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CIVIL RIGHTS - CIVIL STATUS

GUIDE TO USE

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Sanderson v. Heap (1909), 19 Man. R. 122;

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The Attorney General of Canada *(Respondent) Appellant*;

and

Jeannette Vivian Corbiere Lavell *(Applicant) Respondent.*

Richard Isaac, Leonard Staats, Clarence Jamieson, Rena Hill, Norman Lickers, William White, Nina Burnham, John Capton, Howard Lickers, Clifford Lickers, Mitchell Sandy, Ronald Monture, Gordon Hill, Sydney Henhawk, Ross Powless, Victor Porter, Frank Monture, Renson Jamieson and Vincent Sandy *Appellants*;

and

Yvonne Bédard *Respondent.*

1973: February 22, 23, 26, 27; 1973: August 27.

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF ONTARIO

Civil rights—Indians—Indian woman marrying non-Indian—Loss of rights—No analogous provision applicable male Indian—Discrimination by reason of sex—Canadian Bill of Rights, 1960 (Can.), c. 44—Indian Act, R.S.C. 1970, c. I-6, s. 12(1)(b).

The respondents are both female persons of North American Indian ancestry. Mrs. Lavell was born Jeannette Vivian Corbiere, a member of the Wikwemikong Band and registered in the Indian Register. She subsequently married a non-Indian and thereafter her name was deleted from the Indian Register.

Mrs. Bédard was born of Indian parents on the Six Nations Indian Reserve, married a non-Indian and thereafter having separated from her husband returned to the Reserve to live on a property held by her mother by Certificate of Possession and bequeathed to Mrs. Bédard by will approved by the Council of the Six Nations and by the Minister in terms of the *Indian Act*. The Council required Mrs.

Le Procureur général du Canada *(Intimé) Appelant*;

et

Jeannette Vivian Corbiere Lavell *(Requérante) Intimée.*

Richard Isaac, Leonard Staats, Clarence Jamieson, Rena Hill, Norman Lickers, William White, Nina Burnham, John Capton, Howard Lickers, Clifford Lickers, Mitchell Sandy, Ronald Monture, Gordon Hill, Sydney Henhawk, Ross Powless, Victor Porter, Frank Monture, Renson Jamieson et Vincent Sandy *Appelants*;

et

Yvonne Bédard *Intimée.*

1973: les 22, 23, 26 et 27 février; 1973: le 27 août.

Présents: Le Juge en chef Fauteux et les Juges Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon et Laskin.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

EN APPEL DE LA COUR SUPRÊME DE L'ONTARIO

Droits civils—Indiens—Indienne épousant un non-Indien—Perte de droits—Pas de disposition analogue s'appliquant à l'Indien de sexe masculin—Discrimination en raison du sexe—Déclaration canadienne des droits, 1960 (Can.), c. 44—Loi sur les Indiens, S.R.C. 1970, c. I-6, s. 12(1)b).

Les intimées sont toutes deux de descendance indienne nord-américaine. Mme Lavell, née Jeannette Vivian Corbiere, était membre de la bande d'Indiens Wikwemikong et inscrite au registre des Indiens. Elle épousa par la suite un non-Indien et comme conséquence son nom fut rayé du registre des Indiens.

Mme Bédard naquit de parents indiens dans la réserve indienne des Six Nations, épousa un non-Indien et, par la suite, s'étant séparée de son mari, elle retourna à la réserve pour habiter sur une propriété pour laquelle sa mère avait obtenu un certificat de possession et qui lui avait été léguée en vertu d'un testament fait par cette dernière et approuvé par le Conseil des Six Nations et le Ministère conformé-

Bédard to dispose of the property and to leave the Reserve.

Mrs. Lavell failed in an appeal from the decision of the Registrar deleting her name from the Register. However a motion to review that decision was granted by the Federal Court of Appeal which held that s. 12(1)(*b*) of the *Indian Act* was inoperative by reason of s. 1(*b*) of the *Canadian Bill of Rights*. An appeal was filed in this Court.

Mrs. Bédard obtained in the Supreme Court of Ontario a decision in her favour based on the judgment of the Federal Court of Appeal in the *Lavell* case. Leave to appeal was granted to appeal to this Court.

Held (Abbott, Hall, Spence and Laskin JJ. dissenting): The appeals should be allowed.

Per Fauteux C.J. and Martland, Judson and Ritchie JJ.: These appeals are from judgments holding that the provisions of s. 12(1)(*b*) of the *Indian Act*, R.S.C. 1970, c. I-6, are rendered inoperative by s. 1(*b*) of the *Canadian Bill of Rights*, 1960 (Can.), c. 44, as denying equality before the law to the two respondents. In issue 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. The question is confined to deciding whether Parliament, in defining Indian status so as to exclude women of Indian birth who have married non-Indians, enacted a law which cannot be sensibly construed without abrogating, abridging or infringing the rights of such women to equality before the law. The *Queen v. Drybones*, [1970] S.C.R. 282 case can have no application to render inoperative legislation such as s. 12(1)(*b*) of the *Indian Act* passed by Parliament in discharge of its constitutional function under s. 91(24) of the *B.N.A. Act*. Equality before the law under the *Bill of Rights* means equality of treatment in the enforcement and application of the laws of Canada and no such inequality is necessarily entailed in the construction and application of s. 12(1)(*b*).

Per Pigeon J.: This result is in accordance with the view that the enactment of the *Canadian Bill of*

ment à la *Loi sur les Indiens*. Le conseil exigea que Mme Bédard dispose de la propriété et qu'elle quitte la réserve.

L'appel interjeté par Mme Lavell de la décision du registraire de rayer son nom du registre a été rejeté. Cependant une demande d'examen de cette décision a été accordée par la Cour d'appel fédérale, qui a statué que l'al. *b*) du par. (1) de l'art. 12 de la *Loi sur les Indiens* était inopérant en raison de l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits*. Un appel a été interjeté en cette Cour.

Mme Bédard a obtenu en Cour suprême de l'Ontario un jugement en sa faveur fondé sur le jugement de la Cour d'appel fédérale dans l'affaire *Lavell*. La permission d'appeler de cet arrêt en cette Cour a été accordée.

Arrêt (Les Juges Abbott, Hall, Spence et Laskin étant dissidents): Les appels doivent être accueillis.

Le Juge en chef Fauteux et *les* Juges Martland, Judson et Ritchie: Ces appels sont à l'encontre de jugements statuant que les dispositions de l'al. *b*) du par. (1) de l'art. 12 de la *Loi sur les Indiens*, 1970, S.R.C. c. I-6, sont rendues inopérantes par l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits*, 1960 (Can.), c. 44, comme déniant aux deux intimées l'égalité devant la loi. Il s'agit de déterminer si la *Déclaration des droits* doit être interprétée comme rendant inopérante une des conditions imposées par le Parlement pour l'usage et l'occupation des terres de la Couronne réservées aux Indiens. La question se limite à décider si le Parlement, en définissant le statut d'Indien de façon à ne pas inclure les femmes de naissance indienne qui ont épousé des non-Indiens a édicté une loi qu'il est impossible d'interpréter de façon sensée sans supprimer, restreindre ou enfreindre les droits de ces femmes à l'égalité devant la loi. L'arrêt *La Reine c. Drybones*, [1970] R.C.S. 282, ne peut recevoir d'application pour rendre inopérante une législation telle que l'al. *b*) du par. (1) de l'art. 12 de la *Loi sur les Indiens* adopté par le Parlement du Canada dans l'exercice de ses devoirs constitutionnels en vertu du par. (24) de l'art. 91 de l'*Acte de l'A.N.B.* L'égalité devant la loi en vertu de la *Déclaration des droits* veut dire égalité de traitement dans l'application des lois du Canada et l'interprétation et l'application de l'al. *b*) du par. (1) de l'art. 12 ne comportent nécessairement aucune inégalité semblable.

Le Juge Pigeon: Ce résultat est conforme à l'opinion d'après laquelle la *Déclaration canadienne des*

Rights was not intended to effect a virtual suppression of federal legislation over Indians.

Per Abbott J. *dissenting:* The decision in the *Drybones* case cannot be distinguished from the two cases under appeal. Effect must be given to the words "without discrimination by reason of race, national origin, colour, religion or sex" as used in s. 1 of the *Canadian Bill of Rights* and s. 1(*b*) must be read as if those words were recited therein.

Per Hall, Spence and Laskin JJ., *dissenting:* It is not possible to leap over the telling words of s. 1 of the *Canadian Bill of Rights*, "without discrimination by reason of race, national origin, colour, religion or sex" by invoking the words "equality before the law" in clause (*b*). That was not done in the *Drybones* case. There was an intimation during the argument of these appeals that the *Canadian Bill of Rights* is properly invoked only to resolve a clash under its terms between two federal statutes. It is a spurious contention. The *Canadian Bill of Rights* is the indicator to which any Canadian statute or provision thereof must yield unless Parliament has declared that the statute or the particular provision is to operate notwithstanding the *Canadian Bill of Rights*.

[*St. Ann's Island Shooting and Fishing Club Limited v. The King* [1950] S.C.R. 211; *Baker v. Edger* [1898] A.C. 748; *The Queen v. Drybones* [1970] S.C.R. 282; *Curr v. The Queen* [1972] S.C.R. 889; *Smythe v. The Queen* [1971] S.C.R. 680; *Roncarelli v. Duplessis* [1959] S.C.R. 121; *Lowny and Lepper v. The Queen* (1972), 26 D.L.R. (3d) 224; *Brownridge v. The Queen* [1972] S.C.R. 926; *Duke v. The Queen* [1972] S.C.R. 917 referred to].

APPEALS from judgments of the Federal Court of Appeal[1] and the Supreme Court of Ontario[2] affirming that the provisions of the *Indian Act* are inoperative to deprive the respondents of their right to registration in terms of the said Act. Appeals allowed, Abbott, Hall, Spence and Laskin JJ. dissenting.

C. R. O. Munro, Q.C., M. A. Chalmers, Q.C., J. E. Smith and *C. J. Pepper* for the Attorney General of Canada.

Clayton Ruby, for the respondent, J. V. C. Lavell.

[1] [1971] F.C. 347; 22 D.L.R. (3d) 188.
[2] [1972] 2 O.R. 391.

droits n'a pas pour but de supprimer pratiquement toute la législation fédérale sur les Indiens.

Le Juge Abbott *dissident*: La décision dans l'arrêt *Drybones* ne se distingue pas des deux causes en appel. Il faut donner effet aux mots «quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe» figurant à l'art. 1 de la *Déclaration canadienne des droits* et l'al. *b*) de l'art. 1 doit s'interpréter comme si ces mots y étaient insérés.

Les Juges Hall, Spence et Laskin, *dissidents:* Il n'est pas possible de passer par-dessus les termes décisifs de l'art. 1 de la *Déclaration canadienne des droits*, «quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe», par un recours aux termes «égalité devant la loi» de la clause *b*). Ce n'est pas ce qui a été fait dans l'arrêt *Drybones*. Au cours des plaidoiries dans les présents appels, on a suggéré l'avis que la *Déclaration canadienne des droits* ne peut être justement invoquée que pour résoudre un conflit régi par ses termes entre deux lois fédérales. C'est là une prétention sans valeur. C'est la *Déclaration canadienne des droits* qui est la mesure à laquelle toute loi canadienne ou toute disposition d'icelle doivent se conformer à moins que le Parlement n'ait déclaré que la loi ou la disposition en cause s'appliquera nonobstant la *Déclaration canadienne des droits*.

[Arrêts mentionnés: *St. Ann's Island Shooting and Fishing Club Limited c. Le Roi* [1950] R.C.S. 211; *Barker v. Edger* [1898] A.C. 748; *La Reine c. Drybones* [1970] R.C.S. 282; *Curr c. La Reine* [1972] R.C.S. 889; *Smythe c. La Reine* [1971] R.C.S. 680; *Roncarelli c. Duplessis* [1959] R.C.S. 121; *Lowny and Lepper v. The Queen* (1972), 26 D.L.R. (3d) 224; *Brownridge c. La Reine* [1972] R.C.S. 926; *Duke c. La Reine* [1972] R.C.S. 917].

APPELS à l'encontre d'un arrêt de la Cour d'appel fédérale[1] et d'un jugement de la Cour suprême de l'Ontario[2], statuant que les dispositions de la *Loi sur les Indiens* son inopérantes pour priver les intimées de leur droit à l'inscription aux termes de ladite Loi. Appels accueillis, les Juges Abbott, Hall, Spence et Laskin étant dissidents.

C. R. O. Munro, c.r., M. A. Chalmers, c.r., J. E. Smith et *C. J. Pepper* pour le Procureur général du Canada.

Clayton Ruby, pour l'intimée, J. V. C. Lavell.

[1] [1971] C.F. 347; 22 D.L.R. (3d) 188.
[2] [1972] 2 O.R. 391.

B. H. Kellock and *V. Libis*, for the appellants R. Isaac *et al.* and for the Six Nations Band of Indians of the County of Brant. Intervenant.

M. Montgomery, Q.C., for the respondent, Yvonne Bédard.

Douglas Sanders, *B. A. Crane*, *James O'Reilly*, *Ken Regier*, *Bob Young* and *Bruce Fotheringham*, for The Indian Association of Alberta, The Union of British Columbia Indian Chiefs, The Manitoba Indian Brotherhood Inc., The Union of New Brunswick Indians, The Indian Brotherhood of the Northwest Territories, The Union of Nova Scotia Indians, The Union of Ontario Indians, The Federation of Saskatchewan Indians, The Indian Association of Quebec, The Yukon Native Brotherhood and The National Indian Brotherhood. *Intervenants.*

B. J. MacKinnon, Q.C., for the Native Council of Canada. *Intervenant.*

M. P. Hyndman, Q.C., and *Frances Smookler*, for Rose Wilhelm, Alberta Committee on Indian Rights for Indian Women Inc., Viola Shannacappo, University Women's Club of Toronto, University Women Graduates Limited, The North Toronto Business and Professional Women's Club Inc., and Monica Agnes Turner. *Intervenants.*

Arnold F. Moir, Q.C., for the Treaty Voice of Alberta. *Intervenant.*

E. Greenspan, for Anishnawbekwek of Ontario Inc. *Intervenant.*

The judgment of Fauteux C.J., and Martland, Judson and Ritchie was delivered by

RITCHIE J.—I have had the advantage of reading the reasons for judgment prepared for delivery by my brother Laskin.

These appeals, which were heard together, are from two judgments holding that the provisions of s. 12(1)(*b*) of the *Indian Act*, R.S.C. 1970, c. I-6, are rendered inoperative by s. 1(*b*) of the *Canadian Bill of Rights*, 1960 (Can.), c. 44, as denying equality before the law to the two respondents.

B. H. Kellock et *V. Libis*, pour les appelants R. Isaac *et al.* et pour la Bande des Six Nations des Indiens du Comté de Brant, intervenant.

M. Montgomery, c.r., pour l'intimée, Yvonne Bédard.

Douglas Sanders, *B. A. Crane*, *James O'Reilly*, *Ken Regier*, *Bob Young* et *Bruce Fotheringham*, pour The Indian Association of Alberta, The Union of British Columbia Indian Chiefs, The Manitoba Indian Brotherhood Inc., The Union of New Brunswick Indians, The Indian Brotherhood of the Northwest Territories, The Union of Nova Scotia Indians, The Union of Ontario Indians, The Federation of Saskatchewan Indians, L'Association des Indiens du Québec, The Yukon Native Brotherhood et la Fraternité des Indiens du Canada. *Intervenants.*

B. J. MacKinnon, c.r., pour The Native Council of Canada. *Intervenant.*

M. P. Hyndman, c.r., et *Frances Smookler*, pour Rose Wilhelm, Alberta Committee on Indian Rights for Indian Women Inc., Viola Shannacappo, University Women's Club of Toronto, University Women Graduates Limited, The North Toronto Business and Professional Women's Club Inc. et Monica Agnes Turner. *Intervenants.*

Arnold F. Moir, c.r., pour The Treaty Voice of Alberta. *Intervenant.*

E. Greenspan, pour Anishnawbekwek of Ontario Inc. *Intervenant.*

Le jugement du Juge en chef Fauteux et des Juges Martland, Judson et Ritchie a été rendu par

LE JUGE RITCHIE—J'ai eu l'avantage de lire les motifs de jugement préparés par mon collègue le Juge Laskin.

Ces pourvois, qui furent entendus ensemble, sont à l'encontre de deux jugements statuant que les dispositions de l'art. 12, par (1), al. *b*) de la *Loi sur les Indiens*, S.R.C. 1970, c. I-6, sont rendues inopérantes par l'art. 1, al. *b*) de la *Déclaration canadienne des droits*, 1960 (Can.), c. 44, comme déniant aux deux intimées l'égalité devant la Loi.

Both respondents were registered Indians and "Band" members within the meaning of s. 11(*b*) of the *Indian Act* when they elected to marry non-Indians and thereby relinquished their status as Indians in conformity with the said s. 12(1)(*b*) which reads as follows:

> 12. (1) The following persons are not entitled to be registered, namely,
>
> (*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

It is contended on behalf of both respondents that s. 12(1)(*b*) of the Act should be held to be inoperative as discriminating between Indian men and women and as being in conflict with the provisions of the *Canadian Bill of Rights* and particularly s. 1 thereof which provides:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, . . .
>
> (*b*) the right of the individual to equality before the law and the protection of the law; . . .

I think it desirable at the outset to outline the facts concerning the two respondents separately.

1. *Mrs. Lavell*—This woman was a member of the Wikwemikong Band of Indians who married a non-Indian and whose name was deleted from the Indian Register by the Registrar in charge thereof pursuant to the provisions of section 12(1)(*b*) of the Act. An appeal was taken from the Registrar's decision and was heard before His Honour Judge Grossberg, acting as *persona designata* under the *Indian Act* before whom evidence was taken which disclosed that at the time of the hearing and for some nine years before her marriage Mrs. Lavell had not lived on any Reserve except for sporadic visits to her family, and the learned judge declined to accept the suggestion that she could not visit her family on the Reserve whenever she wished. Mrs. Lavell did not claim to have been deprived

Les deux intimées sont des Indiennes inscrites et elles étaient membres d'une «bande» au sens de l'art. 11, al. *b*) de la *Loi sur les Indiens* lorsqu'elles ont choisi d'épouser des non-Indiens et ont renoncé par là à leur qualité d'Indiennes en conformité dudit art. 12, par. (1), al. *b*) qui se lit comme suit:

> 12. (1) Les personnes suivantes n'ont pas le droit d'être inscrites, savoir:
>
> *b*) une femme qui a épousé un non-Indien, sauf si cette femme devient subséquemment l'épouse ou la veuve d'une personne décrite à l'article 11.

On soutient au nom des deux intimées qu'il faudrait statuer que l'art. 12, par. (1), al. *b*) de la Loi est inopérant parce que faisant preuve de discrimination entre les Indiens et les Indiennes et venant en conflit avec les dispositions de la *Déclaration canadienne des droits* et particulièrement de son art. 1 qui prévoit:

> 1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe. . . .
>
> *b*) le droit de l'individu à l'égalité devant la loi et à la protection de la loi; . . .

Je pense souhaitable en premier lieu de relater séparément les faits concernant les deux intimées.

1. *Madame Lavell*—Cette dame était membre de la bande d'Indiens Wikwemikong; elle épousa un non-Indien et son nom fut rayé du registre des Indiens par le registraire préposé audit registre, conformément aux dispositions de l'art. 12, par. (1), al. *b*) de la Loi. Un appel a été interjeté de la décision du registraire et c'est son Honneur le Juge Grossberg qui l'a entendu, agissant à titre de *persona designata* en vertu de la *Loi sur les Indiens*; devant lui ont été présentés des éléments de preuve qui ont révélé qu'à l'époque de l'audition et pendant environ les neuf années antérieures à son mariage, Madame Lavell n'avait pas vécu dans une réserve, sauf pour de rares visites à sa famille, et le savant juge s'est refusé à accepter la proposition qu'elle ne pouvait pas rendre visite à sa famille

of any property rights on the Reserve except those incidental to the right as a Band member.

Judge Grossberg having found that in his opinion section 12(1)(*b*) of the *Indian Act* was not rendered inoperative by the *Bill of Rights* an appeal was taken from his judgment to the Federal Court of Appeal where a judgment was rendered by Mr. Justice Thurlow who concluded his opinion by saying of section 12(1)(*b*) of the *Indian Act*:

> These provisions are thus laws which abrogate, abridge and infringe the right of an individual Indian woman to equality with other Indians before the law. Though this is not a situation in which an act is made punishable at law on account of race or sex, it is one in which under the provisions here in question the consequences of the marriage of an Indian woman to a person who is not an Indian are worse for her than for other Indians who marry non-Indians and than for other Indians of her band who marry persons who are not Indians. *In my opinion this offends the right of such an Indian woman as an individual to equality before the law* and the *Canadian Bill of Rights* therefore applied to render the provisions in question inoperative.

(The italics are my own.)

It is from this judgment that the Crown now appeals.

2. *Mrs. Bédard*—In this case the respondent sought an injunction restraining the members of the Six Nations Council from expelling her and her two infant children from the home she occupied on the Six Nations Indian Reserve in the County of Brant, and an order setting aside a resolution passed by the Council ordering her to dispose of such property. By agreement an additional claim was added for a declaratory judgment concerning the respective rights of the parties.

Mrs. Bédard was born on the Six Nations Indian Reserve of Indian parents and she married a non-Indian in May, 1964, by whom she had two children and with whom she resided off

dans la réserve chaque fois qu'elle le souhaitait. Madame Lavell n'a pas prétendu avoir été privée de droits de propriété dans la réserve, sauf de ceux qui sont accessoires à ses droits de membre de bande.

M. le Juge Grossberg ayant conclu qu'à son avis l'art. 12, par. (1), al. *b*) de la *Loi sur les Indiens* n'a pas été rendu inopérant par la *Déclaration des droits*, un appel de son jugement a été interjeté à la Cour d'appel fédérale où un jugement fut rendu par M. le Juge Thurlow qui a conclu l'énoncé de son opinion en disant de l'art. 12, par. (1), al. *b*) de la *Loi sur les Indiens*.

> Ainsi, il s'agit bien de dispositions qui suppriment, restreignent et enfreignent le droit d'une Indienne à l'égalité avec les autres Indiens devant la loi. Il ne s'agit pas ici, bien sûr, d'un cas où un acte est punissable en droit en raison de la race ou du sexe de son auteur; il n'en demeure pas moins que, aux termes des dispositions en question, les conséquences du mariage d'une Indienne avec un non-Indien sont pires pour elle que pour les autres Indiens qui épousent des non-Indiennes et que pour les autres Indiens de sa bande qui épousent des non-Indiennes. *A mon avis, ceci enfreint le droit à l'égalité devant la loi de ladite Indienne en tant que personne* et, par conséquent, la *Déclaration canadienne des droits* s'applique et rend inopérantes les dispositions en question.

(J'ai mis des mots en italique).

C'est de ce jugement que la Couronne interjette maintenant un appel.

2. *Madame Bédard*—Dans cette affaire-ci l'intimée a tenté d'obtenir une injonction interdisant aux membres du Conseil des Six Nations de les expulser, elle et ses deux jeunes enfants, de la maison qu'elle occupait dans la réserve indienne des Six Nations dans le comté de Brant, de même qu'une ordonnance annulant une résolution adoptée par le Conseil qui lui enjoint de disposer de cette propriété. De consentement, une demande supplémentaire a été ajoutée en vue d'obtenir un jugement déclaratoire portant sur les droits respectifs des parties.

Mme Bédard naquit de parents indiens dans la réserve indienne des Six Nations et, en mai 1964, elle épousa un non-Indien dont elle eut deux enfants et avec qui elle habita hors de la

the Reserve until June 23, 1970 when, having separated from her husband, she returned to the Reserve to live in a house on a property to which her mother had held a Certificate of Possession under s. 20 of the *Indian Act* and which had been bequeathed to her under her mother's will which had been approved by the Council of the Six Nations and on behalf of the Minister of Indian Affairs as required by the *Indian Act*, (section 45(3)) on August 7, 1969.

When Mrs. Bédard returned to the Reserve with her children in 1970 to occupy her mother's house, the Council passed a series of resolutions giving her permission to reside on the Reserve for a period of six months during which she was to dispose of the property, and extending this permission for a further eight months, after which any further requests for her continued residence would be denied. In accordance with these resolutions this respondent conveyed her interest in the property in question to her brother who was a registered member of the Six Nations Band, and to whom a Certificate of Possession of the property was granted on March 15, 1971 by the Minister. Her brother, however, permitted Mrs. Bédard and her infant children to continue occupying the premises without rent, but the Band Council passed a further resolution on September 15, 1971 by which it was resolved that the Brant District Supervisor should be requested to serve a notice to quit the Reserve upon this respondent. It should be noted that the writ instituting this action was issued on September 14, 1971, more than a year after the brother had obtained his Certificate of Possession and that no notice to quit has been served on Mrs. Bédard pursuant to the resolution which was passed after the writ was issued.

Mrs. Bédard's case was heard by Mr. Justice Osler in the Supreme Court of Ontario where it was contended that the Council's request to the District Supervisor and any action taken by the Supervisor pursuant to such request, and the removal of her name from the Band list simply because of her marriage to a non-Indian, are

réserve jusqu'au 23 juin 1970, époque où, s'étant séparée de son mari, elle retourna à la réserve pour habiter sur une propriété pour laquelle sa mère avait détenu un certificat de possession sous le régime de l'art. 20 de la *Loi sur les Indiens* et qui lui avait été léguée en vertu d'un testament fait par cette dernière et approuvé par le Conseil des Six Nations et le ministère des Affaires indiennes, comme le veut la *Loi sur les Indiens*, (art. 45, par. (3)) le 7 août 1969.

Lorsque Mme Bédard est retournée à la réserve avec ses deux enfants en 1970 pour occuper la maison de sa mère, le conseil a adopté une série de résolutions lui permettant de résider dans la réserve pour une période de six mois pendant laquelle elle devait disposer de cette propriété, puis prolongeant la permission de huit mois, après quoi toute nouvelle demande de continuer à y résider serait rejetée. Conformément auxdites résolutions, cette intimée a cédé son droit dans la propriété en question à son frère, un membre inscrit de la bande des Six Nations à qui un certificat de possession de la propriété fut accordé le 15 mars 1971 par le ministre. Ledit frère permit cependant à Mme Bédard de continuer à habiter les lieux avec ses jeunes enfants sans payer de loyer mais, le 15 septembre 1971, le conseil de la bande adopta une autre résolution par laquelle il était décidé de demander au surveillant du district de Brant de signifier un avis de quitter la réserve à l'intimée. Il est bon de signaler que le bref introductif d'action en l'instance fut délivré le 14 septembre 1971, plus d'une année après que le frère eut obtenu son certificat de possession, et qu'aucun avis de quitter les lieux n'a été signifié à Mme Bédard en conformité de la résolution adoptée après la délivrance du bref.

La cause de Mme Bédard fut entendue par M. le Juge Osler en Cour suprême de l'Ontario où l'on a soutenu que la demande adressée par le conseil au surveillant de district et toute action prise par ce dernier par suite de ladite demande, ainsi que le retranchement du nom de l'intimée de la liste de bande simplement à cause de son

actions that discriminate against her by reason of her race and sex and deny her "equality before the law". Mr. Justice Osler, basing his decision on the judgment of the Federal Court of Appeal in the *Lavell* case, concluded that:

> Section 12(1)(*b*) of the Act is . . . inoperative and all acts of the Council Band and of the District Supervisor purporting to be based on the provisions of that section can be of no effect.

Leave to appeal from this judgment was granted by order of this Court on January 25, 1972.

The contention which formed the basis of the argument submitted by both respondents was that they had been denied equality before the law *by reason of sex*, and I propose to deal with the matter on this basis.

In considering the impact of the *Bill of Rights* on the provisions of the *Indian Act*, I think it desirable to reproduce the portions of the Bill which I consider to be relevant and which are:

Preamble

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person *and the position of the family in a society of free men and free institutions*;

Affirming also that *men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law*;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, *in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority* and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

BILL OF RIGHTS

Recognition and Declaration of Rights and Freedoms

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national

mariage avec un non-Indien, sont des actes d discrimination posés contre elle en raison de s race et de son sexe et lui dénient «l'égali devant la Loi». M. le Juge Osler, fondant s décision sur le jugement de la Cour d'app fédérale dans l'affaire *Lavell*, a conclu que:

> [TRADUCTION] L'article 12, par (1), al. *b*) de la Loi e . . . inopérant et tous les actes du conseil de bande du surveillant de district censés être basés sur l dispositions dudit article ne peuvent avoir auc effet.

Permission d'appeler de ce jugement a é accordée par ordonnance de cette Cour, le 2 janvier 1972.

La prétention à la base de l'argument présen par les deux intimées est qu'on leur a dén l'égalité devant la loi *en raison de leur sexe*, et me propose de traiter l'affaire sur cette base.

En considérant l'impact de la *Déclaration d droits* sur la *Loi sur les Indiens*, je crois désir ble de reproduire les parties de la Déclarati que je considère pertinentes et qui sont l suivantes:

Préambule

Le Parlement du Canada proclame que la nati canadienne repose sur des principes qui reconna sent la suprématie de Dieu, la dignité et la valeur de personne humaine *ainsi que le rôle de la famille da une société d'hommes libres et d'institutions libres*;

Il proclame en outre que les *hommes et les insti tions ne demeurent libres que dans la mesure où liberté s'inspire du respect des valeurs morales spirituelles et du règne du droit*;

Et afin d'expliciter ces principes ainsi que les dr de l'homme et les libertés fondamentales qui découlent, *dans une Déclaration de droits qui respe la compétence législative du Parlement du Canada* qui assure à sa population la protection de ces dr et de ces libertés,

EN CONSÉQUENCE, Sa Majesté, sur l'avis et consentement du Sénat et de la Chambre des comm nes du Canada, décrète:

DÉCLARATION DES DROITS

Reconnaissance et Déclaration des Droits et Libert

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondament ci-après énoncés ont existé et continueront à exi

origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(*b*) the right of the individual to equality before the law and the protection of the law;

(*c*) freedom of religion;

(*d*) freedom of speech;

(*e*) freedom of assembly and association; and

(*f*) freedom of the press.

Construction of Law

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;

(*c*) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public

pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe:

a) le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la jouissance de ses biens, et le droit de ne s'en voir privé que par l'application régulière de la loi;

b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;

c) la liberté de religion;

d) la liberté de parole;

e) la liberté de réunion et d'association, et

f) la liberté de la presse.

Interprétation de la législation

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

a) autorisant ou prononçant la détention, l'emprisonnement ou l'exil arbitraires de qui que ce soit;

b) infligeant des peines ou traitements cruels et inusités, ou comme en autorisant l'imposition;

c) privant une personne arrêtée ou détenue

(i) du droit d'être promptement informée des motifs de son arrestation ou de sa détention,

(ii) du droit de retenir et constituer un avocat sans délai, ou

(iii) du recours par voie d'*habeas corpus* pour qu'il soit jugé de la validité de sa détention et que sa libération soit ordonnée si la détention n'est pas légale;

d) autorisant une cour, un tribunal, une commission, un office, un conseil ou une autre autorité à contraindre une personne à témoigner si on lui refuse le secours d'un avocat, la protection contre son propre témoignage ou l'exercice de toute garantie d'ordre constitutionnel;

e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

f) privant une personne accusée d'un acte criminel du droit à la présomption d'innocence jusqu'à ce que la preuve de sa culpabilité ait été établie en

hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(*g*) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

5. (2) The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

(The italics are my own.)

There cannot, in my view, be any doubt that whatever may have been achieved by the *Bill of Rights*, it is not effective to amend or in any way alter the terms of the *British North America Act* and it is clear from the third recital in the preamble that the Bill was intended to "reflect the respect of Parliament for its constitutional authority . . ." so that wherever any question arises as to the effect of any of the provisions of the Bill, it is to be resolved within the framework of the *B.N.A. Act*.

It follows, in my view, that the effect of the *Bill of Rights* on the *Indian Act* can only be considered in light of the provisions of s. 91(24) of the *B.N.A. Act* whereby the subject of "Indians and lands reserved for Indians" is assigned exclusively to the legislative authority of the Parliament of Canada.

It is true that under s. 88 of the *Indian Act* laws of general application in any Province are made applicable to and in respect of Indians in the Province *except to the extent that such laws*

conformité de la loi, après une audition impartiale et publique de sa cause par un tribunal indépendant et non préjugé, ou la privant sans juste cause du droit à un cautionnement raisonnable; ou

g) privant une personne du droit à l'assistance d'un interprète dans des procédures où elle est mise en cause ou est partie ou témoin, devant une cour, une commission, un office, un conseil ou autre tribunal, si elle ne comprend ou ne parle pas la langue dans laquelle se déroulent ces procédures.

5. (2) L'expression «loi du Canada» à la Partie I désigne une loi du Parlement du Canada, édictée avant ou après la mise en vigueur de la présente loi ou toute ordonnance, règle ou règlement établi sous son régime, et toute loi exécutoire au Canada ou dans une partie du Canada lors de l'entrée en application de la présente loi, qui est susceptible d'abrogation, d'abolition ou de modification par le Parlement du Canada.

(3) Les dispositions de la Partie I doivent s'interpréter comme ne visant que les matières qui sont de la compétence législative du Parlement du Canada.

(J'ai mis des mots en italique.)

A mon avis, il ne fait aucun doute que quoi qu'ait pu être le résultat de la *Déclaration des droits*, elle n'a pas pour effet de modifier ou de changer d'aucune façon les dispositions de l'*acte de l'Amérique du Nord Britannique*, et le troisième énoncé dans le préambule indique clairement que la Déclaration devait «respecter la compétence législative du Parlement du Canada . . .» de sorte que toutes les fois qu'une question est soulevée quant à l'effet d'une disposition quelconque de la Déclaration, elle doit être décidée dans le contexte de l'*acte de l'Amérique du Nord Britannique*.

A mon avis, il s'ensuit que l'effet de la *Déclaration canadienne des droits* sur la *Loi sur les Indiens* ne peut être considéré qu'à la lumière des dispositions du par. (24) de l'art. 91 de l'*acte de l'Amérique du Nord Britannique* selon lequel le sujet «les Indiens et les terres réservées pour les Indiens» est exclusivement assigné à la compétence législative du Parlement du Canada.

Il est vrai qu'en vertu de l'art. 88 de la *Loi sur les Indiens*, les lois d'application générale dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard *sauf dans la mesure*

make provision for any matter for which provision is made by or under the Indian Act. But the incorporation of these laws as a part of the Act in no way signifies a relinquishment of Parliament's exclusive legislative authority over Indians, and in any event, the property and civil rights of members of Indian Bands living on Reserves, which is what we are here concerned with, are matters for which express provision is made by the *Indian Act* and which can only apply to Indians as distinct from other Canadians.

In my opinion the exclusive legislative authority vested in Parliament under s. 91(24) 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 *The Queen v. Drybones*[3], at 298, 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

[3] [1970] S.C.R. 282.

où ces lois contiennent des dispositions sur toute question prévue par la loi sur les Indiens ou y ressortissant. Mais l'incorporation de ces lois dans la Loi ne signifie aucunement l'abandon de la compétence législative exclusive du Parlement sur les Indiens, et de toute manière, la propriété et les droits civils des membres des bandes d'Indiens vivant dans des réserves, et c'est là ce qui fait l'objet de la présente espèce, sont des matières qui font l'objet de dispositions expresses dans la *Loi sur les Indiens* et qui ne peuvent s'appliquer qu'aux Indiens comme étant distincts des autres Canadiens.

A mon avis, la compétence législative exclusive assignée au Parlement en vertu du par. (24) de l'art. 91 n'aurait pu efficacement être exercée sans que soient adoptées des lois prescrivant les qualités requises pour qu'une personne ait droit au statut d'Indien et à l'usage et aux avantages des «terres (de la Couronne) réservées pour les Indiens». La législation adoptée à cette fin était, à mon avis, nécessaire à la mise en œuvre de l'autorité ainsi assignée au Parlement en vertu de la constitution.

Suggérer que les dispositions de la *Déclaration canadienne des droits* ont pour effet de rendre toute la *Loi sur les Indiens* inopérante comme étant discriminatoire équivaut à affirmer que la Déclaration a enlevé au Parlement le pouvoir d'exercer la compétence qui lui est assignée en vertu de la constitution d'adopter des lois qui traitent les Indiens vivant dans des réserves différemment des autres Canadiens en ce qui concerne leur propriété et leurs droits civils. La proposition selon laquelle la *Déclaration canadienne des droits* devrait recevoir une application aussi large a fait l'objet de réserves expresses de la majorité de cette Cour dans l'arrêt *La Reine c. Drybones*[3], p. 298, qui sera mentionné ci-après, et je ne crois pas qu'elle puisse être maintenue.

Dans la présente affaire, il s'agit de déterminer si la *Déclaration des droits* doit être interprétée comme rendant inopérante une des conditions imposées par le Parlement pour l'usage

[3] [1970] R.C.S. 282.

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[6] 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.

et l'occupation des terres de la Couronne réservées aux Indiens. Ces conditions ont été imposées comme partie nécessaire de la structure créée par le Parlement pour l'administration interne de la vie des Indiens dans les réserves et l'établissement de leur droit à l'usage et aux avantages des terres de la Couronne situées dans ces réserves, elles ont donc été prescrites dans l'exercice des fonctions constitutionnelles du Parlement en vertu du par. (24) de l'art. 91 et, à mon avis, seule une disposition législative claire expressément adoptée à cette fin pourrait les changer. Il ne semble pas que l'on puisse supposer que le Parlement a fait ou avait l'intention de faire pareil changement par l'emploi de termes généraux visant à proclamer statutairement les droits et libertés fondamentales dont jouissent tous les Canadiens, et je suis donc d'avis que la *Déclaration des droits* n'a pas eu d'effet semblable.

The responsibility of the Parliament of Canada in relation to the internal administration of the life of Indians on Reserves is succinctly stated by Rand J. in *St. Ann's Island Shooting and Fishing Club Limited, v. The King*[4], at 219, where he was dealing with the effect of s. 51 of the *Indian Act*, R.S.C. 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 aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation.

La responsabilité du Parlement du Canada relativement à l'administration interne de la vie des Indiens dans les réserves est succinctement énoncée par le Juge Rand dans l'arrêt *St. Ann's Island Shooting and Fishing Club Limited, c. Le Roi*[4], à la p. 219, où il commente l'effet de l'art. 51 de la *Loi des sauvages*, S.R.C. 1906, c. 81 relativement à «l'abandon» de terres sur les réserves indiennes; il dit ceci:

> [TRADUCTION] Le texte de la loi renferme la notion acceptée que ces aborigènes sont, en fait, des pupilles de l'État dont le soin et le bien-être constituent un mandat politique comportant les plus hautes obligations.

In the case of *Barker v. Edger*[5], the Privy Council was considering the effect of a New Zealand statute which established a Validation Court and contained a provision to the effect that the commencement of proceedings in that Court should operate as a stay of proceedings in any other court in respect of the same matter. The question arose in relation to special legislation concerning the title to lands of the Poututu native tribe which had been governed by the

Dans l'affaire *Barker v. Edger*[5], le Conseil privé a étudié l'effet d'une loi de la Nouvelle Zélande qui établissait une «Validation Court» et contenait une disposition prévoyant que l'introduction d'une instance en cette Cour devait entraîner une suspension d'instance en toute autre cour relativement à la même matière. La question avait surgi relativement à une loi spéciale concernant le droit de propriété de terres de la tribu indigène Poututu qui avait

[4] [1950] S.C.R. 211.
[5] [1898] A.C. 748.

[4] [1950] R.C.S. 211.
[5] [1898] A.C. 748.

Native Land Courts Act whereunder proceedings had been taken when a new action was commenced in the Validation Court and it was claimed that the Native Land Court had thereby lost jurisdiction.

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.

And he concluded this part of his judgment by saying:

> The Legislature could not have intended to displace the complete and precise jurisdiction adapted to the special case of Poututu, or to put it in the power of a defeated litigant to so displace it, without substituting something equally complete and precise in its place.

The contention that the *Bill of Rights* is to be construed as overriding all of the special legislation imposed by Parliament under the *Indian Act* is, in my view, fully answered by Pigeon J. in his dissenting opinion in the *Drybones*[6] case where he said, at p. 304:

> If one of the effects of the *Canadian Bill of Rights* is to render inoperative all legal provisions whereby Indians as such are not dealt with in the same way as the general public, the conclusion is inescapable that Parliament, by the enactment of the *Bill*, has not only fundamentally altered the status of the Indians in that indirect fashion but has also made any future use of federal legislative authority over them subject to the requirement of expressly declaring every time 'that the law shall operate notwithstanding the *Canadian Bill of Rights*'. I find it very difficult to believe that Parliament so intended when enacting the *Bill*. If a virtual suppression of federal legislation over Indians as such was meant, one would have expected this

[6] [1970] S.C.R. 282.

été assujettie au *Native Land Courts Act*, sous le régime duquel des procédures avaient été entamées quand une nouvelle action fut intentée dans la «Validation Court», et l'on a prétendu que la Native Land Court avait de ce fait perdu sa compétence.

Au cours de ses motifs de jugement, Lord Hobhouse eut l'occasion de dire, à la p. 754:

> [TRADUCTION] Lorsque la législature a accordé son attention à un sujet séparé et a adopté des dispositions le visant, la présomption est qu'une mesure législative générale subséquente n'est pas destinée à modifier la disposition spéciale, sauf si elle manifeste très clairement cette intention. Chaque texte législatif doit être interprété à cet égard suivant sa matière propre et suivant ses propres termes.

Et il a conclu cette partie de son jugement en disant:

> [TRADUCTION] La législature ne peut pas avoir eu l'intention de déplacer la compétence complète et précise adaptée au cas spécial des Poututus, ou de permettre au plaideur qui n'a pas eu gain de cause de la déplacer, sans lui substituer quelque chose d'également complet et précis.

La prétention que la *Déclaration des droits* doit être interprétée comme l'emportant sur toute la législation spéciale imposée par le Parlement en vertu de la *Loi des Indiens* est, à mon avis, complètement réglée par le Juge Pigeon dans les motifs de sa dissidence dans l'affaire *Drybones*[6], à la p. 304:

> Si l'un des effets de la *Déclaration canadienne des droits* est de rendre inopérantes toutes les dispositions en vertu desquelles les Indiens en tant que tels ne sont pas traités de la même façon que le grand public, on doit inévitablement conclure que le Parlement, en édictant la *Déclaration*, n'a pas seulement modifié fondamentalement le statut des Indiens, par ce procédé indirect, mais aussi qu'il a assujetti l'exercice futur de l'autorité législative fédérale sur les Indiens à l'exigence d'une déclaration expresse «que la loi s'appliquera nonobstant la *Déclaration canadienne des droits*». J'ai peine à croire que le Parlement avait cette intention lorsqu'il a édicté la *Déclaration*. Si l'on entendait supprimer pratiquement la

[6] [1970] R.C.S. 282.

important change to be made explicitly not surreptitiously so to speak.

That it is membership in the Band which entitles an Indian to the use and benefit of lands on the Reserve is made plain by the provisions of ss. 2 and 18 of the *Indian Act*.; Section 2(1)(*a*) reads as follows:

> 2. (1) In this Act 'band' means a body of Indians
>
> (*a*) for whose use and benefit in common, lands the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951, . . .

Section 18 reads as follows:

> 18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

In considering the meaning to be given to section 1(*b*) of the *Bill of Rights*, regard must of course be had to what was said by Mr. Justice Laskin, speaking in this regard for the whole of the Court in *Curr v. The Queen*[7], at pp. 896 and 897, where he interpreted sections 1(*a*) and 1(*b*) of the Bill in the following passage:

> In considering the reach of s. 1(*a*) and s. 1(*b*), and, indeed, of s. 1 as a whole, I would observe, first, that the section is given its controlling force over federal law by its referential incorporation into s. 2; and, second, that I do not read it as making the existence of any of the forms of prohibited discrimination, a *sine qua non* of its operation. Rather, the prohibited discrimination is an additional lever to which federal legislation must respond. Putting the matter another way, federal legislation which does not offend s. 1 in respect of any of the prohibited kinds of discrimination may nonetheless be offensive to s. 1 if it is violative of what is specified in any of the clauses (*a*) to (*f*) of s. 1. It is *a fortiori* offensive if there is discrimination by reason of race so as to deny equal-

[7] [1972] S.C.R. 889.

législation fédérale sur les Indiens, on devrait s'attendre à ce que ce changement important soit fait explicitement et non pas subrepticement, pour ainsi dire.

Que ce soit le fait d'être membre de la bande qui donne à un Indien le droit à l'usage et aux avantages de terres sises dans la réserve est clairement indiqué par les dispositions des art. 2 et 18 de la *Loi sur les Indiens*; l'al. *a*) du par. (1) de l'art. 2 se lit comme suit:

> 2. (1) Dans la présente loi «bande» signifie un groupe d'Indiens,
>
> *a*) à l'usage et au profit communs desquels, des terres, dont le titre juridique est attribué à Sa Majesté, ont été mises de côté avant ou après le 4 septembre 1951, . . .

L'article 18 se lit comme suit:

> 18. (1) Sauf les dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; et, sauf la présente loi et les stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

En déterminant le sens à attribuer à l'al. *b*) de l'art. 1 de la *Déclaration des droits*, on doit évidemment considérer ce qu'a dit M. le Juge Laskin, parlant à cet égard pour l'ensemble de la Cour dans l'affaire *Curr c. La Reine*[7], pp. 896 et 897, lorsqu'il a interprété les al. *a*) et *b*) de l'art. 1 de la Déclaration dans le passage suivant:

> En ce qui concerne la portée des alinéas *a*) et *b*) de l'art. 1 et, en fait, celle de l'art. 1 au complet, je signale, d'abord, que cet article exerce une influence sur la législation fédérale du fait qu'il est mentionné indirectement à l'art. 2; deuxièmement, je n'interprète pas cet article comme s'appliquant uniquement lorsque existe l'une ou l'autre forme de discrimination interdite. La discrimination interdite est plutôt une norme supplémentaire que la législation fédérale doit respecter. En d'autres termes, une loi fédérale qui ne viole pas l'article 1 en ce qui concerne l'un ou l'autre des genres interdits de discrimination, peut néanmoins le violer si elle porte atteinte à l'un des droits garantis par les alinéas *a*) à *f*) de l'art. 1. Elle constitue *a fortiori* une violation s'il y a discrimination

[7] [1972] R.C.S. 889.

by before the law. That is what this Court decided in *Regina v. Drybones* and I need say no more on this point.

It is, therefore, not an answer to reliance by the appellant on s. 1(*a*) and s. 1(*b*) of the *Canadian Bill of Rights* that s. 223 does not discriminate against any person by reason of race, national origin, colour, religion or sex. The absence of such discrimination still leaves open the question whether s. 223 can be construed and applied without abrogating, abridging or infringing the rights of the individual listed in s. 1(*a*) and s. 1(*b*).

My understanding of this passage is that the effect of s. 1 of the *Bill of Rights* is to guarantee to all Canadians the rights specified in paragraphs (*a*) to (*f*) of that section, irrespective of race, national origin, colour or sex. This interpretation appears to me to be borne out by the French version which reads:

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe: . . .

It was stressed on behalf of the respondents that the provisions of s. 12(1)(*b*) of the *Indian Act* constituted "discrimination by reason of sex" and that the section could be declared inoperative on this ground alone even if such discrimination did not result in the infringement of any of the rights and freedoms specifically guaranteed by s. 1 of the Bill.

