Karnuth* v. *United States* (1928), 279 U.S. 231. That case arose under s. 3 of the *Immigration Act* of 1924, c. 190. Two persons resident in Canada sought to enter the United States either to continue or to secure work, and both were denied admission by the immigration authorities. In *habeas corpus* proceedings, the Federal District Court sustained the action of the immigration officials and dismissed the writ, but that judgment was reversed by the Circuit Court of Appeals. In reaching its conclusion, that Court seemed to be of the opinion that if the *Immigration Act* were so construed as to exclude the aliens, it would be in conflict with the opening words of Article III of the Jay Treaty, which result it thought should be avoided if it could reasonably be done. By *certiorari* the matter was brought to the Supreme Court. There the Court considered the pertinent provisions of Article III of the Jay Treaty, which is as follows: "It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other."

The main point for consideration by the Court was the contention made by the Government that the Treaty provision relied on was abrogated by the War of 1812. The Court

reached the conclusion that the view now commonly accepted was that "whether the stipulations of a Treaty are annulled by war depends upon their intrinsic character".

Then, after referring to the cases of *Sutton* v. *Sutton* (*supra*) and *Society, etc.* v. *New-Haven* (*supra*), the Court said at pp. 239-40: "These cases are cited by respondents and relied upon as determinative of the effect of the War of 1812 upon Article III of the treaty. This view we are unable to accept. Article IX and Article III relate to fundamentally different things. Article IX aims at perpetuity and deals with existing rights, vested and permanent in character, in respect of which, by express provision, neither the owners nor their heirs or assigns are to be regarded as aliens. These are rights which, by their very nature are fixed and continuing, regardless of war or peace. But the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility. See 7 Moore's Digest of International Law, s. 1135; 2 Hyde, International Law, s. 606. The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war. Disturbance of peaceful relations between countries occasioned by war, is often so profound that the accompanying bitterness, distrust and hate indefinitely survive the coming of peace. The causes, conduct or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege connotes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture. It follows that the provision belongs to the class of treaties which does not survive war between the high contracting parties, in respect of which, we quote, as apposite, the words of a careful writer on the subject."

Reference was then made to Hall, International Law (5th ed.), pp. 389-390; Westlake International Law, Part II, pp. 29-32, and to Fauchille, Traité de Droit International Public, 1921, vol. II, p. 55, and the judgment continued at p. 241:

"These expressions and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty now under consideration was brought to an end by the War of 1812, leaving the contracting powers discharged from all obligation in respect thereto, and, in the absence of a renewal, free to deal with the matter as their views of national policy, respectively, might from time to time dictate.

"We are not unmindful of the agreement in Article XXVIII of the Treaty 'that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years.' It is quite apparent that the word 'permanent' as applied to the first ten articles was used to differentiate them from the subsequent articles—that is to say, it was not employed as a synonym for 'perpetual' or 'everlasting,' but in the sense that those articles were not limited to a specific period of time, as was the case in respect of the remaining articles. Having regard to the context, such an interpretation of the word 'permanent' is neither strained nor unusual. See *Texas, etc. Railway Co.* v. *Marshall,* 136 U.S. 393, 403; *Bassett* v. *Johnson,* 2 N.J. Eq. 154. 162."

The finding in that case, it is true, was limited to "the provision of the Jay Treaty now under consideration", which, as noted, was the opening part of Article III relating to the rights of the subjects of both contracting parties and of Indians dwelling on either side of the boundary line freely to pass and repass into the territories of the two contracting parties. It seems to me, however, that the *ratio decidendi* in that case is of equal application to the other part of Article III now under consideration. It involves the right of free entry of peltries *brought* by land or inland navigation and the particular rights of Indians when *passing* or *repassing* from one country to the other with their proper goods and effects. If such rights were not abrogated by war and the rights of passing and repassing were to continue during war, the door would likewise be open for treasonable intercourse.

However, the precise part of Article III with which we are here concerned has also been considered in the American Courts. In *United States* v. *Garrow* (1937), 88 Fed. (2d) 318, the second headnote is as follows: "Provisions of article 3 of Jay Treaty of 1794 permitting Indians to import their own

proper goods and effects free of duty *held* terminated by War of 1812, as regards rights of Indians residing in Canada, and hence Canadian Indians' right subsequently to import goods free of duty depended on statutes rather than treaty."

In that case, which was decided in 1937, an Indian woman, also of the Canadian St. Regis Tribe and residing in Canada near the international border, entered the United States carrying 24 baskets which she had manufactured in Canada and intended to sell in the United States. The Collector at the port of entry imposed a duty under the existing *Tariff Act*. She filed a protest, claiming the baskets to be free under Article III of the Jay Treaty. She alleged also that those provisions were in substance carried into the various Tariff Acts from 1799 to August 28, 1894, and that, while that provision was repealed by the *Tariff Act* of 1897, such repeal in effect abrogated that part of the Jay Treaty and was therefore invalid. The United States Customs Court sustained her protest, holding that the case was controlled by *McCandless* v. *United States*, (1928), 25 Fed. (2*d*) 71, a decision of the Circuit Court of Appeals for the Third Circuit. The Government then appealed to the Court of Customs and Patent Appeals on the following grounds (p. 319):

" '1. Article 3 of the Jay Treaty of 1794 was annulled by the War of 1812.

" '2. Alternatively, if article 3 of the Jay Treaty was not abrogated by the War of 1812, it is, nevertheless, in conflict with a subsequent statute. It is well settled that when a Treaty and a Statute are in conflict, that which is later in date prevails.