I can find no support for such a contention in the *Curr* case in which, in any event, no question of any kind of discrimination was either directly or indirectly involved. My own understanding of the passage which I have quoted from that case was that it recognized the fact that the primary concern evidenced by the first two sections of the *Bill of Rights* is to ensure that the rights and freedoms thereby recognized and declared shall continue to exist for all Canadians, and it follows, in my view, that

raison de la race d'une personne, de façon à priver celle-ci du droit à l'égalité devant la loi. C'est ce qu'a décidé cette Cour dans l'arrêt *Regina c. Drybones*; je n'ai rien d'autre à ajouter sur ce point.

Par conséquent, on ne saurait répondre à l'argument de l'appelant, fondé sur les alinéas *a)* et *b)* de l'art. 1 de la *Déclaration canadienne des droits*, en disant que l'article 223 ne fait aucune distinction entre les particuliers en raison de leur race, de leur origine nationale, de leur couleur, de leur religion ou de leur sexe. En l'absence de pareille discrimination, il reste encore à déterminer si l'art. 223 peut s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre les droits mentionnés aux alinéas *a)* et *b)* de l'art. 1.

Mon interprétation de ce passage est que l'art. 1 de la *Déclaration des droits* a pour effet de garantir à tous les Canadiens les droits spécifiés aux alinéas *a)* et *f)* de cet article, quels que soient leur race, leur origine nationale, leur couleur, leur religion ou leur sexe. Cette interprétation me paraît étayée par la version française.

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe: . . .

On a souligné au nom des intimées que les dispositions de l'art. 12, par. (1), al. *b)* de la *Loi sur les Indiens* constituent une «discrimination en raison du sexe» et que l'article pourrait être déclaré inopérant pour ce seul motif, même si semblable discrimination n'avait pas pour effet d'enfreindre un des droits et libertés spécifiquement garantis par l'art. 1 de la Déclaration.

Je ne trouve aucun fondement à cette prétention dans l'arrêt *Curr* dans lequel, en tout état de cause, aucune question de discrimination de quelque nature que ce soit ne s'est posée directement ou indirectement. Ma propre interprétation du passage de cet arrêt-là que j'ai cité était qu'il reconnaissait que la préoccupation première qui ressort des deux premiers articles de la *Déclaration des droits* est de garantir que les droits et les libertés qui y sont reconnus et déclarés continueront à exister pour tous les

those sections cannot be invoked unless one of the enumerated rights and freedoms has been denied to an individual Canadian or group of Canadians. Section 2 of the *Bill of Rights* provides for the manner in which the rights and freedoms which are recognized and declared by s. 1 are to be enforced and the effect of this section is that every law of Canada shall "be so construed and applied as not to abrogate, abridge or infringe or authorize the abrogation, abridgment or infringement of any of the rights and freedoms herein recognized and declared . . ." (i.e. by s. 1). There is no language anywhere in the *Bill of Rights* stipulating that the laws of Canada are to be construed without discrimination unless that discrimination involves the denial of one of the guaranteed rights and freedoms, but when, as in the case of *The Queen v. Drybones*, *supra*, denial of one of the enumerated rights is occasioned by reason of discrimination, then, as Mr. Justice Laskin has said, the discrimination affords an "additional lever to which federal legislation must respond."

The opening words of s. 2 of the *Bill of Rights* are, in my view, determinative of the test to be applied in deciding whether the section here impugned is to be declared inoperative. The words to which I refer are:

> 2. Every law of Canada shall, unless it is expressly declared by an act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or authorize the abrogation, abridgement of infringement of the freedoms herein recognized and declared . . .

In the course of the reasons for judgment rendered on behalf of the majority of this Court in *The Queen v. Drybones*, *supra*, this language was interpreted in the following passage at p. 294:

> It seems to me that a more realistic meaning must be given to the words in question and they afford, in my view, the clearest indication that s. 2 is intended to mean and does mean that if a law of Canada cannot be "sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights and freedoms, recognized and declared by the

Canadiens, et il s'ensuit, selon moi, que ces articles ne peuvent pas être invoqués sauf si l'un des droits et libertés énumérés a été refusé à un Canadien en particulier ou à un groupe de Canadiens. L'article 2 de la *Déclaration des droits* prévoit la manière dont les droits et libertés qui sont reconnus et déclarés par l'art. 1 doivent être appliqués, et l'effet de cet article est que toute loi du Canada «doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes . . .» (c.-à-d. par l'art. 1). Nulle part dans la *Déclaration des droits* trouvons-nous des termes prévoyant que les lois du Canada doivent s'interpréter sans discrimination à moins que cette discrimination ne comporte un déni de l'un des droits et libertés garantis, mais lorsque, comme dans l'affaire *La Reine c. Drybones*, le déni de l'un des droits énumérés se produit en raison d'une discrimination, alors, comme l'a dit M. le Juge Laskin, la discrimination fournit une «norme supplémentaire que la législation fédérale doit respecter».

Les premiers mots de l'art. 2 de la *Déclaration des Droits* sont, dans mon opinion, déterminants quant au critère qu'il faut appliquer pour décider si l'article attaqué ici doit être déclaré inopérant. Les mots auxquels je me réfère sont:

> 2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes . . .

Dans les motifs de jugement rendus au nom de la majorité de cette Cour dans l'affaire *La Reine c. Drybones*, précitée, les termes de cet article ont été interprétés dans le passage suivant, à la p. 294:

> Il me semble qu'il faut donner à ces mots un sens plus réaliste; à mon avis, ils indiquent très clairement que l'art. 2 veut dire, et signifie effectivement que, une loi du Canada ne peut être «raisonnablement interprétée et appliquée» sans supprimer, restreindre ou enfreindre un des droits ou libertés reconnus et proclamés dans la *Déclaration*, une telle loi est inop

Bill, then such law is inoperative 'unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*'.

Accordingly, in my opinion, the question to be determined in these appeals is confined to deciding whether the Parliament of Canada in defining the prerequisites of Indian status so as not to include women of Indian birth who have chosen to marry non-Indians, enacted a law which cannot be sensibly construed and applied without abrogating, abridging or infringing the rights of such women to equality before the law.

In my view the meaning to be given to the language employed in the *Bill of Rights* is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that the phrase "equality before the law" is to be contrued in light of the law existing in Canada at that time.

In considering the meaning to be attached to "equality before the law" as those words occur in section 1(*b*) of the Bill, I think it important to point out that in my opinion this phrase is not effective to invoke the egalitarian concept exemplified by the 14th Amendment of the U.S. Constitution as interpreted by the courts of that country. (See *Smythe* v. *The Queen*[8] per Fauteux C.J. at pp. 683 and 686). I think rather that, having regard to the language employed in the second paragraph of the preamble to the *Bill of Rights*, the phrase "equality before the law" as used in s. 1 is to be read in its context as a part of "the rule of law" to which overriding authority is accorded by the terms of that paragraph.

In this connection I refer to *Stephens Commentaries on the Laws of England*, 21st Ed. 1950, where it is said in Vol. III at p. 337:

Now the great constitutional lawyer Dicey writing in 1885 was so deeply impressed by the absence of arbitrary governments present and past, that he coined the phrase 'the rule of law' to express the regime under which Englishmen lived; and he tried to give precision to it in the following words which have

[8] [1971] S.C.R. 680.

rante «à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des Droits*».

Par conséquent, à mon avis, la question à trancher dans ces pourvois se limite à décider si le Parlement du Canada, en définissant les conditions préalables au statut d'Indien de façon à ne pas inclure les femmes de naissance indienne qui ont décidé d'épouser des non-Indiens, a édicté une loi impossible à interpréter et à appliquer de façon sensée sans supprimer, restreindre ou enfreindre les droits de ces femmes à l'égalité devant la loi.

Selon moi, le sens à donner au libellé de la *Déclaration des droits* est celui qu'il avait au Canada à l'époque de l'adoption de la Déclaration, et il s'ensuit que l'expression «égalité devant la loi» doit s'interpréter à la lumière de la loi en vigueur au Canada à ce moment-là.

Lorsqu'on considère le sens qu'il faut attacher aux mots «égalité devant la loi» figurant à l'al. *b*) de l'art. 1 de la Déclaration, je crois important de signaler qu'à mon sens ces termes ne sont pas efficaces pour invoquer le concept égalitaire illustré par le 14e Amendement de la Constitution des États-Unis tel qu'interprété par les tribunaux de ce pays-là. (Voir *Smythe c. La Reine*[8], Juge en chef Fauteux, pp. 683 et 686). Je crois plutôt que, compte tenu des termes employés dans le second alinéa du préambule de la *Déclaration des droits*, l'expression «égalité devant la loi» se trouvant à l'art. 1 doit se lire dans son contexte, comme une partie du «règne du droit» auquel les termes de cet alinéa accordent une autorité prépondérante.

A cet égard, je me réfère à *Stephens Commentaries on the Laws of England*, 21e éd. 1950, où il est dit dans le volume III, à la p. 337:

[TRADUCTION] Ainsi le grand spécialiste en droit constitutionnel, Dicey, qui écrivait en 1885, était si profondément impressionné par l'absence de gouvernements arbitraires, tant à l'époque que dans le passé, qu'il a créé l'expression «*the rule of law*» (le règne du droit) pour parler du régime sous lequel vivait l'An-

[8] [1971] R.C.S. 680.

exercised a profound influence on all subsequent thought and conduct.

> 'That the "rule of law" which forms a fundamental principle of the constitution has three meanings or may be regarded from three different points of view . . . .'

The second meaning proposed by Dicey is the one with which we are here concerned and it was stated in the following terms:

> It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts.

"Equality before the law" in this sense is frequently invoked to demonstrate that the same law applies to the highest official of government as to any other ordinary citizen, and in this regard Professor F. R. Scott, in delivering the Plaunt Memorial Lectures on Civil Liberties and Canadian Federalism in 1959, speaking of the case of *Roncarelli v. Duplessis*[9], had occasion to say:

> It is always a triumph for the law to show that it is applied equally to all without fear or favour. This is what we mean when we say that all are equal before the law.

The relevance of these quotations to the present circumstances is that "equality before the law" as recognized by Dicey as a segment of the rule of law, carries the meaning of equal subjection of all classes to the ordinary law of the land *as administered by the ordinary courts*, and in my opinion the phrase "equally before the law" as employed in section 1(*b*) of the *Bill of Rights* is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land. This construction is, in my view, supported by the provisions of subsec-

[9] [1959] S.C.R. 121.

glais; et il a tenté de la préciser dans les terme suivants, qui ont exercé une profonde influence su toute la pensée et la conduite subséquente.

> «Que le «règne du droit» qui constitue un princip fondamental de la constitution à trois sens, ou peu être envisagé sous trois points de vu différents . . .»

Le second sens proposé par Dicey est celui q nous occupe ici et il l'a couché dans les terme suivants:

> [TRADUCTION] Un autre sens est celui d'égalité devar la loi ou d'assujettissement égal de toutes les classe au droit commun du pays appliqué par les tribunau ordinaires; le «règne du droit», dans ce sens, excl l'idée d'une exemption de fonctionnaires ou d'autre personnes du devoir d'obéissance à la loi auquel so assujettis les autres citoyens, ou de la compéten des tribunaux ordinaires.

«L'égalité devant la loi», dans ce sens, e souvent invoquée pour démontrer que la mêr loi s'applique aussi bien aux plus hauts fonctio naires du gouvernement qu'à tout autre citoy ordinaire, et à cet égard le professeur F. Scott, dans les cours donnés dans le cadre d Plaunt Memorial Lectures sur les libertés civil et le fédéralisme canadien, en 1959, eut l'occ sion de dire en parlant de l'affaire *Roncarelli Duplessis*[9],

> [TRADUCTION] C'est toujours un triomphe pour la de montrer qu'elle est appliquée à tous égalemе sans crainte ni favoritisme. C'est ce que nous ent dons quand nous disons que tous sont égaux dev la loi.

La pertinence de ces citations dans les p sentes circonstances est que «l'égalité devan loi», reconnue par Dicey comme une partie «règne du droit», comporte le sens d'assujet sement égal de toutes les classes au d commun du pays *appliqué par les tribun ordinaires*, et à mon avis, l'expression «ég devant la loi» qui figure à l'art. 1, al. *b*) d *Déclaration des droits* doit être traitée com signifiant égalité dans l'administration ou l'ap cation de la loi par les fonctionnaires chargé son application et par les tribunaux ordin du pays. Cette interprétation est, à mon

[9] [1959] R.C.S. 121.

tions (*a*) to (*g*) of s. 2 of the Bill which clearly indicate to me that it was equality in the administration and enforcement of the law with which Parliament was concerned when it guaranteed the continued existence of "equality before the law".

Turning to the *Indian Act* itself, it should first be observed that by far the greater part of that Act is concerned with the internal regulation of the lives of Indians on Reserves and that the exceptional provisions dealing with the conduct of Indians off Reserves and their contacts with other Canadian citizens fall into an entirely different category.

It was, of course necessary for Parliament, in the exercise of section 91(24) authority, to first define what Indian meant, and in this regard s. 2(1) of the Act provides that:

'Indian' means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

It is therefore clear that registration is a necessary prerequisite to Indian status and in order to fully appreciate the nature of the issue raised by the respondents, I think it desirable to consider s. 12(1)(*b*) in the context of ss. 11 and 12 of the Act which provide:

11. (1) Subject to section 12, a person is entitled to be registered if that person

(*a*) on the 26th day of May 1874 was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

(*b*) is a member of a band

étayée par les dispositions des alinéas *a*) à *g*) de l'art. 2 de la Déclaration qui indiquent clairement, selon moi, que c'est l'égalité dans l'administration et l'application de la loi qui était la préoccupation du Parlement lorsqu'il a garanti que se continuerait l'existence de «l'égalité devant la loi».

Passant à la *Loi sur les Indiens* elle-même, il est bon d'observer en premier lieu que la très grande partie de cette Loi porte sur la réglementation interne de la vie des Indiens dans les réserves et que les dispositions d'exception visant la conduite des Indiens hors des réserves et leurs relations avec d'autres citoyens canadiens tombent dans une catégorie entièrement différente.

Il était évidemment nécessaire que le Parlement, dans l'exercice des pouvoirs conférés par l'art. 91, par. (24), définisse d'abord ce que signifie «Indien», et à cet égard l'art. 2, par. (1) de la Loi édicte que:

«Indien» signifie une personne qui, conformément à la présente loi, est inscrite à titre d'Indien ou a droit de l'être.

Il est donc clair que l'enregistrement est une condition préalable nécessaire au statut d'Indien et, afin d'apprécier pleinement la nature de la question soulevée par les intimées, je crois souhaitable d'étudier l'al. *b*) du par. (1) de l'art. 12, dans le contexte des art. 11 et 12 de la Loi qui prévoient:

11. (1) Sous réserve de l'article 12, une personne a droit d'être inscrite si

a) elle était, le 26 mai 1874, aux fins de la loi alors intitulée: *Acte pourvoyant à l'organisation du Département du Secrétaire D'État du Canada, ainsi qu'à l'administration des Terres des Sauvages et de l'Ordonnance*, chapitre 42 des Statuts du Canada de 1868, modifiée par l'article 6 du chapitre 6 des Statuts du Canada de 1869 et par l'article 8 du chapitre 21 des Statuts du Canada de 1874, considérée comme ayant droit à la détention, l'usage ou la jouissance des terres et autres biens immobiliers appartenant aux tribus, bandes ou groupes d'Indiens au Canada, ou affectés à leur usage;

b) elle est membre d'une bande

(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

(*c*) is a male person who is a direct descendant in the male line of a male person described in paragraph (*a*) or (*b*);

(*d*) is the legitimate child of

(i) a male person described in paragraph (*a*) or (*b*), or

(ii) a person described in paragraph (*c*);

(*e*) is the illegitimate child of a female person described in paragraph (*a*), (*b*) or (*d*); or

(*f*) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (*a*), (*b*), (*c*), (*d*) or (*e*).

(2) Paragraph (1)(*e*) applies only to persons born after the 13th day of August 1956. R.S., c. 149, s. 11; 1956, c. 40, s. 3.

12. (1) The following persons are not entitled to be registered, namely,

(*a*) a person who

(i) has received or has been alloted halfbreed lands or money scrip,

(ii) is a descendant of a person described in subparagraph (i),

(iii) is enfranchised, or

(iv) is a person born of a marriage entered into after the 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(*a*), (*b*) or (*d*) or entitled to be registered by virtue of paragraph 11(1)(*e*),

unless, being a woman, that person is the wife or widow of a person described in section 11, and

(*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

Provision for the loss of status by women who marry non-Indians was first introduced in 1869 by section 6 of chapter 6 of the Statutes of Canada of that year which reads as follows:

(i) à l'usage et au profit communs de laquelle des terres ont été mises de côté ou, depuis le 26 mai 1874, ont fait l'objet d'un traité les mettant de côté, ou

(ii) que le gouverneur en conseil a déclarée une bande aux fins de la présente loi;

c) elle est du sexe masculin et descendante directe dans la ligne masculine, d'une personne du sexe masculin décrite à l'alinéa *a*) ou *b*);

d) elle est l'enfant légitime

(i) d'une personne du sexe masculin décrite à l'alinéa *a*) ou *b*); ou

(ii) d'une personne décrite à l'alinéa *c*);

e) elle est l'enfant illégitime d'une personne de sexe féminin décrite à l'alinéa *a*), *b*) ou *d*); ou

f) elle est l'épouse ou la veuve d'une personne ayant le droit d'être inscrite aux termes de l'alinéa *a*), *b*), *c*), *d*) ou *e*).

(2) L'alinéa (1)*e*) s'applique seulement aux personnes nées après le 13 août 1956. S.R., c. 149, art. 11; 1956, c. 40, art. 3.

12. (1) Les personnes suivantes n'ont pas le droit d'être inscrites, savoir:

a) une personne qui

(i) a reçu, ou à qui il a été attribué, des terres ou certificats d'argent de métis,

(ii) est un descendant d'une personne décrite au sous-alinéa (i),

(iii) est émancipée, ou

(iv) est née d'un mariage contracté après le 4 septembre 1951 et a atteint l'âge de vingt et un ans, dont la mère et la grand-mère paternelle ne sont pas des personnes décrites à l'alinéa 11(1)*a*), *b*) ou *d*) ou admises à être inscrites en vertu de l'alinéa 11(1)*e*),

sauf si, étant une femme, cette personne est l'épouse ou la veuve de quelqu'un décrit à l'article 11, et

b) une femme qui a épousé un non-Indien sauf si cette femme devient subséquemment l'épouse ou la veuve d'une personne décrite à l'article 11.

Une disposition prévoyant la perte de statut par les femmes qui épousent des non-Indiens a été adoptée la première fois en 1869 à l'article 6 du chapitre 6 des Statuts du Canada de cette année-là qui se lit comme suit:

Provided always that any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act; Provided also, that any Indian woman marrying an Indian of another tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father's tribe only.

It is thus apparent that the marital status of Indian women who marry non-Indians has been the same for at least one hundred years and that their loss of Band status on marriage to a member of another Band and acquisition of status in that Band, for which provision is made under s. 14 of the *Indian Act*, has been in effect for the same period.

The first 41 sections of the *Indian Act* are concerned with the status of Indians and the administration of Indian Reserves, including the detailed provisions to which I have referred with respect to the status of those entitled to the use and benefit of the lands of which they are composed.

The Act then proceeds to the enactment of laws governing the use and disposition of all property of Indians whether real or personal (see sections 42 to 86), and s. 87 deals with conditions under which property of Indians on Reserves is exempt from taxation.

Relations between Indians and non-Indians are first considered under the following headings:

Legal Rights of Indians (s. 88 to 90);
Trading with Indians (s. 91 to 92);
Removal of materials from Reserves (s. 93);
Sale of intoxicants to and possession thereof by Indians (s. 94 to 97);

and forfeitures and penalties for breach of these sections are dealt with in ss. 103 and 104. The remainder of the statute is concerned almost exclusively with the topic of enfran-

Mais toute femme Sauvage qui se mariera à un autre qu'un Sauvage, cessera d'être une Sauvage dans le sens du présent acte, et les enfants issus de ce mariage ne seront pas non plus considérés comme Sauvages dans le sens du présent acte; pourvu aussi que toute femme Sauvage qui se mariera à un Sauvage d'une autre nation, tribu ou peuplade cessera d'être membre de la nation, tribu ou peuplade à laquelle elle appartenait jusque là, et deviendra membre de la nation, tribu ou peuplade à laquelle appartient son mari; et les enfants issus de ce mariage seront membres de la tribu de leur père seulement.

Il est donc clair que l'état matrimonial des Indiennes qui épousent des non-Indiens est le même depuis au moins cent ans, et que le fait qu'elles cessent d'être membres de la bande par suite d'un mariage avec un membre d'une autre bande et deviennent membre de cette dernière bande, comme le prévoit l'art. 14 de la *Loi sur les Indiens*, découle d'une disposition en vigueur depuis la même époque.

Les 41 premiers articles de la *Loi sur les Indiens* concernent le statut des Indiens et l'administration des réserves indiennes, y compris les dispositions détaillées que j'ai mentionnées relativement au statut des personnes ayant droit à l'usage et au profit des terres dont elles sont composées.

La Loi contient ensuite des dispositions régissant l'usage et la disposition de tous les biens des Indiens, qu'ils soient mobiliers ou immobiliers (voir art. 42 à 86), et l'art. 87 prescrit les conditions en vertu desquelles les biens des Indiens dans des réserves sont exemptés de taxation.

Les rapports entre les Indiens et les non-Indiens sont d'abord considérés sous les titres suivants:

Droits légaux des Indiens (art. 88 à 90);
Commerce avec les Indiens (art. 91 à 92);
Enlèvement d'objets sur les réserves (art. 93);
Vente de spiritueux à des Indiens et possession de spiritueux par des Indiens (art. 94 à 97);

et les confiscations et peines pour la violation de ces articles sont prévues aux art. 103 et 104. Le reste de la loi concerne presque exclusi-

chisement, s. 109 to 113 and schools, s. 114 to 123.

A careful reading of the Act discloses that section 95 (formerly 94) is the only provision therein made which creates an offence for any behaviour of an Indian *off* a Reserve and it will be plain that there is a wide difference between legislation such as s. 12(1)(*b*) governing the civil rights of designated persons living on Indian Reserves to the use and benefit of Crown lands, and criminal legislation such as s. 95 which creates an offence punishable at law for Indians to act in a certain fashion when *off* a Reserve. The former legislation is enacted as a part of the plan devised by Parliament, under s. 91(24) for the regulation of the internal domestic life of Indians on Reserves. The latter is criminal legislation exclusively concerned with behaviour of Indians *off* a Reserve.

Section 95 (formerly s. 94) reads, in part, as follows:

95. An Indian who . . .

(*b*) is intoxicated . . .

off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.

These were the provisions that were at issue in the case of *The Queen v. Drybones*, *supra*, where this Court held that they could not be construed and applied without exposing Indians as a racial group to a penalty in respect of conduct as to which the Parliament of Canada had imposed no sanctions on other Canadians who were subject to Canadian laws regulating their conduct, which were of general application in the Northwest Territories where the offence was allegedly committed and in which there are no Indian Reserves.

vement la question de l'émancipation, art. 109 à 113, et des écoles, art. 114 à 123.

Une lecture attentive de la Loi révèle que l'art. 95 (l'ancien art. 94) est la seule disposition qui crée une infraction relativement au comportement d'un Indien *hors* d'une réserve et il apparaîtra clairement qu'il existe une grande différence entre des dispositions comme l'al. *b* du par. (1) de l'art. 12 régissant, quant à l'usage et aux avantages de terres de la Couronne, les droits civils de personnes désignées vivant dans des réserves indiennes, et des dispositions de nature criminelle comme l'art. 95, qui rend infraction punissable en justice un certain comportement de la part d'Indiens *hors* d'une réserve. Les dispositions mentionnées en premier lieu sont adoptées comme partie du programme conçu par le Parlement, en vertu du par. (24) de l'art. 91, en vue de la réglementation de la vie interne et domestique des Indiens à l'intérieur des réserves. Le dernier genre de dispositions constitue une législation de nature criminelle et s'adresse exclusivement au comportement des Indiens *hors* d'une réserve.

L'article 95 (l'ancien art. 94) se lit, en partie, comme suit:

95. Un Indien qui . . .

b) est ivre . . .

hors d'une réserve, est coupable d'une infraction passible, sur déclaration sommaire de culpabilité, d'une amende d'au moins dix dollars et d'au plus cinquante dollars ou d'un emprisonnement n'excédant pas trois mois, ou de l'amende et de l'emprisonnement à la fois.

Ces dernières dispositions étaient celles en litige dans l'affaire *La Reine c. Drybones*, précitée, dans laquelle cette Cour a décidé qu'elles ne pouvaient être interprétées et appliquées sans exposer les Indiens en tant que groupe racial à une peine relativement à un comportement pour lequel le Parlement du Canada n'avait imposé aucune sanction aux autres Canadiens qui étaient assujettis aux lois canadiennes régissant le comportement, lesquelles étaient d'application générale dans les territoires du Nord-Ouest où l'infraction avait, semble-t-il, été commise et où il n'y a pas de réserves indiennes.

In that case the decision of the majority of this Court was that the provisions of s. 94(*b*), as it then was, could not be enforced without bringing about inequality between one group of citizens and another and that this inequality was occasioned by reason of the race of the accused. It was there said, at page 297:

. . . I am . . . of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

It is only necessary for the purpose of deciding this case for me to say that in my opinion s. 94(*b*) of the *Indian Act* is a law of Canada which creates such an offence and that it can only be construed in such manner that its application would operate so as to abrogate, abridge or infringe one of the rights declared and recognized by the *Bill of Rights*. For the reasons which I have indicated, I am therefore of opinion that s. 94(*b*) is inoperative.

For the purpose of determining the issue raised by this appeal it is unnecessary to express any opinion respecting the operation of any other section of the *Indian Act*.

And it was later said:

The present case discloses laws of Canada which abrogate, abridge and infringe the right of an individual Indian to equality before the law and in my opinion if those laws are to be applied in accordance with the express language used by Parliament in s. 2 of the *Bill of Rights*, then s. 94(*b*) of the *Indian Act* must be declared to be inoperative.

It appears to me to be desirable to make it plain that these reasons for judgment are limited to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity; in my opinion the same considerations do not by any means apply to all the provisions of the *Indian Act*.

Having regard to the express reservations contained in these passages, I have difficulty in understanding how that case can be construed as having decided that any sections of the

Dans cette affaire-là, la majorité en cette Cour a décidé que les dispositions de l'al. *b*) de l'art. 94, tel qu'il était conçu à l'époque, ne pouvaient être appliquées sans créer de l'inégalité entre un groupe de citoyens et un autre, et que cette inégalité était occasionnée en raison de la race de l'accusé. On a dit ceci, p. 297:

. . . J'en conclus . . . qu'une personne est privée de l'égalité devant la loi, si pour elle, à cause de sa race, un acte qui, pour ses concitoyens canadiens, n'est pas une infraction et n'appelle aucune sanction devient une infraction punissable en justice.

Pour décider la présente affaire, il me suffit de dire qu'à mon avis l'art. 94 *b*) de la *Loi sur les Indiens*, qui est une loi du Canada, crée une telle infraction et qu'en l'interprétant on ne peut que conclure que son application supprime, restreint ou enfreint l'un des droits déclarés et reconnus dans la *Déclaration des droits*. Pour les motifs que je viens d'indiquer, je suis donc d'avis que l'art. 94 *b*) est inopérant.

Pour décider la question soulevée par le pourvoi, il n'est pas nécessaire d'exprimer une opinion sur l'application d'aucun autre article de la *Loi sur les Indiens*.

Et plus loin:

L'affaire présentement devant nous démontre qu'il existe des lois du Canada qui suppriment, restreignent et enfreignent le droit d'un Indien à l'égalité devant la loi et, à mon avis, afin d'appliquer ces lois en se conformant aux termes explicites employés par le Parlement à l'art. 2 de la *Déclaration des droits* il faut déclarer que l'art. 94 *b*) de la *Loi sur les Indiens* est inopérant.

Je crois utile d'affirmer clairement que ces motifs s'appliquent seulement à un cas où, en vertu des lois du Canada, est réputé infraction punissable en droit, pour une personne, à cause de sa race, un acte que ses concitoyens canadiens qui ne sont pas de cette race peuvent poser sans encourir aucune sanction. A mon avis, cela est bien loin d'être applicable à toutes les dispositions de la *Loi sur les Indiens*.

Eu égard aux réserves expresses contenues dans ces passages, je comprends difficilement comment l'arrêt en question peut être interprété comme ayant décidé que des articles de la *Loi*

Indian Act, except s. 94(*b*) are rendered inoperative by the *Bill of Rights*.

The *Drybones* case can, in my opinion, have no application to the present appeals as it was in no way concerned with the internal regulation of the lives of Indians *on* Reserves or their right to the use and benefit of Crown lands thereon, but rather deals exclusively with the effect of the *Bill of Rights* on a section of the *Indian Act* creating a crime with attendant penalties for the conduct by Indians *off* a Reserve in an area where non-Indians, who were also governed by federal law, were not subject to any such restriction.

The fundamental distinction between the present case and that of *Drybones*, however, appears to me to be that the impugned section in the latter case could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary courts of the land to a racial group, whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application of s. 12(1)(*b*) of the *Indian Act*.

To summarize the above, I am of opinion:

1. That the *Bill of Rights* is not effective to render inoperative legislation, such as s. 12(1)(*b*) of the *Indian Act*, passed by the Parliament of Canada in discharge of its constitutional function under s. 91(24) of the *B.N.A. Act*, to specify how and by whom Crown lands reserved for Indians are to be used;

2. that the *Bill of Rights* does not require federal legislation to be declared inoperative unless it offends against one of the rights specifically guaranteed by section 1, but where legislation is found to be discriminatory, this affords an added reason for rendering it ineffective;

sur les Indiens, à part l'al. *b*) de l'art. 94, sont rendus inopérants par la *Déclaration des droits*.

L'arrêt *Drybones* ne peut, à mon avis, recevoir d'application dans les présents pourvois puisqu'il ne vise d'aucune façon la réglementation interne de la vie des Indiens dans des réserves, ou leur droit à l'usage et aux avantages de terres de la Couronne situées dans celles-ci, mais plutôt traite exclusivement de l'effet de la *Déclaration des droits* sur un article de la *Loi sur les Indiens* créant une infraction criminelle et des peines connexes relativement à la conduite d'Indiens *hors* d'une réserve dans une zone où les non-Indiens, également régis par les lois fédérales, n'étaient assujettis à aucune semblable restriction.

Cependant, la distinction fondamentale entre la présente affaire et l'affaire *Drybones* me paraît être que l'article incriminé dans cette dernière affaire ne pouvait recevoir d'application sans que soit déniée à un groupe racial l'égalité de traitement dans l'administration et l'application de la loi devant les tribunaux ordinaires du pays, tandis qu'aucune semblable inégalité de traitement entre Indiens et Indiennes ne résulte nécessairement de l'application de l'al. *b*) du par. (1) de l'art. 12 de la *Loi sur les Indiens*.

Pour résumer ce qui précède, je suis d'avis:

1. Que la *Déclaration des droits* n'a pas pour effet de rendre inopérante une législation, telle que l'al. *b*) du par. (1) de l'art. 12 de la *Loi sur les Indiens*, adoptée par le Parlement du Canada dans l'exercice de ses devoirs constitutionnels en vertu du par (24) de l'art. 91 de l'*acte de l'A.N.B.* aux fins de préciser comment et par qui les terres de la Couronne réservées aux Indiens doivent être utilisées;

2. que la *Déclaration des droits* ne requiert pas qu'une législation fédérale soit déclarée inopérante à moins qu'elle n'enfreigne l'un des droits spécifiquement garantis par l'article 1, mais que lorsqu'une législation est jugée discriminatoire cela fournit une raison de plus de la rendre sans effet;

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3. that equality before the law under the *Bill of Rights* means equality of treatment in the enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary courts of the land, and no such inequality is necessarily entailed in the construction and application of s. 12(1)(*b*).

I would allow the appeal of the *Attorney General of Canada against J. V. Corbiere Lavell*, reverse the judgment of the Federal Court of Appeal and restore the decision of Judge B. W. Grossberg. In accordance with the terms of the order of the Federal Court of Appeal granting leave to appeal to this Court, the appellant will pay to the respondent her solicitor and client costs of the appeal and the application for leave. There should be no further order as to costs.

On the appeal of *Richard Isaac and others v. Yvonne Bedard*, a question was raised in this Court as to the jurisdiction of the trial court. In view of the conclusion reached on the merits, no decision is now necessary on that question. The appeal to this Court should be allowed, the judgment at trial should be reversed and the action dismissed. Under the circumstances, there should be no order as to costs in that case in any court.

ABBOTT J. (*dissenting*)—The facts which are not in dispute are set out in the reasons of Ritchie and Laskin JJ. which I have had the advantage of reading. I am in agreement with the reasons of Laskin J. and wish to add only a few observations.

I share his view that the decision of this Court in *The Queen v. Drybones*[10] cannot be distinguished from the two cases under appeal although in these two appeals the consequences of the discrimination by reason of sex under s. 12(1)(*b*) of the *Indian Act* are more serious than the relatively minor penalty for the drinking

[10] [1970] S.C.R. 282.

3. que l'égalité devant la loi en vertu de la *Déclaration des droits* veut dire égalité de traitement dans l'application des lois du Canada devant les fonctionnaires chargés d'appliquer la loi et devant les tribunaux ordinaires du pays, et que l'interprétation et l'application de l'al. *b*) du par. (1) de l'art. 12 ne comporte nécessairement aucune inegalité semblable.

Je suis d'avis d'accueillir le pourvoi du *Procureur général du Canada contre J. V. Corbiere Lavell*, d'infirmer l'arrêt de la Cour d'appel fédérale et de rétablir la décision du Juge B. W. Grossberg. Conformément aux conditions de l'ordonnance de la Cour d'appel fédérale autorisant l'appel à cette Cour, l'appelant devra payer à l'intimée les dépens procureur-client qu'elle a subis dans le pourvoi et dans la demande d'autorisation. Il n'y a lieu à aucune autre adjudication de dépens.

Relativement au pourvoi de *Richard Isaac et d'autres c. Yvonne Bédard*, on a soulevé en cette Cour une question relative à la compétence du tribunal de première instance. Vu la conclusion tirée sur le fond, aucune décision n'est maintenant nécessaire sur cette question. Le pourvoi à cette Cour devrait être accueilli, le jugement de première instance infirmé et l'action rejetée. Dans les circonstances, il n'y a pas lieu à une adjudication de dépens en cette affaire-là dans aucune cour.

LE JUGE ABBOTT (*dissident*)—Les faits qui ne sont pas contestés sont relatés dans les motifs de MM. les Juges Ritchie et Laskin que j'ai eu l'avantage de lire. Je suis d'accord avec les motifs du Juge Laskin et j'ajouterai seulement quelques observations.

Je partage son opinion que la décision de cette Cour dans *R. c. Drybones*[10] ne se distingue pas des deux causes en appel, même si dans ces deux appels les conséquences de la discrimination en raison du sexe, sous le régime de l'art. 12, par. (1), al. *b*) de la *Loi sur les Indiens*, sont plus graves que la sanction comparativement

[10] [1970] R.C.S. 282.

offence under s. 94 of the *Act* which was in issue in *Drybones*.

In that case, this Court rejected the contention that s. 1 of the *Canadian Bill of Rights* provided merely a canon of construction for the interpretation of legislation existing when the Bill was passed. With respect I cannot interpret "equality before the law" as used in s. 1(*b*) of the Bill as meaning simply "the equal subjection of all classes to the ordinary law of the land as administered by the ordinary courts" to use the language of Dicey which is quoted in the reasons of Ritchie J.

Unless the words "without discrimination by reason of race, national origin, colour, religion or sex" used in s. 1 are to be treated as mere rhetorical window dressing, effect must be given to them in interpreting the section. I agree with Laskin J. that s. 1(*b*) must be read as if those words were recited therein.

In my view the *Canadian Bill of Rights* has substantially affected the doctrine of the supremacy of Parliament. Like any other statute it can of course be repealed or amended, or a particular law declared to be applicable notwithstanding the provisions of the Bill. In form the supremacy of Parliament is maintained but in practice I think that it has been substantially curtailed. In my opinion that result is undesirable, but that is a matter for consideration by Parliament not the courts.

Ritchie J. said in his reasons for judgment in *Drybones* that the implementation of the *Bill of Rights* by the courts can give rise to great difficulties and that statement has been borne out in subsequent litigation. Of one thing I am certain the Bill will continue to supply ample grist to the judicial mills for some time to come.

I would dismiss both appeals with costs.

légère prévue pour le délit de consommation de spiritueux de l'art. 94 de la Loi qui était en litige dans l'affaire *Drybones*.

Dans cette cause-là, cette Cour a rejeté la prétention que l'art. 1 de la *Déclaration canadienne des droits* établissait simplement des règles d'interprétation pour les lois existant lors de l'adoption de la Déclaration. Respectueusement, je ne puis interpréter les mots «égalité devant la loi», tels qu'ils sont employés à l'al. *b*) de l'art. 1 de la Déclaration, comme signifiant simplement «l'assujettissement égal de toutes les classes au droit commun du pays appliqué par les tribunaux ordinaires», pour reprendre les termes de Dicey cités dans les motifs du Juge Ritchie.

A moins que les mots «quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe» figurant à l'art. 1 doivent être traités simplement comme fleurs de rhétorique il faut leur donner effet en interprétant l'article. Je suis d'accord avec le Juge Laskin que l'al. *b*) de l'art. 1 doit s'interpréter comme si ces mots y étaient insérés.

A mon avis, la *Déclaration canadienne des droits* a porté atteinte de façon importante à la doctrine de la suprématie du Parlement. Comme toute autre loi, elle peut évidemment être abrogée ou modifiée, ou une loi particulière être déclarée applicable nonobstant les dispositions de la Déclaration. Dans l'abstrait la suprématie du Parlement est maintenue, mais dans la pratique je crois qu'elle a été réduite de façon importante. A mon avis, c'est là un résultat indésirable, mais c'est une question qui relève du Parlement et non des tribunaux.

M. le Juge Ritchie a dit dans ses motifs de jugement dans l'affaire *Drybones* que l'application judiciaire de la *Déclaration des droits* peut donner lieu à de grandes difficultés et des litiges subséquents ont prouvé le bien-fondé de cette observation. Je suis certain d'une chose, c'est que la Déclaration continuera encore pendant un certain temps à amener beaucoup d'eau au moulin judiciairement parlant.

Je rejetterais les deux appels avec dépens.

The judgment of Hall, Spence and Laskin JJ. was delivered by

LASKIN J. (*dissenting*)—These two appeals, which are here by leave respectively of the Federal Court of Appeal (as to *Attorney General of Canada v. Lavell*, under s. 31(2) of the *Federal Court Act*, 1970 (Can.), c. 1) and of this Court (as to *Isaac et al v. Bédard*, under s. 39 of the *Supreme Court Act*, R.S.C. 1970, c. S-19, as enacted by R.S.C. 1970, 1st Supp., c. 44, s. 2) involve consideration again of the principles governing the application of the *Canadian Bill of Rights*, 1960 (Can.), c. 44, as laid down by this Court in *The Queen v. Drybones*[1]. In my opinion, unless we are to depart from what was said in *Drybones*, both appeals now before us must be dismissed. I have no disposition to reject what was decided in *Drybones*; and on the central issue of prohibited discrimination as catalogued in s. 1 of the *Canadian Bill of Rights*, it is, in my opinion, impossible to distinguish *Drybones* from the two cases in appeal. If, as in *Drybones*, discrimination by reason of race makes certain statutory provisions inoperative, the same result must follow as to statutory provisions which exhibit discrimination by reason of sex.

The issues in both appeals are, in the main, as simple as that. They focus on s. 12(1)(*b*) of the *Indian Act*, R.S.C. 1970, c. I-6 which is as follows:

12. (1) The following persons are not entitled to be registered, namely,

. . .

(*b*) a woman who married a person who is not an Indian, unless the woman is subsequently the wife or widow of a person described in section 11.

[1] [1970] S.C.R. 282.

Le jugement des Juges Hall, Spence et Laskin a été rendu par

LE JUGE LASKIN (*dissident*)—Ces deux appels, qui sont devant cette Cour sur autorisation de la Cour d'appel fédérale (dans l'affaire *Attorney General of Canada c. Lavell*, en vertu du par. (2) de l'art. 31 de la *Loi sur la Cour fédérale*, 1970 (Can.), c. 1) et de cette Cour (dans l'affaire *Isaac et d'autres c. Bédard*, en vertu de l'art. 39 de la *Loi sur la Cour suprême*, S.R.C. 1970, c. S-19, tel qu'édicté par S.R.C. 1970, 1er Supp., c. 44, art. 2) respectivement, requièrent encore une fois l'examen des principes régissant l'application de la *Déclaration canadienne des droits*, 1960 (Can.), c. 44, tels qu'ils ont été exposés par cette Cour dans l'affaire *Regina c. Drybones*[1]. A mon avis, à moins que nous devions nous écarter de ce qui a été dit dans l'affaire *Drybones*, les deux appels qui sont maintenant devant nous doivent être rejetés. Je n'ai aucune inclination à rejeter ce qui a été décidé dans l'arrêt *Drybones*; et sur la question centrale de la discrimination prohibée cataloguée dans l'art. 1 de la *Déclaration canadienne des droits*, il est, à mon avis, impossible de considérer l'affaire *Drybones* comme différente des deux affaires en appel. Si, comme dans l'affaire *Drybones*, la discrimination en raison de la race rend certaines dispositions législatives inopérantes, le même résultat doit s'ensuivre quant aux dispositions législatives qui dénotent la discrimination en raison du sexe.

Les questions en litige dans les deux appels sont, pour le principal, aussi simples que ça. Elles se rattachent à l'al. *b*) du par. (1) de l'art. 12 de la *Loi sur les Indiens*, S.R.C. 1970, c. I-6, qui est le suivant:

[TRADUCTION] 12. (1) Les personnes suivantes n'ont pas le droit d'être inscrites, savoir,

. . .

b) une femme qui a épousé un non-Indien, sauf si cette femme devient l'épouse ou la veuve d'une personne décrite à l'article 11.

[1] [1970] R.C.S. 282.

There are other provisions of the Act to which I will refer later in these reasons but for the moment it is enough to say that no similar disqualification is visited upon an Indian man who marries a non-Indian woman.

In the *Lavell* case, the Federal Court of Appeal held that s. 12(1)(*b*) was inoperative in purporting to disentitle the respondent, born an Indian, to continued registration as a member of the Wikwemikong Band of Indians because she had married a man who was not an Indian. The marriage took place on April 11, 1970 and on December 7, 1970, the respondent's name was removed from the Band membership list by the Registrar under the *Indian Act*. After protest by the respondent and denial thereof by the Registrar, the matter was referred for review to Judge B. W. Grossberg, of the York County Court pursuant to s. 9(3) of the *Indian Act*. Judge Grossberg in his reasons concluded that there was no violation of s. 12(1)(*b*) of the *Canadian Bill of Rights* because the respondent on her marriage had equality in that status with all other Canadian married females, both as to rights and obligations. He rejected the contention that discrimination by reason of sex within the class of Indians brought the *Canadian Bill of Rights* into play. There was, in his opinion, no inequality before the law when the respondent was in no different position than other fellow Canadians who were married females. This decision was reversed by the Federal Court of Appeal which held that because the *Indian Act* prescribed a different result in the case of an Indian woman who married a non-Indian man from that which followed when an Indian man married a non-Indian woman, there was discrimination by reason of sex in violation of the *Canadian Bill of Rights*; and, further, that this discrimination infringed the respondent's right to equality with other Indians before the law.

In *Isaac et al v. Bédard*, Osler J. of the Ontario Supreme Court also held that s. 12(1)(*b*)

Il existe d'autres dispositions de la Loi auxquelles je vais me reporter plus loin dans les présents motifs mais pour l'instant il suffit de dire qu'aucune semblable exclusion ne frappe un Indien de sexe masculin qui épouse une non-Indienne.

Dans l'affaire *Lavell*, la Cour d'appel fédérale a statué que l'al. *b*) du par. (1) de l'art. 12 était inopérant en visant à priver l'intimée, Indienne de naissance, du droit de continuer à être inscrite comme membre de la bande Wikwemikong, pour avoir épousé un non-Indien. Le mariage a été célébré le 11 avril 1970, et, le 7 décembre 1970, le registraire a retranché le nom de l'intimée de la liste de bande en vertu de la *Loi sur les Indiens*. Après qu'une protestation eut été faite par l'intimée et qu'un refus eut été opposé par le registraire, l'affaire a été renvoyée pour révision au juge B. W. Grossberg, de la Cour du comté de York, en vertu du par. (3) de l'art. 9 de la *Loi sur les Indiens*. Dans ses motifs, le Juge Grossberg a conclu qu'il n'y avait pas violation de l'al. *b*) du par. (1) de l'art. 12 de la *Déclaration canadienne des droits* parce que l'intimée, en se mariant, était sur un pied d'égalité dans ce statut de femme mariée avec toutes les autres Canadiennes mariées, à la fois quant aux droits et quant aux obligations. Il a rejeté la prétention que la discrimination en raison du sexe à l'intérieur d'une catégorie d'Indiens mettait en jeu la *Déclaration canadienne des droits*. A son avis, il n'y avait pas inégalité devant la loi lorsque la position de l'intimée n'était pas différente de celle des autres citoyens canadiens qui étaient des femmes mariées. Cette décision a été infirmée par la Cour d'appel fédérale qui a statué que parce que la *Loi sur les Indiens* prescrit dans le cas d'une Indienne qui épouse un non-Indien un résultat différent de celui où un Indien épouse une non-Indienne, il y avait discrimination fondée sur le sexe contrairement à la *Déclaration canadienne des droits*, et, en outre, que cette discrimination violait le droit de l'intimée à l'égalité avec les autres Indiens devant la loi.

Dans l'arrêt *Isaac et al. v. Bedard*, le Juge Osler de la Cour suprême de l'Ontario a égal

of the *Indian Act* was inoperative, agreeing with the decision of the Federal Court of Appeal in the *Lavell* case which he considered to be in accordance with the *Drybones* case. In the *Bédard* case, as in the *Lavell* case, the respondent, born a full blooded Indian, had married a non-Indian man in 1964 but she separated from him in 1970 and returned with the two children of the marriage to the Six Nations Reserve where she had been born and took possession of a house which had been left to her under her mother's will, the terms of which had been approved, as required by the *Indian Act*, by the Council of the Six Nations and by an official on behalf of the Minister of Indian Affairs. The defendants, members of the Council, passed a number of resolutions purporting to give the respondent permission for successive limited periods to reside on the Reserve, but she was to dispose of the property during that time. On September 7, 1971, after having previously informed the respondent that there would be no further permission, the Council passed a resolution requesting the District Supervisor to serve a notice to quit on the respondent. Thereupon the respondent sued to enjoin her expulsion and also sought declaratory relief. The application for an injunction was later withdrawn and counsel agreed that a declaration only would be sought as against the members of the Band Council, the appellants in this Court. The respondent's name was removed from the membership list of her Band after she brought action but before delivery of her statement of claim.

ment statué que l'al. *b*) du par. (1) de l'art. 12 de la *Loi sur les Indiens* était inopérant, acceptant la décision de la Cour d'appel fédérale dans l'arrêt *Lavell* qu'il considérait conforme à l'arrêt *Drybones*. Dans l'arrêt *Bédard*, comme dans l'arrêt *Lavell*, l'intimée, une vraie Indienne de naissance, avait épousé un non-Indien en 1964 mais s'était séparée de lui en 1970 et était retournée avec les deux enfants issus du mariage à la réserve natale des Six Nations, où elle avait pris possession d'une maison qui lui avait été laissée en vertu du testament de sa mère, dont les dispositions avaient été approuvées, comme le requiert la *Loi sur les Indiens*, par le conseil des Six Nations et par un fonctionnaire au nom du ministre des Affaires indiennes. Les défendeurs, membres du conseil, avaient passé un certain nombre de résolutions censées donner à l'intimée la permission de résider dans la réserve pour des périodes de temps successives et limitées, mais elle devait disposer de la propriété durant cette période. Le 7 septembre 1971, après avoir au préalable informé l'intimée qu'il n'y aurait pas d'autre permission, le conseil a passé une résolution demandant au surveillant de district de signifier à l'intimée une intimation de quitter les lieux. L'intimée a alors demandé une injonction empêchant son expulsion et elle a aussi demandé un redressement déclaratoire. La demande d'injonction a par la suite été retirée et les avocats furent d'accord pour que seule une déclaration soit demandée contre les membres du conseil de la bande, les appelants en cette Cour. Le nom de l'intimée fut retranché de la liste des membres de sa bande après qu'elle eut intenté l'action mais avant que soit délivré l'exposé de sa demande.

Osler J. determined that "there is plainly discrimination by reason of sex with respect to the rights of an individual to the enjoyment of property"; and further that "the loss of status as an Indian and the loss of the right to be registered and to occupy property upon a Reserve is discrimination which is adverse to the interest of Indian women" and is in contravention of the *Canadian Bill of Rights*. He declared that all acts of the Council of the Band and of the

Le Juge Osler a statué que [TRADUCTION] «il y a clairement discrimination en raison du sexe relativement aux droits d'un individu à la jouissance du droit de propriété»; et de plus que [TRADUCTION] «la perte du statut d'indien et la perte du droit d'être inscrit et d'occuper une propriété sur une réserve constituent une discrimination qui est contraire aux intérêts des Indiennes» et va à l'encontre de la *Déclaration canadienne des droits*. Il a déclaré sans effet

District Supervisor purportedly based on s. 12(1)(*b*) were without effect.

In both cases, which were argued together, leave was given to various bodies and organizations and to a number of individuals to intervene by representation and by submissions to this Court. The position of the Attorney General of Canada in the *Lavell* case was supported by counsel appearing on behalf of The Indian Association of Alberta, The Union of British Columbia Indian Chiefs, The Manitoba Indian Brotherhood Inc., The Union of New Brunswick Indians, The Indian Brotherhood of the Northwest Territories, The Union of Nova Scotia Indians, The Union of Ontario Indians, The Federation of Saskatchewan Indians, The Indian Association of Quebec, The Yukon Native Brotherhood and The National Indian Brotherhood, by counsel appearing on behalf of the Six Nations Band and by counsel appearing on behalf of the Treaty Voice of Alberta Association. The position of the respondent was supported by counsel appearing for the Native Council of Canada, by counsel appearing for Rose Wilhelm, Alberta Committee on Indian Rights for Indian Women Inc., Viola Shannacappo, University Women's Club of Toronto and University Women Graduates Limited, The North Toronto Business and Professional Women's Club Inc. and Monica Agnes Turner, and by counsel for Anishnawbekwek of Ontario Incorporated. There was the same division of support for the appellants and the respondent in the *Bédard* case, in which the Attorney General of Canada also intervened to support the position of the appellants.

An issue of jurisdiction was raised in the *Bédard* case with which it will be convenient to deal at this point. That issue is whether it was open to Osler J., as a member of a provincial superior Court, to entertain an action for declaratory relief in this case, or whether exclusive jurisdiction resided in the Federal Court by virtue of s. 18 of the *Federal Court Act*, 1970 (Can.), c. 1. Osler J. was of the opinion that his

tous les actes du conseil de bande et du surveillant de district censés fondés sur l'al. *b*) du par. (1) de l'art. 12.

Dans les deux affaires, qui ont été plaidées ensemble, permission a été accordée à divers organismes et organisations et à un certain nombre d'individus d'intervenir devant cette Cour par représentation et de soumettre des prétentions. La position du procureur général du Canada dans l'affaire *Lavell* a été appuyée par l'avocat qui a comparu au nom de The Indian Association of Alberta, The Union of British Colombia Indian Chiefs, The Manitoba Indian Brotherhood Inc., The Union of New Brunswick Indians, The Indian Brotherhood of the Northwest Territories, The Union of Nova Scotia Indians, The Union of Ontario Indians, The Federation of Saskatchewan Indians, L'Association des Indiens du Québec, The Yukon Native Brotherhood et la Fraternité des Indiens du Canada, par l'avocat qui a comparu au nom de la bande des Six Nations et par l'avocat qui a comparu au nom de la Treaty Voice of Alberta Association. La position de l'intimée a été appuyée par l'avocat qui a comparu au nom du Conseil des autochtones du Canada, par celui qui a comparu au nom de Rose Whilhelm, Alberta Committee on Indian Rights for Indian Women Inc., Viola Shannacappo, University Women's Club of Toronto and University Women Graduates Limited, The North Toronto Business and Professional Women's Club Inc. et Monica Agnes Turner, et par l'avocat de Anishnawbekwek of Ontario Incorporated. Les appelants et l'intimée ont reçu les mêmes appuis dans l'arrêt *Bédard*, dans lequel le procureur général du Canada est également intervenu pour appuyer la position des appelants.

Dans l'affaire *Bédard*, on a soulevé une question de compétence qu'il conviendrait de commenter à ce stade-ci. La question était de savoir si le Juge Osler, en tant que membre d'une cour supérieure provinciale, était compétent en cette affaire pour connaître d'une action en jugement déclaratoire, ou si la Cour fédérale avait compétence exclusive en vertu de l'art. 18 de la *Loi sur la Cour fédérale*, 1970 (Can.), c. 1. Le Juge

jurisdiction as a Superior Court judge was not clearly taken away by s. 18 of the *Federal Court Act*, and he doubted also whether the Band Council was a "federal board, commission or other tribunal" within s. 2(g) of that Act.

I share the doubt of Osler J. whether a Band Council, even an elected one under s. 74 of the *Indian Act* (the Act also envisages that a Band Council may exist by custom of the Band), is the type of tribunal contemplated by the definition in s. 2(g) of the *Federal Court Act* which embraces "any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada". A Band Council has some resemblance to the board of directors of a corporation, and if the words of s. 2(g) are taken literally, they are broad enough to embrace boards of directors in respect of powers given to them under such federal statutes as the *Bank Act*, R.S.C. 1970, c. B-1, as amended, the *Canada Corporations Act*, R.S.C. 1970, c. C-32, as amended, and the *Canadian and British Insurance Companies Act*, R.S.C. 1970, c. I-15, as amended. It is to me an open question whether private authorities (if I may so categorize boards of directors of banks and other companies) are contemplated by the *Federal Court Act* under s. 18 thereof. However, I do not find it necessary to come to a definite conclusion here on whether jurisdiction should have been ceded to the Federal Court to entertain the declaratory action brought by Mrs. Bédard against the members of the Band Council. There is another ground upon which, in this case, I would not interfere with the exercise of jurisdiction by Osler J.

Although the *Indian Act* by s. 81, confers authority upon the Council of a Band to make by-laws for specified purposes, and it may also

Osler a été d'avis que l'art. 18 de la *Loi sur la Cour fédérale* ne lui avait pas clairement enlevé sa compétence comme juge d'une cour supérieure, et il n'était pas sûr non plus que le conseil de bande était un «office, commission ou autre tribunal fédéral» au sens de l'al. *g*) de l'art. 2 de cette Loi-là.

Je partage le doute exprimé par le Juge Osler sur la question de savoir si un conseil de bande, même s'il a été élu en vertu de l'art. 74 de la *Loi sur les Indiens* (la Loi prévoit aussi qu'un conseil de bande peut être établi par coutume de la bande), est la forme de tribunal envisagée dans la définition contenue à l'al. *g*) de l'art. 2 de la *Loi sur la Cour fédérale* qui comprend «un organisme ou une ou plusieurs personnes ayant, exerçant ou prétendant exercer une compétence ou des pouvoirs conférés par une loi du Parlement du Canada.» Un conseil de bande ressemble quelque peu à un conseil d'administration d'une compagnie, et si on donne un sens littéral aux termes de l'al. *g*) de l'art. 2, ils sont assez larges pour comprendre les conseils d'administration en ce qui concerne les pouvoirs qui leurs sont donnés en vertu de lois fédérales comme la *Loi sur les banques*, S.R.C. 1970, c. B-1, modifiée, la *Loi sur les Corporations canadiennes*, S.R.C. 1970, c. C-32, modifiée, et la *Loi sur les compagnies d'assurance canadiennes et britanniques*, S.R.C. 1970, c. I-15, modifiée. En ce qui me concerne, on peut se demander si les organismes privés (s'il m'est permis de classer ainsi les conseils d'administrations des banques et des autres compagnies) sont visés par la *Loi sur la Cour fédérale* en son art. 18. Cependant, je ne crois pas qu'il soit nécessaire de tirer une conclusion définitive ici sur la question de savoir s'il aurait fallu céder à la Cour fédérale le pouvoir de connaître d'une action déclaratoire intentée par Mme Bédard contre les membres du conseil de bande. Dans la présente affaire, il y a un autre motif pour lequel je n'interviendrais pas dans l'exercice de compétence du Juge Osler.

Bien que la *Loi sur les Indiens*, à l'art. 81, confère au conseil d'une bande le pouvoir d'établir des statuts administratifs pour des fins pré-

be given authority under s. 83 to make by-laws for additional specified purposes, there is nothing in the record here that indicates that the members of the Band Council proceeded under any by-law. The by-law powers include in clause (*p*) of s. 81 the removal and punishment of persons trespassing upon the Reserve, but in the cross-examination of the appellant Isaac on his affidavit he stated that the Band Council did not purport to remove Mrs. Bédard from the Reserve. Nor was any charge laid against her by any member of the Band Council under s. 30 of the *Indian Act* which makes it an offence to trespass on a Reserve. The Band Council was content to request the District Supervisor to give her a notice to quit and to leave any legal proceedings to the administrative authorities under the *Indian Act*. Such proceedings might have consisted of a charge of trespass or might also have been taken under s. 31 of the *Indian Act* which empowers the Attorney General to exhibit an information in respect of any alleged trespass upon a Reserve.

What the Band Council did do was to assume to exercise permit power in respect of Mrs. Bédard's residence on the Reserve. I use the word "assume" because in his affidavit the defendant Isaac stated that the Band Council "has at all times assumed jurisdiction to grant, refuse and revoke permission for persons who are not members of the Six Nations Band to reside upon or occupy property upon the Six Nations Reserve". The record does not disclose any statutory basis for this assumption of authority which was exercised against Mrs. Bédard by the various resolutions already referred to. Section 25 of the *Indian Act*, relating to the required disposition of land by an Indian who ceases to be entitled to reside thereon on a Reserve, itself specifies the period within which

cises, et il peut aussi, en vertu de l'art. 83, se voir accorder le pouvoir d'établir des statuts administratifs pour d'autres fins précises, il n'y a rien au dossier qui indique que les membres du conseil de bande ont procédé en vertu d'un statut administratif. Les pouvoirs d'établir des statuts administratifs comprennent, dans la clause *p*) de l'art. 81, l'expulsion et la punition de personnes qui pénètrent sans droit ni autorisation dans la réserve, mais dans le contre-interrogatoire de l'appelant Isaac sur sa déclaration sous serment, celui-ci a déclaré que le conseil de bande n'avait pas prétendu expulser Madame Bédard de la réserve. Il n'y a pas eu, non plus, d'accusation portée contre elle par un membre de la bande en vertu de l'art. 30 de la *Loi sur les Indiens*, lequel crée l'infraction de pénétrer sans droit ni autorisation dans une réserve. Le conseil de bande s'est contenté de demander au surveillant de district de lui donner une intimation de quitter les lieux, et de laisser aux autorités administratives la question des procédures judiciaires en vertu de la *Loi sur les Indiens*. De telles procédures auraient pu être une accusation d'avoir pénétré sans droit ni autorisation dans la réserve, ou auraient aussi pu être prises en vertu de l'art. 31 de la *Loi sur les Indiens* qui autorise le procureur général à produire une dénonciation relativement à toute pénétration dans une réserve sans droit ni autorisation que l'on allègue avoir été commise.

Ce qu'a fait le conseil de bande fut d'assumer l'exercice d'un pouvoir d'autorisation en ce qui a trait à la résidence de Mme Bédard dans la réserve. J'emploie le mot «assumer» parce que dans sa déclaration sous serment le défendeur Isaac a déclaré que le conseil de bande [TRADUCTION] «a en tout temps assumé compétence pour accorder, refuser ou révoquer la permission de résider, ou d'occuper une propriété dans la réserve des Six Nations, relativement aux personnes qui ne sont pas membres de la bande des Six Nations». Le dossier ne révèle aucun fondement légal relativement à cette prise de compétence exercée contre Mme Bédard par les diverses résolutions déjà mentionnées. L'article 25 de la *Loi sur les Indiens*, relatif à la disposition de terres par un Indien qui cesse

the disposition must be made and confers upon the responsible Minister and not upon the Band Council the power to extend the period.

I am not satisfied that the Band Council was purporting to exercise powers conferred by the *Indian Act* rather than powers which it felt it had apart from the Act. It was open to the appellants to establish their authority if it was drawn from the Act, but they did not do so. This leaves the question whether in such circumstances the respondent should have been allowed to proceed by way of a declaration in the light of the fact that the Band Council's resolutions were in themselves, on the record in the case, of no legal force. They did threaten Mrs. Bédard and could have been followed up by invocation of s. 31 or by the laying of a charge under s. 30. In these circumstances, I am disposed to support the broad view taken by Osler J. in exercising his discretion to entertain Mrs. Bédard's claim for declaratory relief so that her rights could be ascertained: see *Vine v. National Dock Labour Board*[12].

The contentions of the appellants in both cases in appeal, stripped of their detail, amount to a submission that the *Canadian Bill of Rights* does not apply to Indians on a Reserve, nor to Indians in their relations to one another whether or not on a Reserve. This submission does not deny that the effect of s. 12(1)(*b*) of the *Indian Act* is to prescribe substantive discrimination by reason of sex, a differentiation in the treatment of Indian men and Indian women when they marry non-Indians, this differentiation being exhibited in the loss by the women of their status as Indians under the Act. It does, however, involve the assertion that the particular discrimination upon which the two appeals are focussed is not offensive to the relevant provisions of the *Canadian Bill of Rights;* and it also involves the assertion that the *Drybones* case is distinguishable or, if not, that it has been over-

[12] [1957] A.C. 488.

d'avoir droit d'y procéder dans une réserve, précise lui-même le délai dans lequel la disposition doit être effectuée et confère au ministre responsable, et non au conseil de bande, le pouvoir de proroger le délai.

Je ne suis pas convaincu que le conseil de bande prétendait exercer des pouvoirs conférés par la *Loi sur les Indiens* plutôt que des pouvoirs qu'il pensait détenir indépendamment de la Loi. Les appelants avaient la faculté d'établir leur autorité si elle était tirée de la Loi, mais ils ne l'ont pas fait. Cela laisse la question de savoir si, dans les circonstances, l'intimée aurait dû être autorisée à procéder par voie déclaratoire à la lumière du fait que, d'après le dossier en l'espèce, les résolutions du conseil de bande n'avaient aucun effet légal. Elles ont effectivement menacé Mme Bédard et elles auraient pu être suivies d'un recours à l'art. 31 ou d'une poursuite en vertu de l'art. 30. Dans ces circonstances, je suis disposé à appuyer les vues larges adoptées par le Juge Osler lorsqu'il a exercé sa discrétion de connaître de la demande en jugement déclaratoire de Mme Bédard de sorte que les droits de cette dernière puissent être définis: voir l'arrêt *Vine v. National Dock Labour Board*[12].

Les prétentions des appelants dans les deux affaires en appel équivalent, questions de détail mises à part, à une allégation que la *Déclaration canadienne des droits* ne s'applique pas aux Indiens dans une réserve, ni aux Indiens dans leurs rapports entre eux qu'ils soient dans une réserve ou non. Cette allégation ne nie pas que l'al. *b*) du par. (1) de l'art. 12 de la *Loi sur les Indiens* a pour effet de prescrire une discrimination fondamentale en raison du sexe, de traiter différemment les Indiens et les Indiennes lorsqu'ils épousent des non-Indiens, cette différence se manifestant par la perte par les femmes de leur statut d'Indiennes en vertu de la loi. Elle comporte toutefois l'assertion que la discrimination particulière que mettent en lumière les deux appels ne va pas à l'encontre des dispositions pertinentes de la *Déclaration canadienne des droits*: elle comporte aussi l'assertion que l'on

[12] [1957] A.C. 488.

come by the re-enactment of the *Indian Act* in the Revised Statutes of Canada, 1970, including the then s. 94 (now s. 95) which was in issue in that case. I regard this last-mentioned assertion, which is posited on the fact that the *Canadian Bill of Rights* was not so re-enacted, as simply an oblique appeal for the overruling of the *Drybones* case.

The *Drybones* case decided two things. It decided first—and this decision was a necessary basis for the second point in it—that the *Canadian Bill of Rights* was more than a mere interpretation statute whose terms would yield to a contrary intention; it had paramount force when a federal enactment conflicted with its terms, and it was the incompatible federal enactment which had to give way. This was the issue upon which the then Chief Justice of this Court, Chief Justice Cartwright, and Justices Abbott and Pigeon, dissented. Pigeon J. fortified his view on this main point by additional observations, bringing into consideration, *inter alia*, s. 91(24) of the *British North America Act*. The second thing decided by *Drybones* was that the accused in that case, an Indian under the *Indian Act*, was denied equality before the law, under s. 1(*b*) of the *Canadian Bill of Rights*, when it was made a punishable offence for him, on account of his race, to do something which his fellow Canadians were free to do without being liable to punishment for an offence. Ritchie J., who delivered the majority opinion of the Court, reiterated this basis of decision by concluding his reasons as follows:

> It appears to me to be desirable to make it plain that these reasons for judgment are limited to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity.

peut considérer l'affaire *Drybones* comme différente ou, sinon, que l'arrêt *Drybones* se trouve écarté par la réadoption de la *Loi sur les Indiens* dans les Statuts revisés du Canada, 1970, y compris de ce qui était alors l'art. 94 (maintenant l'art. 95), lequel était en litige dans cette affaire-là. Je considère cette prétention mentionnée en dernier lieu, laquelle est axée sur le fait que la *Déclaration canadienne des droits* n'a pas été ainsi réadoptée, comme étant simplement une requête indirecte pour qu'il soit passé outre à l'arrêt *Drybones*.

L'arrêt *Drybones* a décidé deux choses. Premièrement—et cette décision était le fondement nécessaire de la seconde—que la *Déclaration canadienne des droits* était plus qu'une simple loi d'interprétation dont les termes devaient céder le pas à une intention contraire; elle avait force prépondérante lorsqu'un texte législatif fédéral entrait en conflit avec ses termes, et c'était le texte incompatible fédéral qui devait céder le passage. Cela fut la question sur laquelle le Juge en chef d'alors en cette Cour ainsi que les Juges Abbott et Pigeon, furent dissidents. Le Juge Pigeon renforça d'observations additionnelles son avis sur ce point fondamental, faisant entrer en ligne de compte, entre autres, le par. (24) de l'art. 91 de l'*Acte de l'Amérique du Nord britannique*. Le deuxième point décidé par l'arrêt *Drybones* a été que l'accusé dans cette affaire-là, un Indien au sens de la *Loi sur les Indiens*, s'est vu refuser l'égalité devant la loi, au sens de l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits*, lorsque le fait pour lui de faire quelque chose que ses concitoyens canadiens étaient libres de faire sans être punissables en raison d'une infraction est devenu une infraction punissable à son égard. Le Juge Ritchie, qui a rédigé l'avis de la majorité de la Cour, a réaffirmé ce fondement de décision en concluant ses motifs comme suit:

> Je crois utile d'affirmer clairement que ces motifs s'appliquent seulement à un cas où, en vertu des lois du Canada, est réputé infraction punissable en droit pour une personne, à cause de sa race, un acte que ses concitoyens canadiens qui ne sont pas de cette race peuvent poser sans encourir aucune sanction.

It would be unsupportable in principle to view the *Drybones* case as turning on the fact that the challenged s. 94 of the *Indian Act* created an offence visited by punishment. The gist of the judgment lay in the legal disability imposed upon a person by reason of his race when other persons were under no similar restraint. If for the words "on account of race" there are substituted the words "on account of sex" the result must surely be the same where a federal enactment imposes disabilities or prescribes disqualifications for members of the female sex which are not imposed upon members of the male sex in the same circumstances.

It is said, however, that although this may be so as between males and females in general, it does not follow where the distinction on the basis of sex is limited as here to members of the Indian race. This, it is said further, does not offend the guarantee of "equality before the law" upon which the *Drybones* case proceeded. I wish to deal with these two points in turn and to review, in connection with the first point, the legal consequences for an Indian woman under the *Indian Act* when she marries a non- Indian.

It appears to me that the contention that a differentiation on the basis of sex is not offensive to the *Canadian Bill of Rights* where that differentiation operates only among Indians under the *Indian Act* is one that compounds racial inequality even beyond the point that the *Drybones* case found unacceptable. In any event, taking the *Indian Act* as it stands, as a law of Canada whose various provisions fall to be assessed under the *Canadian Bill of Rights*, I am unable to appreciate upon what basis the command of the *Canadian Bill of Rights*, that laws of Canada shall operate without discrimination by reason of sex, can be ignored in the operation of the *Indian Act*.

mon avis, cela est bien loin d'être applicable à toutes les dispositions de la *Loi sur les Indiens*.

Il serait indéfendable en principe de considérer l'arrêt *Drybones* comme reposant essentiellement sur le fait que la disposition incriminée, l'art. 94 de la *Loi sur les Indiens*, créait une infraction punissable. Le jugement a porté essentiellement sur l'incapacité légale imposée à une personne en raison de sa race quand d'autres personnes ne sont pas soumises à pareille restriction. Si l'expression «à cause de son sexe» était substituée à l'expression «à cause de sa race», le résultat devrait certainement être le même lorsqu'une loi fédérale frappe les personnes du sexe féminin d'incapacités ou de privations de droits qui ne sont pas imposées aux personnes du sexe masculin dans les mêmes circonstances.

On dit toutefois que bien qu'il puisse en être ainsi à l'égard des hommes et des femmes en général, il n'en va pas de même lorsque la distinction fondée sur le sexe se limite, comme dans la présente affaire, aux membres de la race indienne. On ajoute que cela ne va pas à l'encontre de la garantie de «l'égalité devant la loi» sur laquelle reposait l'arrêt *Drybones*. Je désire traiter ces deux points l'un après l'autre et passer en revue, relativement au premier point, les conséquences légales qui s'ensuivent pour une indienne en vertu de la *Loi sur les Indiens* quand elle épouse un non-Indien.

Il me semble que la prétention selon laquelle une distinction fondée sur le sexe ne va pas à l'encontre de la *Déclaration canadienne des droits* lorsque cette distinction s'applique seulement aux Indiens visés par la *Loi sur les Indiens* en est une qui s'accommode de l'inégalité raciale même au-delà des limites que l'arrêt *Drybones* a jugé inacceptables. De toute manière, en considérant la *Loi sur les Indiens* telle qu'elle se présente, comme une loi du Canada dont les diverses dispositions doivent être appréciées en regard de la *Déclaration canadienne des droits*, je ne puis voir comment la prescription de la *Déclaration canadienne des droits* selon laquelle les lois du Canada doivent s'appliquer sans discrimination en raison du sexe, peut être écartée

The *Indian Act* defines an Indian as a person who is registered as an Indian pursuant to the Act or is entitled to be so registered. It is registration or registrability upon a Band list or upon a general list that is the key to the scheme and application of the Act. The Registrar, charged with keeping the membership records, is the person to whom protests may be made by a Band Council or by an affected person respecting the inclusion or deletion of a name from the Indian Register. By s. 9(2) his decision on a protest is final subject to a reference to a judge under s. 9(3). The *Lavell* case arose in this way. Section 11 of the Act enumerates the persons entitled to be registered, and it is common ground that both Mrs. Lavell and Mrs. Bédard were so entitled prior to their respective marriages. Section 12 lists the classes of persons not entitled to be registered, and the only clause thereof relevant here is subsection 1(*b*) which I have already quoted. Section 14 has a peripheral relevance to the present case in its provision that a woman member of a Band who marries a person outside that Band ceases to be a member thereof but becomes a member of the Band of which her husband is a member. There is no absolute disqualification of an Indian woman from registrability on the Indian Register (that is, as a member on the general list) by marrying outside a Band unless the marriage is to a non-Indian.

Registration or registrability entitles an Indian as a member of a Band (and that was the status of both Mrs. Lavell and Mrs. Bédard prior to their respective marriages) to the use and benefit of the Reserve set aside for the Band. This may take the form of possession or occupation of particular land in the Reserve under an allotment by the Council of the Band with the approval of the responsible Minister, and it may

en ce qui concerne l'application de la *Loi sur les Indiens*.

La *Loi sur les Indiens* définit l'Indien comme une personne qui, conformément à la Loi, est inscrite à titre d'Indien ou a le droit de l'être. C'est l'enregistrement ou l'enregistrabilité sur une liste de bande ou sur une liste générale qui constitue la clé du programme et de l'application de la Loi. Le registraire, chargé de la garde des registres des membres, est la personne à qui des protestations peuvent être faites par un conseil de bande ou par une personne touchée, relativement à l'inclusion ou au retranchement d'un nom dans le registre des Indiens. Suivant le par. (2) de l'art. 9, sa décision à l'égard d'une protestation est définitive sous réserve d'un renvoi à un juge prévu au par. (3) de l'art. 9. L'affaire *Lavell* a commencé de cette façon. L'article 11 de la Loi énumère les personnes qui ont le droit d'être inscrites, et il est reconnu de part et d'autre que tant Mme Lavell que tant Mme Bédard avaient, avant leurs mariages respectifs, droit à l'enregistrement. L'article 12 donne les catégories de personnes qui n'ont pas le droit d'être inscrites, et la seule clause pertinente de l'article en l'espèce est l'al. *b*) du par. (1) que j'ai reproduit plus haut. L'article 14 est pertinent de façon tangentielle en l'espèce présente du fait qu'il prévoit que lorsqu'une femme qui est membre d'une bande épouse une personne qui n'en est pas membre, elle cesse d'en faire partie mais entre dans la bande à laquelle appartient son mari. Il n'existe aucune privation absolue du droit d'une Indienne à l'enregistrement sur le registre des Indiens (soit à titre de membre d'après la liste générale) lorsqu'elle épouse une personne qui n'est pas membre de sa bande, à moins qu'elle n'épouse un non-Indien.

L'enregistrement ou l'enregistrabilité donne à un Indien, en tant que membre d'une bande, (et c'était là le statut dont jouissaient Mmes Lavell et Bédard avant leurs mariages respectifs), le droit à l'usage et aux avantages de la réserve constituée au profit de la bande. Cela peut être sous forme de possession ou d'occupation d'une terre dans la réserve en vertu d'une attribution faite par le conseil de la bande avec l'approbation du

be evidenced by a certificate of possession or a certificate of occupation, the latter representing possession for a limited period only. Indians may make wills disposing of their property, and it may also pass on intestacy, in either case subject to approval or control of the Minister or of a competent court; and in the case of a devise or descent of land in a Reserve the claimant's possession must be approved by the Minister under s. 49. Section 50 has only a remote bearing on the *Bédard* case in providing that a person who is not entitled to reside on a Reserve does not by devise or descent acquire a right to possession or occupation of land in that Reserve. It begs the question in that the issue here is whether or not Mrs. Bédard became disentitled to reside on the land in the Reserve which was left to her by her mother upon the latter's death in 1969. The fact that the respondent's brother now holds a certificate of possession of all the land formerly possessed by the mother, that certificate having been issued after the respondent transferred her interest to her brother in February, 1971, does not affect the overriding question of the respondent's right to reside on the land, having her brother's consent to residence thereon.

ministre responsable, et peut être constaté par un certificat de possession ou un certificat d'occupation, ce dernier représentant une possession pour une durée limitée seulement. Les Indiens peuvent transmettre leurs biens par testament, et hériter aussi par droit de succession, sous réserve, dans chaque cas, de l'approbation ou du contrôle du ministre ou tribunal compétent; et dans le cas de terres transmises par legs ou droit de succession dans une réserve, la possession par le réclamant doit être approuvée par le ministre en vertu de l'art. 49. L'article 50 n'a qu'une portée éloignée sur l'affaire *Bédard* en édictant qu'une personne non autorisée à résider dans une réserve n'acquiert pas, par legs ou transmission par droit de succession, le droit de posséder ou d'occuper une terre dans cette réserve. Il passe à côté de la question à l'étude car dans le présent litige la question est de savoir si, oui ou non, Mme Bédard a perdu le droit de résider sur la terre qui lui a été laissée dans la réserve par sa mère lors du décès de cette dernière en 1969. Le fait que le frère de l'intimée détient maintenant un certificat de possession pour toutes les terres qui ont été possédées par la mère, certificat qui lui a été délivré après que l'intimée lui eut transféré ses droits en février 1971, ne porte pas atteinte à la question déterminante du droit qu'a l'intimée de résider sur la terre, ayant le consentement de son frère à cet égard.

Indians entitled to be registered and to live on a Reserve are members of a society in which, through Band Councils, they share in the administration of the Reserve subject to overriding governmental authority. There is provision for election of councillors by Band members residing on a Reserve, and I note that there is no statutory discrimination between Indian men and women either as qualified electors or as qualified candidates for election as councillors. Other advantages that come from membership in the social unit relate to farm operations and to eligibility for governmental loans for various enumerated purposes.

Les Indiens qui ont le droit d'être inscrits et de vivre dans une réserve sont membres d'une société au sein de laquelle, par le truchement des conseils de bande, ils participent à l'administration de la réserve sous réserve de l'autorité prépondérante du gouvernement. Des dispositions prévoient l'élection de conseillers par les membres de la bande qui résident dans la réserve, et je note qu'il n'existe aucune discrimination légale entre Indiens et Indiennes en ce qui a trait soit à la qualité d'électeur soit à l'éligibilité au poste de conseiller. L'exploitation de fermes et le droit à des prêts gouvernementaux à des fins diverses énumérées sont d'autres avantages pouvant découler de l'appartenance, en tant que membre, à l'entité sociale.

Section 12(1)(*b*) effects a statutory excommunication of Indian women from this society but not of Indian men. Indeed, as was pointed out by counsel for the Native Council of Canada, the effect of ss. 11 and 12(1)(*b*) is to excommunicate the children of a union of an Indian woman with a non-Indian. There is also the invidious distinction, invidious at least in the light of the *Canadian Bill of Rights*, that the *Indian Act* creates between brothers and sisters who are Indians and who respectively marry non-Indians. The statutory banishment directed by s. 12(1)(*b*) is not qualified by the provision in s. 109(2) for a governmental order declaring an Indian woman who has married a non-Indian to be enfranchised. Such an order is not automatic and no such order was made in relation to Mrs. Bédard; but when made the woman affected is, by s. 110, deemed not to be an Indian within the *Indian Act* or any other statute or law. It is, if anything, an additional legal instrument of separation of an Indian woman from her native society and from her kin, a separation to which no Indian man who marries a non-Indian is exposed.

It was urged, in reliance in part on history, that the discrimination embodied in the *Indian Act* under s. 12(1)(*b*) is based upon a reasonable classification of Indians as a race, that the *Indian Act* reflects this classification and that the paramount purpose of the Act to preserve and protect the members of the race is promoted by the statutory preference for Indian men. Reference was made in this connection to various judgments of the Supreme Court of the United States to illustrate the adoption by that Court of reasonable classifications to square with the due process clause of the Fifth Amendment and with due process and equal protection under the Fourteenth Amendment. Those cases have at best a marginal relevance because the *Canadian Bill of Rights* itself enumerates prohibited classifications which the judiciary is bound to respect; and, moreover, I doubt

L'alinéa *b*) du par. (1) de l'art. 12 constitue une excommunication légale qui exclut les Indiennes, mais non les Indiens, de cette société-là. De fait, comme l'a fait remarquer l'avocat du Conseil des autochtones du Canada, l'art. 11 et l'al. *b*) du par. (1) de l'art. 12 ont pour effet d'exclure les enfants nés du mariage d'une Indienne avec un non-Indien. Il y a aussi la distinction vexante, vexante au moins en regard de la *Déclaration canadienne des droits*, que la *Loi sur les Indiens* introduit entre des Indiens qui, étant frères et sœurs, épousent respectivement des non-Indiens. Le bannissement légal de l'al. *b*) du par. (1) de l'art. 12 n'est pas mitigé par la disposition du par. (2) de l'art. 109, laquelle prévoit qu'une ordonnance gouvernementale peut déclarer émancipée une Indienne qui a épousé un non-Indien. Une telle ordonnance n'est pas automatique et aucune ordonnance semblable n'a été rendue à l'égard de Mme Bédard; mais lorsque l'ordonnance est rendue, la femme visée est alors censée, en vertu de l'art. 110, ne pas être une Indienne au sens de la *Loi sur les Indiens* ou de toute autre loi. L'ordonnance constitue à tout le moins un instrument légal de plus pour séparer une Indienne de son milieu social originel et de ses proches, séparation à laquelle n'est exposé aucun Indien qui épouse une non-Indienne.

On a avancé, en se référant en partie à l'histoire, que la discrimination que comporte l'al. *b*) du par. (1) de l'art. 12 est basée sur une catégorisation raisonnable des Indiens comme constituant une race, que la *Loi sur les Indiens* reflète cette catégorie et que le but premier de la Loi qui est de préserver et protéger les membres de cette race, est servi par la préférence accordée par la Loi aux Indiens de sexe masculin. On a mentionné à cet égard divers arrêts de la Cour suprême des États-Unis afin d'illustrer l'adoption par cette Cour-là de catégorisations raisonnables pour se conformer à la clause de l'application régulière de la loi, contenue dans le Cinquième Amendement, ainsi qu'à l'application régulière et la protection égale de la loi qu'envisage le Quatorzième Amendement. Ces arrêts n'ont tout au plus qu'une pertinence marginale parce que la *Déclaration canadienne des droits*

whether discrimination on account of sex, where as here it has no biological or physiological rationale, could be sustained as a reasonable classification even if the direction against it was not as explicit as it is in the *Canadian Bill of Rights*.

énumère elle-même les catégorisations prohibées que les tribunaux sont tenus d'appliquer; et, de plus, je doute que la discrimination fondée sur le sexe, lorsqu'elle n'a pas, et c'est le cas en l'espèce, de fondement biologique ou physiologique, pourrait être sanctionnée comme catégorisation raisonnable même si l'interdiction dirigée contre elle n'était pas aussi explicite qu'elle ne l'est dans la *Déclaration canadienne des droits*.

I do not think it is possible to leap over the telling words of s. 1, "without discrimination by reason of race, national origin, colour, religion or sex", in order to explain away any such discrimination by invoking the words "equality before the law" in clause (*b*) and attempting to make them alone the touchstone of reasonable classification. That was not done in the *Drybones* case; and this Court made it clear in *Curr v. The Queen*[1], that federal legislation, which might be compatible with the command of "equality before the law" taken alone, may nonetheless be inoperative if it manifests any of the prohibited froms of discrimination. In short, the proscribed discriminations in s. 1 have a force either independent of the subsequently enumerated clauses (*a*) to (*f*) or, if they are found in any federal legislation, they offend those clauses because each must be read as if the prohibited forms of discrimination were recited therein as a part thereof.

Je ne crois pas qu'il soit possible de passer par-dessus les termes décisifs de l'art. 1, «quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe», aux fins de justifier une discrimination fondée sur un de ces critères en invoquant les termes «égalité devant la loi» de la clause *b*) et en tentant de faire de ces seuls termes la pierre de touche d'une catégorisation raisonnable. Ce n'est pas ce qui a été fait dans l'arrêt *Drybones*; et cette Cour a clairement fait comprendre, dans l'arrêt *Curr c. La Reine*[1], qu'une loi fédérale qui peut être compatible avec la prescription de «l'égalité devant la loi» prise isolément, peut, néanmoins, être inopérante si elle manifeste une des formes prohibées de discrimination. En résumé, les formes proscrites de discrimination de l'art. 1 ont une application ou bien indépendante des clauses subséquentes énumérées *a*) à *f*) ou bien, si on les trouve dans une loi fédérale, vont à l'encontre de ces clauses pour le motif que chacune doit être lue comme si les formes prohibées de discrimination y étaient énoncées comme partie du libellé.

This seems to me an obvious construction of s. 1 of the *Canadian Bill of Rights*. When that provision states that the enumerated human rights and fundamental freedoms shall continue to exist "without discrimination by reason of race, national origin, colour, religion or sex", it is expressly adding these words to clauses (*a*) to (*f*). Section 1(*b*) must read therefore as "the right of the individual to equality before the law and the protection of the law without discrimination by reason of race, national origin, colour, religion or sex". It is worth repeating that this is

Cela est une interprétation de l'art. 1 de la *Déclaration canadienne des droits* qui me paraît évidente. Lorsque cette disposition déclare que les droits de l'homme et libertés fondamentales énumérés continueront à exister «quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe», elle se trouve à ajouter expressément ces motifs aux clauses *a*) à *f*). L'alinéa *b*) de l'art. 1 doit par conséquent s'interpréter comme «le droit de l'individu à l'égalité devant la loi et à la protection de la loi quels que soient sa race, son origine nationale, sa

[1] [1972] S.C.R. 889.

[1] [1972] R.C.S. 889.

what emerges from the *Drybones* case and what is found in the *Curr* case.

There is no clear historical basis for the position taken by the appellants, certainly not in relation to Indians in Canada as a whole, and this was in effect conceded during the hearing in this Court. In any event, history cannot avail against the clear words of ss. 1 and 2 of the *Canadian Bill of Rights*. It is s. 2 that gives this enactment its effective voice, because without it s. 1 would remain a purely declaratory provision. Section 2 brings the terms of s. 1 into its orbit, and its reference to "every law of Canada" is a reference, as set out in s. 5(2), to any Act of the Parliament of Canada enacted before or after the effective date of the *Canadian Bill of Rights*. Pre-existing Canadian legislation as well as subsequent Canadian legislation is expressly made subject to the commands of the *Canadian Bill of Rights*, and those commands, where they are as clear as the one which is relevant here, cannot be diluted by appeals to history. Ritchie J. in his reasons in the *Drybones* case touched on this very point when he rejected the contention that the terms of s. 1 of the *Canadian Bill of Rights* must be circumscribed by the provisions of Canadian statutes in force at the date of the enactment of the *Canadian Bill of Rights:* see [1970] S.C.R. 282, at pp. 295-296. I subscribe fully to the rejection of that contention. Clarity here is emphasized by looking at the French version of the *Canadian Bill of Rights* which speaks in s. 1 of the enumerated human rights and fundamental freedoms «pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe».

In my opinion, the appellants' contentions gain no additional force because the *Indian Act*, including the challenged s. 12(1)(*b*) thereof, is a fruit of the exercise of Parliament's exclusive legislative power in relation to "Indians, and

couleur, sa religion ou son sexe». Il est utile de répéter que c'est là ce qui ressort de l'arrêt *Drybones* et ce que l'on trouve dans l'arrêt *Curr*.

Il n'existe aucun fondement historique clair pour la position prise par les appelants, certainement pas en ce qui a trait aux Indiens du Canada dans leur ensemble, et cela a été en définitive admis lors de l'audition en cette Cour. De toute manière, l'histoire ne peut prévaloir contre les termes clairs des art. 1 et 2 de la *Déclaration canadienne des droits*. C'est l'art. 2 qui donne à ce texte législatif sa force véritable, parce que sans lui l'art. 1 demeure une disposition purement déclaratoire. L'article 2 place les termes de l'art. 1 dans son champ d'action, et sa mention de «toute loi du Canada» est une mention, comme il est dit au par. (2) de l'art. 5, visant toute loi du Parlement du Canada édictée avant ou après la date de mise en vigueur de la *Déclaration canadienne des droits*. La législation canadienne qui existait déjà aussi bien que celle qui vient après font expressément l'objet des prescriptions de la *Déclaration canadienne des droits*, et ces prescriptions, quand elles sont aussi nettes que celle qui est présentement en cause, ne peuvent être diluées par des appels à l'histoire. Le Juge Ritchie, dans les motifs qu'il a rédigés dans l'affaire *Drybones*, a touché ce point précis lorsqu'il a rejeté la prétention que les termes de l'art. 1 de la *Déclaration canadienne des droits* doivent être circonscrits par les dispositions des lois canadiennes en vigueur à la date de l'adoption de la *Déclaration canadienne des droits*: voir [1970] R.C.S. 282, pp. 295-296. Je souscris pleinement au rejet de cette prétention. La situation est d'autant plus claire si l'on regarde la version française de la *Déclaration canadienne des droits* qui, à l'art. 1, parle des droits de l'homme et libertés fondamentales énumérés «pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe».

A mon avis, les prétentions des appelants ne deviennent pas plus solides du fait que la *Loi sur les Indiens*, y inclus l'al. *b*) incriminé du par. (1) de son art. 12, est le fruit de l'exercice du pouvoir exclusif du Parlement de légiférer su

Lands reserved for the Indians" under s. 91(24) of the *British North America Act*. Discriminatory treatment on the basis of race or colour or sex does not inhere in that grant of legislative power. The fact that its exercise may be attended by forms of discrimination prohibited by the *Canadian Bill of Rights* is no more a justification for a breach of the *Canadian Bill of Rights* than there would be in the case of the exercise of any other head of federal legislative power involving provisions offensive to the *Canadian Bill of Rights*. The majority opinion in the *Drybones* case dispels any attempt to rely on the grant of legislative power as a ground for escaping from the force of the *Canadian Bill of Rights*. The latter does not differentiate among the various heads of legislative power; it embraces all exercises under whatever head or heads they arise. Section 3 which directs the Minister of Justice to scrutinize every Bill to ascertain whether any of its provisions are inconsistent with ss. 1 and 2 is simply an affirmation of this fact which is evident enough from ss. 1 and 2.

«les Indiens et les terres réservées pour les Indiens» en vertu du par. (24) de l'art. 91 de l'*Acte de l'Amérique du Nord britannique*». Le traitement discriminatoire fondé sur la race, la couleur ou le sexe n'est pas compris dans l'attribution de ce pouvoir législatif. Le fait que l'exercice de ce pouvoir puisse être accompagné de certaines formes de discrimination prohibées par la *Déclaration canadienne des droits* ne justifie pas davantage une violation de la *Déclaration canadienne des droits* que ne le ferait l'exercice de tout autre pouvoir législatif fédéral énuméré se traduisant par des dispositions contraires à la *Déclaration canadienne des droits*. L'opinion majoritaire dans l'affaire *Drybones* écarte toute tentative de s'appuyer sur l'attribution d'un pouvoir législatif comme moyen de se soustraire à l'application de la *Déclaration canadienne des droits*. Cette dernière ne fait pas de distinction entre les divers pouvoirs législatifs énumérés; elle embrasse l'exercice de tout pouvoir énuméré, quel(s) qu'il(s) soi(en)t. L'article 3, qui oblige le ministre de la Justice à examiner tout projet ou proposition de loi en vue de constater si l'une quelconque de ses dispositions est incompatible avec les art. 1 et 2, n'est simplement qu'une affirmation de ce fait, lequel découle de façon assez évidente des art. 1 et 2.

There was an intimation during the argument of these appeals that the *Canadian Bill of Rights* is properly invoked only to resolve a clash under its terms between two federal statutes, and the *Drybones* case was relied on in that connection. It is a spurious contention, if seriously advanced, because the *Canadian Bill of Rights* is itself the indicator to which any Canadian statute or any provision thereof must yield unless Parliament has declared that the statute or the particular provision is to operate notwithstanding the *Canadian Bill of Rights*. A statute may in itself be offensive to the *Canadian Bill of Rights*, or it may be by relation to another statute that it is so offensive.

Au cours des plaidoiries dans les présents appels, on a suggéré l'avis que la *Déclaration canadienne des droits* ne peut être justement invoquée que pour résoudre un conflit régi par ses termes entre deux lois fédérales, et on s'est à cet égard appuyé sur l'arrêt *Drybones*. C'est là, si on l'avance sérieusement, une prétention sans valeur, car c'est la *Déclaration canadienne des droits* elle-même qui est la mesure à laquelle toute loi canadienne, ou toute disposition d'icelle, doivent se conformer à moins que le Parlement n'ait déclaré que la loi ou la disposition en cause s'appliquera nonobstant la *Déclaration canadienne des droits*. Une loi peut en elle-même être contraire à la *Déclaration canadienne des droits*, ou elle peut être telle de par sa relation avec une autre loi qui, elle, l'est en elle-même.

I would dismiss both appeals with costs.

Je rejetterais les deux appels avec dépens.

PIGEON J.—I agree in the result with Ritchie J. I certainly cannot disagree with the view I did express in *The Queen v. Drybones*[14] (at p. 304) that the enactment of the *Canadian Bill of Rights* was not intended to effect a virtual suppression of federal legislation over Indians. My difficulty is Laskin J.'s strongly reasoned opinion that, unless we are to depart from what was said by the majority in *Drybones*, these appeals should be dismissed because, if discrimination by reason of race makes certain statutory provisions inoperative, the same result must follow as to statutory provisions which exhibit discrimination by reason of sex. In the end, it appears to me that, in the circumstances, I need not reach a firm conclusion on that point. Assuming the situation in such as Laskin J. says, it cannot be improper for me to adhere to what was my dissenting view, when a majority of those who did not agree with it in respect of a particular section of the *Indian Act*, now adopt it for the main body of this important statute.

I would observe that this result does not conflict with any of our decisions subsequent to *Drybones*. In no case was the *Canadian Bill of Rights* given an invalidating effect over prior legislation.

In *Lowry and Lepper v. The Queen*[15] and in *Brownridge v. The Queen*[16], the application of criminal legislation, past and subsequent, was held to be subject to provisions respecting a "fair hearing" and "the right to retain and instruct counsel". These decisions are important illustrations of the effectiveness of the Bill without any invalidating effect.

In *Smythe v. The Queen*[17] it was held that provisions for stiffer penalties depending on the

[14] [1970] S.C.R. 282.
[15] (1972) 26 D.L.R. (3d) 224.
[16] [1972] S.C.R. 926.
[17] [1971] S.C.R. 680.

LE JUGE PIGEON—Je suis d'accord avec M. le Juge Ritchie sur la décision à rendre. Je ne puis certainement pas être en désaccord avec ce que j'ai dit dans l'affaire *La Reine c. Drybones*[14] (à la p. 304): la *Déclaration canadienne des droits* n'a pas pour but de supprimer pratiquement toute la législation fédérale sur les Indiens. La difficulté que j'éprouve vient de l'opinion fortement motivée de M. le Juge Laskin selon laquelle, à moins que nous nous écartions de ce que la majorité a décidé dans l'affaire *Drybones*, les présents pourvois devraient être rejetés parce que, si la discrimination suivant la race rend certaines dispositions législatives inopérantes, le même résultat doit s'ensuivre pour la discrimination suivant le sexe. En fin de compte, il me paraît que, dans les circonstances, je n'ai pas besoin d'en venir à une conclusion ferme sur ce point. En supposant que la situation soit comme le dit M. le Juge Laskin, rien ne s'oppose à ce que je m'en tienne à ce qui fut mon avis dissident, lorsqu'une majorité de ceux qui n'y ont pas souscrit quant à un article particulier de la *Loi sur les Indiens*, l'adopte maintenant pour la partie principale de cette importante législation.

Il convient de remarquer que ce résultat ne vient pas en contradiction avec nos décisions postérieures à l'arrêt *Drybones*. Aucune n'a jamais donné à la *Déclaration canadienne des droits* l'effet de nullifier une loi antérieure.