" '3. Assuming, for the sake of argument, that article 3 was not abrogated but is still in force and effect, the importation is not within the purview of the language of said article 3.' "

The Court, after pointing out that these terms of the Treaty were at that time self-executing, referred to the fact that they were also incorporated in an Act of Congress in 1799, and in substance were continued by various later amendments and revisions; that, however, in the Session of 1897, that provision was omitted and has not been carried into any later revision; that both by that Act and any succeeding Acts duties have been imposed upon similar goods. The Court then considered the *McCandless* case (*supra*) in which the United States District Court in 1928 held that the declaration of the War of 1812 did not end the Treaty rights secured to the Indians through the Jay Treaty so long as they remained neutral; that their rights were permanent and were at most only

suspended during the instance of the war; and that therefore the petitioner, a fullblooded Indian, might pass and repass freely under and by virtue of Article III. The Court of Customs and Patent Appeals pointed out, however, that that case had not been appealed to the Supreme Court of the United States, possibly because of an Act of Congress in 1928 which provided that the *Immigration Act* of 1924 should not apply to Indians crossing the international border.

The Court then considered and followed the *Karnuth* case (*supra*), concluding its opinion on this point as follows (p. 323):

"The view of the Supreme Court on this interesting question, expressed in the case last cited, was confirmatory of views held by that court from the initiation of our government. See Society for Propagation of Gospel in Foreign Parts v. Town of New Haven and William Wheeler, 8 Wheat. 464, 494, 5 L. Ed. 662.

"It was also obviously in conformity with the current of authority both in the United States and England. Moore's International Law Digest, vol. 5, par. 779."

The Court then proceeded to consider the submission that the *Karnuth* case was not applicable to Indians and stated its conclusion in these words (p. 323):

"It is contended by the appellee that some distinction should be made between the members of an Indian tribe and the immigrants in the Karnuth Case, supra. We know of no authority which states or indicates that any such distinction exists, especially as to Indians domiciled in a foreign country. There is no such line of demarcation indicated in the opinion of Mr. Justice Sutherland, hereinbefore quoted. If article 3 of the Jay Treaty was nullified by the War of 1812, as to Canadian citizens or subjects, it certainly was nullified, so far as Indians residing in Canada were concerned, for, although wards of the Canadian government, they were certainly within the category of citizens or subjects.

"We think, therefore, it must be said that so far as the provision under which the appellee here claims is concerned, the War of 1812 ended the right which the appellee now claims of bringing her goods across the border and into the United States without the payment of duty."

Finally, the Court came to the conclusion that at least since 1812 the rights of the Indians of Canada to bring their peltries and goods into the United States free of duty were granted by statute and not by Treaty; and that as the right of exemption

was dropped from the Revising Act of 1897 and duties imposed thereafter, the appeal should be allowed, there being at the time of importation no treaty or statutory exemption in regard thereto.

Counsel for the suppliant herein laid considerable stress on the fact that the goods imported in the *Garrow* case were goods intended to be sold, whereas the goods imported by the suppliant herein were for his own personal use. In the *Garrow* case, however, the protestant relied entirely on the particular part of Article III which is here in question—the general right conferred on Indians to pass or repass with their own proper goods and effects; and the Court clearly held that that part of the article in the Treaty was terminated by the War of 1812. As I read the judgment, it is not based on the fact that the goods there imported were or were not for sale, but on a general consideration of the words of the provision itself.

The Supreme Court of the United States in the *Karnuth* case has held that the outbreak of the War of 1812 annulled the provisions of the opening part of Article III of the Treaty, which conferred the right upon citizens (including Indians) on either side of the boundary to pass and repass freely across the border. The reasons in that case would seem to be relevant also to that part of Article III now under consideration, which conferred an exemption upon Indians from payment of duties while passing and repassing the border with their own proper goods and effects. The Court of Customs and Patent Appeals in the *Garrow* case reached a similar conclusion. While it is true that these cases are not binding upon me, the reasons given in each case commend themselves to me and with respect I shall adopt them in this case. My conclusion, therefore, is that the particular provision of the Jay Treaty on which the suppliant relies was annulled by the War of 1812. In view of that finding, it becomes unnecessary to consider the further submission made on behalf of the respondent that in any event the nature of the goods imported by the suppliant is not such as to be within the purview of the goods mentioned in Article III.

Counsel for the Crown also relies on the provisions of s. 49 of the Statutes of Canada, 1949 (2nd Sess.), c. 25, which is as follows:

"49. For greater certainty it is hereby declared and enacted that, notwithstanding any other law heretofore enacted by a legislative authority other than the Parliament of Canada (including a law of Newfoundland enacted prior to the first day

of April nineteen hundred and forty-nine), no person is entitled to

"(*a*) any deduction, exemption or immunity from, or any privilege in respect of,

"(i) any duty or tax imposed by an Act of the Parliament of Canada, or

"(ii) any obligation under an Act of the Parliament of Canada imposing any duty or tax, or

"(*b*) any exemption or immunity from any provision in an Act of the Parliament of Canada requiring a licence, permit or certificate for the export or import of goods,

unless provision for such deduction, exemption, immunity or privilege is expressly made by the Parliament of Canada."

I have thought it advisable to set out the section in full although counsel relies only on para. (*a*) (i).

That Act is entitled *An Act to amend The Income Tax Act and the Income War Tax Act* and was assented to on December 10, 1949. Most of the sections have to do with income tax throughout the whole of Canada. Counsel for the suppliant suggests that inasmuch as this section appears between ss. 48 and 50 which have to do specifically with Newfoundland, and as the enactment was made just prior to the entry of Newfoundland into Confederation, s. 49 should be read as applicable to the Province of Newfoundland only. I am quite unable to agree with that submission. Were I to do so, I would be disregarding the clear meaning of the words of the section itself which are general in their application and relate to "any other law heretofore enacted by a legislative authority other than the Parliament of Canada". The words "including a law of Newfoundland" could not be construed so as to exclude all other laws.

Now the clear effect of that part of the section when applied to the facts of this case is this—that thereafter no person is entitled to an exemption or immunity from any duty or tax imposed by an Act of the Parliament of Canada unless provision for such exemption or immunity is expressly made *by* the Parliament of Canada, notwithstanding any other law heretofore enacted by any other legislative authority which might have granted such exemption or immunity. The exemption must now be found in the Acts of the Parliament of Canada. All such exemptions, for example, as may have been made prior to 1867 by any of the previous legislative bodies such as those of Lower or Upper Canada, even if continued in practice, would, after the enactment of s. 49 and in the absence of an Act of the Parliament of Canada conferring the exemption, be of no effect.