Dans les arrêts *Lowry et Lepper c. La Reine*[15] et *Brownridge c. La Reine*[16] on a statué que l'application de la législation antérieure ou postérieure, en matière criminelle, était assujettie aux dispositions concernant une «audition équitable» et «le droit de retenir et constituer un avocat». Ces décisions sont des exemples importants de l'efficacité de la Déclaration sans effet nullifiant.

Dans l'arrêt *Smythe c. La Reine*[17], on a statué que des dispositions prévoyant des peines plus

[14] [1970] R.C.S. 282.
[15] (1972), 26 D.L.R. (3d) 224.
[16] [1972] R.C.S. 926.
[17] [1971] R.C.S. 680.

method of prosecution were not rendered inoperative by the *Canadian Bill of Rights* as infringing equality before the law, although the choice of the method of prosecution always depends on executive discretion.

In *Curr v. The Queen*[18] recent *Criminal Code* provisions for compulsory breath analysis were held not to infringe the right to the "protection of the law" any more than the right to the "protection against self-crimination".

Finally, in *Duke v. The Queen*[19] these same provisions were said not to deprive the accused of a "fair trial" although proclaimed without some paragraphs contemplating a specimen being offered and given on request to the suspect.

Appeals allowed. ABBOTT, HALL, SPENCE *and* LASKIN JJ. *dissenting.*

Solicitor for the Attorney general of Canada, appellant: D. S. Maxwell, Ottawa.

Solicitors for the respondent, J. V. C. Lavell: Copeland & Ruby, Toronto.

Solicitors for the appellants, R. Isaac et al: Waterous, Holden, Kellock & Kent, Brantford.

Solicitors for the respondent, J. V. C. Lavell: Copeland & Ruby, Toronto.

Solicitor for the intervenants, The Indian Association of Alberta, The Union of British Columbia Indian Chiefs, The Manitoba Indian Brotherhood Inc., The Union of New Brunswick Indians, The Indian Brotherhood of the Northwest Territories, The Union of Nova Scotia Indians, The Union of Ontario Indians, The Federation of Saskatchewan Indians, The Indian Association of Quebec, The Yukon Native Brotherhood and The National Indian Brotherhood: Douglas Sanders, Ottawa.

[18] [1972] S.C.R. 889.
[19] [1972] S.C.R. 917.

sévères eu égard à la forme de la poursuite n'étaient pas rendues inopérantes par la *Déclaration canadienne des droits* comme violant le principe de l'égalité devant la loi, bien que le choix de la forme de poursuite relève toujours du pouvoir discrétionnaire de l'exécutif.

Dans l'arrêt *Curr c. La Reine*[18], il a été décidé que les dispositions récentes du *Code criminel* visant l'analyse obligatoire de l'haleine ne violaient pas plus le droit à la «protection de la loi» que le droit à la «protection contre son propre témoignage».

Finalement, dans l'arrêt *Duke c. La Reine*[19], on a considéré que ces mêmes dispositions ne privaient pas le prévenu de son droit à un «procès équitable» bien qu'elles aient été proclamées en vigueur sans certains alinéas prévoyant qu'un spécimen soit offert ou fourni sur demande au prévenu.

Appels accueillis, les JUGES ABBOTT, HALL, SPENCE *et* LASKIN *étant dissidents.*

Procureur du Procureur général du Canada, appelant: D. S. Maxwell, Ottawa.

Procureurs de l'intimée, J. V. C. Lavell: Copeland & Ruby, Toronto.

Procureurs des appelants, R. Isaac et al.: Waterous, Holden, Kellock & Kent, Brantford.

Procureurs de l'intimée, Yvonne Bédard: Montgomery & Gardner, Toronto.

Procureur des intervenants, The Indian Association of Alberta, The Union of British Columbia Indian Chiefs, The Manitoba Indian Brotherhood Inc., The Union of New Brunswick Indians, The Indian Brotherhood of the Northwest Territories, The Union of Nova Scotia Indians, The Union of Ontario Indians, The Federation of Saskatchewan Indians, L'association des Indiens du Québec, The Yukon Native Brotherhood et la Fraternité des Indiens du Canada: Douglas Sanders, Ottawa.

[18] [1972] R.C.S. 889.
[19] [1972] R.C.S. 917.

Solicitors for the intervenants, The Six Nations Band of Indians of the County of Brant: Waterous, Holden, Kellock & Kent, Brantford.

Solicitors for the intervenants, The Native Council of Canada: MacKinnon, McTaggart, Toronto.

Solicitors for the intervenants, Alberta Committee on Indian Rigitts for Indian Women Incorporated, University Women's Club of Toronto, University Women Graduates Limited, Viola Shannacappo, Rose Wilhelm, The North Toronto Business and Professional Women's Club Inc., Monica Agnes Turner: Blackwell, Law, Threadgold & Armstrong, Toronto.

Solicitors for the intervenants, The Treaty Voice of Alberta: Wood, Moir, Hyde & Ross, Edmonton.

Solicitors for the intervenants, Anishnawbekwek of Ontario Inc.: Pomerant, Pomerant & Greenspan, Toronto.

Procureurs des intervenants, La Bande des Six Nations des Indiens du Comté de Brant: Waterous, Holden, Kellock & Kent, Brantford.

Procureurs des intervenants, Le Conseil des Autochtones du Canada: MacKinnon, McTaggart, Toronto.

Procureurs des intervenants, Alberta Committee on Indian Rights for Indian Women Incorporated, University Women's Club of Toronto, University Women Graduates Limited, Viola Shannacappo, Rose Wilhelm, The North Toronto Business and Professional Women's Club Inc., Monica Agnes Turner: Blackwell, Law, Threadgold & Armstrong, Toronto.

Procureurs des intervenants, The Treaty Voice of Alberta: Wood, Moir, Hyde & Ross, Edmonton.

Procureurs des intervenants, Anishnawbekwek of Ontario Inc.: Pomerant, Pomerant & Greenspan, Toronto.

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Jeannette Vivian Corbiere Lavell (*Applicant*)

v.

Attorney General of Canada (*Respondent*)

Court of Appeal, Jackett C.J., Thurlow and Pratte JJ.—Ottawa, October 7, 8, 1971.

Female Indian married to non-Indian—Registration as member of Band revoked by Registrar—Review by county court judge—Jurisdiction of county court judge conferred by federal legislation—Judge not exercising function of county court—Review by Federal Court of Appeal—Federal Court Act, secs. 2(g), 28, Indian Act, R.S.C. 1970, c. I-6, s. 12(1)(b), B.N.A. Act, s. 96.

Male Indians in similar situation remain registered—Indian Act discriminates as to sex—Female Indians entitled to equality before law—Infringement of rights contrary to Canadian Bill of Rights.

The applicant was a registered member of the Wikwemikong Band of Indians until her marriage to a non-Indian. The Registrar had her name struck from the Band list by reason of s. 12(1)(*b*) of the *Indian Act*. Her protest to the Registrar was dismissed and his decision was confirmed by a county court judge under review procedures provided by s. 9(3) of the *Indian Act*.

Held, the judgment of the county court judge is set aside.

1. Although the judge was appointed under s. 96 of the *B.N.A. Act* to the county court, he was not exercising a function or authority of that court so as to bring him within the excluding provisions in the definition of "federal board, commission or other tribunal" in s. 2(*g*) of the *Federal Court Act*. Review proceedings from the decisions of federal boards, etc., are taken under s. 28 of that Act to the Federal Court of Appeal. Nor was he exercising jurisdiction conferred under provincial legislation so as to bring him within the same excluding provisions of that Act. Rather, he was acting as a person designated under the *Indian Act*, which is federal legislation, to carry out the function of reviewing the Registrar's decision, and therefore this Court has, under s. 28 of the *Federal Court Act*, jurisdiction to review his decision.

2. A male Indian who marries a non-Indian or an Indian from another Band continues to be a registered member, and s. 11(*f*) of the *Indian Act* even provides for the registry of his wife as a member. The difference in the consequences within a group or class of married persons constitutes discrimination by reason of sex. The legislation infringes the applicant's right to equality before the law and the *Canadian Bill of Rights* applies to render the provisions of s. 12(1)(*b*) of the *Indian Act* inoperative just as the provisions of s. 94(*b*) of the *Indian Act* were declared inoperative because of discrimination by reason of race. (*Drybones* case [1970] S.C.R. 282.)

Jeannette Vivian Corbiere Lavell (*Requérante*)

c.

Le procureur général du Canada (*Intimé*)

Cour d'appel; le juge en chef Jackett, les juges Thurlow et Pratte—Ottawa, les 7 et 8 octobre 1971.

Indienne mariée à un non-Indien—Inscription en qualité de membre d'une bande radiée par le registraire—Examen par un juge d'une cour de comté—Le juge d'une cour de comté tient sa juridiction d'une loi fédérale—Juge n'exerçant pas une fonction de la cour de comté—Examen par la Cour d'appel fédérale—Loi sur la Cour fédérale, art. 2g) et 28; Loi sur les Indiens, S.R.C. 1970, c. I-6, art. 12(1)b); A.A.N.B., art. 96.

Les Indiens se trouvant dans une situation semblable demeurent inscrits—Loi sur les Indiens discriminatoire en raison du sexe—Les Indiennes ont droit à l'égalité devant la loi—Violation des droits contraire à la Déclaration canadienne des droits.

La requérante était inscrite en qualité de membre de la bande Wikwemikong jusqu'à son mariage avec un non-Indien. Le registraire a radié son nom de la liste de bande en invoquant l'art. 12(1)*b*) de la *Loi sur les Indiens*. Le registraire rejeta sa protestation et, à la suite de la procédure d'examen prévue à l'art. 9(3) de la *Loi sur les Indiens*, cette décision fut confirmée par un juge de la cour de comté.

Arrêt: Infirmation du jugement du juge de la cour de comté.

1. Bien que le juge ait été nommé à la cour de comté en vertu de l'art. 96 de l'*A.A.N.B.*, il n'exerçait pas une fonction ou une compétence de cette cour; il ne peut donc entrer dans les limites des exclusions comprises dans la définition d'«office, commission ou autre tribunal fédéral» contenue à l'art. 2*g*) de la *Loi sur la Cour fédérale*. Les procédures d'examen des décisions des offices fédéraux etc. sont engagées devant la Cour d'appel fédérale, sous le régime de l'art. 28 de ladite Loi. Il n'exerçait pas non plus une juridiction conférée par une loi provinciale, ce qui aurait eu pour effet de le faire entrer dans les limites des exclusions prévues à la Loi. Il agissait plutôt en tant que personne désignée par une loi fédérale, la *Loi sur les Indiens*, pour examiner la décision du registraire et, partant, cette Cour a, aux termes de l'art. 28 de la *Loi sur la Cour fédérale*, juridiction pour examiner sa décision.

2. Un Indien qui épouse une non-Indienne ou une Indienne d'une autre bande demeure membre inscrit; l'art. 11*f*) de la *Loi sur les Indiens* prévoit même l'inscription de sa femme. Des conséquences différentes d'un même acte à l'intérieur d'un groupe ou d'une catégorie de gens mariés constitue une discrimination en raison du sexe. Cette disposition législative enfreint le droit de la requérante à l'égalité devant la loi. La *Déclaration canadienne des droits* a pour effet de rendre inopérantes les dispositions de l'art. 12(1)*b*) de la *Loi sur les Indiens* de la même façon que l'arrêt *Drybones* [1970] R.C.S. 282, a déclaré inopérantes les dis-

MOTION to review.

C. C. Ruby for applicant.

N. A. Chalmers, Q. C., and *James B. Beckett* for respondent.

The judgment of the Court was delivered by

THURLOW J.—Two points arise on this motion to review under s. 28 of the *Federal Court Act*. The first concerns the jurisdiction of the Court to review the decision of Judge Grossberg in view of the definition of "federal board, commission or other tribunal" in s. 2(*g*) of the Act. That definition reads as follows:

2(*g*) "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*;

I have no difficulty in concluding that Judge Grossberg, when reviewing the Registrar's decision, was acting as a person designated to carry out that function by or under the *Indian Act*, R.S.C. 1970, c. I-6, and was not exercising the authority of the county court of which he was a judge. He thus constituted a person having and exercising jurisdiction or powers conferred by a statute of the Parliament of Canada and not a court or other body constituted by or under a law of a province within the definition.

The interpretation and application of the remaining portion of the definition, that is to say, the wording "or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*," are not as easy to resolve in view of the fact that, as a judge of the county court, Judge Grossberg is a person appointed under section 96 of the *British North America Act*, but it appears to me

positions de l'art. 94*b*) de cette même Loi pour cause de discrimination en raison de la race.

REQUÊTE pour examen.

C. C. Ruby pour la requérante.

N. A. Chalmers, c.r., et *James B. Beckett* pour l'intimé.

Le jugement de la Cour a été prononcé par

LE JUGE THURLOW—Cette demande de révision, faite en vertu de l'art. 28 de la *Loi sur la Cour fédérale*, soulève deux problèmes. Il tant d'abord à déterminer si la Cour a le pouvoir de réviser la décision du juge Grossberg compte tenu de la définition donnée par l'art. 2g) de la Loi aux mots «office, commission ou autre tribunal fédéral». Cette définition est ainsi rédigée:

2g) «office, commission ou autre tribunal fédéral» désigne un organisme ou une ou plusieurs personnes ayant, exerçant ou prétendant exercer une compétence ou des pouvoirs conférés par une loi du Parlement du Canada ou sous le régime d'une telle loi, à l'exclusion des organismes de ce genre constitués ou établis par une loi d'une province ou sous le régime d'une telle loi ainsi que des personnes nommées en vertu ou en conformité du droit d'une province ou en vertu de l'article 96 de l'*Acte de l'Amérique du Nord britannique, 1867*;

Il ne m'est pas difficile de conclure qu'en révisant la décision du registraire, le juge Grossberg agissait en tant que personne désignée par la *Loi sur les Indiens*, S.R.C. 1970, c. I-6, ou sous son régime pour exercer cette fonction, et qu'il ne statuait pas en sa qualité de juge de la cour de comté. Par conséquent, le juge Grossberg était une personne ayant et exerçant une compétence ou des pouvoirs conférés par une loi du Parlement du Canada et non pas une cour ou un autre organisme constitué ou établi par une loi d'une province ou sous le régime d'une telle loi au sens de la définition.

L'interprétation et l'application de la fin de la définition, c'est-à-dire, les termes «ainsi que des personnes nommées en vertu ou en conformité du droit d'une province ou en vertu de l'article 96 de l'*Acte de l'Amérique du Nord britannique, 1867*» soulèvent plus de difficultés puisque, en sa qualité de juge de la cour de comté, le juge Grossberg est bien une personne nommée en vertu de l'article 96 de l'*Acte de l'Amérique du Nord britannique*. J'estime toutefois que, puis-

that since the judge, when exercising his powers and authority under the *Indian Act*, did not exercise a function or an authority of the court of which he is a judge the fact that he was appointed to that court under section 96 of the *British North America Act* will not serve to bring him for this purpose within the exclusion which I have just cited from the definition. It follows that this Court has jurisdiction under s. 28 of the *Federal Court Act* to review his decision.

The other question for determination is whether s. 12(1)(*b*) or any other provision of the *Indian Act* operates to deprive the applicant of the right she would otherwise have to be and remain registered as a member of the Wikwemikong Band of Indians. The applicant is a woman of Indian ancestry and was a registered member of that Band from her birth until December 7, 1970 when the Registrar under the *Indian Act* struck her name from the Band list. The Registrar took this action because on April 11, 1970 the applicant had married a person who is not an Indian. Her protest to the Registrar was dismissed and this decision was confirmed by Judge Grossberg on a review conducted at her request under the review procedure provided by the statute [s. 9].

On the face of it s. 12(1)(*b*) appears to justify the Registrar's action for the section provides:

> 12. (1) The following persons are not entitled to be registered, namely
>
> ...
>
> (*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

Under the Act, however, a male Indian who marries a woman who is not an Indian does not lose his right to be and remain registered on the Band list. Indeed s. 11(*f*) even provides for the registry of his wife as a member of the Band. Other provisions of the Act from s. 4 to s. 17 inclusive throw somewhat more light on the system of Indian registry but the foregoing features of the system appear to me to be ample to point up the problem.

The applicant contends that this legislation is rendered inoperative by the *Canadian Bill of*

que le juge exerçait ses pouvoirs et sa compétence sous le régime de la *Loi sur les Indiens*, il n'exerçait pas une fonction ou la compétence du tribunal auquel il siège en tant que juge; le fait qu'il y ait été nommé en vertu de l'article 96 de l'*Acte de l'Amérique du Nord britannique* ne pourra donc pas servir à le faire entrer, en l'espèce, dans les limites des exclusions que je viens juste de tirer de la définition. Il s'ensuit qu'en vertu de l'art. 28 de la *Loi sur la Cour fédérale*, cette Cour est compétente pour examiner sa décision.

L'autre problème à résoudre est celui de savoir si l'art. 12(1)*b*) ou toute autre disposition de la *Loi sur les Indiens* permet de priver l'appelante du droit qu'elle aurait autrement d'être et de rester inscrite en qualité de membre de la bande des Indiens Wikwemikong. L'appelante est d'origine indienne et fut membre inscrit de cette bande de sa naissance au 7 décembre 1970, date à laquelle le registraire raya son nom de la liste de bande conformément à la *Loi sur les Indiens*. Le registraire prit cette mesure parce que le 11 avril 1970, la requérante avait épousé un non-Indien. Le registraire rejeta la protestation formulée par la requérante et, c'est cette décision qu'a confirmée le juge Grossberg après qu'elle lui eut été soumise pour révision conformément à la loi [s. 9].

A première vue, l'art 12(1)*b*) semble justifier l'action du registraire car il prévoit que:

> 12. (1) Les personnes suivantes n'ont pas le droit d'être inscrites, savoir:
>
> ...
>
> *b*) une femme qui a épousé un non-Indien, sauf si cette femme devient subséquemment l'épouse ou la veuve d'une personne décrite à l'article 11.

Toutefois, en vertu de la Loi, un Indien qui épouse une non-Indienne ne perd pas son droit à être et à rester inscrit sur la liste de bande. En fait, l'art. 11*f*) prévoit même l'inscription de sa femme en qualité de membre de la bande. D'autres dispositions de la loi, de l'art. 4 à l'art. 17 inclus, éclairent quelque peu le système d'inscription des Indiens, mais les caractéristiques déjà citées du système me semblent amplement suffisantes pour faire ressortir la difficulté.

L'appelante soutient que la *Déclaration canadienne des droits* a pour effet de rendre cette

Rights since it discriminates against her on the basis of sex in depriving her of her right to the status of an Indian and to continue to be registered as a member of the Wikwemikong Band.

Judge Grossberg in a carefully considered opinion expressed the view that the applicant's marriage gave her the status of a married woman with the same capacities and incapacities as all other Canadian married females and that this is the equality to be assured to her under the *Canadian Bill of Rights* and not necessarily equality within a group or class of married persons to whom a particular law of Canada applies. He therefore confirmed the Registrar's decision.

As will presently appear I take a somewhat different view of the problem which the *Canadian Bill of Rights* raises. It is clear that both male Indians and female Indians have capacity to marry and that each has the capacity and the right to contract a marriage either with another Indian or with a person who is not an Indian. The *Indian Act*, however, which is a law made by the Parliament of Canada for Indians, prescribes a different result with respect to the rights of an Indian woman who marries a person other than an Indian, or an Indian of another Band, from that which is to obtain when a male Indian marries a person other than an Indian, or an Indian who is a member of another Band.

This difference in the consequences of such a marriage plainly arises under a law of Canada, i.e., the *Indian Act*, and in my opinion it constitutes discrimination by reason of sex within the meaning of the *Canadian Bill of Rights* just as the effect of the statute invoked in the *Drybones* case [1970] S.C.R. 282, was to discriminate against Drybones on the basis of his race.

It is of course clear that the discrimination in that case was between the rights of Drybones, as an Indian to whom the *Indian Act* applied, and those of other Canadians not subject to the particular provision but nevertheless subject only to the laws of Canada as distinguished from laws of particular provinces of Canada,

législation inopérante car elle est discriminatoire à son encontre, en raison du sexe, en la privant de son droit au statut d'Indienne et à continuer d'être inscrite en qualité de membre de la bande Wikwemikong.

Dans sa décision soigneusement motivée, le juge Grossberg a affirmé que le mariage de l'appelante lui donnait le statut de femme mariée avec les mêmes capacités et incapacités légales que toutes les autres femmes canadiennes mariées et que c'est cette égalité que lui garantit la *Déclaration canadienne des droits* et non pas obligatoirement l'égalité avec les personnes mariées au sein d'un groupe ou d'une classe visés par une loi particulière du Canada. En conséquence, il a confirmé la décision du registraire.

Comme on va le voir, mon point de vue sur la question que soulève la *Déclaration canadienne des droits* est quelque peu différent. Il est clair que les Indiennes aussi bien que les Indiens ont la capacité légale de contracter mariage que ce soit avec un Indien ou un non-Indien. Cependant, la *Loi sur les Indiens*, loi édictée par le Parlement du Canada, prévoit dans le cas où une personne indienne épouse quelqu'un qui ne l'est pas ou qui appartient à une autre bande, que ce mariage aura, quant aux droits de la personne indienne qui se marie ainsi, des conséquences différentes suivant qu'il s'agit d'une femme ou d'un homme.

Cette différence dans les conséquences d'un tel mariage est le résultat direct d'une loi du Canada, la *Loi sur les Indiens* et, à mon avis, elle constitue une discrimination en raison du sexe dans l'acception de la *Déclaration canadienne des droits* de même que, dans l'affaire *Drybones* [1970] R.C.S. 282, la loi invoquée avait un effet discriminatoire à l'encontre de Drybones en raison de sa race.

Bien sûr, il est clair que la discrimination dans ce cas-là portait sur les droits de Drybones, en tant qu'Indien à qui s'appliquait la *Loi sur les Indiens*, par rapport à ceux des autres Canadiens qui n'étaient pas soumis à la disposition particulière en cause, mais qui, néanmoins, restaient seulement soumis aux lois canadiennes

but that this sort of discrimination is not the only kind within the precept of the *Canadian Bill of Rights* and does not represent its full scope is emphatically stated in the judgment of Hall J. in the *Drybones* case. The learned judge said at page 300:

> The social situations in *Brown v. Board of Education* and in the instant case are, of course, very different, but the basic philosophic concept is the same. The *Canadian Bill of Rights* is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when subject to the single exception set out in s. 2 it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself not only as between Indian and Indian but as between all Canadians whether Indian or non-Indian.

To my mind it makes no difference in the present case whether the matter is viewed as between Indian and Indian or simply as between member and member of the Wikwemikong Band of Indians. In either view the apparent effect of the legislation is, in my opinion, to discriminate by reason of sex. To this extent therefore the case of the applicant appears to me to be made out.

There is, however, another and perhaps a more elusive facet of the problem, that is to say, whether such discrimination by reason of sex abrogates, abridges or infringes the human right of the applicant as an individual, which is recognized and declared by the statute to have existed and to continue to exist, to equality before the law.

The meaning of this expression in the *Canadian Bill of Rights* was considered in the *Drybones* case where Ritchie J. speaking for the majority of the Supreme Court said at page 297:

> I think that the word "law" as used in s. 1(*b*) of the *Bill of Rights* is to be construed as meaning "the law of Canada" as defined in s. 5(2) (i.e. Acts of the Parliament of Canada and any orders, rules or regulations thereunder) and without attempting any exhaustive definition of "equality before the law" I think that s. 1(*b*) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of opinion that

(qu'il faut distinguer des lois de chaque province canadienne). Le fait que cette sorte de discrimination ne soit pas la seule dans l'esprit de la *Déclaration canadienne des droits* et qu'elle ne représente pas son entière portée, est nettement exposé dans le jugement rendu par le juge Hall dans l'affaire *Drybones*. Le savant juge déclarait à la page 300:

> Les situations sociales considérées dans *Brown v. Board of Education* et dans la présente cause sont, bien entendu, très différentes, mais le concept philosophique fondamental est le même. La *Déclaration canadienne des droits* n'atteint pas son but si pour l'égalité devant la loi elle ne fait qu'établir un rapport d'égalité entre Indiens et Indiens; elle n'a de valeur et n'a de sens que lorsque, sous réserve de l'unique exception énoncée à l'art. 2, elle répudie dans chaque loi du Canada la discrimination en raison de la race, de l'origine nationale, de la couleur, de la religion ou du sexe à l'égard des droits de l'homme et des libertés fondamentales énoncés à l'art. 1, de quelque façon que cette discrimination puisse se manifester, non seulement entre Indiens et Indiens, mais entre tous les Canadiens qu'ils soient Indiens ou non-Indiens.

A mon point de vue, il importe peu qu'en l'espèce, il s'agisse d'un problème entre Indiens ou simplement entre membres de la bande d'Indiens Wikwemikong. Dans les deux cas, à mon avis, la législation a pour effet évident d'établir une discrimination en raison du sexe. Par conséquent, dans cette mesure, j'estime que le point de vue de l'appelante doit prévaloir.

Cependant, il y a un autre aspect au problème, qui est peut-être plus difficile à cerner, à savoir si une telle discrimination en raison du sexe supprime, restreint ou enfreint le droit fondamental de l'appelante, en tant que personne, à l'égalité devant la loi, droit qui a existé et qui continuera à exister comme le reconnaît et le déclare la loi.

Le sens de cette expression dans la *Déclaration canadienne des droits* fut étudié dans l'affaire *Drybones*, dans laquelle le juge Ritchie, parlant au nom de la majorité en Cour suprême, déclarait à la page 297:

> Je pense que le mot «loi» dans l'art. 1*b*) de la *Déclaration des droits* doit s'interpréter comme signifiant une «loi du Canada» au sens de la définition à l'art. 5(2) (c'est-à-dire, une loi du Parlement du Canada, ou une ordonnance, une règle ou un règlement établis sous son régime). Sans rechercher une définition complète de l'expression «égalité devant la loi», je pense que l'art. 1*b*) signifie au moins qu'un individu ou un groupe d'individus ne doit pas être traité plus

an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

Later in his reasons Ritchie J. restated his position and in doing so he said at page 298:

In my view under the provisions of s. 1 of the *Bill of Rights* "the right of the individual to equality before the law" "without discrimination by reason of race" is recognized as a right which exists in Canada, and by ss. 2 and 5 of that *Bill* it is provided that every law of Canada enacted before or after the coming into force of the *Bill*, unless Parliament makes an express declaration to the contrary, is to be "so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement" of any of the rights so recognized and declared.

It may well be that the implementation of the *Canadian Bill of Rights* by the courts can give rise to great difficulties, but in my view full effect must be given to the terms of s. 2 thereof.

The present case discloses laws of Canada which abrogate, abridge and infringe the right of an individual Indian to equality before the law and in my opinion if those laws are to be applied in accordance with the express language used by Parliament in s. 2 of the *Bill of Rights*, then s. 94(*b*) of the *Indian Act* must be declared to be inoperative.

It appears to me to be desirable to make it plain that these reasons for judgment are limited to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity; in my opinion the same considerations do not by any means apply to all the provisions of the *Indian Act*.

The last paragraph of this quotation appears to me to show that the *Drybones* case cannot be regarded as having determined the particular problem which must now be decided but it seems to me that the statutory provisions here under consideration manifestly work a disadvantage to an Indian woman who marries a person who is not an Indian by depriving her of her right to registration as a member of her Band or as an Indian and in consequence to the rights of an Indian under the *Indian Act*.

These provisions are thus laws which abrogate, abridge and infringe the right of an individual Indian woman to equality with other Indians before the law. Though this is not a situation in which an act is made punishable at law on account of race or sex, it is one in which

durement qu'un autre en vertu de la loi. J'en conclus donc qu'une personne est privée de l'égalité devant la loi, si pour elle, à cause de sa race, un acte qui, pour ses concitoyens canadiens, n'est pas une infraction et n'appelle aucune sanction devient une infraction punissable en justice.

Plus loin dans ses motifs, le juge Ritchie réaffirmait sa position et, ce faisant, déclarait à la page 298:

A mon avis, en vertu des dispositions de l'art. 1 de la *Déclaration des droits* «le droit de l'individu à l'égalité devant la loi» «quelle que soit sa race» est reconnu comme un droit qui existe au Canada et les art. 2 et 5 de la *Déclaration* décrètent que toute loi du Canada édictée avant ou après la mise en vigueur de la *Déclaration* doit, à moins que le Parlement ne déclare expressément le contraire, «s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre» l'un quelconque des droits ainsi reconnus ni à en «autoriser la suppression, la diminution ou la transgression».

Il est bien possible que l'application judiciaire de la *Déclaration canadienne des droits* donne lieu à de grandes difficultés mais, à mon avis, il faut donner leur plein effet aux dispositions de l'art. 2.

L'affaire présentement devant nous démontre qu'il existe des lois du Canada qui suppriment, restreignent et enfreignent la droit d'un Indien à l'égalité devant la loi et, à mon avis, afin d'appliquer ces lois en se conformant aux termes explicites employés par le Parlement à l'art. 2 de la *Déclaration des droits* il faut déclarer que l'art. 94*b*) de la *Loi sur les Indiens* est inopérant.

Je crois utile d'affirmer clairement que ces motifs s'appliquent seulement à un cas où, en vertu des lois du Canada, est réputé infraction punissable en droit, pour une personne, à cause de sa race, un acte que ses concitoyens canadiens qui ne sont pas de cette race peuvent poser sans encourir aucune sanction. A mon avis, cela est bien loin d'être applicable à toutes les dispositions de la *Loi sur les Indiens*.

A mon avis, le dernier alinéa de cette citation indique qu'on ne peut considérer que l'affaire *Drybones* a réglé le problème particulier qu'il faut maintenant trancher, mais il me semble que les dispositions législatives en question sont manifestement au désavantage d'une Indienne qui épouse un non-Indien puisqu'elles la privent de son droit d'inscription comme membre de sa bande ou comme Indienne et, en conséquence, des droits accordés aux Indiens par la *Loi sur les Indiens*.

Ainsi, il s'agit bien de dispositions qui suppriment, restreignent et enfreignent le droit d'une Indienne à l'égalité avec les autres Indiens devant la loi. Il ne s'agit pas ici, bien sûr, d'un cas où un acte est punissable en droit en raison de la race ou du sexe de son auteur; il n'en

under the provisions here in question the consequences of the marriage of an Indian woman to a person who is not an Indian are worse for her than for other Indians who marry non-Indians and than for other Indians of her Band who marry persons who are not Indians. In my opinion this offends the right of such an Indian woman as an individual to equality before the law and the *Canadian Bill of Rights* therefore applies to render the provisions in question inoperative.

I would set aside the decision of Judge Grossberg and refer the matter back to him to be disposed of on the basis that the provisions of the *Indian Act* are inoperative to deprive the applicant of her right to registration as a member of the Wikwemikong Band of Indians.

demeure pas moins que, aux termes des dispositions en question, les conséquences du mariage d'une Indienne avec un non-Indien sont pires pour elle que pour les autres Indiens qui épousent des non-Indiennes et que pour les autres Indiens de sa bande qui épousent des non-Indiennes. A mon avis, ceci enfreint le droit à l'égalité devant la loi de ladite Indienne en tant que personne et, par conséquent, la *Déclaration canadienne des droits* s'applique et rend inopérantes les dispositions en question.

Par conséquent, je suis d'avis d'infirmer la décision du juge Grossberg et de lui renvoyer l'affaire pour qu'il en dispose en tenant compte du fait que les dispositions de la *Loi sur les Indiens* ne peuvent avoir pour effet de priver l'appelante de son droit d'inscription en qualité de membre de la bande d'Indiens Wikwemikong.

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[HIGH COURT OF JUSTICE]

Bedard v. Isaac et al.

OSLER, J. 15TH DECEMBER 1971.

Civil rights — Equality before the law — Indian Act (Can.) providing that an Indian woman loses status as an Indian on marrying a non-Indian or loses membership in a band on marrying a person not a member of that band — No similar provision regarding marriage of Indian men — Whether Act authorizes discrimination on basis of sex — Canadian Bill of Rights.

Indians — Indian woman marrying non-Indian and leaving reserve — Subsequent return to reserve to live in house owned by her — Band Council ordering her to dispose of house and leave reserve — Council acting under provision in Indian Act providing that an Indian woman loses status as an Indian on marrying a non-Indian or loses membership in a band on marrying a person not a member of that band — No similar provision regarding marriage of Indian men — Whether Act authorizes discrimination on basis of sex contrary to Canadian Bill of Rights — Indian Act (Can.), ss. 12, 14.

The plaintiff, born a full-blooded Indian, married a non-Indian and lived with him until her separation from him six years later at which time she returned to the reserve to live in a house bequeathed to her by her mother. Upon her return the defendants, who comprise the Council of the Six Nations Indians and who, by virtue of their position, are given certain statutory powers and duties, passed a series of resolutions ordering the plaintiff to dispose of her property and expelling her from her home on the reserve. On a motion for an injunction restraining the defendants from expelling her from the reserve and an order setting aside the resolutions passed by the defendant, *held*, the motion should be granted.

In so far as s. 12(1)(*b*) of the *Indian Act*, R.S.C. 1970, c. I-6, which provides, *inter alia*, that a woman who marries a person who is not an Indian is not entitled to be registered as a member of the band, leads to a different result with respect to the rights of an Indian woman from that which obtains when a male Indian marries a person other than an Indian it authorizes discrimination by reason of sex contrary to the *Canadian Bill of Rights*, R.S.C. 1970, App. III, and is, accordingly, inoperative. While it is true that elsewhere in the Act Indian women are given some advantages that do not accrue to men and that such a distinction is not adverse to them, it remains the case that the loss of status as an Indian and the loss of the right to be registered and to occupy property on a reserve is discrimination which is adverse to the person affected. *Quaere*, whether the entire *Indian Act* is inoperative by reason of the *Canadian Bill of Rights*.

[*R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, 10 C.R.N.S. 344, 71 W.W.R. 161, apld; *Re Lavell and A.-G. Can.* (1971), 22 D.L.R. (3d) 188, [1971] F.C. 347, 14 *Crim. L.Q.* 236, folld]

Courts — Stare decisis — Decision of Appeal Division of Federal Court — No appeal from High Court of Justice to Appeal Division of Federal Court — Stare decisis does not apply to bind High Court — Federal Court of Appeal decisions treated in same way as decision of Courts of Appeal of other Provinces.

Courts — Federal Court Act (Can.) — Whether District Supervisor under Indian Act "a federal board, commission or other tribunal" — Whether in consequence jurisdiction to review acts of District Supervisor denied to provincial superior Court.

The term "federal board, commission or other tribunal" is not sufficiently broad to encompass an individual such as a District Supervisor under the *Indian Act*, R.S.C. 1970, c. I-6, and, accordingly, jurisdiction to review his acts vests in a provincial superior Court. In any event nothing in the *Federal Court Act*, 1970-71 (Can.), c. 1, deprives a provincial superior Court of jurisdiction to construe and interpret that Act in a proper case and where action is taken under a federal statute which, upon construction, is found to be inoperative by virtue of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, it can only be protected from review by a Court if the powers of review exercised by the provincial superior Courts are taken away by clear and unambiguous language.

MOTION for an injunction restraining defendants from expelling plaintiff from an Indian reserve.

Malcolm Montgomery, Q.C., for plaintiff.
Burton H. Kellock, for defendants.

OSLER, J.:—In this action the plaintiff seeks an injunction restraining the defendants from expelling her and her two infant children from the home she occupies on the Six Nations Indian Reserve in the County of Brant and an order setting aside a certain resolution passed by the defendants which ordered the plaintiff to dispose of such property. By consent of counsel for the parties, the motion was treated as a motion for judgment and an additional claim was added for a declaratory judgment concerning the respective rights of the parties.

The matter is one of great interest and importance, concerning as it does the relationship of the *Indian Act*, R.S.C. 1970, c. I-6, and the *Canadian Bill of Rights*, R.S.C. 1970, App. III, and I am obliged to both counsel for the able and elaborate argument addressed to me. It is through force of other circumstances and by no means from lack of appreciation of their efforts that I have decided justice will best be served if I give shortly my reasons for disposing of the matter as I do rather than deferring it further for the purpose of writing a more elaborate opinion.

The plaintiff was born upon the Six Nations Indian Reserve in the County of Brant of parents, both of whom were members of the Six Nations Band at that time and until their death. She was thus born a full-blooded Six Nations Indian. On May 30, 1964, the plaintiff married a non-Indian and by him had two children. On or about June 23, 1970, the plaintiff separated from her husband and returned with her two chil-

dren to the Six Nations Reserve to live in a house bequeathed to her by her mother, the late Carrie Williams.

The said house and the land upon which it stands is properly described as parcel 17 in lot 13, River Range, Tuscarora Indian Reserve No. 40, and the plaintiff's mother held a certificate of possession to such property under s. 20 of the *Indian Act*, R.S.C. 1970, c. I-6.

The last will and testament of an Indian is not probated in accordance with the *Surrogate Courts Act*, R.S.O. 1970, c. 451, but rather under the provisions of s. 42 of the *Indian Act* and under the provisions of that statute the terms of the will under which the plaintiff apparently took was approved by the Council of the Six Nations and by the Director of Operations, Indian and Eskimo Affairs, on behalf of the Minister of Indian Affairs, as required by the Act.

The defendants compose the Six Nations Council, a body recognized by s. 74 of the *Indian Act* and by that statute given certain statutory powers and duties.

Section 5 of the Act provides that a Register shall be maintained in which shall be recorded the name of every person who is entitled to be registered as an Indian. Every person who is entitled to be registered shall be entered either as a member of a band or in a General List. Section 12(1)(*b*) provides that:

> (*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

is not entitled to be registered.

Section 14 provides that:

> 14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, . . .

A male Indian who marries outside the band or who marries a non-Indian is not by that Act deprived of his status as an Indian or a person entitled to be registered or to occupy Indian lands.

Upon the return of the plaintiff to the reserve and her occupation of the dwelling purportedly bequeathed to her by her mother, the defendants passed a series of resolutions which successively (a) gave the plaintiff permission to reside on the reserve for a period of six months, during which time she was to dispose of the property; (b) extended that permission for a further six months from February 16, 1971; (c) granted the plaintiff a further period of two months' residence from June 15, 1971, and informed her that any further requests for resi-

dence would be denied and (d) determined to "request the Brantford District Supervisor to serve a notice to Mrs. Yvonne Bedard to quit the Six Nations Indian Reserve". This last was known as resolution 15 and was adopted by the Council of the Band on September 7, 1971.

Various procedural questions present themselves when the actions of the Band Council and its relationship with the District Supervisor under the *Indian Act* are examined. However, the main thrust of the plaintiff's case is that, assuming all procedural matters were properly carried out, the actions of the Band Council in requesting the District Supervisor to serve notice to quit, any action taken by the Supervisor pursuant to such request and the removal of her name from the Band Register simply because of her marriage to a non-Indian are actions that discriminate against her by reason of her race and her sex with reference to her right to the "enjoyment of property, and the right not to be deprived thereof except by due process of law" [*Canadian Bill of Rights*, s. 1(*a*)].

As the parties are agreed that the principal point for determination is whether or not the *Indian Act* or certain of its provisions is inoperative by reason of the *Canadian Bill of Rights*, and as they are further agreed upon the impropriety of enjoining the Crown or an agent thereof, under which description the District Supervisor may well fall, I shall confine myself to deciding whether or not a declaration should issue. The specific form of any consequential order may be later discussed with me by counsel.

One major difficulty that was not raised by counsel arises from the *Federal Court Act*, 1970-71 (Can.), c. 1, s. 18 of which reads as follows:

> 18. The Trial Division has exclusive original jurisdiction
>
> (*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

By s. 2(*g*) of the Act, it is declared that:

> (*g*) "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such per-

son or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*;

It would appear that the District Supervisor may well be a "person . . . having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada . . ." and that jurisdiction to deal with his acts is, by the statute mentioned, denied to the Superior Courts of the Provinces. However, it is undoubted law that the powers exercised or formerly exercised by superior Courts through the prerogative writs and now, in this Province at least, exercised by way of order in lieu of such writs, can only be taken away by the most clear and unambiguous language. I am not persuaded that the term "federal board, commission or other tribunal" is sufficiently broad to encompass an individual such as a District Supervisor under the *Indian Act*, or indeed perhaps even a Band Council. In any event, there is nothing in the Act that persuades me that this Court is deprived of jurisdiction to construe and interpret the *Federal Court Act* in a proper case. Both the Band Council and the District Supervisor in dealing with the plaintiff as they purported to do, were undoubtedly affecting a matter of property and civil rights within the Province of Ontario and, hence, their actions are subject to examination by the Supreme Court of the Provinces unless such actions are clearly authorized by valid federal statutes or other federal law enacted pursuant to the powers given to Parliament by s. 91(24) of the *B.N.A. Act, 1867*, "Indians, and Lands reserved for the Indians".

Put succinctly, no action of such a person can be protected from review by this Court if such action purports to be justified only by a federal statute which is upon a true construction inoperative by virtue of the provisions of the *Canadian Bill of Rights.*

It was argued that the matter before me has been decided by a Court whose judgments and decisions are binding upon me. In a judgement which is as yet unreported, but which was filed on October 13, 1971, *Re Lavell and A.-G. Can.* [since reported 22 D.L.R. (3d) 188, [1971] F.C. 347, 14 *Crim. L.Q.* 236], the Appeal Division of the Federal Court decided that s. 12(1)(*b*) of the *Indian Act* was rendered inoperative by virtue of the *Canadian Bill of Rights.* There is no appeal from this Court to the Federal Court of Appeal and, hence, the rule of *stare decisis* is of no application. In my respectful view, the decisions of the Federal Court of Appeal are entitled to the same consideration and persuasive weight as would be given

by this Court to the decisions of the Courts of Appeal in other Provinces and, hence, the decision in *Re Lavell and A.-G. Can.* is of persuasive value only and does not bind me.

Having said that, I go on to state that I agree with that decision, I find that it is in accordance with *R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, and I propose to follow it.

I am not unmindful of the caution appended by Ritchie, J., to his decision in the *Drybones* case wherein he made it plain that the considerations he had discussed "do not by any means apply to all the provisions of the Indian Act". The Court there held that s. 94(*b*) of the *Indian Act*, R.S.C. 1952, c. 149 (now s. 95(*b*)), did abrogate, abridge and infringe the right of an individual Indian to equality before the law. It was thus declared to be inoperative on grounds that it discriminated by reason of race. It was unnecessary for the Court to examine further the *Indian Act* in that case.

Regardless of the larger question of whether virtually the entire *Indian Act*, which is plainly based upon a distinction of race and has no other reason for its existence, may be said to be a valid exercise of the powers of Parliament and may remain in force despite the *Canadian Bill of Rights*, it is abundantly clear that under various provisions of the Act there follows "a different result with respect to the rights of an Indian woman who marries a person other than an Indian, or an Indian of another band, from that which is to obtain when a male Indian marries a person other than an Indian, or an Indian who is a member of another band" (*per* Thurlow, J., for the Court in *Re Lavell and A.-G. Can.*, *supra* [p. 191]) and, hence, there is plainly discrimination by reason of sex with respect to the rights of an individual to the enjoyment of property. Indeed, the whole status of such a person as an Indian is completely altered as s. 2(1) provides that:

> "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

Such status is not specifically dealt with by the *Bill of Rights*, but the question of the enjoyment of property and the security thereof undoubtedly is.

It was most ably argued by counsel for the defendants that "discrimination" means not merely distinction, but distinction adverse to the person with respect to whom it is made. I am not at all sure the word is limited to the meaning thus put forward, but in any case, while it may be said that Indian women are given some advantages elsewhere in the Act that do not accrue to males and that these compensate for disadvantages,

it is perfectly apparent that the loss of status as an Indian and the loss of the right to be registered and to occupy property upon a reserve is discrimination which is adverse to the interest of Indian women and, hence, is declared by the *Bill of Rights* not to have existed in Canada with respect to legislation enacted by Parliament, unless expressly declared otherwise by an Act of Parliament.

It is, therefore, the duty of the Court, applying the *Bill* in the way in which the majority in the *Drybones* case directed it should be applied, to declare s. 12(1)(*b*) of the *Indian Act* inoperative and accordingly, I do so.

As it was put to me by counsel in argument, the conclusion to be drawn from such a declaration may well be that virtually the entire Act must be held to be inoperable. I can only echo the statement of Ritchie, J., at p. 298 S.C.R., p. 485 D.L.R., in the *Drybones* case.

> It may well be that the implementation of the *Canadian Bill of Rights* by the courts can give rise to great difficulties, but in my view full effect must be given to the terms of s. 2 thereof.

Section 12(1)(*b*) of the Act is, therefore, inoperative and all acts of the Council Band and of the District Supervisor purporting to be based upon the provisions of that section can be of no effect.

The applicant is entitled to her costs. If there are difficulties about the form of the order I may be spoken to.

Motion granted.

[SUPREME COURT OF ONTARIO]
MASTER'S CHAMBERS

Mengarelli v. Forrest et al.

MASTER (DAVIDSON) 10TH MAY 1971.

Practice — Pleading — Libel action — Whether intention of defendant may be pleaded — Rules 143 and 139.

In a libel action the intention of the defendant at the time of the alleged libel is immaterial and therefore cannot be pleaded.

[*Tisdall v. Sowdon*, [1942] O.W.N. 383; *Toronto Star Ltd. v. Globe Printing Co.*, [1941] O.W.N. 157, [1941] 3 D.L.R. 376, folld]

APPLICATION to strike out portions of the statement of claim as being embarrassing.

A. S. Cooper, for defendant, applicant.
J. C. Goldenberg, Q.C., for plaintiff, respondent.

If such amendments were added to the Act it would still allow a treaty Indian to be removed from the register if she were a female, who married a non Indian by Section 12A. Since an Indian woman takes the status of her husband and since her husband is prohibited from being registered as an Indian, it is logical that she too must cease to be an Indian. Furthermore although this is a surrender of her treaty rights it is voluntary and necessary.

I add that the committee included many persons sincerely concerned with the civil rights of Indians. I mention particularly Mrs. J. C. Gorman of Calgary who was chairman of the committee, and Professor F. R. Scott of Montreal.

Counsel for the appellant has referred to several cases in the United States of America. These cases must be considered with caution and, in my opinion, cannot be applied. They are based on the written constitution of the United States or on federal or State statutes.

In my opinion s. 12(1)(*b*) of the *Indian Act* is not inoperative under the *Canadian Bill of Rights*.

The appeal is dismissed.

NOTE: On October 8, 1971, a motion to review this decision was granted by the Federal Court of Appeal (Jackett, C.J., Thurlow and Pratte, JJ.). The decision was set aside and the matter referred back to Grossberg, Co.Ct.J., to be disposed of on the basis that the provisions of the *Indian Act* are inoperative to deprive appellant of her right to registration as a member of the band. The report of that decision appears below.

[1971] F.C. 347

RE LAVELL AND ATTORNEY-GENERAL OF CANADA

Federal Court of Appeal, Jackett, C.J., Thurlow and Pratte, JJ.
October 8, 1971.

Civil rights — Equality before the law — Indian Act, R.S.C. 1970, s. 12(1)(b) — Marriage of Indian woman to non-Indian — Effect on right to registration as member of band — Whether Act deprives Indian woman of equality before the law on basis of sex — Canadian Bill of Rights, R.S.C. 1970, s. 1(b).

In so far as the *Indian Act*, R.S.C. 1970, c. I-6, s. 12(1)(*b*), deprives an Indian woman who marries a non-Indian of her right to registration as a member of her band with the resulting loss of rights as an Indian under the *Indian Act*, and does not effect a similar result in respect of the marriage of a male Indian to a non-Indian, it deprives an Indian woman of equality before the law with other Indians and it does so on the basis of her sex contrary to the *Canadian Bill of Rights*, R.S.C. 1970, App. III, s. 1(*b*). Accordingly, on a motion to review a decision of a County Court Judge confirming a decision of the Registrar

under the *Indian Act* dismissing a protest against removal of the applicant's name from the band list, *held*, the decision should be set aside, on the basis that the provisions of s. 12 (1)(*b*) of the *Indian Act* are inoperative in the face of the *Canadian Bill of Rights*.

[*R. v. Drybones*, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, [1970] S.C.R. 282, 10 C.R.N.S. 334, 71 W.W.R. 161, apld]

Courts — Jurisdiction — Federal Court — Power to review — Decision of County Court Judge as persona designata confirming action of Registrar under Indian Act — Whether reviewable — Whether a federal board, commission or other tribunal — Federal Court Act, 1970-71 (Can.), c. 1, s. 28.

A County Court Judge reviewing a decision of the Registrar under the *Indian Act* acts as a person designated to carry out that function by or under the *Indian Act*, and is thus a person having and exercising jurisdiction or powers conferred by a statute of the Parliament of Canada and is not exercising the authority of the County Court of which he is a Judge and is not a Court or other body constituted by or under a law of a Province.

MOTION to review a decision of Grossberg, Co.Ct.J., *ante*, p. 182, as *persona designata* confirming a decision of the Registrar under the *Indian Act* dismissing a protest against removal of applicant's name from the Indiar Register.

Clayton C. Ruby, for applicant.
N. A. Chalmers, Q.C., and *J. B. Beckett*, for respondent.

The judgment of the Court was delivered orally by

THURLOW, J.:—Two points arise on this motion to review under s. 28 of the *Federal Court Act*, 1970-71 (Can.), c. 1. The first concerns the jurisdiction of the Court to review the decision of Grossberg, Co.Ct.J., in view of the definition of "federal board, commission or other tribunal" in s. 2(*g*) of the Act. That definition reads as follows:

> (*g*) "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*;

I have no difficulty in concluding that Judge Grossberg, when reviewing the Registrar's decision, was acting as a person designated to carry out that function by or under the *Indian Act*, R.S.C. 1970, c. I-6, and was not exercising the authority of the County Court of which he was a Judge. He thus constituted a person having and exercising jurisdiction

or powers conferred by a statute of the Parliament of Canada and not a Court or other body constituted by or under a law of a Province within the definition.

The interpretation and application of the remaining portion of the definition, that is to say, the wording "or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *British North America Act, 1867*", are not as easy to resolve in view of the fact that, as a Judge of the County Court, Judge Grossberg is a person appointed under s. 96 of the *B.N.A. Act, 1867*, but it appears to me that since the Judge, when exercising his powers and authority under the *Indian Act*, did not exercise a function or an authority of the Court of which he is a Judge the fact that he was appointed to that Court under s. 96 of the *B.N.A. Act, 1867* will not serve to bring him for this purpose within the exclusion which I have just cited from the definition. It follows that this Court has jurisdiction under s. 28 of the *Federal Court Act* to review his decision.

The other question for determination is whether s. 12(1) (*b*) or any other provision of the *Indian Act* operates to deprive the applicant of the right she would otherwise have to be and remain registered as a member of the Wikwemikong Band of Indians. The applicant is a woman of Indian ancestry and was a registered member of that band from her birth until December 7, 1970, when the Registrar under the *Indian Act* struck her name from the band list. The Registrar took this action because on April 11, 1970, the applicant had married a person who is not an Indian. Her protest to the Registrar was dismissed and this decision was confirmed by Judge Grossberg on a review conducted at her request under the review procedure provided by the statute.

On the face of it s. 12(1) (*b*) appears to justify the Registrar's action for the section provides:

> 12(1) The following persons are not entitled to be registered, namely,
>
> (*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

Under the Act, however, a male Indian who marries a woman who is not an Indian does not lose his right to be and remain registered on the band list. Indeed s. 11(*f*) even provides for the registry of his wife as a member of the band. Other provisions of the Act, from s. 4 to s. 17 inclusive, throw somewhat more light on the system of Indian registry

but the foregoing features of the system appear to me to be ample to point up the problem.

The applicant contends that this legislation is rendered inoperative by the *Canadian Bill of Rights*, R.S.C. 1970, App. III, since it discriminates against her on the basis of sex in depriving her of her right to the status of an Indian and to continue to be registered as a member of the Wikwemikong Band.

Judge Grossberg in a carefully considered opinion expressed the view that the applicant's marriage gave her the status of a married woman with the same capacities and incapacities as all other Canadian married females and that this is the equality to be assured to her under the *Canadian Bill of Rights* and not necessarily equality within a group or class of married persons to whom a particular law of Canada applies. He therefore confirmed the Registrar's decision.

As will presently appear I take a somewhat different view of the problem which the *Canadian Bill of Rights* raises. It is clear that both male Indians and female Indians have capacity to marry and that each has the capacity and the right to contract a marriage either with another Indian or with a person who is not an Indian. The *Indian Act*, however, which is a law made by the Parliament of Canada for Indians, prescribes a different result with respect to the rights of an Indian woman who marries a person other than an Indian, or an Indian of another band, from that which is to obtain when a male Indian marries a person other than an Indian, or an Indian who is a member of another band.

This difference in the consequences of such a marriage plainly arises under a law of Canada, *i.e.*, the *Indian Act*, and, in my opinion, it constitutes discrimination by reason of sex within the meaning of the *Canadian Bill of Rights* just as the effect of the statute invoked in *R. v. Drybones*, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, [1970] S.C.R. 282, was to discriminate against Drybones on the basis of his race.

It is, of course, clear that the discrimination in that case was between the rights of Drybones, as an Indian to whom the *Indian Act* applied, and those of other Canadians not subject to the particular provision but nevertheless subject only to the laws of Canada as distinguished from laws of particular Provinces of Canada, but that this sort of discrimination is not the only kind within the precept of the *Canadian Bill of Rights* and does not represent its full scope is emphatically stated in the judgment of Hall, J., in the *Drybones* case. The learned Judge said at pp. 486-7:

> The social situations in *Brown v. Board of Education* [(1953), 347 U.S. 483] and in the instant case are, of course, very different, but the basic philosophic concept is the same. The *Canadian Bill of Rights* is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when, subject to the single exception set out in s. 2, it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself not only as between Indian and Indian, but as between all Canadians whether Indian or non-Indian.

To my mind it makes no difference in the present case whether the matter is viewed as between Indian and Indian or simply as between member and member of the Wikwemikong Band of Indians. In either view the apparent effect of the legislation is, in my opinion, to discriminate by reason of sex. To this extent therefore the case of the applicant appears to me to be made out.

There is, however, another and perhaps a more elusive facet of the problem, that is to say, whether such discrimination by reason of sex abrogates, abridges or infringes the human right of the applicant as an individual, which is recognized and declared by the statute to have existed and to continue to exist, to equality before the law.

The meaning of this expression in the *Canadian Bill of Rights* was considered in the *Drybones* case where Ritchie, J., speaking for the majority of the Supreme Court, said at p. 484:

> I think that the word "law" as used in s. 1(*b*) of the *Bill of Rights* is to be construed as meaning "the law of Canada" as defined in s. 5(2) (*i.e.*, Acts of the Parliament of Canada and any orders, rules or regulations thereunder) and without attempting any exhaustive definition of "equality before the law" I think that s. 1(*b*) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

Later in his reasons Ritchie, J., restated his position and in doing so he said at pp. 485-6:

> In my view under the provisions of s. 1 of the *Bill of Rights* "the right of the individual to equality before the law" "without discrimination by reason of race" is recognized as a right which exists in Canada, and by ss. 2 and 5 of that Bill it is provided that every law of Canada enacted before or after the coming into force of the Bill, unless Parliament makes an express declaration

to the contrary, is to be "so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement" of any of the rights so recognized and declared.

It may well be that the implementation of the *Canadian Bill of Rights* by the Courts can give rise to great difficulties, but in my view full effect must be given to the terms of s. 2 thereof.

The present case discloses laws of Canada which abrogate, abridge and infringe the right of an individual Indian to equality before the law and in my opinion if those laws are to be applied in accordance with the express language used by Parliament in s. 2 of the *Bill of Rights*, then s. 94(*b*) of the *Indian Act* must be declared to be inoperative.

It appears to me to be desirable to make it plain that these reasons for judgment are limited to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity; in my opinion the same considerations do not by any means apply to all the provisions of the *Indian Act*.

The last paragraph of this quotation appears to me to show that the *Drybones* case cannot be regarded as having determined the particular problem which must now be decided but it seems to me that the statutory provisions here under consideration manifestly work a disadvantage to an Indian woman who marries a person who is not an Indian by depriving her of her right to registration as a member of her band or as an Indian and in consequence to the rights of an Indian under the *Indian Act*.

These provisions are thus laws which abrogate, abridge and infringe the right of an individual Indian woman to equality with other Indians before the law. Though this is not a situation in which an act is made punishable at law on account of race or sex, it is one in which under the provisions here in question the consequences of the marriage of an Indian woman to a person who is not an Indian are worse for her than for other Indians who marry non-Indians and than for other Indians of her band who marry persons who are not Indians. In my opinion this offends the right of such an Indian woman as an individual to equality before the law and the *Canadian Bill of Rights* therefore applies to render the provisions in question inoperative.

I would set aside the decision of Judge Grossberg and refer the matter back to him to be disposed of on the basis that the provisions of the *Indian Act* are inoperative to deprive the applicant of her right to registration as a member of the Wikwemikong Band of Indians.

Motion granted.

I assign the degree of fault attributable to the defendants Van Horne and Hydro as 65% and to the defendant Brayden as 35%.

[Consideration of the measure of damages is omitted.]

Judgment accordingly.

RE LAVELL AND ATTORNEY-GENERAL OF CANADA

County Court of the Judicial District of York, Ontario, Grossberg, Co.Ct.J. June 21, 1971.

Civil rights — Discrimination on basis of sex — Indian woman marrying non-Indian — Loss of rights and privileges as Indian — Similar treatment not applying to male Indian — Whether offensive to Canadian Bill of Rights — Indian Act, R.S.C. 1952.

Under the *Indian Act*, R.S.C. 1952, c. 149 (now R.S.C. 1970, c. I-6), an Indian male who marries a non-Indian retains his status as an Indian but an Indian woman who marries a non-Indian, not only cannot confer on him the status of an Indian, but loses all her rights and privileges in respect of property or money held by the Crown for the benefit of Indians. However, she acquires the same rights and privileges in matters of marriage and property as any other Canadian married woman. Consequently, she has not been deprived of "equality before the law" because of "discrimination by reason of . . . sex" within the meaning of the *Canadian Bill of Rights*, 1960 (Can.), c. 44 (now R.S.C. 1970, App. III).

[*R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, 10 C.R.N.S. 334, 71 W.W.R. 161, distd; *R. v. Gonzales* (1962), 32 D.L.R. (2d) 290, 132 C.C.C. 237, 37 C.R. 56, 37 W.W.R. 257; *R. v. Beaulne, Ex p. Latreille*, [1971] 1 O.R. 630, 16 D.L.R. (3d) 657, 2 C.C.C. (2d) 196, refd to]

APPEAL from a decision of the Registrar of the Department of Citizenship and Immigration deleting appellant's name from the Indian Register.

Clayton C. Ruby, for appellant.
N. A. Chalmers, Q.C., for respondent.

GROSSBERG, CO.CT.J.:—This is an appeal by Jeannette Vivian Corbiere Lavell, pursuant to s. 9 of the *Indian Act*, R.S.C. 1952, c. 149 [now R.S.C. 1970, c. I-6], as amended by 1956, c. 40, s. 2, from the decision of the Registrar of the Department of Citizenship and Immigration who is in charge of the Indian Register.

I have to decide, in this appeal, whether s. 12(1)(*b*) [am. s. 4, *idem*] of the *Indian Act* is inoperative because of the *Canadian Bill of Rights*, 1960 (Can.), c. 44 [now R.S.C. 1970, App. III].

Counsel for the appellant and for the respondent have agreed in writing to the following facts:

1. The Appellant is a female person of Indian ancestry and was born Jeannette Vivian Corbiere. She was at birth a member of the Wikwemikong Band and was at birth registered as an Indian pursuant to the Indian Act, R.S.C. 1952, Chapter 149, as amended, as Number 1713 Wikwemikong Band, Manitoulin Island Agency.
2. On April 11th, 1970, the Appellant married David Mills Lavell, who is not an Indian, nor a member of any Band of Indians.
3. The Registrar in charge of the Indian Register on December 7th, 1970, deleted the Appellant's name from the Wikwemikong Band list.
4. On December 17th, 1970, the Appellant protested the deletion of her name from the said Band list.
5. The Registrar subsequently decided not to alter his deletion of the Appellant's name from the said Band list and this decision was communicated to the Appellant by her solicitors by a letter dated January 6th, 1971.
6. By letter January 15th, 1971, the Appellant by her solicitors requested the Registrar to refer his decision to a Judge for review and by letter dated January 27th, 1971, the Registrar referred his decision together with all material considered by him to such Judge of the County Court of the Judicial District of York, where the Appellant resides, as might be named by His Honour the Senior Judge of the said Court.
7. The Appellant has not yet been paid her *per capita* share of the capital and revenue monies held by Her Majesty on behalf of the Wikwemikong Band (which would amount to the sum of $37.00 approximately); no monies would be paid to her under any treaty should she continue to be a member of the said Band.

Section 5 of the *Indian Act* provides that the Indian Register shall be maintained in the Department of Citizenship and Immigration which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.

"Band" is defined in s. 2(*a*) of the *Indian Act* as follows:

> (*a*) "band" means a body of Indians
>
> (i) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before or after the coming into force of this Act,
>
> (ii) for whose use and benefit in common, moneys are held by Her Majesty, or
>
> (iii) declared by the Governor in Council to be a band for the purposes of this Act;

Section 2(*g*) of the *Indian Act* provides as follows:

> (*g*) "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

Section 14 of the *Indian Act* provides as follows:

14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, but if she marries a member of another band, she thereupon becomes a member of the band of which her husband is a member.

Section 12(1)(*b*) of the *Indian Act*, which is the section attacked on this appeal, provides as follows:

12(1) The following persons are not entitled to be registered, namely,

(*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

I summarize the problem in a few sentences. The *Indian Act* provides that an Indian male who marries a non-Indian retains his Indian status. An Indian woman who marries a non-Indian not only cannot confer on him the status of an Indian but loses all her rights and privileges of an Indian under the *Indian Act*.

Part I of the *Canadian Bill of Rights* is as follows:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(*b*) the right of the individual to equality before the law and the protection of the law;

(*c*) freedom of religion;

(*d*) freedom of speech;

(*e*) freedom of assembly and association; and

(*f*) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;

(*c*) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(*g*) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

4. The provisions of this Part shall be known as the *Canadian Bill of Rights*.

I have had the benefit of able, oral and written arguments by counsel for the appellant and for the respondent.

Counsel for the appellant contends that s. 12(1)(*b*) of the *Indian Act* is inoperative under the *Canadian Bill of Rights*. He submits the section denies to the appellant "equality before the law" because of "discrimination by reason of . . . sex".

I have been referred to s. 9(6) of the *Indian Act* which is as follows:

9(6) Where a decision of the Registrar has been referred to a judge for review under this section, the burden of establishing that the decision of the Registrar is erroneous is on the person who requested that the decision be so referred.

In *R. v. Gonzales* (1962), 32 D.L.R. (2d) 290, 132 C.C.C. 237, 37 C.R. 56 (British Columbia Court of Appeal), Tysoe, J.A., expressed the view that the *Canadian Bill of Rights* is operative, in the face of a law of Canada, only when that law does not give equality to all persons within the class to whom that particular law extends or relates. This "separate but

equal" doctrine was rejected by the majority decision of the Supreme Court of Canada in *R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355.

In the case I have to decide there is a different situation than existed in *R. v. Drybones*. In *R. v. Drybones* there was equality within the class (*i.e.*, Indians) but inequality with "fellow Canadians". In the present case the marriage of the appellant gives her equality with all other Canadian married females but it is alleged there is discrimination within a class (*i.e.*, Indians) by reason of sex.

Accordingly, it is submitted there is inequality in law.

The marriage of the appellant has created a status. This status is the condition of belonging to a particular class of persons (*i.e.*, married women), to whom the law assigns capacities or incapacities: Bromley, *Family Law*, p. 3.

The appellant entered into a voluntary marriage which gave her the status and all the rights enjoyed by all other Canadian married females. Her marriage also imposed on her the same obligations imposed on all other Canadian married females: *R. v. Drybones, supra*, at p. 297 S.C.R., pp. 484-5 D.L.R.; *R. v. Beaulne, Ex p. Latreille*, [1971] 1 O.R. 630 at p. 632, 16 D.L.R. (3d) 657 at p. 659, 2 C.C.C. (2d) 196.

In *R. v. Drybones*, at p. 306 S.C.R., p. 491 D.L.R., Pigeon, J., commented that the expression "equality before the law" is ". . . largely unlimited and undefined". I am unable to conclude in enacting the *Canadian Bill of Rights* it was contemplated that, as a general or inflexible principle, inequality within a group or class itself, by reason of sex is necessarily offensive to the *Canadian Bill of Rights*. In my view, in this case, the equality which should be sought and assured to the appellant upon her marriage in equality with all other Canadian married females. The appellant has such equality. The appellant has not been deprived of any human rights or freedoms contemplated by the *Canadian Bill of Rights*.

I observe, in the "Report of the Royal Commission on the Status of Women in Canada", when it dealt with the legal status of Indians, that para. 58, p. 238, concludes as follows: "Indian women and men should enjoy the same rights and privileges in matters of marriage and property as other Canadians."

The marriage of the appellant permits her to enjoy the same rights and privileges as all other Canadian married females.

In addition to the agreed statement of facts I heard the evidence of the appellant. Most of her evidence was of dubious relevance to the legal point I have to decide. I am not

insensitive to some of her testimony, but with no disrespect to her, I am unable to accept her assertion that she cannot retain her Indian culture, heritage and customs and inculcate these in her child or children if she so desires. The appellant has not resided on a reserve for 10 years, except for sporadic visits to her family. I decline to accept that she cannot visit her family on the reserve if she wishes.

I resist the temptation to embark on an extended academic treatise of the reserve system for Indians which would be replete with plagiarism. Further, I resist being lured into an injudicious or critical expostulation of s. 12(1)(*b*) of the *Indian Act*. However, I make the following comments because of the appellant's emotional and militant evidence.

There are divided views among Indians themselves and among other individuals and well-meaning groups, who are seriously concerned with the welfare of Indians, as to the desirability of continuing s. 12(1)(*b*) of the *Indian Act*. This section in its present form, or in language having the same meaning and effect, has been in force for about 95 years. It has been submitted that many Indians wish to retain s. 12(1)(*b*) so that peace, harmony and good will among Indians on the reserve will not be unduly endangered by permitting Indian bands to be infiltrated with non-Indians.

Section 91(24) of the *B.N.A. Act, 1867* gives the Parliament of Canada exclusive legislative authority over "Indians and lands reserved for Indians". This provision confers legislative authority over Indians *qua* Indians, and not otherwise: *R. v. Martin* (1917), 41 O.L.R. 79, 59 D.L.R. 635.

Indians are rightfully members of a proud and courageous race. They were the original residents of Canada. They properly wish to preserve their culture, customs and heritage. However arguable are the solutions, Indians themselves have the intelligence and capacity to judge what is good or bad for them. Indians desire sincere and purposeful dialogue to solve their own problems. If s. 12(1)(*b*) is distasteful or undesirable to Indians, they themselves can arouse public conscience, and thereby stimulate Parliament by legislative amendment to correct any unfairness or injustice.

The Civil Liberties section of the Canadian Bar Association, in its 1958 report on "Legal Status and Civil Rights of the Canadian Indian", proposed certain changes to s. 12 of the *Indian Act*. With the reservation that the report was presented before the enactment of the *Canadian Bill of Rights*, I quote the following paragraph from the report:

The Attorney General of Canada and William Barber Rees (*Defendants*) *Appellants*;

and

Flora Canard (*Plaintiff*) *Respondent*;

and

The National Indian Brotherhood and The Manitoba Indian Brotherhood *Intervenants.*

1974: March 7, 8; 1975: January 28.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon and Beetz JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law—Indians—Appointment by Minister of official as administrator of estate—Legislation and Regulations relating to estates of deceased Indians—Validity—No conflict with Bill of Rights—Meaning of "ordinarily reside on a reserve"—Indian Act, R.S.C. 1970, c. I-6, ss. 4(3), 42, 43—Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1(b)—British North America Act, 1867, s. 91(24).

Courts—Jurisdiction of Supreme Court of Canada—Supreme Court Act, R.S.C. 1970, c. S-19, s. 47—Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10.

The respondent's husband, C, an Indian of the Fort Alexander Indian Reserve in Manitoba, was killed in a traffic accident on July 6, 1969. He died intestate. C and his wife had made their home on the reserve since 1964. In 1967 and 1968, C was employed for several weeks each summer on a farm at St. Andrews, Manitoba, and on those occasions he and his family would move to the farm, complete the work that was to be done, and then move back to the reserve. In 1969, C was again employed on the same farm, but had moved his family to the farm and commenced his employment only two days before his death. His wife then moved back to their home on the reserve.

On December 1, 1969, the second appellant, R, a departmental officer, was appointed to be administrator of C's estate by the Minister of Indian Affairs and Northern Development pursuant to ss. 42 and 43 of the *Indian Act*, R.S.C. 1952, c. 149 (now R.S.C. 1970, c. I-6). In that capacity, on March 1, 1970, he commenced an action in the Manitoba Court of Queen's Bench,

Le procureur général du Canada et William Barber Rees (*Défendeurs*) *Appelants*;

et

Flora Canard (*Demanderesse*) *Intimée*;

et

La fraternité nationale des indiens et la fraternité des indiens du Manitoba *Intervenants.*

1974: les 7 et 8 mars; 1975: le 28 janvier.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon et Beetz.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Droit constitutionnel—Indiens—Fonctionnaire nommé administrateur d'une succession par le Ministre—Lois et règlements concernant les successions d'Indiens décédés—Validité—Aucun conflit avec la Déclaration des droits de l'homme—Sens des mots «réside ordinairement dans une réserve»—Loi sur les Indiens, S.R.C. 1970, c. I-6, art. 4(3), 42 et 43—Déclaration canadienne des droits de l'homme, S.R.C. 1970, App. III, art. 1 b)—Acte de l'Amérique du Nord britannique, 1867, art. 91(24).

Tribunaux—Compétence de la Cour suprême du Canada—Loi sur la Cour suprême, S.R.C. 1970, c. S-19, art. 47—Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), c. 10.

L'intimée est la veuve de C, un Indien de la réserve indienne du Fort Alexander (Manitoba), qui a été tué dans un accident de la circulation le 6 juillet 1969. Il est mort intestat. C et son épouse ont commencé à résider dans la réserve en 1964. Pendant les étés 1967 et 1968, C a travaillé plusieurs semaines comme garçon de ferme à St-Andrews (Manitoba). La famille C allait alors s'installer à la ferme, effectuait le travail et retournait ensuite à la réserve. En 1969, C fut de nouveau embauché aux mêmes fins, mais il est décédé à peine deux jours après que sa famille se fut installée à la ferme et qu'il eut commencé à travailler. Son épouse est alors retournée vivre dans leur maison de la réserve.

Le 1er décembre 1969, le second appelant, R, un fonctionnaire ministériel, a été nommé administrateur de la succession de C par le ministre des Affaires indiennes et du Nord canadien conformément aux art. 42 et 43 de la *Loi sur les Indiens*, S.R.C. 1952, c. 149 (maintenant S.R.C. 1970, c. I-6). A ce titre, il a, le 1er mars 1970, intenté en Cour du Banc de la Reine du

claiming damages from three defendants in respect of the accident resulting in the death of C.

On March 18, 1970, pursuant to an application made by the respondent, letters of administration were issued to her by the Surrogate Court of the Eastern Judicial District of Manitoba. The Minister of Indian Affairs and Northern Development had not given to that Court his consent to the exercise of testamentary jurisdiction under s. 44 of the *Indian Act* in relation to the estate of C. In her capacity as administratrix of the estate of her late husband, the respondent also commenced an action in the Court of Queen's Bench on July 6, 1970, against the same three defendants and against a fourth one.

The respondent then commenced an action against the appellants, claiming a judgment declaring that the *Indian Act* did not apply to the deceased because of exempting provisions under s. 4(3) of the Act, or, alternatively, if the Act did apply, its provisions relating to administration of estates of Indians (ss. 42, 43, 44) were *ultra vires* and contrary to the principles of the *Canadian Bill of Rights*; the appointment of R as administrator was contrary to the principles of natural justice. By way of counterclaim the appellants claimed (*a*) a declaratory judgment declaring R to be the lawful administrator of C's estate; (*b*) a declaratory judgment declaring the appointment of the respondent as administratix to be void; (*c*) an injunction restraining the respondent from acting as administratrix; (*d*) an order impounding her letters of administration.

The trial judge held that when C died, he was not ordinarily resident on a reserve, and, as a result, the respondent was entitled to a declaration that pursuant to s. 4(3) of the *Indian Act*, ss. 42 to 44 did not govern the administration of C's estate and that the appointment of R as administrator was invalid. He issued a declaration accordingly and dismissed the counterclaim.

The Court of Appeal found, on the evidence, that C did ordinarily reside on a reserve, and so the application of s. 43 was not excluded by the operation of s. 4(3). The Court went on to hold that s. 43 was inoperative to the extent that, in violation of s. 1(*b*) the *Bill of Rights*, guaranteeing the right to equality before the law without discrimination by reason of race, it denied the respondent administration of the estate of her late husband. From that judgment the appellants appealed to this Court.

Manitoba une action en dommages-intérêts contre trois défendeurs relativement à l'accident qui a causé la mort de C.

Le 18 mars 1970, l'intimée a demandé et obtenu l'émission de lettres d'administration de la cour de vérification du district judiciaire de l'est du Manitoba. Le ministre des Affaires indiennes et du Nord canadien n'avait pas consenti, suivant l'art. 44 de la *Loi sur les Indiens*, à ce que la cour de vérification exerce, relativement à la succession de C, sa juridiction en matière testamentaire. A titre d'administratrice de la succession de feu son mari, l'intimée a aussi intenté une action en Cour du Banc de la Reine, le 6 juillet 1970, contre les trois mêmes défendeurs et contre un quatrième.

L'intimée a alors intenté une action contre les appelants dans laquelle elle a demandé qu'il soit déclaré que la *Loi sur les Indiens* ne s'applique pas à C à cause des dispositions d'exception prévues au par. (3) de l'art. 4 de la Loi ou, subsidiairement, que si la Loi s'applique, ses dispositions traitant de l'administration de la succession des Indiens (art. 42, 43 et 44) sont *ultra vires* et contraires aux principes de la *Déclaration canadienne des droits* et que la nomination de R comme administrateur est contraire aux principes de la justice naturelle. Par demande reconventionnelle, les appelants ont demandé *a*) un jugement déclarant R l'administrateur légal de la succession de C; *b*) un jugement déclarant sans effet la nomination de l'intimée comme administrateur; *c*) une injonction empêchant la demanderesse d'agir à titre d'administratrice; *d*) une ordonnance enjoignant la confiscation des lettres d'administration de l'intimée.

Le juge de première instance a décidé qu'à l'époque de son décès, C ne résidait pas ordinairement dans une réserve et que, par conséquent, l'intimée avait droit à ce qu'en conformité du par. (3) de l'art. 4 de la *Loi sur les Indiens*, les art. 42 à 44 de cette loi soient déclarés inapplicables à l'administration de la succession de C et que la nomination de R comme administrateur soit déclarée invalide. Le juge a donc émis une déclaration en ce sens et rejeté la demande reconventionnelle.

La Cour d'appel a jugé, en se fondant sur la preuve présentée, que C résidait ordinairement dans une réserve, si bien que l'art. 43 ne devient pas inapplicable par l'effet du par. (3) de l'art. 4. La Cour a ensuite décidé que l'art. 43 est inopérant dans la mesure où, en violation de l'al. *b*) de l'art. 1 de la *Déclaration des droits* garantissant le droit à l'égalité devant la loi sans discrimination en raison de la race, il ne permet pas à l'intimée d'administrer la succession de son mari décédé. Les appelants ont interjeté appel de cet arrêt devant cette Cour.

Held (Laskin C.J. and Spence J. dissenting): The appeal should be allowed, the judgments of the Courts below set aside, the respondent's action dismissed and the appellants' counterclaim maintained except para. (*a*) thereof on which no view was expressed.

Per curiam: As held by the Court of Appeal, C at his death was ordinarily resident on a reserve and therefore s. 4(3) of the *Indian Act* did not apply.

Per Martland and Judson JJ.: Section 43 of the *Indian Act* is legislation relating to the administration of the estates of deceased Indians and (unless the Minister otherwise orders, which he did not do in this case) relates only to those Indians ordinarily resident on reserves. It enables the Minister to appoint administrators of estates of deceased Indians and to remove them. The regulations enacted pursuant to s. 42 enable the Minister to appoint an officer of the Indian Affairs Branch to be the administrator of estates and to supervise the administration of estates. There is no discrimination against the respondent by reason of race in these provisions. They relate exclusively to the administration of the estates of deceased Indians, in certain circumstances, and apply generally to such estates. There is no federal legislation relating to the administration of estates of non-Indians in the provinces, and, constitutionally, such legislation could not be enacted. This is not a case in which federal legislation dealing with a subject-matter within s. 91 of the *B.N.A. Act, 1867* has permitted certain acts or conduct by non-Indians and prohibited Indians from doing the same thing. The provisions of the *Indian Act*, including s. 43, deal only with the legal rights of Indians.

Per Martland, Judson and Ritchie JJ.: The civil right, *i.e.*, the right to administer the estate of her husband, said to be denied to the respondent "that other Canadians not of her race enjoy", is a provincial right which is beyond the scope of the legislative authority of the Parliament of Canada, and which cannot therefore be invoked in contra-distinction to the provisions of otherwise valid federal legislation so as to result in a denial to the respondent of "equality before the law" within the meaning of s. 1(*b*) of the *Canadian Bill of Rights*. In the context of this case there can only be a conflict between the *Bill of Rights* and the *Indian Act* if the *Indian Act*, standing alone or read in conjunction with other federal legislation, can be said to result in a denial to Indians of the equality before the law guaranteed by s. 1(*b*) of the Bill.

Arrêt (Le juge en chef Laskin et le juge Spence étant dissidents): Le pourvoi doit être accueilli, les jugements des cours d'instance inférieure infirmés, l'action de l'intimée rejetée et la demande reconventionnelle des appelants maintenue, sauf l'al. *a*) de celle-ci, sur lequel aucun point de vue n'est exprimé.

La Cour: Comme l'avait décidé la Cour d'appel, C résidait ordinairement dans une réserve à l'époque de son décès de sorte que le par. (3) de l'art. 4 de la *Loi sur les Indiens* ne s'applique pas.

Les juges Martland et Judson: L'article 43 de la *Loi sur les Indiens* est une disposition relative à l'administration des successions des Indiens et (à moins que le Ministre n'en ordonne autrement, ce qu'il n'a pas fait en l'espèce) s'applique seulement aux Indiens résidant ordinairement dans des réserves. Il permet au Ministre de nommer des administrateurs de successions d'Indiens décédés et de les révoquer. Les règlements édictés en vertu de l'art. 42 donnent au Ministre le pouvoir de nommer un fonctionnaire de la Division des affaires indiennes pour administrer les successions et pour surveiller leur administration. Il n'y a pas dans ces dispositions de matières discriminatoires à l'encontre de l'intimée en raison de sa race. Elles concernent exclusivement l'administration des successions des Indiens décédés, en certaines circonstances, et s'appliquent généralement à ces successions. Il n'y a pas de loi fédérale ayant trait à l'administration des successions des non-Indiens dans les provinces, et, du point de vue constitutionnel, une telle loi ne pourrait être adoptée. Il ne s'agit pas d'un cas où une loi fédérale qui traite d'un sujet inclus dans l'art. 91 de l'*Acte de l'Amérique du Nord britannique* permet à des non-Indiens d'agir d'une façon qu'elle interdit aux Indiens. Les dispositions de la *Loi sur les Indiens*, y compris l'art. 43, traitent seulement des droits légaux des Indiens.

Les juges Martland, Judson et Ritchie: Le droit civil dont l'intimée serait privée, c.-à-d. le droit d'administrer la succession de son époux, droit «dont jouissent les autres Canadiens qui ne sont pas de sa race», est un droit provincial qui n'est pas de la compétence législative du Parlement du Canada et qui ne peut donc pas être invoqué par opposition à une disposition d'une loi fédérale autrement valide de façon à nier à l'intimée «l'égalité devant la loi» au sens de l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits*. Dans le présent contexte, il ne peut exister de conflit entre la *Déclaration des droits* et la *Loi sur les Indiens* que si celle-ci, considérée seule ou interprétée conjointement avec d'autres lois fédérales, peut être réputée avoir pour effet de dénier aux Indiens l'égalité devant la loi garantie par l'al. *b*) de l'art. 1 de la Déclaration.

Per Martland, Judson, Ritchie and Pigeon JJ.: The very object of s. 91(24) of the *B.N.A. Act, 1867* in so far as it relates to Indians, is to enable the Parliament of Canada to make legislation applicable only to Indians as such, and there is no reason why provisions with respect to the administration of the estate of deceased Indians would be excluded from the scope of such authority.

The contention that such provisions were made inoperative by the *Canadian Bill of Rights* cannot be accepted. If one of the effects of the Bill is to render inoperative all legal provisions whereby Indians as such are not dealt with in the same way as the general public, the conclusion is inescapable that Parliament, by the enactment of the Bill, has not only fundamentally altered the status of Indians in that indirect fashion but has also made any future use of federal legislative authority over them subject to the requirement of expressly declaring every time "that the law shall operate notwithstanding the *Canadian Bill of Rights*". It is very difficult to believe that Parliament so intended when enacting the Bill. Also, the provisions of the *Indian Act* vesting in the Minister jurisdiction for the appointment of administrators, cannot be considered as an infringement of the principle of equality before the law for much the same reasons as provisions creating a special jurisdiction respecting juvenile delinquents and authorizing discretionary transfers to the ordinary courts cannot be looked upon as violations of that same rule.

Lastly, concerning the attack against the Minister's order based on absence of notice and of any valid reason for not appointing the widow as administratrix, the Courts of Manitoba were without jurisdiction to entertain it for the reasons given by Beetz J.

Per Beetz J.: Sections 42 to 44 of the *Indian Act* are not *ultra vires* of the Parliament of Canada. Testamentary matters and causes with respect to deceased Indians come within the class of subjects of "Indians and Lands reserved for the Indians" upon which Parliament has exclusive legislative authority under s.91(24) of the *British North America Act, 1867*. In a matter of exclusive federal competence, such as "Indians and Lands reserved for the Indians" there is nothing unconstitutional in Parliament excluding the authority of provincial courts over this subject and bestowing it upon a Minister, particularly if it makes it subject to a form of judicial control as is provided by s. 47 of the *Indian Act*.

Les juges Martland, Judson, Ritchie et Pigeon: Ce que vise l'art. 91(24) de l'*A.A.N.B. de 1867* quant aux Indiens, c'est à habiliter le Parlement du Canada à faire des lois qui ne s'appliquent qu'aux Indiens comme tels, et il n'y a aucune raison d'exclure du champ de cette compétence des dispositions relatives à l'administration des successions des Indiens décédés.

La prétention que ces dispositions ont été rendues inopérantes par la *Déclaration canadienne des droits* ne peut être acceptée. Si l'un des effets de la Déclaration est de rendre inopérantes toutes les dispositions en vertu desquelles les Indiens en tant que tels ne sont pas traités de la même façon que le grand public, on doit inévitablement conclure que le Parlement, en édictant la Déclaration, n'a pas seulement modifié fondamentalement le statut des Indiens par ce procédé indirect, mais aussi qu'il a assujetti l'exercice futur de l'autorité législative fédérale sur les Indiens à l'exigence d'une déclaration expresse «que la loi s'appliquera nonobstant la *Déclaration canadienne des droits*». On peut difficilement croire que telle était l'intention du Parlement lorsqu'il a édicté la *Déclaration*. De plus, les dispositions de la *Loi sur les Indiens* qui attribuent au Ministre le pouvoir de nommer les administrateurs ne peuvent être considérées comme une atteinte au principe de l'égalité devant la loi, et ce, pour les mêmes raisons que les dispositions qui établissent une juridiction spéciale pour les jeunes délinquants et autorisent un renvoi discrétionnaire aux tribunaux ordinaires ne peuvent être considérées comme des violations de cette même règle.

Enfin, en ce qui concerne l'attaque contre l'ordonnance du Ministre fondée sur le défaut d'avis et de raisons valables de ne pas nommer la veuve administratrice, les tribunaux du Manitoba n'avaient pas juridiction à cet égard, et ce, pour les motifs formulés par le juge Beetz.

Le juge Beetz: Les articles 42 à 44 de la *Loi sur les Indiens* ne sont pas *ultra vires* du Parlement du Canada. Les affaires testamentaires et les matières relatives aux Indiens décédés relèvent de la catégorie de sujets «les Indiens et les terres réservées pour les Indiens» sur laquelle le Parlement jouit d'une compétence législative exclusive aux termes du par. (24) de l'art. 91 de l'*Acte de l'Amérique du Nord britannique de 1867*. Dans une matière de compétence exclusivement fédérale telle «les Indiens et les terres réservées pour les Indiens», il n'y a rien d'inconstitutionnel dans le fait que le Parlement retire aux tribunaux provinciaux leur juridiction sur ce sujet et la confère à un ministre, particulièrement s'il la subordonne à une forme de surveillance judiciaire comme l'art. 47 de la *Loi sur les Indiens* le prévoit.

Nor are ss. 42 to 44 in conflict with the *Canadian Bill of Rights*. There is nothing in ss. 42 and 43 which prevents the Minister, on account of the respondent's race, from authorizing her to administer the estate of her late husband, and nothing which deprives the respondent from the capacity to receive such authorization. The Act empowers the Minister to appoint anyone, including the respondent. In other words, if the respondent has been the victim of racial discrimination, such discrimination was administrative in nature; it does not flow from the *Indian Act*. The *Indian Act* in this respect is capable of being construed and applied so as to provide for Indians a treatment similar to that reserved for their fellow Canadians. Accordingly, it is not in conflict with the *Canadian Bill of Rights* and no part of it ought to be declared inoperative for the purpose of this case

As to whether, in this particular instance, the Act had been applied in accordance with the principle of equality before the law, the opinion might have been formed that the burden of showing cause why the respondent should not be appointed administratix was a burden which rested upon the appellants: in view of their failure to discharge that burden, the appointment of R could then have been deemed to have been made contrary to the principles of fundamental justice and to the *Canadian Bill of Rights* and the matter could have been referred back to the Minister for determination. However, once it is conceded that the Minister has jurisdiction to appoint an administrator, the exercise of this jurisdiction can only be reviewed in accordance with the *Indian Act* and the *Federal Court Act* and not by the Courts of Manitoba, which could not hear an appeal from the Minister's decision or otherwise review it. This Court, sitting in appeal from a decision of the Manitoba Court of Appeal, is limited to giving the judgment that that Court could and should have given but not the one that could and should have been given had the issue been raised in the Federal Court.

As to the letters of administration issued to the respondent, their nullity makes no doubt. The Court which issued them was without jurisdiction to do so as this jurisdiction is vested exclusively in the Minister by ss. 42 and 43 of the *Indian Act* and could not, under s. 44, be exercised by the Surrogate Court without the consent of the Minister. This consent was not given.

Per Laskin C.J. and Spence J., *dissenting*: On the face of the *Indian Act* as amplified by the Regulations thereunder, and certainly as fortified by the invariable practice of the Department of Indian Affairs, Indians are disqualified from obtaining letters of administration

Les articles 42 à 44 ne vont pas non plus à l'encontre de la *Déclaration canadienne des droits*. Il n'y a rien dans les art. 42 et 43 qui empêche le Ministre d'autoriser l'intimée, en raison de sa race, à administrer la succession de feu son mari, et il n'y a rien qui restreint la capacité de l'intimée d'être ainsi autorisée. La Loi donne au Ministre le pouvoir de nommer n'importe qui, y compris l'intimée. En d'autres mots, si l'intimée a été victime de discrimination raciale, cette discrimination est de nature administrative, elle n'est pas inhérente à la *Loi sur les Indiens*. Cette loi peut à cet égard s'interpréter et s'appliquer de manière que les Indiens soient traités de la même façon que leurs concitoyens canadiens. Par conséquent, elle ne va pas à l'encontre de la *Déclaration canadienne des droits* et aucune partie de la Loi ne doit être déclarée inopérante aux fins de cette affaire.

Quant à savoir si, en l'espèce, la Loi a été appliquée en conformité du principe de l'égalité devant la loi, on aurait pu être porté à croire qu'il incombait aux appelants de prouver pourquoi l'intimée ne devait pas être nommée administratrice: étant donné qu'ils ne l'ont pas fait, la nomination de R aurait pu alors être tenue pour contraire aux principes de justice fondamentale et à la *Déclaration canadienne des droits* et la question aurait pu être renvoyée au Ministre pour décision. Cependant, une fois admis que le Ministre est compétent pour nommer un administrateur, l'exercice de cette compétence ne peut être examiné que conformément à la *Loi sur les Indiens* et à la *Loi sur la Cour fédérale* et non par les tribunaux du Manitoba, qui ne pouvaient pas entendre un appel à l'encontre d'une décision du Ministre ni la reviser de quelque façon. La juridiction de cette Cour, qui entend un pourvoi à l'encontre d'un arrêt de la Cour d'appel du Manitoba, se limite à prononcer l'arrêt que cette dernière aurait pu ou aurait dû prononcer, mais non pas l'arrêt qui aurait pu ou aurait dû être rendu si la question avait été soumise à la Cour fédérale.

Quant aux lettres d'administration accordées à l'intimée, il n'y a pas de doute qu'elles sont invalides. Le tribunal qui les a émises n'avait pas juridiction pour le faire puisque la juridiction en cette matière est dévolue exclusivement au Ministre par les art. 42 et 43 de la *Loi sur les Indiens* et ne pouvait, en vertu de l'art. 44, être exercée par ce tribunal sans le consentement du Ministre. Ce consentement n'a pas été donné.

Le juge en chef Laskin et le juge Spence, *dissidents*: A sa lecture, la *Loi sur les Indiens*, amplifiée par ses règlements et certainement renforcée par la pratique invariable du ministère des Affaires indiennes, rend les Indiens incapables d'obtenir des lettres d'administration

of the estate of an Indian intestate, even in the case where the intestate is a spouse, and *a fortiori* where the intestate may have a lesser relationship to a would-be Indian applicant. This creates an inequality before the law by reason of race in violation of s. 1(*b*) of the *Canadian Bill of Rights*.

While it is much easier for the Courts to apply the *Bill of Rights* to a federal legislative measure if Parliament itself provides the touchstone of comparison in other federal legislation, it may equally provide it by what it has done and failed to do in the very measure that is under challenge. The Court's function in such a case is different only in degree but not in kind.

The mere grant of legislative power is not to be regarded as itself authorizing Parliament to offend against its generally stated protections in the *Bill of Rights*. If Parliament deems it necessary to treat its grant of legislative power under s. 91(24) of the *British North America Act* in terms that would be offensive to the *Bill of Rights*, it is open to Parliament to do so, but s. 91(24) is not an invitation to the Courts to do what Parliament has not chosen to do.

The appeal should be dismissed but the judgment of the Court of Appeal should be varied by avoiding any declaration that s. 43 of the *Indian Act* is inoperative and by declaring instead that s. 43 must be applied consistently with s. 1 (*b*) of the *Canadian Bill of Rights* and that s. 11 of the *Indian Estates Regulations* is inoperative in so far as it excludes Indians from eligibility to be administrators of the estates of deceased Indians.

[*R. v. Drybones*, [1970] S.C.R. 282; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, discussed; *R. v. Burnshine*, [1975] S.C.R. 693; *Re Regina and M* (1973), 2 O.R. (2d) 86; *R. v. Smythe*, [1971] S.C.R. 680, referred to.]

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal from a judgment of Matas J. Appeal allowed, Laskin C.J. and Spence J. dissenting.

I. G. Whitehall and *D. F. Friesen*, for the defendants, appellants.

W. Rachman, for the plaintiff, respondent.

D. E. Sanders, for the intervenants.

[1] [1972] 5 W.W.R. 678, 30 D.L.R. (3d) 9.

de la succession d'un Indien décédé intestat, même dans le cas où le *de cujus* intestat est un conjoint, et *a fortiori* lorsque le *de cujus* intestat peut avoir un lien de parenté plus éloigné avec l'Indien qui en ferait la demande. Cela crée une inégalité devant la loi en raison de la race et contrevient donc à l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits*.

Il est naturellement plus facile pour les tribunaux d'appliquer la *Déclaration des droits* à une mesure législative fédérale si le Parlement lui-même fournit le critère de comparaison dans d'autres lois fédérales, mais le Parlement peut également fournir ce critère par ce qu'il a fait ou a omis de faire dans la mesure même qui est contestée. La différence du rôle de la cour en pareil cas en est une de degré et non pas de nature.

La simple attribution d'un pouvoir législatif ne constitue pas en elle-même une autorisation pour le Parlement d'aller à l'encontre des mesures de sauvegarde qu'il a énoncées de façon générale dans la *Déclaration des droits*. Si le Parlement juge nécessaire de traiter son pouvoir de légiférer en vertu de l'art. 91(24) de l'*Acte de l'Amérique du Nord britannique* d'une façon qui irait à l'encontre de la *Déclaration des droits*, il est libre de le faire mais l'art. 91(24) ne constitue pas une invitation aux tribunaux de faire ce que le Parlement n'a pas voulu faire lui-même.

Il y a lieu de rejeter l'appel et de modifier le jugement de la Cour d'appel en omettant toute déclaration que l'art. 43 de la *Loi sur les Indiens* est inopérant et en statuant plutôt que l'art. 43 doit s'appliquer en conformité avec l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits* et que l'art. 11 des *Règlements sur les successions des Indiens* est inopérant dans la mesure où il prononce l'incapacité des Indiens à être nommés administrateurs des successions d'Indiens décédés.

[Arrêts discutés: *R. c. Drybones*, [1970] R.C.S. 282; *Procureur général du Canada c. Lavell*, [1974] R.C.S. 1349; arrêts mentionnés: *R. c. Burnshine*, [1975] R.C.S. 693; *Re Regina and M* (1973), 2 O.R. (2d) 86; *R. c. Smythe*, [1971] R.C.S. 680.]

POURVOI interjeté à l'encontre d'un arrêt de la Cour d'appel du Manitoba[1], qui a rejeté un appel d'un jugement du juge Matas. Pourvoi accueilli, le juge en chef Laskin et le juge Spence étant dissidents.

I. G. Whitehall et *D. F. Friesen*, pour les défendeurs, appelants.

W. Rachman, pour la demanderesse, intimée.

D. E. Sanders, pour les intervenants.

[1] [1972] 5 W.W.R. 678, 30 D.L.R. (3d) 9.

The judgment of Laskin C.J. and Spence J. was delivered by

THE CHIEF JUSTICE (*dissenting*)—I have had the advantage of reading the reasons prepared by my brother Beetz and the concurring reasons of my brother Pigeon, holding that the Manitoba Courts were wrong in concluding that s. 43 of the *Indian Act*, R.S.C. 1952, c. 149, now R.S.C. 1970, c. I-6, was inoperative in the present case because of incompatibility with s. 1(*b*) of the *Canadian Bill of Rights*. I accept the narrative of facts in the reasons of Beetz J. but I cannot accept his conclusion that s. 1(*b*) of the *Canadian Bill of Rights* is without effect.