This section, as I have said, was assented to on December 10, 1949. It was therefore in effect at the time the suppliant imported the refrigerator and oil heater, but not in effect when the washing machine was imported in 1948. So far as the first two articles are concerned, the provisions of s. 49 (*supra*) are sufficient in my opinion to bar any right of exemption from duty or tax unless by some Act of the Parliament of Canada the exemption is provided. The duties here in question were levied under the provisions of the *Customs Tariff Act* and the *Excise Tax Act* and it is common ground that neither of these Acts confers any exemption upon Indians as such.

Counsel for the suppliant, however, claims that such an exemption is to be found in s. 86 (1) of the *Indian Act*, R.S.C. 1952, c. 149, which reads in part as follows:

"86 (1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 82, the following property is exempt from taxation, namely,

"(*a*) the interest of an Indian or a band in reserve or surrendered lands, and

"(*b*) the personal property of an Indian or band situated on a reserve,

and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property."

This provision first appeared in that form in the *Indian Act*, 1951 (Can.), c. 29, s. 86; prior thereto a somewhat similar right was provided in a different form in the *Indian Act*, R.S.C. 1927, c. 98, s. 102. I am of the opinion that s-s. (1) (*b*) is of no assistance to the suppliant in this case. The exemption from taxation therein provided relates to personal property of an Indian or band *situated on a reserve*, and not elsewhere. The importance of that limitation is seen also from a consideration of ss. 88 and 89.

Whatever be the extent of the exemption from taxation granted to Indians in respect of their personal property on a Reserve, it does not in my view extend to an exemption from customs duties and excise taxes payable on the importation of goods into Canada. Indians, when they buy imported goods subject to such duties, must, like the others, pay a higher price.

Section 9 of the *Customs Act*, R.S.C. 1952, c. 58 provides: "All goods imported into Canada, whether by sea, land, coastwise, or by inland navigation, whether dutiable or not, shall be

brought in at a port of entry where a Custom-house is lawfully established."

Now the suppliant did not comply with the provisions of that section, which is imperative in its terms and applicable to everyone, including Indians. The evidence is that there was no Custom-house on the St. Regis Reserve at the time the goods were imported, and it was therefore the duty of the suppliant to report at the nearest Custom-house, declare the goods, and pay all duties in respect thereto before taking them to his home. In effect, the contention of the suppliant is this: "The reserve on which I live is adjacent to the American border. I brought the goods directly from the United States to the reserve, and, while I may have been guilty of non-compliance with the provisions of the Customs Act in that I failed to report the entries at a custom-house and there pay the proper duties, such duties cannot now be collected from me because, as an Indian, my goods are exempt from taxation as they are on a reserve."

It seems to me, however, that the suppliant is not entitled to take advantage of his own illegal actions to obtain an exemption in this manner. Were he permitted to do so, the result would be that the relatively few Indians who happen to reside on a Reserve adjacent to the American border would be able to secure an exemption from duties and taxes not available to Indians residing on a Reserve remote from the border. The latter, of course, would be required to comply with the *Customs Act*, report the goods, and pay the duties before there was any possibility of getting the imported goods to the Reserve on which they lived. As I read the provisions of s. 86 (1) of the *Indian Act*, the clear intention is that the exemptions from taxation therein provided are intended to apply equally to the property of all Indians on all Reserves. I am quite unable to construe that section as conferring special benefits only on Indians who reside on a Reserve adjacent to our borders. In my opinion, the section has no application whatever to the payment of customs duties or excise taxes.

For the reasons which I have stated, the claim must fail on all grounds. There will, therefore, be judgment declaring that the suppliant is not entitled to any of the relief claimed in the petition of right and dismissing his petition with costs payable to the respondent.

Judgment accordingly.

must be furnished by the complainant of the delivery by the accused person of more than one handbill not bearing on its face the name and address of the printer and publisher to more than one person?

"2. Was I right in dismissing the information and complaint against the respondent?"

In my opinion the question devolves on the meaning of the word "distribute." The general rule is that statutes are presumed to use words in their popular sense. This is especially so when the word is capable of one meaning only. It is difficult for me to imagine how things could be distributed to one person only.

According to Murray's Oxford Dictionary the verb distribute comes from the Latin word *distribuere*. *Dis* means in various directions, and *tribuere* means to *assign, grant, deliver.* In this case the delivery of the handbill was made to one person only. The word distribute connotes the delivery of something to several persons.

In *Marino and Yipp* v. *The King*, [1931], 4 D.L.R. 530 at p. 532, S.C.R. 482, 56 Can. C.C. 136 at pp. 138-9, Anglin C.J.C. said:

"To contend that, because two separate sales were proved in evidence, two offences are actually charged seems absurd. How could distribution be shown unless more than one sale was proved? A single sale probably does not amount to 'distribution' within the meaning of that word, as used in the Criminal Code."

Both questions must be answered in the affirmative. The appeal by way of stated case is dismissed with costs.

Appeal dismissed.

REX v. GROSLOUIS.

Quebec Court of Sessions of the Peace, Pettigrew J.Sess. December 10, 1943.

Indians—Retail Sales Tax Act (Que.)—Applicability to Indian merchant on Reserve selling to white man.

An Indian merchant who resides and operates a retail store on an Indian Reserve must comply with the provisions of the *Retail Sales Tax Act*, R.S.Q. 1941, c. 88 on a sale to a white man and *semble* on a sale to any one outside the Reserve, and hence may

be convicted of the offence of selling movable property by retail without having first obtained a certificate of provincial registration as required by such Act in respect of any such sale. By virtue of s. 92 of the *Indian Act*, R.S.C. 1927, c. 98 which exempts Indians from taxation, subject to the exceptions therein specified, such merchant is not required to comply with the *Retail Sales Tax Act* if he sells only to Indians inhabiting his Reserve.

Cases Judicially Noted: *R.* v. *Hill* (C.A.), 15 O.L.R. 406; *R.* v. *Bebonin*g (C.A.), 13 Can. C.C. 405, 17 O.L.R. 23; *R.* v. *Martin* (C.A.), 39 D.L.R. 635, 29 Can. C.C. 189, 41 O.L.R. 79; *R.* v. *Rodgers* (C.A.), [1923] 3 D.L.R. 414, 40 Can. C.C. 51, 33 Man. R. 139, apld.

Statutes Considered: *Retail Sales Tax Act*, R.S.Q. 1941, c. 88, ss. 3(1), 12; *Indian Act*, R.S.C. 1927, c. 98, ss. 2, 102.

PROSECUTION on a charge of unlawfully selling movable property without first having obtained a certificate of provincial registration contrary to the *Retail Sales Tax Act*, R.S.Q. 1941, c. 88. Accused convicted.

Gerard Lacroix, K.C., for A.-G. Quebec.

Paul Lesage, K.C., for accused.

PETTIGREW J. SESS.:—The Attorney-General of the Province of Quebec charges the respondent with having, on May 27, 1943, in the Indian Reserve of Lorette, Huron Village, in the District of Quebec, sold and delivered chattels without being provided with a certificate of provincial registration contrary to the provisions of an Act to impose a tax on the retail sales within the Province (*Retail Sales Tax Act*, R.S.Q. 1941, c. 88).

The parties, through their respective attorneys, have made the following admissions: 1. The accused is an Indian; 2. He is domiciled upon the Reserve of Lorette, Huron Village, District of Quebec; 3. He operates a store for retail sale within the said Reserve; 4. The accused, on the dates mentioned in the action, had no permit or licence as provided for in c. 88 of the Revised Statutes of Quebec 1941; 5. He sells retail, in his store, to the persons who present themselves there; 6. On the occasion of the retail sales he effects, the accused collects no provincial sales tax.

It was proven, moreover, that the respondent sold to one Pacifique Ayotte, of the white race and not inhabiting the Indian Reserve, the following articles, namely: (*a*) two boxes of lighter flints at 10 cents per box, forming a total of 20 cents, without demanding from the purchaser the 4% tax, that is one

cent; (*b*) one package of "Henley" cigarettes for the sum of 30 cents, omitting to collect from the purchaser the 10% tax, that is three cents.

Section 3 of R.S.Q. 1941, c. 88, reads as follows:

"3.(1) No vendor shall sell any movable property in the Province, at a retail sale, unless a registration certificate has been, upon his application, granted to him under the authority of this act, and unless such certificate be in force at the time of the sale."

Section 12 of the said provincial Act provides for exemptions.

"12. This act shall not apply to the following: . . . .

"(*e*) Beer and tobacco."

We must state immediately that the charge is not well-founded in respect of the sale of the package of cigarettes.

The sale of tobacco is the subject of a special Act [*Tobacco Tax Act*], R.S.Q. 1941, c. 87.

There remains as proof of the infraction, if there is infraction, the sale of lighter flints; moreover, for the purposes of this case, the admission of facts, signed by the parties and above described, would be sufficient.

The following problem is the one we have to solve:

Is an Indian living upon a Reserve under the control of the Dominion Government and operating a store, for the retail sale of chattels, subject to the prescriptions of the Act to impose a tax on the retail sales within the Province?

The *B.N.A. Act*, s. 91, para. 24, states that: "Indians, and Lands reserved for the Indians" are under "the exclusive Legislative Authority of the Parliament of Canada."

As a matter of fact, the Parliament of Canada has legislated in respect of the person of the Indian and the lands that are specially reserved for him by adopting *"An Act respecting Indians"* [*Indian Act*, R.S.C. 1927, c. 98].

The word "Indian", here, is synonymous of the expression 'Indian" (sauvage) which we encounter at para. 24 of s. 91 of the *B.N.A. Act*.

Section 2, para. (*d*) of R.S.C. 1927, c. 98, defines the word 'Indian":

"(*d*) 'Indian' means

"(i) any male person of Indian blood reputed to belong to a particular band."

Paragraph (*b*) defines the word "band":

" 'band' means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible."

Now, here, for the purposes of this case, it has been admitted that the accused is an Indian domiciled in the Reserve of Lorette, Huron Village, near Quebec.

Section 102 declares that no Indian shall be liable to taxes for any real or personal property.

Here is how the legislator expresses himself:

"102. 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."

Therefore, it is clear that the property of an Indian, whether real or personal, can only be taxed if such property is outside of the Reserve.

To what end does c. 88 of the Revised Statutes of Quebec, 1941, require from a retail merchant a registration certificate unless it be to collect the taxes on each of the articles sold to a third party. If the Indian, a merchant, only sells to Indians inhabiting his Reserve, it would be logical to conclude that the Attorney-General of the Province cannot demand legally of this Indian, a merchant, that he comply with para. 3 of the chapter in question. On the other hand, if as in the case with which we are dealing, this Indian sells to persons who do not inhabit the Reserve, does he come within the provisions of the provincial Act?

Canadian Courts have on several occasions delivered judgments on various problems concerning the Indians in their dealings with third parties, and in respect of the application of provincial laws to them.

It seems to follow from jurisprudence taken as a whole that the Indian, in so far as an Indian inhabiting a Reserve under the control of the Dominion Government, is not amenable to the laws of the Provinces; but as soon as he goes out of that Reserve, he becomes, like any ordinary citizen, subject to the application of provincial laws to which he owes obedience failing which he is liable to the penalties provided in such a case.