There are a number of preliminary points that are, in my opinion, easily put out of the way. I have no difficulty in accepting the conclusion of the Manitoba Court of Appeal that the deceased Canard was an Indian ordinarily resident on a reserve when he died in a traffic accident. Thus, under s. 4(3) of the *Indian Act*, the provisions of that Act respecting testamentary matters were applicable to him. Again, I am in entire agreement with the Manitoba Court of Appeal that Parliament, in legislating in the exercise of its exclusive power under s. 91(24) of the *British North America Act*, may include in such legislation testamentary provisions which would, according to their reach, govern the issue of letters of administration of the estate of an Indian intestate. Moreover, I see no constitutional infirmity in the assignment of jurisdiction in such matters to a federal functionary. Any constitutional limitation which might arguably reside in s. 96 of the *British North America Act* if provincial legislation was involved does not apply to the otherwise valid legislation of Parliament.

The only point for serious consideration in this appeal is whether any of the prescriptions of the *Canadian Bill of Rights* are offended by certain provisions of the *Indian Act* or by the administration of those provisions through regulations pro-

Le jugement du juge en chef Laskin et du juge Spence a été rendu par

LE JUGE EN CHEF (*dissident*)—J'ai eu l'avantage de lire les motifs rédigés par mon collègue M. le juge Beetz et les motifs concordants de mon collègue M. le juge Pigeon qui ont décidé que les tribunaux du Manitoba avaient erronément conclu que l'art. 43 de la *Loi sur les Indiens*, S.R.C. 1952, c. 149, maintenant S.R.C. 1970, c.I-6 était inopérant en l'espèce en raison de son incompatibilité avec l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits*. Je suis d'accord avec le récit des événements fait par M. le juge Beetz dans ses motifs mais je ne puis accepter sa conclusion que l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits* est sans effet.

A mon avis, on peut facilement éliminer plusieurs points préliminaires. Je ne vois aucune difficulté à accepter la conclusion de la Cour d'appel du Manitoba que le défunt Canard était un Indien résidant ordinairement dans une réserve lorsqu'il est mort dans un accident de la route. Ainsi, en vertu du par. (3) de l'art. 4 de la *Loi sur les Indiens*, il était assujetti aux dispositions de cette Loi à l'égard des matières testamentaires. Je suis aussi complètement d'accord avec la Cour d'appel du Manitoba que le Parlement, en légiférant dans l'exercice de son pouvoir exclusif en vertu de l'art. 91(24) de l'*Acte de l'Amérique du Nord britannique*, peut incorporer dans ses textes législatifs des dispositions testamentaires qui selon leur portée régiraient la question des lettres d'administration de la succession de l'Indien mort intestat. De plus, je ne vois pas d'anomalie constitutionnelle dans le fait de conférer la juridiction en semblables matières à un fonctionnaire fédéral. La seule restriction constitutionnelle dont pourrait faire l'objet l'art. 96 de l'*Acte de l'Amérique du Nord britannique* s'il s'agissait d'une loi provinciale, ne s'applique pas à une loi du Parlement par ailleurs valide.

La seule question à examiner sérieusement en l'espèce est de savoir si certaines des prescriptions de la *Déclaration canadienne des droits* sont violées par certaines dispositions de la *Loi sur les Indiens* ou par l'administration de ces dispositions

mulgated under the *Indian Act*. The Manitoba Court of Appeal took the position that s. 43 of the *Indian Act* disqualified an Indian, whether male or female, from being an administrator or administratrix of his or her deceased spouse's estate and that this created an inequality before the law by reason of race in violation of s. 1(*b*) of the *Canadian Bill of Rights*. Dickson J.A., as he then was, speaking for the Manitoba Court of Appeal, formulated his conclusion as follows:

In the present case we have a situation in which the Parliament of Canada has said in effect "because you are an Indian you shall not administer the estate of your late husband". Parliament has thereby in a law of Canada placed a legal road-block in the way of one particular racial group, placing that racial group in a position of inequality before the law. The inequality does not arise through conflict between a federal statute with a provincial statute. It arises through conflict between the *Bill of Rights* and a federal statute. The *Bill of Rights* has capacity to render inoperative, racially discriminatory legislation, whether or not there be provincial legislation touching the subject-matter.

. . .

The right of Mrs. Canard to equality before the law of Canada does not depend upon which province she happens to live in. She enjoys that right as a citizen of Canada. If a law of Canada infringes that right on racial grounds, the *Bill of Rights* is available to remedy the injustice.

There is no doubt that this statement of principle carries the operation of s. 1(*b*) of the *Canadian Bill of Rights* beyond the law as considered in *Regina v. Drybones*[2], and beyond the law as expounded even in the minority judgment in *Attorney General of Canada v. Lavell*[3]. In each of those two cases, this Court took the position that the *Canadian Bill of Rights* would have an operative effect if the conflict with any of its provisions arose under federal law in the sense that there was a discordance either between two federal statutes or between provisions of the same federal statute such as to exhibit that one of the statutes or one of the provisions was vis-à-vis the other in conflict with a prescription of the *Canadian Bill of Rights*.

[2] [1970] S.C.R. 282.
[3] [1974] S.C.R. 1349.

conformément aux règlements établis en vertu de la *Loi sur les Indiens*. La Cour d'appel du Manitoba a été d'avis que l'art. 43 de la *Loi sur les Indiens* empêchait un Indien, qu'il soit de sexe masculin ou féminin, d'administrer la succession de son conjoint décédé et que cela créait une inégalité devant la loi en raison de la race et violait l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits*. Le juge Dickson, alors juge d'appel, parlant au nom de la Cour d'appel du Manitoba, a conclu en s'exprimant comme suit:

[TRADUCTION] En l'espèce, nous sommes dans une situation où le Parlement du Canada a de fait déclaré «parce que vous êtes une Indienne vous ne pouvez pas administrer la succession de votre mari décédé». Le Parlement a ainsi érigé dans une loi du Canada un barrage légal entravant un groupe racial particulier et le plaçant dans une position d'inégalité devant la loi. L'inégalité ne résulte pas d'un conflit entre une loi fédérale et une loi provinciale. Elle résulte d'un conflit entre la *Déclaration des droits* et une loi fédérale. La *Déclaration des droits* peut rendre inopérante une loi discriminatoire en raison de la race, qu'il y ait ou non des lois provinciales sur le sujet.

. . .

Le droit de Mme Canard à l'égalité devant la loi du Canada ne dépend pas de la province où elle demeure. Elle jouit de ce droit à titre de citoyenne du Canada. Si une loi du Canada enfreint ce droit pour des motifs raciaux, la *Déclaration des droits* peut servir à corriger l'injustice.

Il n'y a pas de doute que cet énoncé de principe entraîne l'application de l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits* au-delà de la loi telle que considérée dans *Regina c. Drybones*[2], et au-delà de la loi telle qu'énoncée même dans le jugement minoritaire dans *Procureur général du Canada c. Lavell*[3]. Dans chacun de ces deux arrêts, cette Cour a adopté la position que la *Déclaration canadienne des droits* s'appliquerait si le conflit avec quelques-unes de ses dispositions avait son origine dans les lois fédérales dans le sens d'une discordance soit entre deux lois fédérales, soit entre des dispositions d'une même loi fédérale de façon que l'une des lois ou l'une des dispositions soit vis-à-vis l'autre en conflit avec une prescrip-

[2] [1970] R.C.S. 282.
[3] [1974] R.C.S. 1349.

The effect of the judgment of Dickson J.A. is to measure the operation of a federal statute, or any provision thereof, by the guarantees (if I may so term them) of the *Canadian Bill of Rights* alone, and thus to treat those guarantees as requiring not only comparative conformity to their terms but conformity by a challenged statute alone.

I do not find this to be other than a proper appreciation of what the *Canadian Bill of Rights* says. This Court in *Curr v. The Queen*[4] explored the issues in that case under the same appreciation. The fact that the Court has not hitherto found it necessary to give effect to the *Canadian Bill of Rights* in relation to a particular statute measured in its own terms against the prescriptions of s. 1 (*b*) of the *Canadian Bill of Rights* is not a ground for refusing to do so in a case which calls for consideration of such an issue. This is what the Supreme Court of the United States has been doing over the years in testing state and federal legislation under the American Bill of Rights. This Court has done exactly this in relation to other provisions of the *Canadian Bill of Rights*, as, for example, in *Brownridge v. The Queen*[5], in relation to s. 2(*c*) (ii) (the right of a person who has been arrested or detained to retain and instruct counsel without delay), and in *Lowry and Lepper v. The Queen*[6], in relation to s. 2(*e*) (the right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations), a provision which, as Martland J. speaking for the Court rightly said (at p. 201), relates back to those rights guaranteed by s.1. The proposition advanced by Dickson J. A. is with due recognition of the fact that the Parliament of Canada may take any of its legislation out of the scope of the *Canadian Bill of Rights* by appropriate enactment.

[4] [1972] S.C.R. 889.
[5] [1972] S.C.R. 926.
[6] [1974] S.C.R. 195.

tion de la *Déclaration canadienne des droits*. La conséquence du jugement du juge d'appel Dickson est d'apprécier l'application d'une loi fédérale, ou de toute disposition de cette loi, en se fondant sur les garanties (si je peux les appeler ainsi) de la *Déclaration canadienne des droits* seule, et d'ainsi traiter ces garanties comme exigeant non seulement une relative conformité à leurs termes entre les différentes lois mais aussi la conformité de la part d'une loi contestée prise isolément.

A mon avis, cela n'est rien d'autre qu'une juste appréciation de ce qui est énoncé dans la *Déclaration canadienne des droits*. Dans l'arrêt *Curr c. La Reine*[4], cette Cour a examiné les questions en litige en cette affaire-là sous le même angle. Le fait que la Cour n'a pas jusqu'ici trouvé nécessaire d'appliquer la *Déclaration canadienne des droits* à l'égard d'une loi particulière dont les dispositions sont appréciées au regard des prescriptions de l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits* n'est pas un motif pour refuser de l'appliquer dans une affaire qui demande l'examen d'une telle question. C'est ce que la Cour suprême des États-Unis a fait au cours des années en jugeant la validité des lois des États et du gouvernement fédéral par rapport à la Déclaration américaine des droits. C'est exactement ce que cette Cour a fait à l'égard d'autres dispositions de la *Déclaration canadienne des droits*, comme, par exemple, dans *Brownridge c. La Reine*[5], à l'égard du sous-al. (ii) de l'al. *c*) de l'art. (2) (le droit d'une personne arrêtée ou détenue de retenir et de constituer un avocat sans délai) et dans *Lowry and Lepper c. La Reine*[6], à l'égard de l'al. *e*) de l'art. (2) (le droit d'une personne à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations), une disposition qui, comme le dit, à juste titre (à la p. 201) le juge Martland parlant au nom de la Cour, se rattache aux droits garantis par l'art. 1. La proposition énoncée par le juge d'appel Dickson tient parfaitement compte du fait que le Parlement du Canada peut soustraire n'importe laquelle de ses lois du champ de la *Déclaration canadienne des droits* en légiférant de façon appropriée.

[4] [1972] R.C.S. 889.
[5] [1972] R.C.S. 926.
[6] [1974] R.C.S. 195.

What is involved in this approach, patent on the face of the *Canadian Bill of Rights*, is the premise of our legal system that no legal permission is needed to do anything or act in any manner not prohibited by law, whether statute law or common law. Hence, if a federal enactment were to operate prohibitively against a specified class of persons by reason, for example, of colour or religion, saying nothing about other classes, the question of its operability under the *Canadian Bill of Rights* would arise notwithstanding that there was no federal legislation expressly sanctioning for those other classes what was prohibited for a specified class. In short, the question would be whether, having regard to the purpose of the statute, it had accorded equality before the law (to take s. 1(*b*) of the *Canadian Bill of Rights* as illustrative) to the affected class. It is easy to give examples; for instance, a provision in federal railway legislation prohibiting Indians alone from travelling in first class accommodation; or a provision in federal communications legislation prohibiting members of Jehovah's Witnesses from participating in religious programmes on radio or television; or a provision in federal banking legislation prohibiting persons of Asian descent from being bank directors. None of these illustrations are intended pejoratively, but they do raise the issue that arises here, namely, that it appears to be forbidden to Indians to become administrators of estates of Indian intestates, where no other class is singled out for disqualification.

Ce qui ressort de ce point de vue, de façon évidente à la lecture même de la *Déclaration canadienne des droits*, est le fondement de notre système juridique selon lequel aucune autorisation légale n'est requise pour faire quelque chose non interdit ou agir d'une façon non interdite par la loi, qu'elle soit statutaire ou coutumière. Par conséquent, si une loi fédérale devait créer une interdiction à une catégorie particulière de personnes en raison, par exemple, de leur couleur ou religion, pour ne pas parler des autres catégories, la question de son applicabilité en vertu de la *Déclaration canadienne des droits* serait soulevée même s'il n'existe pas de loi fédérale permettant explicitement aux autres catégories ce qui est interdit à une catégorie particulière. En résumé, la question serait de savoir, considérant le but visé par la loi, si elle a accordé l'égalité devant la loi (en prenant comme exemple l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits*) à la catégorie visée. Les exemples sont nombreux; ainsi, une disposition d'une loi fédérale sur les chemins de fer qui interdirait aux Indiens seulement de voyager en première classe; ou une disposition dans une loi fédérale sur les communications qui interdirait aux témoins de Jéhovah de participer à des émissions religieuses à la radio ou la télévision; ou une disposition dans une loi fédérale sur les banques qui interdirait aux personnes d'origine asiatique d'être administrateurs de banque. Aucun de ces exemples ne se veut péjoratif, mais ils soulèvent la question qui se pose en l'espèce, à savoir qu'il semble défendu aux Indiens de devenir administrateurs des successions d'Indiens morts intestat, alors que l'incapacité ne vise aucune autre catégorie désignée.

It is said, however, that because questions of administration of estates are, generally, in the provincial domain, a consideration of the disqualification of Indians under the *Indian Act* would mean testing the operation of the *Canadian Bill of Rights* by reference to provincial legislation and that this is outside the scope of the *Canadian Bill of Rights* which applies only to federal law. In my opinion, this is to obtrude an irrelevant factor into the matter at issue. If provincial legislation respecting the administration of estates exhibited

On dit toutefois que vu que les questions d'administration des successions sont, règle générale, de compétence provinciale, un examen de l'incapacité des Indiens en vertu de la *Loi sur les Indiens* équivaudrait à juger l'application de la *Déclaration canadienne des droits* par rapport à une loi provincial et que cela est hors de la portée de la *Déclaration canadienne des droits* qui s'applique seulement aux lois fédérales. A mon avis, c'est là introduire dans la question en litige un facteur non pertinent. Si une loi provinciale ayant pour objet

any conflict with the prescriptions of the *Canadian Bill of Rights*, that would be obviously no ground for challenging its operability as provincial legislation. Correlatively, I see no reason to refer to provincial legislation to test the operability of federal legislation under the *Canadian Bill of Rights*. The question whether any of the prescriptions of the *Canadian Bill of Rights* are offended by federal legislation depends on what that legislation provides and on the reach of the *Canadian Bill of Rights* itself.

It is thus not a telling factor for me that the respondent Mrs. Canard was appointed administratrix of her late husband's estate by letters of administration issued out of a Surrogate Court in Manitoba. The relevance of this is in its relation to the issue whether Mrs. Canard as an Indian was disqualified under the *Indian Act* and applicable regulations from being appointed administratrix by the authorized federal functionaries charged with the execution of the *Indian Act* and regulations thereunder. Sections 42 to 44 of the *Indian Act* must now be considered, and they read as follows:

42. (1) Unless otherwise provided in this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister, and shall be exercised subject to and in accordance with regulations of the Governor in Council.

(2) The Governor in Council may make regulations for providing that a deceased Indian who at the time of his death was in possession of land in a reserve shall, in such circumstances and for such purposes as the regulations prescribe, be deemed to have been at the time of his death lawfully in possession of that land.

(3) Regulations made under this section may be made applicable to estates of Indians who died before, on or after the 4th day of September, 1951.

43. Without restricting the generality of section 42, the Minister may

(*a*) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;

l'administration des successions présentait quelque conflit avec les prescriptions de la *Déclaration canadienne des droits*, cela ne constituerait évidemment pas un motif pour contester son application en tant que loi provinciale. Corrélativement, je ne vois pas pourquoi on se référerait à la loi provincial pour apprécier l'applicabilité de la loi fédérale sous le régime de la *Déclaration canadienne des droits*. La question de savoir si la loi fédérale viole certaines prescriptions de la *Déclaration canadienne des droits* dépend du contenu de la loi et du champ d'application de la *Déclaration canadienne des droits* elle-même.

Ainsi, j'accorde peu d'importance à la nomination de l'intimée Mme Canard comme administratrice de la succession de son mari décédé par des lettres d'administration émises par un tribunal des testaments et successions au Manitoba. Sa pertinence est reliée à la question de savoir si Mme Canard, en tant qu'Indienne, n'était pas habilitée en vertu de la *Loi sur les Indiens* et des règlements applicables à être nommée administratrice par les fonctionnaires fédéraux chargés de l'application de la *Loi sur les Indiens* et de ses règlements. Les articles 42 à 44 doivent être maintenant examinés et ils se lisent comme suit:

42. (1) Sauf disposition contraire de la présente loi, les juridiction et autorité sur les matières et causes testamentaires relatives à des Indiens décédés sont dévolues au Ministre exclusivement et doivent être exercées sous réserve et en conformité de règlements établis par le gouverneur en conseil.

(2) Le gouverneur en conseil peut établir des règlements stipulant qu'un Indien décédé qui, au moment de son décès, était en possession de terres dans une réserve, sera réputé, en telles circonstances et à telles fins que prescrivent les règlements, avoir été légalement en possession desdites terres au moment de son décès.

(3) Les règlements prévus par le présent article peuvent être rendus applicables aux successions des Indiens morts avant ou après le 4 septembre 1951 ou à cette date.

43. Sans restreindre la généralité de l'article 42, le Ministre peut

a) nommer des exécuteurs de testaments et des administrateurs de successions d'Indiens décédés, révoquer ces exécuteurs et administrateurs et les remplacer;

(*b*) authorize executors to carry out the terms of the wills of deceased Indians;

(*c*) authorize administrators to administer the property of Indians who die intestate;

(*d*) carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and

(*e*) make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred to in section 42.

44. (1) The court that would have jurisdiction if the deceased were not an Indian may, with the consent of the Minister, exercise, in accordance with this Act, the jurisdiction and authority conferred upon the Minister by this Act in relation to testamentary matters and causes and any other powers, jurisdiction and authority ordinarily vested in that court.

(2) The Minister may direct in any particular case that an application for the grant of probate of the will or letters of administration shall be made to the court that would have jurisdiction if the deceased were not an Indian, and the Minister may refer to such court any question arising out of any will or the administration of any estate.

(3) A court that is exercising any jurisdiction or authority under this section shall not without the consent in writing of the Minister enforce any order relating to real property on a reserve.

Since no consent of the Minister has been given under s. 44(1) and no direction under s. 44(2), it is unnecessary to consider that section for the purposes of this case; it is simply not applicable. We are left then with ss. 42 and 43 and with the *Indian Estates Regulations*, promulgated pursuant to s. 42. The relevant provisions of the Regulations are ss. 4 and 11 which I reproduce hereunder so far as material:

4. (1) With the notice of death or as soon thereafter as possible, the Superintendent shall forward an itemized statement of inventory in the form prescribed, to the Minister, showing all the real and personal property of the deceased, the value of each item estimated as closely as possible, as well as all debts of or claims against the estate known at such time; he shall also state

b) autoriser des exécuteurs à donner suite aux termes des testaments d'Indiens décédés;

c) autoriser des administrateurs à gérer les biens d'Indiens morts intestat;

d) réaliser les stipulations des testaments d'Indiens décédés et administrer les biens d'Indiens morts intestat; et

e) donner tout ordre ou instruction ou établir toute conclusion qu'il juge nécessaire ou désirable à l'égard de quelque matière mentionnée à l'article 42.

44. (1) Du consentement du Ministre, la cour qui aurait juridiction si la personne décédée n'était pas un Indien peut exercer, en conformité de la présente loi, la juridiction et l'autorité que la présente loi confère au Ministre à l'égard des matières et des causes testamentaires, ainsi que tous autres pouvoirs, juridiction et autorité ordinairement dévolus à cette cour.

(2) Dans tout cas particulier, le Ministre peut ordonner qu'une demande en vue d'obtenir l'homologation d'un testament ou l'émission de lettres d'administration soit présentée à la cour qui aurait juridiction si la personne décédée n'était pas un Indien. Il a la faculté de soumettre à cette cour toute question que peut faire surgir un testament ou l'administration d'une succession.

(3) Une cour qui exerce quelque juridiction ou autorité sous le régime du présent article ne doit pas, sans le consentement écrit du Ministre, mettre à exécution une ordonnance visant des biens réels sur une réserve.

Puisque le Ministre n'a pas donné son consentement conformément au par. (1) de l'art. 44, ni émis d'ordonnance conformément au par. (2) de l'art. 44, il n'est pas nécessaire pour les besoins de la présente affaire de considérer cet article qui ne s'applique tout simplement pas. Il nous reste les art. 42 et 43 et les *Règlements relatifs aux successions des Indiens*, établis en vertu de l'art. 42. Les dispositions pertinentes des règlements sont les art. 4 et 11 dont je cite les parties applicables:

4. (1) Dès notification du décès ou le plus tôt possible après le reçu de cet avis, le surintendant doit faire parvenir au Ministre un état détaillé de l'inventaire en la forme prescrite, qui doit indiquer les biens meubles et immeubles du défunt, la valeur de chaque article appréciée aussi exactement que possible, et toutes les dettes de la succession et les réclamations des créanciers connues

therein whether the deceased left a will and give the names of all persons entitled to share in the estate and all such other information as may be required by the Minister.

(2) For all the purposes of this section, the Superintendent shall act in the capacity of an administrator and shall take all necessary steps for the proper safekeeping or safeguarding of the assets of the deceased and for the collection of moneys due or owing to the deceased and shall dispose of the moneys so collected or held as the Minister may direct.

11. (1) The Minister may appoint an officer of the Indian Affairs Branch to be the administrator of estates and to supervise the administration of estates and of all the assets of deceased Indians, and may provide that for the purposes of closing an estate the administration thereof be transferred to the Superintendent of the Reserve to which the deceased belonged.

(2) The administrator appointed pursuant to this section or the person acting as administrator in accordance with section 4 shall be responsible to the Minister for the proper preparation of the inventory, the giving of all notices and the carrying out of all inquiries and duties that may be necessary or be ordered with respect to any matter referred to in these regulations.

(14) Generally, an administrator shall have all such powers as are required for the carrying out of the duties herein specified, and shall carry out any order or direction and abide by any finding made or given by the Minister with respect to any matter and cause testamentary.

(15) An administrator shall be accountable to the Minister for his administration.

It is clear from the reasons of the Manitoba Court of Appeal that it proceeded on the basis that ss. 42 and 43 did not envisage that an Indian could be an administratrix of a deceased Indian spouse's estate. In this Court, counsel for the Attorney General of Canada submitted that there was nothing in s. 43 that prevented Mrs. Canard from applying for the issue to her of letters of administration, and nothing to prevent the Minister from granting her application. The completely illusory possibility of this is belied not only by the Regulations and the provisions thereof to which I have referred (provisions which name the Superintendent of Indian Affairs and officers of the Indian Affairs Branch as the qualified administrators)

à ce moment-là. Le surintendant doit aussi déclarer dans cet état si le défunt a fait un testament et donner les noms de toutes les personnes ayant droit à une part de la succession et toute autre information pertinente que peut exiger le Ministre.

(2) Aux fins du présent article, le surintendant doit agir en qualité d'administrateur et prendre toutes les mesures qui s'imposent pour assurer la bonne garde ou protection des biens du défunt et le recouvrement des sommes dues ou exigibles et disposer des deniers recouvrés ou détenus, de la manière que détermine le Ministre. . . .

11. (1) Le Ministre peut nommer un fonctionnaire de la Division des affaires indiennes comme administrateur des successions et pour surveiller l'administration des successions et de tous les biens des Indiens décédés; afin de régler une succession, il peut autoriser que l'administration en soit transférée au surintendant de la réserve à laquelle appartenait la personne décédée.

(2) L'administrateur nommé conformément au présent article ou la personne qui agit en qualité d'administrateur en vertu de l'article 4 doit rendre compte au Ministre de la préparation adéquate de l'inventaire, de la signification de tous les avis et de l'exécution de toutes les enquêtes et fonctions qui peuvent s'imposer ou être ordonnées à l'égard de toute question mentionnée dans les présents règlements.

(14) En général, un administrateur doit avoir tous les pouvoirs nécessaires pour s'acquitter des fonctions spécifiées ci-dessus et doit exécuter les ordres ou instructions et maintenir toute conclusion établie ou donnée par le Ministre à l'égard de toute matière et cause testamentaires.

(15) Un administrateur doit répondre au Ministre de son administration.

Les motifs de la Cour d'appel du Manitoba indiquent clairement que celle-ci a procédé sur la base que les art. 42 et 43 n'envisagent pas qu'un Indien puisse être nommé administrateur de la succession de son conjoint décédé. Devant cette Cour, l'avocat du Procureur général du Canada a soumis qu'il n'y avait rien dans l'art. 43 qui empêchait Mme Canard de faire une demande en vue d'obtenir l'émission de lettres d'administration et le Ministre de les lui accorder. Cette possibilité tout à fait illusoire est contredite non seulement par les règlements et les dispositions que j'ai cités (dispositions qui nomment le surintendant des affaires indiennes et les fonctionnaires de la Division des affaires indiennes comme administrateurs

but by the fact that Mrs. Canard was not told by the Department of Indian Affairs that the appellant Rees, an officer of the Branch, had been appointed administrator of her deceased husband's estate, nor was she told that Rees had commenced an action as administrator to recover damages arising out of the traffic accident in which Mrs. Canard's husband was fatally injured. I do not think that the *Canadian Bill of Rights* can be set to one side so easily.

On the face of the *Indian Act* as amplified by the Regulations thereunder, and certainly as fortified by the invariable practice of the Department of Indian Affairs, Indians are disqualified from obtaining letters of administration of the estate of an Indian intestate, even in the case where the intestate is a spouse, and *a fortiori* where the intestate may have a lesser relationship to a would-be Indian applicant. The contention is, however, and here the judgment of Ritchie J. in the *Lavell* case is invoked, that federal legislative authority in relation to Indians is itself an expression of a classification that removes the *Indian Act* and allied legislation from any taint under the *Canadian Bill of Rights*. We are told that the reason why the *Drybones* case stands apart is because there other federal legislation had established a position of inequality by reason of race that operated against Indians alone, and that that is not this case, nor was it the case in *Lavell*.

If anything, the *Drybones* case is quite consistent with the approach I would take here. The fact that the Court had before it a liquor ordinance of the Territories which made it an offence for any person to be intoxicated in a public place and that s. 94(*b*) of the *Indian Act* made it an offence for an Indian to be intoxicated off a reserve, meant only that whereas all others in the Territories were not subject to liability and penalty for intoxication in other than a public place an Indian was so subject. I cannot believe that the *Drybones* case would have been decided differently if s. 94(*b*) of the *Indian Act* stood alone, thus making Indians alone subject to liability and penalty for being intoxicated off a reserve but there was no prohibition against anyone else. The

qualifiés) mais par le fait que Mme Canard n'a pas été avisée par le ministère des Affaires indiennes que l'appelant Rees, un fonctionnaire de la Division, avait été nommé administrateur de la succession de son mari décédé, ni que Rees avait intenté une action en qualité d'administrateur en vue de recouvrer des dommages-intérêts résultant de l'accident de la route où le mari de Mme Canard avait perdu la vie. Je ne crois pas que la *Déclaration canadienne des droits* puisse être écartée aussi facilement.

A sa lecture, la *Loi sur les Indiens*, amplifiée par ses règlements et certainement renforcée par la pratique invariable du ministère des Affaires indiennes, rend les Indiens incapables d'obtenir des lettres d'administration de la succession d'un Indien décédé intestat, même dans le cas où le de cujus intestat est un conjoint, et *a fortiori* lorsque le de cujus intestat peut avoir un lien de parenté plus éloigné avec l'Indien qui en ferait la demande. Toutefois, on prétend que, et ici l'on invoque le jugement du juge Ritchie dans *Lavell*, que l'autorité législative fédérale à l'égard des Indiens crée elle-même une catégorie qui a pour effet de placer la *Loi sur les Indiens* et ses lois connexes à l'abri de la *Déclaration canadienne des droits*. On nous a dit que l'arrêt *Drybones* est unique à cause de l'existence d'autres lois fédérales qui ont créé une situation d'inégalité en raison de la race qui joue uniquement contre les Indiens, et que ce n'est pas le cas en l'espèce ni dans *Lavell*.

En fait, l'arrêt *Drybones* est tout à fait conciliable avec le point de vue que j'adopte ici. Le fait qu'une ordonnance des Territoires relative à l'alcool interdisait à toute personne de se trouver en état d'ébriété dans un endroit public et que l'al. *b*) de l'art. 94 de la *Loi sur les Indiens* interdisait à un Indien d'être ivre en dehors d'une réserve, signifie seulement que tandis que toutes les autres personnes dans les Territoires n'étaient pas passibles de sanction si elles étaient ivres ailleurs que dans un endroit public, un Indien l'était. Je ne peux pas croire que l'arrêt *Drybones* eût été décidé autrement si l'on avait considéré uniquement l'al. *b*) de l'art. 94 de la *Loi sur les Indiens*, de sorte que seuls les Indiens auraient été passibles de condamnation et de sanction pour être ivres hors

Territories liquor ordinance merely circumscribed the offence and the issue of inequality resided in the want of any prohibition outside of that circumscription affecting others than Indians.

Of course, it is much easier for the Courts to apply the *Canadian Bill of Rights* to a federal legislative measure if Parliament itself provides the touchstone of comparison in other federal legislation. Yet, it may equally provide it by what it has done and failed to do in the very measure that is under challenge. The Court's function in such a case is different only in degree but not in kind.

In my opinion, to the extent that there is any majority opinion in the *Lavell* case (having regard to the separate concurring reasons of Pigeon J. since the Court was otherwise evenly split), it resides in the view that the *Indian Act* is a self-contained code which if it exhibits any dissonance with the *Canadian Bill of Rights* is justified by the very fact that Indians have been designated as a special class for which Parliament may legislate. I did not accept that view in *Lavell* and I do not accept it now, because I do not regard the mere grant of legislative power as itself authorizing Parliament to offend against its generally stated protections in the *Canadian Bill of Rights*. If Parliament deems it necessary to treat its grant of legislative power under s. 91(24) of the *British North America Act* in terms that would be offensive to the *Canadian Bill of Rights*, it is open to Parliament to do so, but s. 91(24) is not, in my opinion, an invitation to the Courts to do what Parliament has not chosen to do. It seems to me patent that no grant of federal legislative power, as a mere vehicle for legislation, should be viewed as necessarily carrying with it a built-in exclusion of the mandates of the *Canadian Bill of Rights*.

d'une réserve sans qu'il y ait interdiction contre personne d'autre. L'ordonnance des Territoires relative à l'alcool ne fait que circonscrire l'infraction et la question d'inégalité réside en l'absence de toute interdiction visant les non-Indiens, en dehors de ces limites.

Il est naturellement plus facile pour les tribunaux d'appliquer la *Déclaration canadienne des droits* à une mesure législative fédérale si le Parlement lui-même fournit le critère de comparaison dans d'autres lois fédérales. Malgré cela, il peut également fournir ce critère par ce qu'il a fait ou a omis de faire dans la mesure même qui est contestée. La différence du rôle de la cour en pareil cas en est une de degré et non pas de nature.

A mon avis, dans la mesure où il y avait une opinion majoritaire dans *Lavell* (tenant compte des motifs distincts concordants du juge Pigeon puisque la Cour était autrement divisée de façon égale), elle se fonde sur le point de vue que la *Loi sur les Indiens* est un code complet en lui-même qui, s'il présente quelque désaccord avec la *Déclaration canadienne des droits*, se justifie par le fait même que les Indiens ont été considérés comme formant une catégorie particulière à l'égard de laquelle le Parlement pouvait légiférer. Je n'ai pas accepté ce point de vue dans *Lavell* et je ne l'accepte pas maintenant, parce que je ne considère pas que la simple attribution d'un pouvoir législatif constitue en lui-même une autorisation pour le Parlement d'aller à l'encontre des mesures de sauvegarde qu'il a énoncées de façon générale dans la *Déclaration canadienne des droits*. Si le Parlement juge nécessaire de traiter son pouvoir de légiférer en vertu de l'art. 91 (24) de *l'Acte de l'Amérique du Nord britannique* d'une façon qui irait à l'encontre de la *Déclaration canadienne des droits*, il est libre de le faire mais l'art. 91(24) ne constitue pas, à mon avis, une invitation aux tribunaux de faire ce que le Parlement n'a pas voulu faire lui-même. Il me semble évident que nul pouvoir législatif fédéral, qui n'est qu'un simple instrument pour adopter les lois, ne devrait être considéré comme comportant nécessairement en soi une exclusion des mandements de la *Déclaration canadienne des droits*.

Lavell was, apart from the foregoing, an even more obvious case than *Drybones* for the application of the *Canadian Bill of Rights*, because the inequality in that case, on the ground of sex, was built into the *Indian Act* itself. The present case on its facts is at least as susceptible as was *Drybones* to the purging effect of the *Canadian Bill of Rights*, and I can add nothing more in this respect to what was said more tersely but just as effectively by Dickson J.A.

I would dismiss the appeal with costs but I would vary the judgment of the Manitoba Court of Appeal by avoiding any declaration that s. 43 of the *Indian Act* is inoperative and by declaring instead that s. 43 must be applied consistently with s. 1(*b*) of the *Canadian Bill of Rights* and that s. 11 of the *Indian Estates Regulations* is inoperative in so far as it excludes Indians from eligibility to be administrators of the estates of deceased Indians.

The Attorney General of Canada undertook, if he was successful here, to pay the costs of the appellant in this Court on a party-and-party basis and to forgo costs in the Courts below. In view of the result I reach, the appellant does not need this indulgence.

The judgment of Martland and Judson JJ. was delivered by

MARTLAND J.—The facts which give rise to this appeal are stated in the reasons of my brother Beetz.

The relevant provisions of the *Indian Act*, R.S.C. 1970, c. I-6, are subs. (3) of s. 4 and ss. 42 and 43, which provide as follows:

4. (3) Sections 114 to 123 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province.

42. (1) Unless otherwise provided in this Act, all jurisdiction and authority in relation to matters and

En plus de ce qui est mentionné ci-dessus, il est encore plus évident dans *Lavell* que dans *Drybones* que la *Déclaration canadienne des droits* s'appliquait, parce qu'en cette affaire-là, l'inégalité en raison du sexe était incorporée dans la *Loi sur les Indiens* elle-même. D'après les faits, la présente affaire est au moins aussi susceptible que l'affaire *Drybones* de subir l'effet purifiant de la *Déclaration canadienne des droits*, et je ne peux ajouter rien de plus à cet égard à ce qui a été dit de façon plus concise mais tout aussi efficace par le juge d'appel Dickson.

Je rejetterais l'appel avec dépens mais je modifierais le jugement de la Cour d'appel du Manitoba en omettant toute déclaration que l'art. 43 de la *Loi sur les Indiens* est inopérant et en statuant plutôt que l'art. 43 doit s'appliquer en conformité avec l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits* et que l'art. 11 des *Règlements sur les successions des Indiens* est inopérant dans la mesure où il prononce l'incapacité des Indiens à être nommés administrateurs des successions d'Indiens décédés.

Le Procureur général du Canada s'était engagé, s'il avait gain de cause ici, à payer les dépens de l'intimée devant cette Cour, applicables entre les parties, et de renoncer aux dépens devant les tribunaux d'instance inférieure. En raison de ma conclusion, cette bienveillance en faveur de l'intimée est superflue.

Le jugement des juges Martland et Judson a été rendu par

LE JUGE MARTLAND—Les faits qui ont donné naissance au présent appel sont énoncés dans les motifs de mon collègue M. le juge Beetz.

Les dispositions pertinentes de la *Loi sur les Indiens*, S.R.C. 1970, c. I-6, sont le par. (3) de l'art. 4 et les art. 42 et 43, qui prévoient ce qui suit:

4. (3) Les articles 114 à 123 et, sauf si le Ministre en ordonne autrement, les articles 42 à 52 ne s'appliquent à aucun Indien, ni à l'égard d'aucun Indien, ne résidant pas ordinairement dans une réserve ou sur des terres qui appartiennent à Sa Majesté du chef du Canada ou d'une province.

42. (1) Sauf disposition contraire de la présente loi, les juridiction et autorité sur les matières et causes

causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister, and shall be exercised subject to and in accordance with regulations of the Governor in Council.

(2) The Governor in Council may make regulations for providing that a deceased Indian who at the time of his death was in possession of land in a reserve shall, in such circumstances and for such purposes as the regulations prescribe, be deemed to have been at the time of his death lawfully in possession of that land.

(3) Regulations made under this section may be made applicable to estates of Indians who died before, on or after the 4th day of September 1951.

43. Without restricting the generality of section 42, the Minister may

(*a*) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;

(*b*) authorize executors to carry out the terms of the wills of deceased Indians;

(*c*) authorize administrators to administer the property of Indians who die intestate;

(*d*) carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and

(*e*) make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred to in section 42.

The learned trial judge held that the deceased, Alexander Canard, did not ordinarily reside on a reserve, and, in consequence, there having been no order of the Minister otherwise, the Minister did not have the power, under s. 43, to appoint an administrator of his estate.

The Court of Appeal found, on the evidence, that Canard did ordinarily reside on a reserve, and so the application of s. 43 was not excluded by the operation of s. 4(3). I agree with this conclusion. The Court went on to hold that s. 43 was inoperative to the extent that, in violation of the *Bill of Rights*, guaranteeing the right to equality before the law without discrimination by reason of race, it denied Mrs. Canard administration of the estate of her late husband. It is from this judgment that the present appeal is brought.

testamentaires relatives à des Indiens décédés sont dévolues au Ministre exclusivement et doivent être exercées sous réserve et en conformité de règlements établis par le gouverneur en conseil.

(2) Le gouverneur en conseil peut établir des règlements stipulant qu'un Indien décédé qui, au moment de son décès, était en possession de terres dans une réserve, sera réputé, en telles circonstances et à telles fins que prescrivent les règlements, avoir été légalement en possession desdites terres au moment de son décès.

(3) Les règlements prévus par le présent article peuvent être rendus applicables aux successions des Indiens morts avant ou après le 4 septembre 1951 ou à cette date.

43. Sans restreindre la généralité de l'article 42, le Ministre peut

a) nommer des exécuteurs de testaments et des administrateurs de successions d'Indiens décédés, révoquer ces exécuteurs et administrateurs et les remplacer:

b) autoriser des exécuteurs à donner suite aux termes des testaments d'Indiens décédés;

c) autoriser des administrateurs à gérer les biens d'Indiens morts intestat;

d) réaliser les stipulations des testaments d'Indiens décédés et administrer les biens d'Indiens morts intestat; et

e) donner tout ordre ou instruction ou établir toute conclusion qu'il juge nécessaire ou désirable à l'égard de quelque matière mentionnée à l'article 42.

Le savant juge de première instance a décidé que le *de cujus*, Alexander Canard, ne résidait pas ordinairement dans une réserve et que par conséquent, comme le Ministre ne l'avait pas ordonné autrement, celui-ci n'avait pas le pouvoir, en vertu de l'art. 43, de nommer un administrateur de la succession.

La Cour d'appel a jugé, d'après la preuve, que Canard résidait ordinairement dans une réserve et ainsi l'application de l'art. 43 n'a pas été exclue par l'effet du par. (3) de l'art. 4. Je suis d'accord avec cette conclusion. La Cour a ensuite décidé que l'art. 43 était inopérant dans la mesure où, en violation de la *Déclaration des droits*, garantissant l'égalité devant la loi à toute personne sans discrimination en raison de la race, il ne permettait pas à Mme Canard d'administrer la succession de son mari décédé. C'est ce jugement qui fait l'objet du présent appel.

Section 1(*b*) of the *Canadian Bill of Rights* provides that:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(*b*) the right of the individual to equality before the law and the protection of the law;

Section 91(24) of the *British North America Act* gave to the Parliament of Canada exclusive legislative authority over the subject of "Indians, and Lands reserved for the Indians." Pursuant to this authority Parliament has enacted the *Indian Act*, which establishes a comprehensive regime for Indians, dealing with such diverse matters as the possession of lands in reserves; the surrender of reserve lands; wills; the distribution of property on intestacy; mentally incompetent Indians; the administration of property of infant children; loans to Indians; schools; and enfranchisement.

The provisions of the Act dealing with wills and estates provide a scheme for testamentary capacity and for the administration of estates. It is characterized by a discretionary and supervisory jurisdiction in the Minister of Indian Affairs rather than in the Courts.

The subject-matter defined in s. 91(24) necessarily contemplates legislation respecting the status and rights of a particular class of persons. If the words "equality before the law" in s. 1(*b*) of the *Bill of Rights* were to be construed as precluding legislation of this kind it would prevent Parliament from exercising the power entrusted to it by s. 91(24).

The majority of this Court in *Attorney General of Canada v. Lavell*[7], rejected the application of the *Bill of Rights* in that way, and approved the

[7] [1974] S.C.R. 1349.

L'alinéa *b*) de l'art. 1 de la *Déclaration canadienne des droits* prévoit que:

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe:

b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;

L'article 91(24) de l'*Acte de l'Amérique du Nord britannique* donne au Parlement du Canada l'autorité législative exclusive sur le sujet des «Indiens et des terres réservées pour les Indiens». En vertu de cette autorité, le Parlement a adopté la *Loi sur les Indiens*, qui établit un régime global pour les Indiens, traitant de matières aussi diverses que la possession de terres dans les réserves, les cessions des terres de la réserve, les testaments, la distribution des biens ab intestat, les Indiens mentalement incapables, l'administration des biens des enfants mineurs, les prêts aux Indiens, les écoles et l'émancipation.

Les dispositions de la Loi relatives aux testaments et aux successions ont pour objet la capacité de tester et l'administration des successions. Leur caractéristique est de conférer au ministre des Affaires indiennes plutôt qu'aux tribunaux un pouvoir discrétionnaire de contrôle.

La matière définie à l'art. 91(24) envisage nécessairement l'adoption de lois relatives au statut et aux droits d'une catégorie particulière de personnes. Si les mots «égalité devant la loi» de l'al. *b*) de l'art. 1 de la *Déclaration des droits* devaient être interprétés comme excluant l'adoption de lois de cette nature, ils empêcheraient le Parlement d'exercer le pouvoir que lui confère l'art. 91(24).

Dans l'arrêt *Procureur général du Canada c. Lavell*[7], la majorité de cette Cour a rejeté l'application de la *Déclaration des droits* de cette façon

[7] [1974] R.C.S. 1349.

statement of Pigeon J., on this point, in his dissenting reasons in *The Queen v. Drybones*[8], at p. 304:

> If one of the effects of the *Canadian Bill of Rights* is to render inoperative all legal provisions whereby Indians as such are not dealt with in the same way as the general public, the conclusion is inescapable that Parliament, by the enactment of the *Bill*, has not only fundamentally altered the status of the Indians in that indirect fashion but has also made any future use of federal legislative authority over them subject to the requirement of expressly declaring every time "that the law shall operate notwithstanding the *Canadian Bill of Rights*". I find it very difficult to believe that Parliament so intended when enacting the *Bill*. If a virtual suppression of federal legislation over Indians as such was meant, one would have expected this important change to be made explicitly not surreptitiously so to speak.

In *The Queen v. Burnshine*[9], this Court had occasion to consider the application of s. 1(*b*) in relation to federal legislation which dealt specially with a designated class of individuals, in relation to indeterminate sentences for young offenders. It was held that the right to equality before the law guaranteed by s. 1(*b*) of the *Bill of Rights* did not involve the proposition that all federal statutes must apply equally to all individuals in all parts of Canada, and that federal legislation which applied to a particular group or class of people, or in a particular area of Canada, did not offend against that guarantee if it was enacted in order to achieve a valid federal objective.

The judgments of this Court in *Lavell* and in *Burnshine* were delivered after the judgment of the Court of Appeal in the present case.

[8] [1970] S.C.R. 282.
[9] [1975] S.C.R. 693.

et elle a approuvé sur cette question l'énoncé du juge Pigeon dans ses motifs de dissidence dans l'arrêt *La Reine c. Drybones*[8], à la p. 304:

> Si l'un des effets de la *Déclaration canadienne des droits* est de rendre inopérantes toutes les dispositions en vertu desquelles les Indiens en tant que tels ne sont pas traités de la même façon que le grand public, on doit inévitablement conclure que le Parlement, en édictant la *Déclaration*, n'a pas seulement modifié fondamentalement le statut des Indiens par ce procédé indirect, mais aussi qu'il a assujetti l'exercice futur de l'autorité législative fédérale sur les Indiens à l'exigence d'une déclaration expresse «que la loi s'appliquera nonobstant la *Déclaration canadienne des droits*». J'ai peine à croire que le Parlement avait cette intention lorsqu'il a édicté la *Déclaration*. Si l'on entendait supprimer pratiquement la législation fédérale sur les Indiens, on devrait s'attendre à ce que ce changement important soit fait explicitement et non subrepticement, pour ainsi dire.

Dans l'arrêt *La Reine c. Burnshine*[9], cette Cour a eu l'occasion d'examiner l'application de l'al. *b*) de l'art. 1 relativement à une loi fédérale qui traitait particulièrement d'une catégorie déterminée d'individus, à l'égard de l'imposition de sentences indéterminées aux jeunes contrevenants. Il a été décidé que le droit à l'égalité devant la loi garanti par l'al. *b*) de l'art. 1 de la *Déclaration des droits* ne signifie pas que toutes les lois fédérales doivent s'appliquer également à tous les individus de toutes les parties du Canada, et qu'une loi fédérale qui s'appliquait à un groupe particulier ou à une catégorie de personnes, ou dans une région particulière du Canada, n'allait pas à l'encontre de cette garantie si elle était adoptée en vue de l'accomplissement d'un objectif fédéral régulier.

Les jugements de cette Cour dans *Lavell* et *Burnshine* ont été rendus après le jugement de la Cour d'appel dans la présente affaire.

[8] [1970] R.C.S. 282.
[9] [1975] R.C.S. 693.

Section 43 of the *Indian Act* is legislation relating to the administration of the estates of deceased Indians and (unless the Minister otherwise orders, which he did not do in this case) relates only to those Indians ordinarily resident on reserves. It enables the Minister to appoint administrators of estates of deceased Indians and to remove them. The regulations enacted pursuant to s. 42 enable the Minister to appoint an officer of the Indian Affairs Branch to be the administrator of estates and to supervise the administration of estates. In my opinion there are legitimate reasons of policy for the enactment of such provisions in relation to the estate assets of deceased Indians ordinarily resident on reserves.

I cannot find in these provisions discrimination against the respondent by reason of race. They relate exclusively to the administration of the estates of deceased Indians, in certain circumstances, and apply generally to such estates. There is no federal legislation relating to the administration of estates of non-Indians in the provinces, and, constitutionally, such legislation could not be enacted. This is not a case in which federal legislation dealing with a subject-matter within s. 91 of the *British North America Act* has permitted certain acts or conduct by non-Indians and prohibited Indians from doing the same thing. The provisions of the *Indian Act*, including s. 43, deal only with the legal rights of Indians.

For these reasons, as well as those delivered by my brother Ritchie and by my brother Pigeon, I would allow this appeal and dispose of the matter in the manner proposed by my brother Beetz.

RITCHIE J.—The conclusion reached by the Court of Appeal for Manitoba in this case is that s. 43 of the *Indian Act* is "inoperative to the extent that in violation of the *Bill of Rights* guaranteeing the right to equality before the law without discrimination by reason of race, it denies Mrs. Canard administration of the estate of her late husband."