In the case of *R.* v. *Hill* (1907), 15 O.L.R. 406, it was decided that the Indian outside the Reserve is subject to the general law which applies in the Province. An Indian who commits an offence against a provincial law beyond the limits of an Indian Reserve, may be convicted and punished just as all other persons may. An unenfranchised Indian is subject to provincial legislation in precisely the same way as a non-Indian at least where he is out of this reservation.

We have the same decision in *R.* v. *Beboning* (1908), 17 O.L.R. 23, 13 Can. C.C. 405 and in *R.* v. *Martin* (1917), 39 D.L.R. 635, 41 O.L.R. 79, 29 Can. C.C. 189.

In the last case of *Martin*, Mr. Justice Riddell, of the Supreme Court of Ontario, quoting a decision of the Judicial Committee of the Privy Council, *C.P.R.* v. *Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, expressed himself in these words [39 D.L.R. at pp. 638-9, 29 Can. C.C. at pp. 192-3]:

"I think the language used by the Judicial Committee in *Canadian Pacific R.W. Co.* v. *Corporation of the Parish of Nôtre Dame de Bonsecours* . . . . may well be applied *mutatis mutandis:*

" 'The British North America Act, whilst it gives the legislative control of the Indian defendant, *quâ* Indian to the Parliament of the Dominion, does not declare that the defendant shall cease to be a denizen of the Province in which he may be, or that he shall, in other respects, be exempted from the jurisdiction of the provincial legislatures . . . . It therefore appears . . . . that any attempt by the Legislature of Ontario to regulate by enactments his conduct *quâ* Indian would be in excess of its powers. If, on the other hand, the enactment had no reference to the conduct of the defendant *quâ* Indian, but provided generally that no one was to sell, etc., liquors, then the enactment would . . . . be a piece of legislation competent to the Legis-

lature . . . .' even though he—not in his status *quâ* Indian, but under the general words—should come within the prohibition.

"In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them."

Now, the "Act to impose a Tax on Retail Sales within the Province (R.S.Q. 1941, c. 88)" is a law of general application, affecting every person indiscriminately, dealing in chattels within the limits of the Province.

The Federal Statute dealing with "Indians" contains no provision with respect to the status of the Indians doing business generally.

Sections 40 to 45 of c. 98, R.S.C. 1927, speak of the sale of grain crops and other produce grown upon a reserve in the Province of Manitoba, Saskatchewan, Alberta or the Territories; prohibit all barter in such territories, without a special permit issued by the Superintendent of Indian Affairs, and, on general principle, no missionary, official or employee of the department may trade with the Indians unless he has been specially authorized to do so.

In *R.* v. *Rodgers,* reported [1923] 3 D.L.R. 414 at p. 421, 40 Can. C.C. 51 at p. 59, 33 Man. R. 139, Justice Dennistoun, of the Manitoba Appeal Court, said: "In the absence of express legislation to the contrary by the Dominion, an Indian whether on or off his reserve is, I think, subject to the general law of the Province."

The Indian cannot claim he is not a subject of the Crown and that the Reserve forms a small independent country, enclaved in the Province, subject to the sole directions of the Councils and the Chief of the band.

Indians are subjects of the Crown and are not exempt from the general law; it cannot be maintained that Indians are "not in reality subjects of the King but an independant people—allies of His Majesty—and in a measure at least exempt from the civil laws governing the true subject:" *Sero* v. *Gault* (1921), 64 D.L.R. 327 at p. 330, 50 O.L.R. 27.

And in *R.* v. *Beboning,* 13 Can. C.C. 405 at p. 413: "The suggestion that the Criminal Code does not apply to Indians is . . . . so manifestly absurd as to require no refutation."

These citations show that in the almost unanimous opinion of the Courts of this country the Indian is a Canadian citizen and that, save for the restrictions provided for in the special legislation concerning him, he has the same rights and privileges as the ordinary citizen and therefore the same duties and obligations.

So long as he lives upon his Reserve, the Indian enjoys the privileges that are specially granted to him by the Dominion *Indian Act* and his deeds and actions are subject to the provisions of such Act. When the Act respecting the Indian is silent, the problem must be solved in the light of the general law, either federal or provincial.

Here, it is recorded in the evidence that the respondent sold to a person who is not an Indian and does not live upon the Reserve. Furthermore, the respondent admits that he sells regularly to any person going to his store, thus acknowledging that he barters alike with the Indians of his band and with persons from the outside.

In this case, is it not logical to conclude that the respondent, when he sells to a non-Indian, does an action which causes him, theoretically, to go outside the Reserve?

Does he not encroach on the provincial field by thus withdrawing from the public department the sales tax which the citizen, a purchaser in this Province, must pay?

The white person who goes out of his way to buy from the Indian does so for the obvious purposes of evading the payment of the tax and thus defraud the provincial Act. Does the Indian who sells under such conditions not then become party to such fraud?

To allow the Indian to act in that manner with impunity would be to tolerate a regrettable abuse that would soon degenerate into disorder. If the Indian wishes to profit by the privileges that are granted to him, let him remain strictly within the limits of his field of action.

In conclusion, I must say that the Indian not being liable to be taxed for his chattels, the provincial sales tax does not apply to the Indian, a merchant; but, if he goes outside of his Reserve, such as happens in this case, to sell to persons from the outside, this Indian, merchant, must submit to the prescriptions of the provincial Act.

The Attorney-General has proven his case and, consequently, I find the accused, Harry Groslouis, guilty of having: the twenty-seventh day of May nineteen hundred and forty-three, upon the Indian Reserve of Lorette, Huron Village, in the District of Quebec, sold and delivered to Pacifique Ayotte, of the City of Quebec, chattels, to wit: two boxes of flint lighters at 10 cents a box, without having a provincial registration certificate, contrary to the provisions of the Act to impose a tax on the retail sales within the Province. (R.S.Q. 1941, c. 88, s. 3.)

I condemn the said Harry Groslouis to pay a fine of ten dollars with costs; and in default of such payment between this day and the nineteenth of December to three months' imprisonment. (R.S.Q. 1941, c. 88, s. 17(*a*).)

Accused convicted.

REX v. ABBOTT.

Ontario Court of Appeal, Robertson C.J.O., Kellock and Laidlaw JJ.A. March 13, 1944.

Venue—False pretences—Trial in one county—Money obtained in another—Jurisdiction—Cr. Code s. 577.

The Court of General Sessions of the Peace for the County of Simcoe has jurisdiction to try an accused on an indictment which alleges that accused in the County of Simcoe and elsewhere in the Province of Ontario obtained a sum of money by false pretences with intent to defraud, although the false pretence upon which the prosecution is based was originally made in the County of York, where the money was obtained, if the false pretence was renewed or continued in the County of Simcoe, although accused was arrested in the County of York and taken under process to the County of Simcoe and there committed for trial. Jurisdiction attached to the Court under s. 577 of the *Criminal Code* since the accused was in custody in such county by virtue of being there committed for trial; nor could it be said that accused was not convicted of the offence with which he was charged as a material element thereof took place in the County of Simcoe.

Cases Judicially Noted: *R.* v. *O'Gorman* (C.A.), 15 Can. C.C. 173, 18 O.L.R. 173, distd; *Reg.* v. *Ellis*, [1899] 1 Q.B. 230, expld; *R.* v. *Thornton* (C.A.), 30 D.L.R. 441, 26 Can. C.C. 120, 9 A.L.R. 163, 9 W.W.R. 825, 968; *R.* v. *Nevison* (C.A.), 45 D.L.R. 382, 31 Can. C.C. 116, 27 B.C.R. 12, [1919] 1 WW.R. 793; *R.* v. *Rochon*, 42 Can. C.C. 323, 35 Que. K.B. 208, apld.

Statutes Considered: *Cr. Code*, ss. 405, 577, 584(*b*), 853.

APPEAL by accused from his conviction before the Court of General Sessions of the Peace for the County of Simcoe on a

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The statement in Mr. Quigg's work, "Succession Duties in Canada," 2nd ed., p. 376, that the Act clothes an executor with authority to collect duties in the foregoing cases as a revenue officer appears not to be supported by anything to be found in the Act itself. Section 24(3) makes an executor who has monies for payment of duties in his hands accountable to the Crown therefor but imposes no duty to collect from property not under his control. The former s. 25, now repealed, did not impose such an obligation, and I have been able to find no statutory provision which does. It may be that I have overlooked something in the Act which justifies Mr. Quigg's statement, but *prima facie* it is a startling proposition that an executor must act as collector of duties payable on property which forms no part of the estate he administers and which never vests in him as executor or comes under his control. As at present advised I am not able to accept Mr. Quigg's statement of the law as correct.

In the absence of anything in the will to show an intention to distinguish between beneficiaries in the matter of succession duties, and holding, as I do, that the direction to pay in some cases clearly amounted to a gift, I think that the testator by para. (c) sufficiently indicated his intention to make a gift of the amount necessary to pay succession duty to each of his legatees otherwise liable to pay. The executor should not deduct from any such legacy the amount of any duty payable in respect thereof.

The costs of all parties represented before me should be paid out of the estate, those of the executor as between solicitor and client.

Judgment accordingly.

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Nova Scotia County Court, McArthur Co.Ct.J. December 30, 1939.

Indians—Constitutional Law III A—Taxes I A—Unenfranchised Indians outside Reserve—Provincial poll tax—Field occupied by Dominion.

Unenfranchised Indians resident outside a Reserve are not subject to a poll tax imposed by provincial legislation, the field of taxation in respect to Indians having been occupied by the Dominion Parliament in ss. 102-3-4 of the *Indian Act*, R.S.C. 1927, c. 98, and it being incompetent to a provincial Legislature to supplement, change or restrict such Federal enactments.

Cases Judicially Noted: *G.T.P.* v. *A.-G. Can.*, [1907] A.C. 65; *C.P.R.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367; *Madden* v. *Nelson*, [1899] A.C. 626, apld.

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Chapter 98, R.S.C. 1927, the *Indian Act* provides as follows: "102. 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."

"105. 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 last three preceding sections."

The City Charter of the City of Sydney (1903 (N.S.), c. 174), s. 100, provides that "Every male person between the age of twenty-one and sixty, residing within the City of Sydney, within any portion of the year, who has not been assessed in that year on real or personal property shall be liable to pay a poll tax for the general purpose of the City, of twelve dollars, $12.00 . . ."

Section 144 provides that if any person does not pay his poll tax when due the city treasurer may forthwith issue a warrant directed to any constable or policeman of the city for the collection of the same; and under s. 146, the constable is directed to levy the same by distress and sale of the goods and chattels of such person, and in default of goods and chattels to take the body of such person and commit him to the common jail for such a period of time, not exceeding 15 days, as may appear in such warrant.

It appears clear, that under s-s. (24), s. 91 of the *B.N.A. Act*, there has been assigned to the Federal authorities power to legislate in respect to "Indians, and Lands Reserved for the Indians" and that this power may extend to all matters affecting their welfare and civil rights.

On the other hand, it is quite clear that a great many matters which may directly or indirectly affect Indians in their course of living, come under the heading of certain subjects assigned exclusively to the provincial Legislatures.

The result is, that legislation permissive to the Dominion Parliament in the exercise of the powers given to it under s. 91(24) *B.N.A. Act*, "Indians, and Lands Reserved for the Indians," may be legislation which if enacted by the Province, would be in relation to matters falling within the class of subjects specified in s. 92, *B.N.A. Act*, and exclusively assigned to the provincial Legislatures.

Without elaborating, it is quite apparent that the subject-

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Statutes Considered: *B.N.A. Act*, ss. 91(24), 92(2), (8); *Indian Act*, R.S.C. 1927, c. 98, ss. 102, 103, 104; *Sydney City Charter*, 1903 (N.S.), c. 174, s. 100.

Indians — Taking person of Indian under civil process — Provincial statute.