L'article 43 de la *Loi sur les Indiens* est une disposition relative à l'administration des successions des Indiens décédés et (à moins que le Ministre n'en ordonne autrement, ce qu'il n'a pas fait en l'espèce) s'applique seulement aux Indiens résidant ordinairement dans des réserves. Il permet au Ministre de nommer des administrateurs de successions d'Indiens décédés et de les révoquer. Les règlements édictés en vertu de l'art. 42 donnent au Ministre le pouvoir de nommer un fonctionnaire de la Division des affaires indiennes pour administrer les successions et pour surveiller l'administration des successions. A mon avis, il existe des principes valables pour adopter de pareilles dispositions à l'égard de la succession des Indiens décédés résidant ordinairement dans des réserves.

Je ne puis trouver dans ces dispositions de matières discriminatoires à l'encontre de l'intimée en raison de sa race. Elles concernent exclusivement l'administration des successions des Indiens décédés, en certaines circonstances, et s'appliquent généralement à ces successions. Il n'y a pas de loi fédérale ayant trait à l'administration des successions des non-Indiens dans les provinces, et, du point de vue constitutionnel, une telle loi ne pourrait être adoptée. Il ne s'agit pas d'un cas où une loi fédérale qui traite d'un sujet inclus dans l'art. 91 de l'*Acte de l'Amérique du Nord britannique* permet à des non-Indiens d'agir d'une façon qu'elle interdit aux Indiens. Les dispositions de la *Loi sur les Indiens*, y compris l'art. 43, traitent seulement des droits légaux des Indiens.

Pour ces motifs, de même que ceux énoncés par mes collègues MM. les juges Ritchie et Pigeon, je suis d'avis d'accueillir l'appel et de décider la question de la façon proposée par mon collègue M. le juge Beetz.

LE JUGE RITCHIE—En l'espèce, la Cour d'appel du Manitoba a conclu que l'art. 43 de la *Loi sur les Indiens* est [TRADUCTION] «inopérant dans la mesure où, en violation de la *Déclaration canadienne des droits* garantissant le droit à l'égalité devant la loi sans discrimination en raison de la race, il ne permet pas à Mme Canard d'administrer la succession de son mari décédé».

It is thus the finding of the denial of the fundamental right of "equality before the law" guaranteed to all Canadians by s. 1(*b*) of the *Canadian Bill of Rights* which forms the basis of the Court of Appeal's conclusion that the provisions of s. 43 are inoperative.

In the course of the reasons for judgment which he delivered on behalf of the Court of Appeal, Mr. Justice Dickson recognized the validity of the proposition that the question of whether a piece of federal legislation has been rendered inoperative should not rest on a difference between such legislation and that of any of the provinces "for", as he said, "its operation would then vary from province to province and from time to time", but he went on to say of the present case:

> The inequality does not arise through a conflict between a federal statute and a provincial statute. It arises through conflict between the *Bill of Rights* and a federal statute. The *Bill of Rights* has capacity to render inoperative racially discriminatory legislation, whether or not there be provincial legislation touching the subject-matter.

The matter at issue in the present appeal is the administration of "property" of a deceased Indian, and I agree with the Court of Appeal that he was at the time of his death resident on lands reserved for Indians. This is therefore a subject to which the exclusive legislative authority of the Parliament of Canada extends under s. 91(24) of the *British North America Act*, and where, as here, s. 88 of the *Indian Act* does not apply, it is one to which provincial legislation can have no application. It therefore follows, in my view, that if the impugned sections of the *Indian Act* are to be declared inoperative, it must be shown that they have the effect of creating inequality before laws enacted under the legislative authority of the Parliament of Canada (see *Bill of Rights* s. 5(3)).

The specific ground upon which the Court of Appeal founded its conclusion that the impugned legislation constituted a denial of Mrs. Canard's "right to equality before the law" is expressed in the following paragraph:

> The *Bill of Rights* proclaims an egalitarian doctrine. It assures Mrs. Canard "without discrimination by reason of race" "the right to equality before the law". I do not think Mrs. Ca... of equality before ... *civil right* which ... enjoy—*the right to ... band.* The denial ... principle of equali... of inferiority vis-à-...

The italics are my o...

In my view t... paragraph must of ... the differences exist ... governing the ad... ans and the pro... have general applic... various provinces. T... to Mrs. Canard ... race enjoy", is a ... the scope of the legi... ment of Canada. ... my view, be inv... provisions of other... as to result in a deni... ity before the law ... of the *Canadian B...*

The *Bill of Righ...* any discriminator... of Canada and t... doms therein specif... but these guarantee... preamble to the B... the respect of Parli... s.91(24) of that do... Parliament of Ca... concerning Indian ... laws which the prov... concerning the citizer...

If the provisions ... regulations made th... inoperative as offe... vided by s. 1(*b*) of ... have the effect of trea... other Canadians, the... eventually all such ... and Indians will in... same way as their fel... cannot believe tha...

C'est donc la conclusion qu'il y a eu déni du droit à l'«égalité devant la loi» garanti à tous les Canadiens par l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits* qui est à la base de la décision de la Cour d'appel que les dispositions de l'art. 43 sont inopérantes.

Dans ses motifs de jugement rendus au nom de la Cour d'appel, M. le juge Dickson a reconnu la validité de la proposition que la question de savoir si une disposition d'une loi fédérale est devenue inopérante ne devrait pas se fonder sur une divergence entre cette loi et celle de l'une des provinces [TRADUCTION] «parce que», comme il dit, «son application varierait alors d'une province à l'autre et d'un moment à l'autre». Mais il continue en parlant de la présente affaire:

> [TRADUCTION] L'inégalité ne résulte pas d'un conflit entre une loi fédérale et une loi provinciale. Elle résulte d'un conflit entre la *Déclaration des droits* et une loi fédérale. La *Déclaration des droits* peut rendre inopérante une loi discriminatoire en raison de la race, qu'il y ait ou non des lois provinciales sur le sujet.

La question en litige en ce pourvoi est l'administration des «biens» d'un Indien décédé, et je suis d'accord avec la Cour d'appel qu'au moment de son décès, celui-ci résidait sur les terres réservées aux Indiens. C'est donc un sujet qui tombe sous l'autorité législative exclusive du Parlement du Canada en vertu de l'art. 91(24) de l'*Acte de l'Amérique du Nord britannique* et qui, comme ici, l'art. 88 de la *Loi sur les Indiens* ne s'applique pas, ne peut être visé par une loi provinciale. Il s'ensuit donc, à mon avis, que si les articles attaqués de la *Loi sur les Indiens* doivent être déclarés inopérants, il faut montrer qu'ils ont pour effet de créer l'inégalité vis-à-vis des lois adoptées en vertu de la compétence législative du Parlement du Canada. (Voir *Déclaration des droits* art. 5(3)).

Les raisons spécifiques sur lesquelles la Cour d'appel a fondé sa conclusion que la loi attaquée constituait pour Mme Canard un déni du «droit à l'égalité devant la loi» sont énoncées dans le passage suivant:

> [TRADUCTION] La *Déclaration des droits* proclame une doctrine égalitaire. Elle assure à Mme Canard «quelle que soit sa race» «le droit à l'égalité devant la loi». Je ne

do not think Mrs. Canard can be said to be in a position of equality before the law when that law denies her *a civil right* which other Canadians, not of her race, enjoy—*the right to administer the estate of her husband*. The denial of that right is a negation of the principle of equality and places Mrs. Canard in a state of inferiority vis-à-vis other Canadians.

The italics are my own.

In my view the inequality referred to in this paragraph must of necessity be created because of the differences existing between the law of Canada governing the administration of the estates of Indians and the provincial laws in this regard which have general application to other Canadians in the various provinces. The civil right said to be denied to Mrs. Canard "that other Canadians not of her race enjoy", is a provincial right which is beyond the scope of the legislative authority of the Parliament of Canada, and which cannot therefore, in my view, be invoked in contra-distinction to the provisions of otherwise valid federal legislation so as to result in a denial to the respondent of "equality before the law" within the meaning of s. 1 (*b*) of the *Canadian Bill of Rights*.

The *Bill of Rights* was designed to eradicate any discriminatory laws passed by the Parliament of Canada and to guarantee the rights and freedoms therein specified to all Canadian citizens, but these guarantees are expressly declared in the preamble to the Bill to be enacted so as to "reflect the respect of Parliament for its constitution", and s.91(24) of that document clearly vests in the Parliament of Canada the authority to pass laws concerning Indians which are different from the laws which the provincial legislatures may enact concerning the citizens of the various provinces.

If the provisions of the *Indian Act* and the regulations made thereunder are to be declared inoperative as offending against the guarantee provided by s. 1(*b*) of the *Bill of Rights* wherever they have the effect of treating Indians differently from other Canadians, then it seems to me to follow that eventually all such differences will be eradicated and Indians will in all respects be treated in the same way as their fellow citizens under the law. I cannot believe that the special Indian status so

crois pas qu'on puisse dire que Mme Canard est dans un état d'égalité devant la loi lorsque cette loi la prive d'*un droit civil* dont jouissent les autres Canadiens, qui ne sont pas de sa race,—*le droit d'administrer la succession de son mari*. La privation de ce droit est une négation du principe d'égalité et place Mme Canard dans un état d'infériorité vis-à-vis des autres Canadiens.

J'ai mis des mots en italiques.

A mon avis, il faut nécessairement que l'inégalité mentionnée dans ce passage soit le fait des différences qui existent entre la loi du Canada régissant l'administration des successions des Indiens et les lois provinciales à ce sujet qui s'appliquent généralement aux autres Canadiens dans les différentes provinces. Le droit civil dont, prétend-on, Mme Canard est privée et «dont jouissent les autres Canadiens qui ne sont pas de sa race» est un droit provincial qui n'est pas de la compétence législative du Parlement du Canada, et qui ne peut donc pas, à mon avis, être invoqué par opposition à une disposition d'une loi fédérale autrement valide de façon à nier à l'intimée «l'égalité devant la loi» au sens de l'al. *b*) de l'art. 1 de la *Déclaration canadienne des droits*.

La *Déclaration des droits* a pour but d'éliminer toutes les lois discriminatoires adoptées par le Parlement du Canada et de garantir à tous les citoyens canadiens les droits et libertés qui y sont énoncés, mais le préambule de la Déclaration prévoit expressément que ces garanties doivent «respecter la compétence législative du Parlement du Canada», et l'art. 91(24) de la constitution confère clairement au Parlement du Canada l'autorité d'adopter à l'égard des Indiens des lois différentes de celles que les législatures provinciales peuvent adopter à l'égard des citoyens des différentes provinces.

Si les dispositions de la *Loi sur les Indiens* et les règlements édictés conformément à celle-ci doivent être déclarés inopérants parce qu'ils vont à l'encontre de la garantie prévue à l'al.*b*) de l'art. 1 de la *Déclaration des droits* chaque fois qu'ils ont pour effet de traiter les Indiens de façon différente des autres Canadiens, alors il me semble s'ensuivre qu'éventuellement toutes ces différences disparaîtront et qu'à tous les égards les Indiens seront soumis aux mêmes lois que leurs concitoyens. Je ne

clearly recognized in the *British North America Act* is to be whittled away without express legislation being passed by the Parliament of Canada to that effect.

This is not a case like that of *Regina v. Drybones*[10], where there was found to be inequality before the law because of the interaction of two federal statutes, nor is it like the case of *Attorney General of Canada v. Lavell*[11], where it was alleged that the *Indian Act* by its own provisions created inequality by reason of sex. It appears to me that in the present context there can only be a conflict between the *Bill of Rights* and the *Indian Act* if the *Indian Act*, standing alone or read in conjunction with other federal legislation, can be said to result in a denial to Indians of the equality before the law guaranteed by s. 1(*b*) of the Bill.

I have had the advantage of reading the reasons for judgment of my brother Beetz and I agree with him that the power to appoint an administrator of the estate of a person who has died intestate is not one which must necessarily be assigned to a court and that there is nothing unconstitutional in Parliament excluding the authority of provincial courts over this subject and bestowing it upon a Minister. I think it of interest also to note that while the provisions respecting the appointment of such an administrator vary from province to province, the ultimate discretion as to such appointment rests with the provincial courts, and although the widow occupies a preferred position in applying for administration of the estate of her deceased husband, it is clear that she is not entitled, *as a matter of right* to administer the estate of her late husband, and that, depending on the circumstances, the court may, in its discretion, appoint some other person (*e.g.*, the *Surrogate Courts Act* of Manitoba, R.S.M. 1970, c. C290, s. 31).

For these reasons, as well as for those advanced by Mr. Justice Pigeon, I would dispose of this

[10] [1970] S.C.R. 282.
[11] [1974] S.C.R. 1349.

peux croire que le statut particulier d'Indien si clairement établi dans l'*Acte de l'Amérique du Nord britannique* puisse disparaître graduellement sans une loi explicite adoptée à cette fin par le Parlement du Canada.

Il ne s'agit pas d'un cas semblable à l'arrêt *Regina c. Drybones*[10], où l'on a conclu à l'inégalité devant la loi à cause de l'interaction de deux lois fédérales, ni semblable à l'arrêt *Procureur général du Canada c. Lavell*[11], où l'on a allégué que la *Loi sur les Indiens*, selon ses propres dispositions, crée une inégalité en raison du sexe. Dans le présent contexte, il m'apparaît qu'il ne peut exister un conflit entre la *Déclaration des droits* et la *Loi sur les Indiens* que celle-ci, considérée seule ou interprétée conjointement avec d'autres lois fédérales, peut être réputée avoir pour effet de dénier aux Indiens l'égalité devant la loi garantie par l'al. *b*) de l'art. 1 de la *Déclaration*.

J'ai eu l'avantage de lire les motifs de jugement de mon collègue, M. le juge Beetz, et je suis d'accord avec lui que le pouvoir de nommer un administrateur de la succession d'une personne morte intestat n'en est pas un qui doit être nécessairement assigné à un tribunal et que le Parlement n'agit pas à l'encontre de la constitution en enlevant aux tribunaux provinciaux la compétence en cette matière et en la conférant à un ministre. Je pense qu'il est aussi digne de mention de signaler que bien que les dispositions relatives à la nomination d'un administrateur d'une succession varient d'une province à l'autre, la décision finale à l'égard de ces nominations est du ressort des tribunaux provinciaux, et même si la veuve qui demande l'administration de la succession de son mari décédé est dans une position préférentielle, il est évident qu'elle n'est pas fondée, *de plein droit*, à obtenir l'administration de la succession de son mari décédé, et selon les circonstances, le tribunal peut, à sa discrétion, nommer une autre personne (p. ex. le *Surrogate Courts Act* du Manitoba, R.S.M. 1970, c. C290, art. 31).

Pour ces motifs, de même que pour ceux avancés par M. le juge Pigeon, je suis d'avis de décider ce

[10] [1970] R.C.S. 282.
[11] [1974] R.C.S. 1349.

appeal in the manner proposed by my brother Beetz.

PIGEON J.—I agree in the result with Beetz J. I also concur in his reasons for holding that the late Alexander Canard was, at his death, ordinarily resident on a reserve.

On the constitutional question, I adhere to the view that the very object of s. 91(24) of the *British North America Act, 1867* in so far as it relates to Indians, is to enable the Parliament of Canada to make legislation applicable only to Indians as such, and I fail to see any reason why provisions with respect to the administration of the estate of deceased Indians would be excluded from the scope of such authority.

Concerning the contention that such provisions were made inoperative by the *Canadian Bill of Rights*, I would refer to the paragraph from my reasons in *Drybones*[12] quoted by Ritchie J. in *Lavell*[13], at pp. 1361-2. Also, it appears to me that the provisions of the *Indian Act* vesting in the Minister jurisdiction for the appointment of administrators, cannot be considered as an infringement of the principle of equality before the law for much the same reasons as provisions creating a special jurisdiction respecting juvenile delinquents and authorizing discretionary transfers to the ordinary courts cannot be looked upon as violations of that same rule. In this connection, I would refer to the recent judgment of Houlden J. in *Re Regina and M.*[14] This conclusion is entirely consistent with the judgment of this Court in *R. v. Smythe*[15] holding that provisions for stiffer penalties depending on the method of prosecution do not infringe equality before the law although the choice of the method depends on executive discretion.

Lastly, concerning the attack against the Minister's order based on the absence of notice and of any valid reason for not appointing the widow as

[12] [1970] S.C.R. 282.
[13] [1974] S.C.R. 1349.
[14] (1973), 2 O.R. (2d) 86.
[15] [1971] S.C.R. 680.

pourvoi de la façon proposée par mon collègue M. le juge Beetz.

LE JUGE PIGEON—Je souscris aux conclusions de mon collègue M. le juge Beetz. J'endosse également les motifs pour lesquels il décide que feu Alexander Canard résidait ordinairement dans une réserve lorsqu'il est décédé.

Sur la question constitutionnelle, je suis d'avis que ce que vise l'art. 91(24) de l'*Acte de l'Amérique du Nord britannique* quant aux Indiens, c'est à habiliter le Parlement du Canada à faire des lois qui ne s'appliquent qu'aux Indiens comme tels, et je ne puis voir aucune raison d'exclure du champ de cette compétence des dispositions relatives à l'administration des successions des Indiens décédés.

Quant à la prétention que ces dispositions ont été rendues inopérantes par la *Déclaration canadienne des droits*, je renvoie au paragraphe de mes motifs dans *Drybones*[12] cité par M. le juge Ritchie dans *Lavell*[13], aux pp. 1361-2. Il m'apparaît aussi que les dispositions de la *Loi sur les Indiens* qui attribuent au Ministre le pouvoir de nommer les administrateurs, ne peuvent être considérées comme une atteinte au principe de l'égalité devant la loi pour les mêmes raisons que les dispositions qui établissent une juridiction spéciale pour les jeunes délinquants et autorisent un renvoi discrétionnaire aux tribunaux ordinaires ne peuvent être considérées comme des violations de cette même règle. À ce sujet, je réfère au récent jugement de M. le juge Houlden dans *Regina and M.*[14] Sa conclusion est tout à fait conforme au jugement de cette Cour dans *R. c. Smythe*[15], où l'on a conclu que des dispositions qui prescrivent des peines plus sévères selon le mode de poursuite ne vont pas à l'encontre de l'égalité devant la loi bien que le choix de ce mode soit laissé à la discrétion du pouvoir exécutif.

Enfin, en ce qui concerne l'attaque contre l'ordonnance du Ministre fondée sur le défaut d'avis et de raisons valables de ne pas nommer la veuve

[12] [1970] R.C.S. 282.
[13] [1974] R.C.S. 1349.
[14] (1973), 2 O.R. (2d) 86.
[15] [1971] R.C.S. 680.

administratrix, I agree with Beetz J.'s reasons for holding that the Courts of Manitoba were without jurisdiction to entertain it.

In the circumstances, I do not wish to discuss the validity of the regulations under the *Indian Act*, a point which was hardly mentioned at the hearing in this Court and I find it unnecessary to express an opinion on any other point than those above dealt with.

BEETZ J.—The respondent is the widow of the late Alexander Canard, an Indian of the Fort Alexander Indian Reserve No. 3 in the Province of Manitoba. Alexander Canard was killed in a traffic accident on July 6, 1969. He died intestate.

On December 1, 1969, appellant William Barber Rees, the superintendent in charge of the Clandeboye Fisher River Indian District, in the Province of Manitoba, was appointed to be administrator of Alexander Canard's estate by the Minister of Indian Affairs and Northern Development pursuant to ss. 42 and 43 of the *Indian Act*, R.S.C. 1952, c. 149, (now R.S.C. 1970, c. I-6). In that capacity, on March 1, 1970, he commenced an action in the Manitoba Court of Queen's Bench, claiming damages from three defendants in respect of the accident resulting in the death of Alexander Canard.

On March 18, 1970, pursuant to an application made by the respondent, letters of administration were issued to her by the Surrogate Court of the Eastern Judicial District of Manitoba. The Minister of Indian Affairs and Northern Development had not given to that Court his consent to the exercise of testamentary jurisdiction under s. 44 of the *Indian Act* in relation to the estate of the late Alexander Canard. In her capacity as administratrix of the estate of her late husband, the respondent also commenced an action in the Court of Queen's Bench on July 6, 1970, against the same three defendants and against a fourth one.

The respondent then commenced against the appellants the action which gave rise to the present

administratrice, je suis d'accord avec les motifs de M. le juge Beetz pour décider que les tribunaux du Manitoba n'avaient pas juridiction à cet égard.

Dans les circonstances, je n'entends pas discuter de la validité des règlements établis en vertu de la *Loi sur les Indiens*, une question qui a à peine été mentionnée à l'audition devant cette Cour et je considère qu'il n'est pas nécessaire de me prononcer sur aucun autre point que ceux traités ci-dessus.

LE JUGE BEETZ—L'intimée est la veuve de feu Alexander Canard, un Indien de la réserve indienne du Fort Alexander N° 3 dans la province du Manitoba. Alexander Canard a été tué dans un accident de la circulation le 6 juillet 1969. Il est mort intestat.

Le 1er décembre 1969, l'appelant William Barber Rees, surintendant du district indien de Clandeboye Fisher River, dans la province du Manitoba, a été nommé administrateur de la succession de Alexander Canard par le ministre des Affaires indiennes et du Nord canadien conformément aux art. 42 et 43 de la *Loi sur les Indiens*, S.R.C. 1952, c. 149, (maintenant S.R.C. 1970, c. I-6). A ce titre, il a, le 1er mars 1970, intenté en Cour du Banc de la Reine du Manitoba une action en dommages-intérêts contre trois défendeurs relativement à l'accident qui avait causé la mort de Alexander Canard.

Le 18 mars 1970, l'intimée a demandé et obtenu l'émission de lettres d'administration de la cour de vérification du district judiciaire de l'est du Manitoba. Le ministre des Affaires indiennes et du Nord canadien n'avait pas consenti, suivant l'art. 44 de la *Loi sur les Indiens*, à ce que la cour de vérification exerce, relativement à la succession de Alexander Canard, sa juridiction en matière testamentaire. À titre d'administratrice de la succession de feu son mari, l'intimée a également intenté une action en Cour du Banc de la Reine le 6 juillet 1970 contre les trois mêmes défendeurs et contre un quatrième.

L'intimée a alors commencé contre les appelants l'action qui a donné lieu au pourvoi et qui soulève

appeal and which puts before us the issue we have to decide: which of the two administrators, if any, is the lawful one?

The respondent claims a judgment declaring that:

(a) Certain sections of the Indian Act dealing, among other matters, with the administration of the property of Indians who die intestate do not govern the administration of the estate of Alexander Canard because section 4 (3) of the Act provides that these sections do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province; or

(b) Alternatively, if the Indian Act does apply, its sections 42, 43 and 44 relating to descent of property and the administration of estates of Indians are ultra-vires of the Parliament of Canada and contrary to the principles of the Canadian Bill of Rights (1960) S.C. 8-9 Eliz. 11, Cap. 44, and the appointment of Appellant Rees made under these sections is contrary to natural justice and is null and void.

By way of counterclaim, appellants claim:

(a) A Declaratory Judgment declaring the Defendant, William Barber Rees, to be the lawful Administrator of the estate of Alexander Canard, deceased;

(b) A Declaratory Judgment declaring the appointment of Flora Canard as Administratrix of the estate of Alexander Canard, deceased, null and void;

(c) An Injunction restraining the Plaintiff from purporting to act for any purpose as Administratrix of the estate of Alexander Canard, deceased;

(d) An Order for the impoundment of the Letters of Administration purporting to appoint Flora Canard as Administratrix of the estate of Alexander Canard, deceased, and all certified copies thereof.

The action was tried by Matas J. of the Manitoba Court of Queen's Bench on the basis of an agreed statement of facts filed by the parties and some portions of which I have already paraphrased. The rest of the agreed statement of facts reads as follows:

9. The late Alexander Canard and Mrs. Canard, the Plaintiff commenced to reside on the reserve in the year 1964. In that year they had intermittent residence on the reserve. Mr. Canard and the Plaintiff have made their home on the Reserve since late in 1964. They

la question que nous avons à trancher: lequel des deux administrateurs, s'il en est, est le bon?

L'intimée demande qu'il soit déclaré que:

[TRADUCTION] a) Certains articles de la Loi sur les Indiens traitant, entre autres, de l'administration des biens des Indiens morts intestats ne régissent pas l'administration de la succession de Alexander Canard parce que le par. (3) de l'art. 4 de la Loi prévoit que ces articles ne s'appliquent à aucun Indien, ni à l'égard d'aucun Indien, ne résidant pas ordinairement dans une réserve ou sur des terres qui appartiennent à Sa Majesté du chef du Canada ou d'une province; ou

b) Subsidiairement, si la Loi sur les Indiens s'applique, les articles 42, 43 et 44 traitant de la transmission de biens par droit de succession et de l'administration des successions des Indiens sont ultra vires du Parlement du Canada et contraires aux principes de la Déclaration canadienne des droits (1960) S.C. 8-9 Eliz. II, chap. 44, et la nomination de l'appelant Rees faite en vertu de ces articles est contraire à la justice naturelle et est nulle et sans effet.

Par demande reconventionnelle, les appelants demandent:

[TRADUCTION] a) Un jugement déclarant le défendeur, William Barber Rees, l'administrateur légal de la succession de feu Alexander Canard;

b) Un jugement déclarant nulle et sans effet la nomination de Flora Canard comme administratrice de la succession de feu Alexander Canard;

c) Une injonction empêchant la demanderesse d'agir à quelque fin que ce soit à titre d'administratrice de la succession de feu Alexander Canard;

d) Une ordonnance enjoignant la confiscation des lettres d'administration nommant Flora Canard administratrice de la succession de feu Alexander Canard ainsi que de toutes les copies certifiées de ces lettres.

Le procès a été entendu par M. le juge Matas de la Cour du Banc de la Reine du Manitoba à partir d'un exposé des faits adopté et produit par les parties, et dont j'ai déjà repris certains éléments. Le reste de l'exposé se lit comme suit:

[TRADUCTION] 9. Feu Alexander Canard et Mme Canard, la demanderesse, ont commencé à résider dans la réserve en 1964. Au cours de cette année-là, ils y ont résidé de façon intermittente. Depuis la fin de 1964, M. Canard et la demanderesse ont leur demeure dans la

resided on the Reserve from that time until the date of Mr. Canard's death. In the month of October, 1967 a house was built for Mr. and Mrs. Canard on the Reserve and they occupied it as their home until the date of Mr. Canard's death and Mrs. Canard has continued to live in the house and still resides there.

10. In the summer of 1967 and 1968, Mr. Canard was employed for several weeks each summer as a helper on a farm at St. Andrews Manitoba, and on those occasions the Canard family would move into the bunkhouse on the farm, complete the work to be done, and then move back to the Reserve.

11. In the year 1969, Mr. Canard was again employed on the same farm, but had moved his family to the farm and commenced his employment only two days before his death. After his death Mrs. Canard moved back to the house on the Reserve.

The first question to be decided is whether the late Alexander Canard who, at the time of his death, resided on a farm at St. Andrews, did not ordinarily reside on the Fort Alexander Indian Reserve. If he did not, the provisions of the *Indian Act* relating to descent of property, wills, appeals, distribution of property on intestacy (ss. 42 to 50 of the Act) and to some other matters, would not, under s. 4 (3) of the Act, govern the administration of his estate. Section 4 (3) reads as follows:

Sections 114 to 123 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province.

The laws of Manitoba would then govern this matter.

Matas J. of the Manitoba Court of Queen's Bench found that

... Canard was ordinarily resident, with his family, on the farm at St. Andrews in Manitoba for the period during which he worked there. He was ordinarily resident on the reserve the rest of the time. When Canard died, he was not ordinarily resident on the reserve.

He accordingly issued a declaration that ss. 42 to 44 of the *Indian Act* did not govern the administration of

réserve où ils ont résidé jusqu'au décès de M. Canard. Au mois d'octobre 1967, une maison a été construite sur la réserve pour M. et Mme Canard qui l'ont occupée comme leur demeure jusqu'au décès de M. Canard et Mme Canard a continué à vivre dans cette maison et elle y réside encore.

10. Au cours des étés de 1967 et 1968, M. Canard a travaillé durant plusieurs semaines comme garçon de ferme à St. Andrews (Manitoba). La famille Canard déménageait alors dans une dépendance de la ferme, effectuait le travail à faire, et retournait ensuite à la réserve.

11. En 1969, M. Canard fut de nouveau engagé sur la même ferme, mais il n'a déménagé avec sa famille sur la ferme et commencé son travail que deux jours avant sa mort. Après le décès, Mme Canard est revenue dans la maison de la réserve.

La première question à décider est de savoir si feu Alexander Canard, qui, au moment de sa mort, résidait sur une ferme à St. Andrews, ne résidait pas ordinairement dans la réserve indienne de Fort Alexander. S'il n'y résidait pas ordinairement, les dispositions de la *Loi sur les Indiens* relatives à la transmission de biens par droit de succession, aux testaments, aux appels, à la distribution des biens ab intestat (articles 42 à 50 de la Loi), et à quelques autres sujets, ne régiraient pas, en vertu du par. (3) de l'art. 4 de la Loi, l'administration de sa succession. Le par. (3) de l'art. 4 se lit comme suit:

Les articles 114 à 123 et, sauf si le Ministre en ordonne autrement, les articles 42 à 52 ne s'appliquent à aucun Indien, ni à l'égard d'aucun Indien, ne résidant pas ordinairement dans une réserve ou sur des terres qui appartiennent à Sa Majesté du chef du Canada ou d'une province.

Les lois du Manitoba devraient alors s'appliquer.

M. le juge Matas de la Cour du Banc de la Reine du Manitoba a conclu que

[TRADUCTION] ... Canard résidait ordinairement avec sa famille sur la ferme à St. Andrews au Manitoba au cours de la période où il y travaillait. Il résidait ordinairement dans la réserve le reste du temps. Lorsque Canard est décédé, il ne résidait pas ordinairement dans la réserve.

Il déclara par conséquent que les art. 42 à 44 de la *Loi sur les Indiens* ne régissaient pas l'adminis-

tration of Canard's estate, and that the appointment of appellant Rees was invalid. He dismissed the counterclaim. Because of his finding on the first issue, Matas J. refrained from expressing a view on the other questions.

However, on this first issue, he was overruled by a unanimous judgment of the Court of Appeal. Dickson J.A., as he then was, speaking for the Court, had this to say on the meaning of the words "ordinarily reside on a reserve":

> The words "ordinarily resident" have been judicially considered in many cases, principally income tax cases or matrimonial causes. Among the former: *Thomson v. Minister of National Revenue*,[1946] S.C.R. 209, in which Rand J. said p. 224: "It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence"; *Levene v. Inland* Revenue Comrs., [1928] A.C. 217 in which Viscount Cave said, p. 225: "... I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences". Among the latter: *Stransky v. Stransky*,[1954] 2 All E.R. 536, in which Karminsky J. applied the test, p. 541: "where was the wife's real home?" Perdue J.A., of this Court, in *Emperor of Russia v. Proskouriakoff* (1908), 18 M.R. 56 at p. 72, held that the words "ordinarily resident" simply meant where the person had "his ordinary or usual place of living".
>
> Applying any of these tests it would seem to me that at the time of his death Alexander Canard was ordinarily resident on the reserve. He normally lived there, with some degree of continuity. His ordinary residence there would not be lost by temporary or occasional or casual absences.
>
> When one seeks to interpret the phrase "ordinarily resident" within the context of the *Indian Act* one is reenforced in the view which I have expressed. Section 77 (1) of the Act gives a band member "ordinarily resident on a reserve" the right to vote for the chief of the band and for councillors. Parliament could not have intended that an Indian would lose such voting rights, and lose the right to have his children schooled pursuant to ss. 114 *et seq.* if he left the reserve during the summer months to guide or gather wild rice or work on a nearby farm.

tration de la succession de Canard et que la nomination de l'appelant Rees était nulle. Il a rejeté la demande reconventionnelle. En raison de sa conclusion sur la première question en litige, M. le juge Matas s'est abstenu d'exprimer un avis sur les autres questions.

Sur cette première question, sa décision a toutefois été infirmée par un arrêt unanime de la Cour d'appel. M. le juge Dickson, alors juge de la Cour d'appel, parlant au nom de la Cour, a fait les commentaires suivants sur le sens des mots «réside ordinairement dans une réserve»:

> [TRADUCTION] Les mots «résidant ordinairement» ont été étudiés dans plusieurs arrêts, surtout dans des affaires fiscales ou matrimoniales. Parmi les arrêts de la première catégorie: *Thompson c. Le ministre du Revenu national*, [1946] R.C.S. 209 où le juge Rand déclarait à la p. 224: «Il est jugé qu'ils signifient résidence selon le mode de vie habituel de la personne visée en opposition avec une résidence particulière, occasionnelle ou temporaire»; *Levene v. Inland* Revenue Comrs., [1928] A.C. 217 où le vicomte Cave déclarait à la p. 225: «... Je crois qu'il implique la notion de résidence dans un endroit avec un certain degré de continuité, abstraction faite d'absences accidentelles ou temporaires». Parmi ceux de la seconde catégorie: *Stransky v. Stransky*, [1945] 2 All E.R. 536 où M. le juge Karminsky a appliqué le critère, à la p. 541: «Quel était le véritable domicile de l'épouse?» M. le juge Perdue de cette cour, dans l'arrêt *Emperor of Russia v. Proskouriakoff* (1908), 18 M.R. 56 à la p. 72, a décidé que les mots «résidant ordinairement» signifient simplement là où la personne a «sa demeure ordinaire ou habituelle».
>
> Si j'applique l'un de ces critères, il me semble qu'au moment de son décès Alexander Canard résidait ordinairement dans la réserve. Il y demeurait avec un certain degré de continuité. Des absences temporaires, occasionnelles ou accidentelles ne lui feraient pas perdre sa résidence ordinaire à cet endroit.
>
> L'interprétation des mots «résidant ordinairement» dans le contexte de la *Loi sur les Indiens* renforce l'opinion que je viens d'exprimer. Le par. (1) de l'art. 77 de la Loi donne à un membre d'une bande «qui réside ordinairement dans une réserve» le droit de vote à l'élection du chef de la bande et des conseillers. Le Parlement n'a pu vouloir qu'un Indien perde son droit de vote et le droit que ses enfants soient instruits conformément aux articles 114 *sq.* s'il quitte la réserve durant les mois d'été pour agir comme guide ou pour faire la cueillette du riz sauvage ou pour travailler sur une ferme voisine.

The words "ordinarily resident" as used in s. 77 of the Act have been interpreted by Order in Council SOR/54-425, P.C. 1954-1367, which establishes Rules Governing Band Elections, a subject covered in more general terms in s. 77 of the Act. Admittedly rules contained in Regulations affecting one section of the Act do not govern the meaning to be given to the words in a different section of the Act. However, I am content to adopt the rules found in those Regulations as appropriate for guidance in interpreting the words "ordinarily resident" as found in s. 4 (3) of the Act. Such rules accord with the general objects sought to be achieved by the *Indian Act* and there is the added advantage of maintaining consistency in the interpretation to be given to the words "ordinarily resident" whether in s. 77 or s. 4 (3) of the Act.

These rules read:

"3. The following rules apply to the interpretation of the words "ordinarily resident" in respect of all matters pertaining to the right of an elector to vote in an election:

(*a*) Subject to the other provisions of this section, the question as to where a person is or was ordinarily resident at any material time or during any material period shall be determined by reference to all the facts of the case;

(*b*) The place of ordinary residence of a person is, generally, that place which has always been, or which he had adopted as, the place of his habitation or home, whereto, when away therefrom, he intends to return and, specifically, where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where that person sleeps;

(*c*) A person can have one place of ordinary residence only, and he shall retain such place of ordinary residence until another is acquired;

(*d*) Temporary absence from a place of ordinary residence does not cause a loss or change of place of ordinary residence."

If one applies the foregoing rules, one would, I think, conclude that the late Mr. Canard was ordinarily resident on the Reserve.

I hold that the late Mr. Canard at the time of his death, although resident on the farm at St. Andrews, was ordinarily resident on the Fort Alexander Reserve, and therefore s. 4 (3) of the *Indian Act* does not apply.

Les mots «réside ordinairement» employés à l'art. 77 de la Loi ont été interprétés dans le décret DORS/54-425, C.P. 1954-1367 qui établit le règlement sur les élections au sein des bandes d'Indiens, dont l'art. 77 de la Loi traite de façon plus générale. Même s'il est admis que les dispositions d'un règlement visant un article de la Loi ne déterminent pas la signification à donner aux mots d'un autre article de la Loi on peut toutefois adopter les dispositions de ce règlement comme un guide approprié pour l'interprétation des mots «résidant ordinairement» du par. (3) de l'art. 4 de la Loi. Ces dispositions sont conformes au but général visé par la *Loi sur les Indiens* et il est préférable d'assurer une interprétation uniforme des mots «réside ordinairement» de l'art. 77, et «résidant ordinairement» du par. (3) de l'art. 4 de la Loi.

Ces dispositions se lisent comme suit:

«3. Les règles suivantes déterminent l'interprétation des expressions «réside ordinairement» «résidence ordinaire» en ce qui concerne toute matière qui relève du droit d'un électeur à voter à une élection:

a) Sous réserve des autres dispositions du présent article, la question de savoir où une personne réside ou résidait ordinairement à une époque déterminée ou pendant une période de temps déterminée doit être élucidée en se référant à toutes les circonstances du cas;

b) Le lieu de la résidence ordinaire d'une personne est en général l'endroit qui a toujours été ou qu'elle a adopté comme étant le lieu de son habitation ou de son domicile, où elle entend revenir lorsqu'elle s'en absente et, en particulier lorsqu'une personne couche habituellement dans un endroit et mange ou travaille dans un autre endroit, le lieu de sa résidence ordinaire est celui où la personne couche;

c) Une personne ne peut avoir qu'un seul lieu de résidence ordinaire, et elle ne peut le perdre sans en acquérir un autre;

d) L'absence temporaire du lieu de résidence ordinaire n'entraîne ni la perte ni le changement du lieu de résidence ordinaire.»

Si on applique les règles ci-dessus, on conclut, selon moi, que feu M. Canard résidait ordinairement dans la réserve.

Je conclus que feu M. Canard au moment de son décès, bien que résidant sur la ferme à St-Andrews, résidait ordinairement dans la réserve de Fort Alexander et que par conséquent le par. (3) de l'art. 4 de la *Loi sur les Indiens* ne s'applique pas.

On this point, I agree with the Court of Appeal. There is little I can add to the reasons given by Dickson J.A. except perhaps that while it may be possible for a person to have more than one residence, still, in contradistinction to what is out of the ordinary, the words "ordinary" or "ordinarily", unless the context indicates otherwise, do convey a meaning of uniqueness. In this instance where ss. 42 to 51 of the *Indian Act* constitute a veritable code of laws relating to descent of property, wills and intestacy, applicable to Indians, as opposed to provincial laws, the context is more than compatible with the uniqueness of the ordinary residence. It would be a surprising result if the distribution of the late Alexander Canard's property were to take place in accordance with the intestacy laws of Manitoba rather than under the *Indian Act* simply because Mr. Canard sought summer employment on a farm, established a temporary residence outside the reserve and happened to die during this period. It could not have been intended that the laws governing the descent of property of an Indian should vary with such casual migrations outside the reserve.

The next point is whether ss. 41 to 44 of the *Indian Act*, apart from the question of the effect upon them of the *Canadian Bill of Rights*, are *ultra-vires* of the Parliament of Canada. This point has not been pressed before us but it appears to have been fully argued before the Court of Appeal which dealt with it in some detail. The respondent and the intervenants refer to it in their factums. The respondent's factum submits that "matters testamentary are property and civil rights" and that "the administration of the estate is therefore a disposition of property and civil rights".

It might be useful that ss. 42 to 44 be quoted in full, together with s. 47. They are as follows:

DESCENT OF PROPERTY

42. (1) Unless otherwise provided in this Act, all jurisdiction and authority in relation to matters and

Sur ce point, je partage l'opinion de la Cour d'appel. Il y a peu à ajouter aux motifs de M. le juge Dickson, sauf peut-être que même si une personne peut avoir plus d'une résidence, il reste que, par contraste avec ce qui sort de l'ordinaire, les mots «ordinaire» ou «ordinairement» impliquent sûrement l'unicité à moins que le contexte ne fournisse des indications contraires. En l'espèce, où les art. 42 à 51 de la *Loi sur les Indiens* constituent un véritable code relatif à la transmission de biens par droit de succession, aux testaments et successions ab intestat applicable aux Indiens, par opposition aux lois provinciales, le contexte est plus que compatible avec le caractère unique de la résidence ordinaire. Il serait surprenant que la distribution des biens de feu Alexander Canard se fasse conformément aux lois relatives aux successions ab intestat du Manitoba plutôt qu'en vertu de la *Loi sur les Indiens*, simplement parce que M. Canard a cherché un emploi sur une ferme durant l'été, qu'il a établi une résidence temporaire à l'extérieur de la réserve et qu'il est décédé durant cette période. On ne peut pas avoir voulu que les lois relatives à la transmission des biens d'un Indien par droit de succession puissent varier avec pareilles migrations temporaires hors de la réserve.

La question suivante est de savoir si les art. 41 à 44 de la *Loi sur les Indiens* sont *ultra vires* du Parlement du Canada, abstraction faite de l'effet que peut avoir sur eux la *Déclaration canadienne des droits*. On n'a pas insisté sur ce point devant nous, mais il semble avoir fait l'objet d'un débat complet devant la Cour d'appel qui en traite avec assez de détails. L'intimée et les intervenants en parlent dans leur factum. Dans son factum, l'intimée prétend que [TRADUCTION] «les matières testamentaires relèvent de la propriété et des droits civils» et que «par conséquent l'administration de la discussion est une disposition relative à la propriété et aux droits civils».

Il pourrait être utile de citer au complet les art. 42 à 44, ainsi que l'art. 47. Ces articles se lisent comme suit:

TRANSMISSION DE BIENS PAR DROIT DE SUCCESSION

42. (1) Sauf disposition contraire de la présente loi, les juridiction et autorité sur les matières et causes

causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister, and shall be exercised subject to and in accordance with regulations of the Governor in Council.

(2) The Governor in Council may make regulations for providing that a deceased Indian who at the time of his death was in possession of land in a reserve shall, in such circumstances and for such purposes as the regulations prescribe, be deemed to have been at the time of his death lawfully in possession of that land.

(3) Regulations made under this section may be made applicable to estates of Indians who died before, on or after the 4th day of September 1951.

43. Without restricting the generality of section 42, the Minister may

(*a*) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;

(*b*) authorize executors to carry out the terms of the wills of deceased Indians;

(*c*) authorize administrators to administer the property of Indians who die intestate;

(*d*) carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and

(*e*) make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred to in section 42.

44. (1) The court that would have jurisdiction if the deceased were not an Indian may, with the consent of the Minister, exercise, in accordance with this Act, the jurisdiction and authority conferred upon the Minister by this Act in relation to testamentary matters and causes and any other powers, jurisdiction and authority ordinarily vested in that Court.

(2) The Minister may direct in any particular case that an application for the grant of probate of the will or letters of administration shall be made to the court that would have jurisdiction if the deceased were not an Indian, and the Minister may refer to such court any question arising out of any will or the administration of any estate.

(3) A court that is exercising any jurisdiction or authority under this section shall not without the consent in writing of the Minister enforce any order relating to real property on a reserve.

47. (1) A decision of the Minister made in the exercise of the jurisdiction or authority conferred upon him

testamentaires relatives à des Indiens décédés sont dévolues au Ministre exclusivement et doivent être exercées sous réserve et en conformité de règlement établis par le gouverneur en conseil.

(2) Le gouverneur en conseil peut établir des règlements stipulant qu'un Indien décédé qui, au moment de son décès, était en possession de terres dans une réserve, sera réputé, en telles circonstances et à telles fins que prescrivent les règlements, avoir été légalement en possession desdites terres au moment de son décès.

(3) Les règlements prévus par le présent article peuvent être rendus applicables aux successions des Indiens morts avant ou après le 4 septembre 1951 ou à cette date.

43. Sans restreindre la généralité de l'article 42, le Ministre peut

a) nommer des exécuteurs de testaments et des administrateurs de successions d'Indiens décédés, révoquer ces exécuteurs et administrateurs et les remplacer;

b) autoriser des exécuteurs à donner suite aux termes des testaments d'Indiens décédés;

c) autoriser des administrateurs à gérer les biens d'Indiens morts intestat;

d) réaliser les stipulations des testaments d'Indiens décédés et administrer les biens d'Indiens morts intestat; et

e) donner tout ordre ou instruction ou établir toute conclusion qu'il juge nécessaire ou désirable à l'égard de quelque matière mentionnée à l'article 42.

44. (1) Du consentement du Ministre, la cour qui aurait juridiction si la personne décédée n'était pas un Indien peut exercer, en conformité de la présente loi, la juridiction et l'autorité que la présente loi confère au Ministre à l'égard des matières et des causes testamentaires, ainsi que tous autres pouvoirs, juridiction et autorité ordinairement dévolus à cette cour.

(2) Dans tout cas particulier, le Ministre peut ordonner qu'une demande en vue d'obtenir l'homologation d'un testament ou l'émission de lettres d'administration soit présentée à la cour qui aurait juridiction si la personne décédée n'était pas un Indien. Il a la faculté de soumettre à cette cour toute question que peut faire surgir un testament ou l'administration d'une succession.

(3) Une cour qui exerce quelque juridiction ou autorité sous le régime du présent article ne doit pas, sans le consentement écrit du Ministre, mettre à exécution une ordonnance visant des biens réels sur une réserve.

47. (1) Une décision rendue par le Ministre dans l'exercice de la juridiction ou de l'autorité que lui con-

by section 42, 43 or 46 may, within two months from the date thereof, be appealed by any person affected thereby to the Exchequer Court of Canada, if the amount in controversy in the appeal exceeds five hundred dollars or if the Minister consents to an appeal.

(2) The judges of the Exchequer Court may make rules respecting the practice and procedure governing appeals under this section.

fère l'article 42, 43 ou 46 peut être portée en appel devant la Cour de l'Échiquier du Canada dans les deux mois de cette décision, par toute personne y intéressée, si la somme en litige dans l'appel dépasse cinq cents dollars ou si le Ministre consent à un appel.

(2) Les juges de la Cour de l'Échiquier peuvent établir des règles sur la pratique et la procédure régissant les appels selon le présent article.

The Court of Appeal, Dickson J.A. speaking on its behalf, took the view, on the basis of previous authority, that ss. 42 *et seq.*, and more particularly ss. 42 to 44 come strictly within the class of subjects of "Indians, and Lands reserved for the Indians" upon which Parliament has exclusive legislative authority under s. 91(24) of the *British North America Act, 1867*, and that this included the property and civil rights of Indians and therefore wills, devolution of estates and surrogate procedures.

Au nom de la Cour d'appel, M. le juge Dickson exprime l'opinion, se fondant sur les autorités antérieures, que les art. 42 *sq.*, et plus particulièrement les art. 42 à 44, tombent exactement dans la catégorie de sujets «les Indiens et les terres réservées pour les Indiens», sur laquelle le Parlement dispose d'une compétence législative exclusive en vertu de l'art. 91.24 de l'*Acte de l'Amérique du Nord britannique*, 1867, et que cette catégorie comprend la propriété et les droits civils des Indiens et par conséquent leurs testaments, leurs successions et les procédures relatives à leurs testaments et successions.