The person of an Indian may not be taken under civil process issued under a provincial statute which permits the imprisonment of a debtor only in default of goods whereon to levy, the Indian's only property being exempt from seizure under s. 105 of the *Indian Act*, R.S.C. 1927, c. 98.

Cases Judicially Noted: *Ex p. Tenasse* (N.B.C.A.), [1931] 1 D.L.R. 806, 2 M.P.R. 523; *Re Caledonia Mlg. Co. v. Johns*, 42 O.L.R. 338, folld.

Statutes Considered: *Indian Act*, R.S.C. 1927, c. 98, s. 105; *Sydney City Charter*, 1903 (N.S.), c. 174, s. 146.

EDITORIAL NOTE: For other cases on Indians see ALL-CANADA DIGEST and CANADIAN ANNUAL DIGESTS and CHITTY'S ABRIDGMENT OF CANADIAN CRIMINAL LAW, Vols. I and II, under Indians.

APPLICATION for discharge of Indians imprisoned for failure to pay poll tax imposed under *Sydney City Charter*. Granted.

Colin Mackenzie, K.C., for accused.

Finlay MacDonald, for City of Sydney.

MCARTHUR Co.CT.J.:—This is one of several applications for the discharge of Indians confined in the common jail at Sydney, under a warrant for city poll tax.

During the summer of 1939 some eleven unenfranchised Indians, residing on the Coughnowago Reservation, Quebec, came to Sydney and were employed in certain construction work at the Dominion Iron & Steel Corp. plant, as skilled mechanics.

The appellants have been residing in Sydney for several months. They have no property, real or personal, except what is on their Reservation.

It was agreed between the parties that the grounds of this application are as follows: 1. An Indian is not liable for the payment of a municipal poll tax, and 2. That if he is subject, by reason of residence, to the payment of a municipal poll tax, its payment cannot be enforced by imprisonment.

In order that the questions involved herein may be fully considered, it is well to set out such legislation, imperial, federal, provincial and municipal, as may have any bearing.

Subsection (24), s. 91, of the *B.N.A. Act* confers upon the Parliament of Canada exclusive jurisdiction upon the subject of "Indians, and Lands reserved for the Indians," and s-s. (2), s. 92, confers upon the provincial Legislature power to raise revenue for provincial purposes within the Province, and s-s. (8) to legislate regarding "Municipal Institutions."

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of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would . . . . be a piece of municipal legislation competent to the'' provincial Legislature.

Along with this case it is helpful to read the reasoning of the Privy Council in *Madden* v. *Nelson & Fort Sheppard Ry.*, [1899] A.C. 626 wherein it was held that the provisions in the British Columbia *Cattle Protection Act*, 1891, as amended in 1895, to the effect that a Dominion Ry. Co. unless they erect proper fences on their railway shall be responsible for cattle injured or killed thereon, is *ultra vires* of the provincial Parliament.

In simple language, no statute of the provincial Legislature dealing with Indians or their lands as such, would be valid and effective; but there is no reason why general legislation within provincial scope may not effect them; provided the field is not invaded by Dominion legislation.

It is generally conceded that an Indian who commits an offence against a provincial law, beyond the limits of an Indian Reserve, may be convicted and punished just as all other persons may be: *R.* v. *Hill* (1907), 15 O.L.R. 406; *R.* v. *Bebonning* (1908), 13 Can. C.C. 405, 17 O.L.R. 23; *R.* v. *Martin* (1917), 39 D.L.R. 635, 29 Can. C.C. 189, 41 O.L.R. 79; *R.* v. *Rodgers*, [1923] 3 D.L.R. 414, 40 Can. C.C. 51, 33 Man. R. 139.

I think I may well add that, except where provisions are made in the *Indian Act*, R.S.C. 1927, c. 98, which expressly or by implication declare the Indians' obligations and the consequences which attach to their breach, or which otherwise specially deal with him, the conduct and duty of an Indian in his relations with the public outside the Reserve, are subject to the control of provincial laws in the same manner as those of an ordinary citizen. The Dominion Parliament may remove him from their scope, but to the extent to which it has not done so, he must in his dealings outside the Reserve govern himself by the general laws which apply there. He should not be free to infringe an Act of the Legislature or disregard a municipal by-law, the general protection of which he enjoys, when he does not limit the operations of his life to the Reserve, but, though unenfranchised, seeks a wider sphere.

If this statement of the law is sound, and an Indian, in the absence of Dominion legislation to the contrary, is subject to the general laws of the Province, we are, in this case, faced with the plain but difficult question—do ss. 102, 103 and 104 of the *Indian Act*, under the heading "Taxation" create an exhaustive occupation of this particular field, so as to exclude

matter of "Indians, and Lands Reserved for the Indians" creates a domain in which provincial and Dominion legislation may overlap, and in such cases, the established rule is that neither legislation, provincial or federal, will be *ultra vires* if the field is clear; but if the field is not clear, and the two legislations meet, the Dominion legislation must prevail: *G.T.R.* v. *A.-G. Can.*, [1907] A.C. 65.

As a matter of construction, it is now well settled that it is not competent to the Legislature of a Province, so to legislate as to impair or restrict in a substantial degree, legislation of the Federal Parliament enacted in pursuance of its exclusive legislative authority under s. 91 of the Act.

It is also admitted to be within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial Legislature, under s. 92, are necessarily incidental to effective legislation by the Parliament of the Dominion upon subjects of legislation expressly enumerated in s. 91: *A.-G. Ont.* v. *A.-G. Dom.*, [1896] A.C. 348.

Apart from where the Dominion Parliament has legislated in respect to "Indians and Lands reserved for the Indians" and thereby entered the field to the exclusion of the provincial Legislature, it appears from the reported cases, that unenfranchised Indians are, in their dealings and acts outside the Reserve, amenable to the general laws of the Province, as are ordinary citizens.

I think the language used by the Judicial Committee in *C.P.R.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367 at pp. 372-3, clearly establishes this principle:

"The British North America Act, whilst it gives the legislative control of the appellants' railway, quâ railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company . . . It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event

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True the federal enactment makes no reference to poll or income tax, but its failure to do so does not in my opinion, give a provincial Legislature power to add that which the federal enactment may have omitted.

In the words of the Lord Chancellor in *Madden* v. *Nelson & Fort Sheppard Ry. Co.*, [1899] A.C. at p. 628: "In other words, the provincial legislatures have pointed out in their preamble that in their view the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the provincial legislature, the Dominion Parliament ought to have made; and they thereupon proceed to do that which the Dominion Parliament has omitted to do. It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the provincial parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them and is, therefore, manifestly ultra vires."

It is my view that ss. 102, 103 and 104 of the *Indian Act* are exhaustive on the subject of Indian taxation so as to exclude provincial legislation, and therefore the provisions of the City Charter providing for the payment of a poll tax, has no application to an unenfranchised Indian whether residing on or off the Reserve.

With regard to the second ground, it would appear from the authorities, were those Indians liable for the payment of poll tax, payment could not be enforced by arrest, and imprisonment. The Indian is a ward of the Dominion Government, and as such cannot be imprisoned for a civil debt under a civil process.

In the case of *Ex p. Tenasse*, [1931] 1 D.L.R. 806, 2 M.P.R. 532, it was held that a civil Court has jurisdiction, notwithstanding s. 105 of the *Indian Act* to entertain a claim and enter a judgment against an unenfranchised Indian living upon an Indian Reservation, but doubt was expressed as to the right under such judgment to take the person of an Indian in execution, though certain of his property may be taken.

In the case of *Re Caledonia Mllg. Co.* v. *Johns* (1918), 42 O.L.R. 338, at p. 339, Middleton J. (now J.A.), said: "The Indian Act has not given any right to take the person of an Indian in execution. Certain of his property may be taken; but the Indian is, by the British North America Act, sec. 91(24), subject to the legislation of the Dominion, and is a ward of the Dominion Government."

Section 105 the *Indian Act* provides "No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property

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from it the taxation provisions of the City Charter, ss. 100, 144 and 145, providing for the payment of a poll tax insofar as they may apply to Indians.

The Dominion Parliament, as it had legislative power and authority so to do in relation to Indians and Lands reserved for Indians, entered the field of taxation, and has provided for the taxation of real and personal property held by an Indian outside the Reserve, in his individual right. In the domain of taxation, the two Legislatures meet, and if they are in conflict, the enactment of the Dominion must prevail over that of the Province.

It is urged that inasmuch as s. 102 "The Indian Act" deals only with "real or personal property" the two Legislatures do not meet so as to create any conflict in respect to a poll tax, and that therefore ss. 100 and 144 of the City Charter remain operative.

There can be little doubt, that many of the provisions of the *Indian Act* were designed with the view of safeguarding to the Indian such rights and privileges as were or became his under the articles of capitulation signed at Montreal in 1760, the Royal Proclamation following the Treaty of Paris in 1763, and the Treaties entered into with various tribes from time to time, but as there is no material before me upon which I can base a judicial opinion as to those rights and privileges, I will merely assume that the Dominion Parliament in its legislative enactments regarding "Indians and Lands reserved for the Indians" constantly kept in mind the duty and obligation of the Crown to safeguard all Indian rights, and fulfil all promises contained in those treaties with the exactness which honor and good conscience would dictate, and that the special matters which it saw fit to legislate concerning, rather than leave to the general laws of the land, were subjects which ought to be governed by the Parliament of which the Indians were wards.

We find the Act deals with schools, Reserves, descent of property, trespassing on Reserves, sale and transfer of Indian lands, taxation, etc., and it would appear to me that in respect to those matters, the Dominion having legitimately entered the field, should be deemed to have occupied it generally.

Under ss. 102, 103 and 104 of the *Indian Act*, the Dominion Parliament has legislated in respect to the subject of taxation as it may affect "Indians and Lands Reserved for the Indians," a subject assigned exclusively to that legislative body, and having done so, I do not see under what principle, provincial legislation can be made to supplement, change or restrict such federal enactment.

of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three preceding sections."

This section creates for an Indian the situation in purely civil matters, that he may have property ample and sufficient to satisfy a judgment or other claim, but such property is exempt from seizure, levy or distress, by reason of the fact that it cannot be made subject to any lien or charge.

In a poll tax claim the body may be taken only "in default of goods and chattels whereon to levy." (City Charter, s. 146) If a *right to levy* does not exist, then it follows that the right to take the body in default must fail. The facts in this case disclose that the applicant has no property, save what is exempt from any lien or charge and therefore not a subject for distress.

For reasons which are quite apparent, the Indian has been placed under the guardianship of the Dominion Government. He is its ward, so long as he remains unenfranchised, and the Minister of Interior, as Superintendent General of Indian Affairs, is given the control and management of all lands and property of Indians in Canada. They are looked upon and treated as requiring the friendly care and directing hand of the Government in the management of their affairs. They and their property are, so to speak, under the protecting wing of the Dominion Government, and I do not think in such circumstances, it was ever contemplated that the body of an Indian should be taken in execution under a civil process pure and simple.

For debts or other purely civil liabilities, judgments may be recovered but payment may be enforced only by seizure of such property as may be acquired and held by an Indian in his individual right outside the Reserve.

The application will be granted, and the twelve applicants discharged from custody.

Application granted.

REX v. IMPERIAL TOBACCO Co. et al.

Alberta Supreme Court, McGillivray J.A. January 16, 1940.

Criminal Law II E—Indictment & Information II—Conspiracy—In restraint of trade—Five counts—Motion for particulars — Nature of conspiracy.

An indictment against 42 accused contained 5 counts for conspiracy in restraint of trade under *Cr. Code*, s. 498(1), each count being under a different paragraph (or portion thereof) of the subsection, and in the very words of the paragraph (or portion thereof). The conspiracy charged in each count was alleged to have

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