Dickson J.A. added:

Counsel for Mrs. Canard argued that if ss.42 *et seq.* are within Head 24, of s.91 of the *British North America Act, 1867*, they are none the less invalid for the reason that they effect an ouster of the jurisdiction of a provincial court. They do indeed effect such an ouster but there is ample authority to the effect that Parliament has the right to establish courts having exclusive jurisdiction in a field that is within the jurisdiction of Parliament and to oust the jurisdiction of provincial courts in that field. The only question is whether the words by which that object is sought to be achieved are apt for the purpose. As long ago as 1879 in *Valin v. Langlois* (1879), 3 S.C.R.1, Taschereau J. said, p. 75:

> "... cannot Parliament, in virtue of sec. 101 of the act create new courts of criminal jurisdiction, and enact that all crimes, all offences shall be tried exclusively before these new courts? I take this to be beyond controversy."

and at p. 76:

> "I also think it clear, that Paraliament can say for instance, that all judicial proceedings on promissory notes and bills of exchange shall be taken before the Exchequer Court or before any other Federal Court. This would be certainly interfering with the jurisdiction of the Provincial Courts. But, I hold that it has

M. le juge Dickson ajoute:

[TRADUCTION] L'avocat de Mme Canard prétend que si les articles 42 *sq.* tombent sous la rubrique 24 de l'art. 91 de l'*Acte de l'Amérique du Nord britannique*, 1867, ils sont toutefois nuls pour le motif qu'ils ont pour effet de retirer sa juridiction au tribunal provincial. Il y a effectivement retrait de juridiction mais une jurisprudence abondante reconnaît le pouvoir du Parlement d'établir des tribunaux ayant juridiction exclusive sur une matière qui est de sa comptétence et d'exclure cette matière de la juridiction des tribunaux provinciaux. La seule question est de savoir si le texte employé pour ce faire est de nature à produire cet effet. Déjà en 1879, dans l'arrêt *Valin c. Langlois* (1879), 3 R.C.S.1, le juge Taschereau déclarait à la p. 75:

> «... le Parlement ne peut-il pas, en vertu de l'art. 101 de l'Acte, créer des nouveaux tribunaux de juridiction criminelle et décréter que tous les crimes et toutes les infractions seront jugés exclusivement par ces nouveaux tribunaux? Je considère qu'il n'y a aucun doute à ce sujet.»

et à la p. 76:

> [TRADUCTION] «Je crois aussi qu'il est évident que le Parlement peut déclarer par exemple que toutes les procédures judiciaires relatives aux billets à ordre et aux lettres de change devront être intentées devant la Cour de l'Échiquier ou devant toute autre cour fédérale. Ceci constituerait certainement un empiétement

the power to do so *quoad all matters within its authority.*"

Section 101 of the *British North America Act, 1867*, provides that the Parliament of Canada may from time to time provide for the establishment of any additional courts for the better administration of the laws of Canada and Parliament has in the past acted under this power in establishing the Income Tax Appeal Board, Admiralty Courts, Bankruptcy Courts, Labour Board, Immigration Appeal Board and the like.

Dickson J.A. mentioned several authorities supporting the validity of the ouster of provincial courts' jurisdiction in federal matters. He concluded:

Counsel then submitted that if ouster of jurisdiction is possible, there is nevertheless a distinction between transferring jurisdiction from one court to another court or to a Board, and transferring it from a court to a Minister of the Crown; that the former may be within the federal power but the latter is not. I cannot accept this argument. Acting within the area of its legislative competence Parliament may limit or oust the jurisdiction of a provincial court and give the jurisdiction which would otherwise reside within that court to a federal court or to a federal board or, if Parliament so wishes, to a Minister of the Crown.

I am satisfied that in enacting ss. 42 *et seq.* of the *Indian Act*, Parliament was acting within the powers given to Parliament by the *British North America Act, 1867*.

We are not called upon to decide the constitutional validity of ss. 42 *et seq.* in all their substantive and jurisdictional ramifications. Yet, for the purposes of this case, I find myself in agreement with the general propositions that testamentary matters and causes with respect to deceased Indians come within the class of subjects of "Indians and Lands reserved for the Indians" and that Parliament can constitutionally oust the jurisdiction of provincial courts in these as well as in other federal matters and vest it in a federal agency, subject perhaps to an obvious qualification: while Parliament has the power to establish courts for the administration of the laws of Canada, it does not necessarily follow that it can clothe a Minister, or any official or board of a non-judicial nature

sur la juridiction des tribunaux provinciaux, mais je conclus qu'il a ce pouvoir *à l'égard de toutes les matières relevant de sa compétence.*»

L'art. 101 de l'*Acte de l'Amérique du Nord britannique*, 1867, prévoit que le Parlement du Canada pourra, lorsque l'occasion le requerra, adopter des mesures à l'effet d'établir des tribunaux additionnels pour la meilleure administration des lois du Canada et le Parlement a, dans le passé, agi en vertu de ce pouvoir pour établir la Commission d'appel de l'impôt, des cours d'amirauté, des cours ayant juridiction en matière de faillite, le Conseil des relations du travail, la Commission d'appel de l'immigration et autres tribunaux semblables.

M. le juge Dickson cite plusieurs précédents à l'appui de la validité du retrait aux tribunaux de juridiction provinciale des matières de compétence fédérale. Il conclut ainsi:

[TRADUCTION] L'avocat a alors soutenu que, si le retrait de juridiction est possible, il existe néanmoins une distinction entre le transfert de juridiction d'un tribunal à un autre ou à une commission et le transfert d'un tribunal à un ministre de la Couronne et que le premier pouvait être du ressort du pouvoir fédéral mais non pas le dernier. Je ne puis admettre cet argument. Lorsque le Parlement demeure dans les limites de sa compétence législative, il peut restreindre ou supprimer la juridiction d'un tribunal provincial et conférer cette juridiction soit à un tribunal ou une commission fédérale ou, si telle est la volonté du Parlement, à un ministre de la Couronne.

Je suis convaincu qu'en adoptant les articles 42 *sq.* de la *Loi sur les Indiens*, le Parlement légiférait dans les limites de la compétence qui lui est conférée par l'*Acte de l'Amérique du Nord britannique*, 1867.

Nous n'avons pas à décider de la constitutionnalité des art. 42 *sq.* dans toutes leurs conséquences sur les questions de fond et de juridiction. Cependant, aux fins de la présente affaire, je suis d'accord avec les propositions générales suivantes: les affaires testamentaires et les matières relatives aux Indiens décédés relèvent de la catégorie de sujets «les Indiens et les terres réservées pour les Indiens» de plus la Constitution permet au Parlement d'exclure ces matières comme les autres matières fédérales de la juridiction des tribunaux provinciaux et de les confier à un organisme fédéral, sous réserve peut-être d'une exception évidente: bien que le Parlement ait le pouvoir d'établir des tribunaux pour l'administration des lois du Canada, il ne s'ensuit pas nécessairement qu'il peut revêtir un

with all the functions of a superior court; the powers of Parliament are limited by the wording of s. 101 of the *British North America Act, 1867*, as well as by the federal and fundamental nature of the Constitution which implies an inherent and entrenched jurisdiction in the courts to adjudicate in constitutional matters.

However, the power to appoint an administrator of the estate of persons who have died without leaving a will is not one which must necessarily be assigned to a court. Historically, it is derived from the royal prerogative. It belonged to the King, as *parens patriae* and general trustee of the kingdom and was at first exercised by the King's ministers. It has long been exercised by ecclesiastical courts until by statute it was vested in the Courts of Probate in England, in 1857, and earlier in some of the colonies: the Probate and Surrogate Courts of Ontario, for instance, date from 1793 but were apparently presided by the Governor. (R. E. Kingsford, *Executors and Administrators*, 2nd ed., Toronto, 1914; A. R. Ingpen, *Executors and Administrators*, Canadian edition, Toronto, 1909, pp. 94 and ff.; Parry, *The Law of Succession*, 6th ed., 1972, London, pp. 170 and ff.; *Blackstone's Commentaries*, Book II, c. XXXII). It may also be noted, as a matter of historical curiosity, that in 1867, 1869 and 1872 the Commissions of the first three Governors-General after Confederation, expressly authorized them to exercise all such powers as the Queen was entitled to exercise in Canada "in respect of granting Licences of Marriage, Letters of Administration and Probate of Wills". This power is quasi-administrative in its purpose. It involves a substantial degree of discretion although such discretion must be exercised judicially. In a matter of exclusive federal competence, such as "Indians and Lands reserved for the Indians" there is nothing unconstitutional in Parliament excluding the authority of provincial courts over this subject and bestowing it upon a Minister, particularly if it makes it subject to a form of judicial control as is provided by s. 47 of the *Indian Act*.

ministre, un fonctionnaire ou une commission de caractère non judiciaire de toutes les attributions d'une cour supérieure; les pouvoirs du Parlement sont limités par le texte de l'art. 101 de l'*Acte de l'Amérique du Nord britannique*, 1867, aussi bien que par le caractère fédéral et fondamental de la Constitution selon laquelle les tribunaux ont une juridiction inhérente leur permettant de trancher les questions constitutionnelles.

Toutefois, le pouvoir de nommer un administrateur à la succession de personnes décédées sans testament n'est pas un pouvoir qui doit être nécessairement conféré à un tribunal. Historiquement, ce pouvoir découle de la prérogative royale. Il appartenait au Roi, à titre de *parens patriae* et de curateur général du royaume, et il a d'abord été exercé par les ministres du Roi. Il a longtemps été exercé par les tribunaux ecclésiastiques jusqu'à ce qu'une loi l'attribue aux cours de vérification en Angleterre, en 1857, et auparavant dans quelques colonies: par exemple, les cours de vérification et d'homologation de l'Ontario remontent à 1793 mais elles étaient apparemment présidées par le gouverneur. (R. E. Kingsford, *Executors and Administrators*, 2e éd., Toronto, 1914; A. R. Ingpen, *Executors and Administrators*, Édition canadienne, Toronto, 1909, pp. 94 *sq.*; Parry, *The Law of Succession* 6e éd. 1972, London, pp. 170 *sq.*; *Blackstone's Commentaries*, Livre II, c. XXXII). On peut aussi signaler, à titre de curiosité historique, qu'en 1867, 1869 et 1872, les trois premiers gouverneurs-généraux nommés après la Confédération étaient expressément habilités à exercer tous les pouvoirs que la Reine avait le droit d'exercer au Canada [TRADUCTION] «relativement aux dispenses de bancs, aux lettres d'administration et à l'homologation des testaments». En raison de son but, ce pouvoir est quasi administratif. Il comporte un degré important de discrétion bien que celle-ci doive être exercée de façon judiciaire. Dans une matière de compétence exclusivement fédérale telle «les Indiens et les terres réservées pour les Indiens», il n'y a rien d'inconstitutionnel dans le fait que le Parlement retire aux tribunaux provinciaux leur juridiction sur ce sujet et la confère à un ministre, particulièrement s'il la subordonne à une forme de surveillance judiciaire comme l'art. 47 de la *Loi sur les Indiens* le prévoit.

The third question to be decided is whether the impugned sections of the *Indian Act*, (ss. 42, 43 and 44) are in conflict with the *Canadian Bill of Rights*.

The Court of Appeal held that s. 43 of the *Indian Act* is "inoperative to the extent that, in violation of the *Bill of Rights* guaranteeing the right to equality before the law without discrimination by reason of race, it denies Mrs. Canard administration of the estate of her late husband".

It will have been noted that the Court of Appeal rendered its judgment after *Regina v. Drybones*[16], but before the decision of this Court in *A.G. of Canada v. Lavell* and *Isaac et al v. Bédard*[17]. In both these cases as in the present one, the impact of the *Canadian Bill of Rights* upon certain provisions of the *Indian Act* had to be assessed. More particularly, the complex notion that every individual has the right to equality before the law and the protection of the law without discrimination by reason of race or sex had to be explored in its relationship with Indian status.

Status has been defined in various ways. The *Shorter Oxford Dictionary* describes it as:

> ... the legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations.

Narrower legal definitions of status have been proposed such as that of R. H. Graveson, in *Status in the Common Law*, 1953, p. 2:

> *... a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern.*

The legislative history of the western world has recognized a great diversity of status among which

[16] [1970] S.C.R. 282.
[17] [1974] S.C.R. 1349.

La troisième question à décider est de savoir si les articles attaqués de la *Loi sur les Indiens*, (les art. 42, 43 et 44), viennent en conflit avec la *Déclaration canadienne des droits*.

La Cour d'appel a décidé que l'art. 43 de la *Loi sur les Indiens* est [TRADUCTION] «inopérant dans la mesure où, en violation de la *Déclaration des droits* garantissant le droit à l'égalité devant la Loi sans discrimination en raison de la race, il ne permet pas à Mme Canard d'administrer la succession de son mari décédé».

Il convient de remarquer que la Cour d'appel a rendu jugement après l'arrêt *La Reine c. Drybones* [16], mais avant l'arrêt de cette Cour dans *Procureur général du Canada* c. *Lavell* et *Isaac et al. v. Bédard* [17]. Dans ces deux arrêts, comme en l'espèce, l'effet de la *Déclaration canadienne des droits* sur certaines dispositions de la *Loi sur les Indiens* a dû être examiné. Plus particulièrement, la notion complexe selon laquelle tout individu a droit à l'égalité devant la loi et à la protection de la loi quels que soient sa race ou son sexe a dû être étudiée en regard du statut de l'Indien.

Le terme «statut» a été défini de diverses façons. Le *Shorter Oxford Dictionary* le décrit comme étant:

> [TRADUCTION] ... la situation juridique ou la condition d'une personne telle que déterminée par son appartenance à quelque catégorie de personnes jouissant en vertu de la loi de certains droits ou soumises à certaines restrictions.

Des définitions juridiques plus étroites ont été proposées comme celle de R. H. Graveson dans *Status in the Common Law*, 1953, p. 2:

> [TRADUCTION] *... une condition spéciale d'un caractère continu et institutionnel, différente de la position juridique de la personne ordinaire, qui est conférée par la loi et non simplement par la volonté des parties, toutes les fois qu'une personne est dans une position dont la création, la continuité ou l'abolition ainsi que les incidences intéressent suffisamment la société ou le public.*

L'histoire du droit occidental reconnaît une grande variété de statut dont celui de la femme

[16] [1970] R.C.S. 282.
[17] [1974] R.C.S. 1349.

those of married women, infants, aliens, villeins, nobles, slaves, outlaws, merchants, illegitimate children, lunatics, bankrupts, clerics, etc. Flowing from status are special rights, duties, privileges or incapacities which are the consequences of status and which are sometimes called its incidents. While, conceivably, status can be considered apart from its incidents, it may be difficult to do so in many instances lest a particular status be emptied of any significant content.

The principle of equality before the law is generally hostile to the very nature of status and it is no easy task to reconcile the two in Canada when the one is enshrined in a quasi-constitutional statute and the other forms part of the fundamental law of the land. This the Courts have attempted to do in *Drybones* and *Lavell.*

I take the following principles to be settled by the decision of this Court in *R. v. Drybones*[18].

(1) The *Canadian Bill of Rights* is more than a canon of interpretation, the terms of which would give way to any contrary legislative intent. It renders inoperative any law of Canada that cannot be construed and applied so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized by the Bill, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Bill, and it confers upon the Courts the responsibility to declare any such law inoperative.

(2) Equality before the law without discrimination by reason of race, national origin, colour, religion or sex does not simply mean equality with every other person within the class to whom a particular law relates: such a meaning would render possible all forms of prohibited discrimination so long as the other members of a class were also being discriminated against in the same way.

[18] [1970] S.C.R. 282.

mariée, celui du mineur, celui de l'étranger, celui du serf, celui du noble, celui de l'esclave, celui du hors-la-loi, celui du commerçant, celui de l'enfant illégitime, celui de l'aliéné, celui du failli, celui du clerc, etc. Du statut découlent des droits, devoirs, privilèges ou incapacités particuliers qui en sont les conséquences et que l'on appelle parfois ses incidences. Bien qu'il soit concevable d'exprimer un statut en faisant abstraction de ses incidences, cela peut s'avérer difficile en plusieurs cas de crainte de vider un statut particulier de tout contenu véritable.

Le principe de l'égalité devant la loi va généralement à l'encontre de l'idée même de statut et il n'est pas facile de concilier les deux au Canada lorsque l'un est consacré dans une loi de portée quasi constitutionnelle et que l'autre fait partie du droit fondamental du pays. C'est ce que les tribunaux ont tenté de faire dans *Drybones* et *Lavell.*

Je considère que dans l'arrêt *R. v. Drybones* [18], cette Cour a établi les principes suivants:

(1) La *Déclaration canadienne des droits* est plus qu'une règle d'interprétation dont les dispositions laisseraient le champ libre à toute mesure législative visant un effet contraire. Elle rend inopérante toute loi du Canada qui ne peut pas être interprétée et appliquée sans supprimer, restreindre ou enfreindre un des droits ou libertés reconnus dans la Déclaration, sauf un acte du Parlement du Canada spécifiant qu'il s'appliquera nonobstant la Déclaration, et elle confère aux tribunaux la responsabilité de déclarer pareille loi inopérante.

(2) L'égalité devant la loi sans discrimination en raison de la race, de l'origine nationale, de la couleur, de la religion ou du sexe ne signifie pas simplement l'égalité avec toutes les autres personnes de la catégorie visée par une loi particulière: une telle signification rendrait possible toutes les formes de discrimination interdite dans la mesure où les autres personnes de la catégorie visée seraient aussi victimes de la même forme de discrimination.

[18] [1970] R.C.S. 282.

(3) An Indian is being denied equality before the law contrary to the *Canadian Bill of Rights* if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without committing any offence or being made subject to any penalty.

These principles were reaffirmed in this Court by eight judges out of nine in the *Lavell* case. (Pigeon J. took the position that he could not disagree with the view he had expressed in *Drybones*).

Considering the division of opinion in *Lavell*, it is admittedly difficult, if it is possible, to formulate the *ratio decidendi* of the case. Still, in the light of the opinion of Ritchie J. whose conclusions are those of the majority, I understand *Lavell* to have primarily decided that Parliament must not be deemed to have subjected to the *Canadian Bill of Rights* the authority vested upon it under s. 91 (24) of the *British North America Act, 1867*, exclusively to make laws for "Indians and Lands reserved for the Indians", in so far as this authority, being of a special nature, could not be effectively exercised without the necessarily implied power to define who is and who is not an Indian and how Indian status is acquired or lost. In so defining Indian status, Parliament could, without producing conflict with the *Canadian Bill of Rights*, establish between various sorts of intermarriages, such distinctions as could reasonably be regarded to be inspired by a legitimate legislative purpose in the light for instance of long and uninterrupted history.

Laskin J., as he then was, whose opinion was concurred in by three other judges, took the view that the *Canadian Bill of Rights* "does not differentiate among the various heads of legislative power" and that "it embraces all exercises under whatever head or heads they arise".

(3) Un Indien est privé de l'égalité devant la loi contrairement à la *Déclaration canadienne des droits* si un acte qui, pour ses concitoyens canadiens n'est pas une infraction et n'appelle aucune sanction, constitue pour lui, à cause de sa race, une infraction punissable en justice.

Huit des neuf juges de cette Cour ont réaffirmé ces principes dans l'affaire *Lavell* (M. le juge Pigeon a adopté la position qu'il ne pouvait être en désaccord avec ce qu'il avait dit dans *Drybones*).

Compte tenu des avis partagés dans *Lavell*, il est difficile admettons-le, si c'est possible, d'énoncer la *ratio decidendi* de l'arrêt. Tout de même, à la lumière de l'opinion de M. le juge Ritchie qui exprime les motifs de la majorité, je comprends que *Lavell* a principalement décidé que le Parlement n'a pas voulu assujettir à la *Déclaration canadienne des droits* la compétence exclusive qui lui était assignée par l'art. 91(24) de l'*Acte de l'Amérique du Nord britannique, 1867*, de légiférer relativement aux Indiens et aux terres réservées pour les Indiens, dans la mesure où cette compétence, qui est d'un caractère spécial, ne pourrait être effectivement exercée sans que le Parlement possède implicitement le pouvoir nécessaire de déterminer qui est un Indien et qui ne l'est pas et de quelle façon le statut d'Indien est acquis ou perdu. En définissant le statut d'Indien, le Parlement peut, sans entrer en conflit avec la *Déclaration canadienne des droits*, établir parmi les différentes catégories de mariages entre Indiens et non-Indiens des distinctions de nature telle qu'elles puissent raisonnablement être considérées avoir été inspirées au législateur par un but législatif légitime à la lumière par exemple d'une tradition ancienne et continue.

M. le juge Laskin, alors juge puîné, avec qui trois autres juges sont d'accord, est d'avis que la *Déclaration canadienne des droits* «ne distingue pas entre les diverses catégories de pouvoirs législatifs» et qu'«elle embrasse l'exercice de tous les pouvoirs législatifs, quelle que soit la catégorie de chacun.»

The *British North America Act, 1867*, under the authority of which the *Canadian Bill of Rights* was enacted, by using the word "Indians" in s. 91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment. It does not define the expression "Indian". This Parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values which, apparently were not proven in *Lavell*, or of legislative history of which the Court could and did take cognizance.

En employant le mot «Indien» dans l'art. 91(24), l'*Acte de l'Amérique du Nord britannique, 1867*, sous l'empire duquel la *Déclaration canadienne des droits* a été adoptée, crée une catégorie raciale et il vise un groupe racial pour lequel il envisage la possibilité d'un traitement particulier. Il ne définit pas le terme «Indien», ce que le Parlement peut faire dans les limites de la Constitution en décrétant les normes appropriées. Parmi ces normes, il n'apparaîtrait pas déraisonnable d'inclure le mariage et la filiation et, inévitablement, les mariages entre Indiens et non-Indiens, à la lumière soit des coutumes et des valeurs indiennes dont apparemment on n'a pas fait la preuve dans *Lavell*, soit de l'historique de la législation dont la cour pouvait prendre connaissance et dont elle a effectivement pris connaissance.

Of course, it is possible to legislate in several ways with respect to Indians without impinging upon the principle of equality and other principles incorporated in the *Canadian Bill of Rights*, and this is a point which has also been made by Laskin J. in *Lavell* where he wrote that "discriminatory treatment on the basis of race or colour or sex does not inhere in that grant of legislative power". Nevertheless, it is not easy so to legislate irrespective of race or sex when it is race which has to be defined and, assuming it were possible if one were to start afresh, it may be next to practically impossible so to do for an already existing group which has been sociologically and legislatively defined since before Confederation. The alternative would appear to have been the abolition of the present Indian status or of any Indian status. A very real issue also in *Lavell* was not only whether a fundamental change in Indian status could be done for one or two individuals, on an *ad hoc* basis and without risk of social disruption but whether, as a matter of principle, it should be done on a possibly large scale, in one stroke, (since the courts are without much power to insure transitory stages for any reform that they be called to bring about), regardless of local wishes, desires or preparation. What was decided in *Lavell* finally was that some exclusive rights or privileges such as registration or registrability and the use and benefit of the reserves can be made incidents of Indian status without conflict with the *Canadian Bill of Rights*.

On peut évidemment légiférer de différentes façons à l'égard des Indiens sans porter atteinte au principe d'égalité et aux autres principes incorporés dans la *Déclaration canadienne des droits*, ce qui est également signalé par M. le juge Laskin dans *Lavell* lorsqu'il écrit que «le traitement discriminatoire fondé sur la race, la couleur et le sexe n'est pas inhérent à l'attribution de ce pouvoir législatif». Néanmoins, il n'est pas facile de légiférer sans tenir compte de la race ou du sexe lorsqu'il s'agit précisément de définir la race. Dans l'hypothèse où ce serait possible en commençant à neuf, cela serait presque impossible en pratique à l'égard d'un groupe qui existe déjà et qui a été légalement et socialement défini avant même la Confédération. L'autre solution semblerait l'abolition du statut actuel d'Indien ou de tout statut d'Indien. Une autre question qui se posait dans *Lavell* n'était pas simplement de savoir si une modification fondamentale au statut d'Indien peut être faite *ad hoc*, pour un ou deux individus, et sans risquer un bouleversement de l'ordre social mais si, par principe, la modification devrait se faire en grand et d'un seul coup, (étant donné le pouvoir limité des cours d'assurer l'accomplissement progressif des réformes qu'elles peuvent être appelées à instaurer), sans tenir compte de la préparation, des désirs et des aspirations des intéressés. Dans *Lavell*, on a finalement décidé que des droits et privilèges exclusifs comme l'enregistrement ou le droit à l'enregistrement, ainsi que le

But it is to be noted that these incidents are intimately connected with Indian status. They are not remote or indirect incidents. Registration is the administrative instrumentality whereby Indian status is acknowledged and the right to the exclusive use of the reserve is a necessarily incidental consequence of the idea that certain lands are "reserved" for the Indians.

The issue in *Lavell* is commonly taken to be that of discrimination by reason of sex and, admittedly, it was an essential part of it. However, it was not simply a matter of discriminating between men and women, but of distinguishing between married men and married women, Indian married men and Indian married women, and an Indian male married to a non-Indian woman, and an Indian female married to a non-Indian male. Whether or not it compounded the discrimination, as Laskin J. put it, it certainly did not simplify the problem. But, through and above the question of sex and marriage, what was really at stake was the present Indian status and some of its unseverable incidents.

By contrast, it is not evident that the litigious question in *Drybones* had to do with Indian status or even with the incidents of Indian status. *Drybones*, in the light of *Lavell*, may be rationalized in more than one way: for instance either the attaching of a particular consequence to Indian status could not be characterized as a provision in pith and substance relating to Indians and lands reserved for the Indians but as the use of other federal powers such as the power to enact penal laws for the promotion of temperance and the prevention of drunkenness which would not stand on the same footing vis-à-vis the *Canadian Bill of Rights* as the power to make laws for Indians and lands reserved for the Indians; or, assuming a particular consequence of Indian status could be said to pertain to "Indian" legislation, it would not be beyond the reach of the *Canadian Bill of Rights*, if it was so remote or indirect an incident as not to be indispensable to the effective exercise

droit à l'usage et au profit des réserves peuvent constituer des incidences du statut d'Indien sans aller à l'encontre de la *Déclaration canadienne des droits*. Mais il faut signaler que ces incidences sont intimement liées au statut d'Indien. Elles ne sont ni lointaines ni indirectes. L'enregistrement est le moyen utilisé par l'administration pour reconnaître le statut Indien et le droit à l'usage exclusif de la réserve est une incidence découlant nécessairement de la notion selon laquelle certaines terres sont «réservées» pour les Indiens.

La discrimination en raison du sexe est généralement considérée comme la question en litige dans *Lavell* et, il faut l'admettre, elle en faisait essentiellement partie. Toutefois, il ne s'agissait pas simplement d'une question de discrimination entre hommes et femmes, mais de distinction entre hommes mariés et femmes mariées, entre Indiens mariés et Indiennes mariées, et entre un Indien marié à une non-Indienne et une Indienne mariée à un non-Indien. Qu'il y ait là ou non aggravation de la discrimination, comme le dit M. le juge Laskin, cela ne simplifie certes pas le problème. Mais au-delà de la question de sexe et de mariage, ce qui était réellement en jeu était le statut actuel de l'Indien et quelques-unes de ses incidences inséparables.

Au contraire, il n'est pas clair que la question en litige dans *Drybones* ait été liée au statut d'Indien ou même aux incidences du statut d'Indien. *Drybones*, à la lumière de *Lavell*, peut être expliqué de plus d'une façon: par exemple, ou bien le rattachement d'un effet particulier au statut d'Indien peut ne pas être qualifié comme une disposition véritablement et essentiellement reliée aux Indiens et aux terres réservées pour les Indiens mais plutôt comme l'exercice d'un autre pouvoir fédéral, tel celui d'édicter des lois pénales pour favoriser la tempérance et prévenir l'ivrognerie, pouvoir qui ne se situerait pas, vis-à-vis la *Déclaration canadienne des droits*, sur un même pied que celui d'adopter des lois relatives aux Indiens et aux terres réservées pour les Indiens; ou bien, dans l'hypothèse où un effet particulier du statut d'Indien pourrait être considéré du ressort de la législation relative aux Indiens, il n'échapperait pas à l'emprise de la *Déclaration canadienne des droits*

of the federal power under 91(24) of the *British North America Act, 1867*. In any event, it was made clear in *Drybones* that Parliament could not, without conflict with the *Canadian Bill of Rights*, purport to attach just any consequence to Indian status.

The present case differs from both *Drybones* and *Lavell*. What is in issue is neither the definition of Indian status nor, directly at least, the attachment of some incapacity to Indian status, such as testamentary incapacity.

Some arguments were addressed to us on this point tending to show that the *Indian Act* does not "virtually vitiate the testamentary capacity of Indians" as had been said in the Court of Appeal. However, the case was not fully argued on such a broad basis and I do not propose to deal with it in this manner. This would be unnecessary since the point we have to answer is a narrower one and is, in any event, severable from the rest of the impugned sections of the *Indian Act:* we are not confronted with a will, for this is a case of intestacy, nor with the question of distribution of property on intestacy. The questions before us are whether the vesting in the Minister of certain parts of the administration of the *Indian Act,* of itself, creates some inequality incompatible with the *Canadian Bill of Rights* and whether, in this particular instance, the *Indian Act* has actually been administered in conformity with the principles of the *Canadian Bill of Rights*.

In bestowing upon a Minister rather than upon a provincial Surrogate Court the power to appoint an administrator to the estate of a deceased Indian, the *Indian Act* evidently creates for Indian estates a forum which differs from the forum which would be competent in other testamentary causes. But in my view, the establishment of a special forum does not of itself entail a form of undue discrimination. If it were otherwise, Parliament, by enacting the *Canadian Bill of Rights*, would have purported to bind itself not to exercise *at all*, except in accordance with the manner and

s'il constituait une incidence tellement éloignée ou indirecte qu'elle ne soit pas nécessaire à l'exercice effectif de la compétence fédérale en vertu de l'art. 91.24 de l'*Acte de l'Amérique du Nord britannique, 1867*. De toute façon, il découle clairement de *Drybones* que le Parlement ne peut pas, sans entrer en conflit avec la *Déclaration canadienne des droits*, prétendre pouvoir donner n'importe quel effet au statut d'Indien.

La présente affaire diffère à la fois de *Drybones* et de *Lavell*. Ce qui est en litige n'est pas la définition du statut d'Indien ni, du moins directement, le rattachement au statut d'Indien de quelque forme d'incapacité, comme celle de tester.

Sur ce point, on nous a fait valoir certains arguments cherchant à démontrer que la *Loi sur les Indiens* n'a pas pour effet [TRADUCTION] «d'annuler virtuellement la capacité de tester des Indiens», comme on l'a dit en Cour d'appel. Toutefois, l' affaire n'a pas été complètement débattue sur une base aussi générale et je n'ai pas l'intention d'en traiter de cette façon. Ce ne serait pas nécessaire puisque la question à laquelle nous devons répondre est plus étroite et, de toute façon, elle peut être isolée du reste des articles contestés de la *Loi sur les Indiens:* nous n'avons affaire ni à un testament, puisqu'il s'agit d'une succession ab intestat, ni à la distribution des biens de l'intestat. Il s'agit de savoir si l'attribution au Ministre de l'administration de certaines parties de la *Loi sur les Indiens* crée en soi quelque inégalité incompatible avec la *Déclaration canadienne des droits* et si, en l'espèce, la *Loi sur les Indiens* a effectivement été administrée en conformité des principes de la *Déclaration canadienne des droits*.

En conférant à un ministre plutôt qu'à une cour provinciale de vérification la compétence de nommer un administrateur de la succession d'un Indien décédé, la *Loi sur les Indiens* établit nécessairement pour les successions des Indiens un *forum* autre que celui qui serait compétent en matières testamentaires pour les non-Indiens. Mais à mon avis, l'établissement d'un *forum* particulier ne constitue pas en soi une forme de discrimination indue. S'il en était autrement, le Parlement, en adoptant la *Déclaration canadienne des droits,* se serait par ce fait obligé de n'exercer *aucunement*,

form prescribed by the *Canadian Bill of Rights*, a power which it solely possesses under the Constitution, namely the power to create a forum for the administration of its laws and more particularly a forum for the administration of testamentary matters and causes with respect to deceased Indians. Such a consequence would be tantamount to an amendment of the *British North America Act, 1867*. It would also be contrary to the decision of this Court in *Lavell* with this difference that *Lavell* dealt with a matter of substantive law whereas the respondent in this case complains that she is being denied access to a provincial Court and that the determination of some of her rights depends upon the Minister. Furthermore, the power bestowed upon the Minister by the *Indian Act* to appoint administrators of Indian estates, given its nature and history, is a power perfectly capable of being exercised by him in a judicial or quasi-judicial manner, under judicial control, in accordance with the due process of law and with standards applicable to other Canadians as well as with all the requirements of the *Canadian Bill of Rights*.

sauf dans la forme indiquée par la *Déclaration canadienne des droits*, un pouvoir qu'en vertu de la Constitution il possède seul, savoir le pouvoir d'établir un *forum* pour administrer ses lois et plus particulièrement un *forum* pour l'administration des affaires testamentaires relatives aux Indiens décédés. Une telle conséquence équivaudrait à un amendement à l'*Acte de l'Amérique du Nord britannique, 1867*. Ce serait aussi contraire à la décision de cette Cour dans *Lavell* sauf que cette dernière traite de règles de fond tandis que l'intimée en l'espèce se plaint qu'on lui refuse l'accès à une cour provinciale et que la détermination de quelques-uns de ses droits dépend du Ministre. De plus, le pouvoir que la *Loi sur les Indiens* confère au Ministre de nommer des administrateurs de successions d'Indiens est, compte tenu de sa nature et de son histoire, un pouvoir que celui-ci peut parfaitement exercer d'une manière judiciaire ou quasi-judiciaire, sous la surveillance des tribunaux, conformément à l'application régulière de la loi et aux critères applicables aux autres Canadiens ainsi qu'à toutes les exigences de la *Déclaration canadienne des droits*.

I see nothing in ss. 42 and 43 of the *Indian Act* which prevents the Minister from exercising in this manner the surrogate power devolved upon him. To be more specific, there is nothing in ss. 42 and 43 of the *Indian Act*, the way I read them, which prevents the Minister on account of the respondent's race, from authorizing her to administer the estate of her late husband, and nothing which deprives the respondent from the capacity to receive such authorization. The Act empowers the Minister to appoint anyone, including the respondent. In other words, if the respondent has been the victim of racial discrimination, such discrimination was administrative in nature; it does not flow from the *Indian Act*. The *Indian Act* in this respect is capable of being construed and applied so as to provide for Indians a treatment similar to that reserved for their fellow Canadians. Accordingly, it is not in conflict with the *Canadian Bill of Rights* and no part of it ought to be declared inoperative for the purpose of this case.

Je ne vois rien dans les art. 42 et 43 de la *Loi sur les Indiens* qui empêche le Ministre d'exercer de cette façon à l'égard des testaments et successions le pouvoir qui lui a été dévolu. Pour être plus précis, il n'y a rien dans les art. 42 et 43 de la *Loi sur les Indiens*, de la façon dont je les interprète, qui empêche le Ministre d'autoriser l'intimée, en raison de sa race, à administrer la succession de feu son mari, et il n'y a rien qui restreint la capacité de l'intimée d'être ainsi autorisée. La Loi donne au Ministre le pouvoir de nommer n'importe qui, y compris l'intimée. En d'autres mots, si l'intimée a été victime, de discrimination raciale, cette discrimination est de nature administrative, elle n'est pas inhérente à la *Loi sur les Indiens*. La *Loi sur les Indiens* peut à cet égard s'interpréter et s'appliquer de manière que les Indiens soient traités de la même façon que leurs concitoyens canadiens. Par conséquent, elle ne va pas à l'encontre de la *Déclaration canadienne des droits* et aucune partie de la Loi ne doit être déclarée inopérante aux fins de cette affaire.

Although under the *Indian Act* the respondent was capable of being appointed administratrix of her late husband's estate by the Minister, the fact remains that she was not. The outstanding question is whether the Act has been applied in accordance with the principle of equality before the law.

The sections of the federal statute we are concerned with relate to the administration of a private estate a matter which, were it not for the fact that this estate is that of a deceased Indian, would normally fall under provincial jurisdiction. Accordingly, in a case such as the present one, in order to determine whether the principle of equality before the law has been complied with in the administration of federal law (or, in other words, whether an Indian is not deprived of a right generally recognized to other Canadians), some reference to the standards of provincial laws and practices may be unavoidable as there is no other basis for comparison except perhaps the ordinances of the Yukon and the Northwest Territories, which, under the *Canadian Bill of Rights*, are laws of Canada. It could be argued that a reference to such a variety of standards might entail complications and variations in the administration of the *Indian Act* across Canada and, indeed, I do not wish to suggest that Parliament, in legislating on testamentary matters and causes with respect to Indians, or the Minister, in administering the *Indian Act*, are bound to follow all provincial enactments and practices over which they have no control in any event: this they might not be able to do, they might not find desirable to do and, in my view, they are not required to do in order to comply with the *Canadian Bill of Rights*. But there may well emerge from the variety of provincial laws on these matters a body of general rules common to all or to many provinces, which for want of other criteria and as a sort of *jus gentium* is susceptible to provide general minimum standards to which reference can be made for the purpose of deciding how the principle of equality can be safeguarded.

A proposition to which I cannot subscribe in its generality however is one which has been put to us by appellants and according to which Indians are

Même si en vertu de la *Loi sur les Indiens* l'intimée pouvait être nommée par le Ministre administratrice de la succession de feu son mari, le fait demeure qu'elle ne l'a pas été. La question qui reste est de savoir si la Loi a été appliquée conformément au principe de l'égalité devant la loi.

Les articles de la loi fédérale en cause traitent de l'administration de la succession d'un particulier, une matière qui, n'était le fait que cette succession est celle d'un Indien, serait normalement de compétence provinciale. Par conséquent, dans un cas comme celui-ci, pour déterminer si le principe de l'égalité devant la loi a été respecté dans l'application de la loi fédérale (ou, en d'autres mots, si un Indien a été privé d'un droit généralement reconnu aux autres Canadiens), on ne peut faire autrement que de se référer de quelque façon aux critères des lois et pratiques provinciales puisqu'il n'y a pas d'autre point de comparaison, sauf peut-être les ordonnances du Yukon et des territoires du Nord-Ouest qui, selon la *Déclaration canadienne des droits*, sont des lois du Canada. On pourrait prétendre qu'un renvoi à des critères aussi variés peut entraîner des complications et des variations à travers le pays dans l'administration de la *Loi sur les Indiens*. Effectivement, je ne veux pas suggérer que le Parlement, lorsqu'il légifère sur les matières et causes testamentaires relatives aux Indiens, ou que le Ministre, lorsqu'il administre la *Loi sur les Indiens* devraient suivre toutes les lois et règles de pratique provinciales sur lesquelles ils n'ont de toute façon aucun contrôle: ceci, ils ne pourraient peut-être pas le faire ni vouloir le faire et, à mon avis, ils ne sont pas obligés de le faire pour se conformer à la *Déclaration canadienne des droits*. Mais il peut ressortir des différentes lois provinciales sur ces matières un ensemble de règles générales communes à toutes les provinces ou à plusieurs d'entre elles, ce qui, faute d'autres critères et comme une sorte de *jus gentium*, est susceptible de suggérer des normes générales minima sur lesquelles il est possible de se fonder en vue de déterminer comment sauvegarder le principe d'égalité.

Une proposition que je ne peux toutefois pas accepter telle quelle est celle mise de l'avant par les appelants et en vertu de laquelle les Indiens ne

not placed in a position of inequality provided they are treated equally vis-à-vis other Canadians "who are also subject to federal law". Whatever else may be meant by this proposition it would appear to me that, when applied to Indians, it would allow all sorts of discriminations provided all Indians were being equally discriminated against; this would be contrary to the decision of this Court in *Drybones*.

It was argued on behalf of the appellants that no one had a "right" to be appointed administrator of an estate. But this is not a reasoning I would be prepared to entertain: under normal circumstances, and according to rules in force in most provinces, the respondent, as widow of the deceased, had every reason to expect the appointment.

In Manitoba more particularly, the matter is governed by the *Surrogate Courts Act*, R.S.M. 1970, c. C290, s. 31, which provides that:

> Where, by reason of special circumstances, it appears to the court to be expedient to grant administration to some person other than the person who, if this Act had not been passed, *would be entitled to a grant*, the court, in its discretion, may grant administration to him upon the giving of such security, if any, as the court directs; and such administration so granted may be limited as the court thinks fit.

(Italics are mine.)

Some person is therefore "entitled" to be granted the administration of the estate when the deceased dies intestate, and that person, according to 21 Henry VIII, c. 5, s. 2, is "the widow of the same person deceased, or . . . the next of his kin, or . . . both, as by the discretion of the . . . Ordinary shall be thought good".

Such "entitlement" may not be a right, strictly speaking, but I would be prepared to regard it as having colour of right and as not being capable of frustration unless good cause be shown why it should be defeated, and unless it be defeated by a judicially exercised discretion.

In referring to the *Manitoba Surrogate Courts Act* and to the statute of 21 Henry VIII, c. 5, I

sont pas victimes d'inégalité dans la mesure où ils sont traités également vis-à-vis les autres Canadiens [TRADUCTION] «qui sont aussi assujettis aux lois fédérales». Quel que soit le sens de cette proposition, elle m'apparaît, lorsqu'on l'applique aux Indiens, permettre tous les genres de discrimination dans la mesure où celle-ci s'exerce également contre tous les Indiens; ce serait contraire à la décision de cette Cour dans *Drybones*.

Les appelants ont soutenu que personne n'a le «droit» d'être nommé administrateur d'une succession. Ce n'est pas là un raisonnement que je serais prêt à accepter. Dans des circonstances normales, et selon les dispositions en vigueur dans la plupart des provinces, l'intimée, à titre de veuve du défunt, avait tout lieu de s'attendre d'être nommée administratrice.

Plus particulièrement au Manitoba, la question est régie par le *Surrogate Courts Act*, R.S.M. 1970, c. C290, art. 31, qui prévoit que:

> [TRADUCTION] Lorsque, en raison de circonstances spéciales, le tribunal juge opportun de confier l'administration à une personne autre que celle qui, si cette loi n'avait pas été adoptée, *aurait été fondée à obtenir l'administration*, le tribunal peut, à sa discrétion, lui confier l'administration sur dépôt d'une garantie, s'il y a lieu, que le tribunal peut prescrire; et le tribunal peut limiter, comme il le juge à propos, l'administration ainsi accordée.

(J'ai mis des mots en italiques.)

Il y a par conséquent une personne qui «est fondée» à obtenir l'administration de la succession d'un intestat, et cette personne, en vertu de 21 Henry VIII, c. 5, art. 2 est [TRADUCTION] «la veuve du défunt ou . . . son parent le plus proche ou . . . les deux selon ce que l'Ordinaire croit avantageux . . . à sa discrétion».

Un tel «fondement» peut ne pas être un droit, strictement parlant, mais je serais prêt à considérer qu'il a couleur de droit et qu'il ne peut être écarté à moins que l'on fasse valoir de bonnes raisons pour passer outre et à moins qu'il n'y soit passé outre en vertu d'une discrétion exercée de façon judiciaire.

En renvoyant au *Manitoba Surrogate Court Act* et à la loi 21 Henry VIII, c. 5, je ne veux pas dire

should not be taken to mean that the Minister was bound by the *Canadian Bill of Rights* to adhere to all the provisions of such laws which, again, I quote as purely illustrative of a relatively general practice.

I do not believe either that the laws of Manitoba govern the matter under s. 88 of the *Indian Act*. This section reads as follows:

88. 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.

In my view, the appointment of an administrator to the estate of an Indian who has died intestate is a matter for which "provision is made" by ss. 42, 43 and 44 of the *Indian Act*; this matter accordingly, does not come under s. 88.

The reasons why the respondent was not appointed administratrix by the Minister are not before us. In the course of argument, the question was asked as to what was the practice of the Department of Indian Affairs and Northern Development in these matters. But counsel for the appellants could not enlighten us. We could not be told whether an Indian widow or widower had ever been appointed once to be administrator of his spouse's estate, or whether the practice is common or unheard of and what the reasons are for such a practice whatever it is.

It may be that the reasons why Mrs. Canard was not appointed administratrix of her late husband's estate are to be found in the Regulations made pursuant to s. 42 of the *Indian Act* (SOR/55-285, P.C. 1955-1083). Their relevant provisions are as follows:

2. In these regulations,

(*b*) "administrator" means a person appointed by the Minister to administer the property of deceased Indians and includes a person who by reason of his office, is instructed to initiate or conclude the administration of an estate;

que le Ministre devait, en vertu de la *Déclaration canadienne des droits*, suivre toutes les dispositions de ces lois: je les cite seulement en exemple d'une pratique relativement générale.

Je ne crois pas non plus que selon l'art. 88 de la *Loi sur les Indiens*, les lois du Manitoba régissent cette question. Cet article se lit comme suit:

88. Sous réserve des dispositions de quelque traité et de quelque autre loi du Parlement du Canada, toutes lois d'application générale et en vigueur, à l'occasion, dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où lesdites lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou statut administratif établi sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou y ressortissant.

A mon avis, la nomination d'un administrateur à la succession d'un Indien mort intestat est une question «prévue» aux art. 42, 43 et 44 de la *Loi sur les Indiens;* par conséquent, cette question ne ressortit pas à l'art. 88.

Nous ne connaissons pas les raisons pour lesquelles le Ministre n'a pas nommé l'intimée administratrice. Au cours de la plaidoirie, on a demandé quelle était la pratique du ministère des Affaires indiennes et du Nord canadien en ce domaine. Mais l'avocat des appelants n'a pu nous éclairer. On a été incapable de nous dire si un Indien veuf ou une Indienne veuve avait déjà été nommé administrateur de la succession de son conjoint ou encore si la pratique était courante ou inconnue et quels étaient les motifs de la pratique quelle qu'elle fût.

Il est possible que les raisons pour lesquelles Mme Canard n'a pas été nommée administratrice de la succession de feu son mari soient contenues dans le règlement adopté en vertu de l'art. 42 de la *Loi sur les Indiens* (DORS/55-285, C.P. 1955-1083). Les dispositions pertinentes sont les suivantes:

2. Dans les présents règlements, l'expression

b) «administrateur» signifie une personne nommée par le Ministre pour gérer les biens des Indiens décédés et comprend une personne qui, en raison de ses fonctions, est chargée de commencer ou de terminer l'administration d'une succession;

4. (1) With the notice of death or as soon thereafter as possible, the Superintendent shall forward an itemized statement of inventory in the form prescribed, to the Minister, showing all the real and personal property of the deceased, the value of each item estimated as closely as possible, as well as all debts of or claims against the estate known at such time; names of all persons entitled to share in the estate and all such other information as may be required by the Minister.

(2) For all the purposes of this section, the Superintendent shall act in the capacity of an administrator and shall take all necessary steps for the proper safekeeping or safeguarding of the assets of the deceased and for the collection of moneys due or owing to the deceased and shall dispose of the moneys so collected or held as the Minister may direct.

6. With the application under section 5, or with the statement of inventory if there is no will, the Superintendent shall forward to the Minister an application for administration in the form prescribed.

11. (1) The Minister may appoint an officer of the Indian Affairs Branch to be the administrator of estates and to supervise the administration of estates and of all the assets of deceased Indians, and may provide that for the purposes of closing an estate the administration thereof be transferred to the Superintendent of the Reserve to which the deceased belonged.

(2) The administrator appointed pursuant to this section or the person acting as administrator in accordance with section 4 shall be responsible to the Minister for the proper preparation of the inventory, the giving of all notices and the carrying out of all inquiries and duties that may be necessary or be ordered with respect to any matter referred to in these regulations.

(14) Generally, an administrator shall have all such powers as are required for the carrying out of the duties herein specified, and shall carry out any order or direction and abide by any finding made or given by the Minister with respect to any matter and cause testamentary.

Read by themselves and apart from the Act, these Regulations would appear to give the Minister no choice, where an Indian died intestate, but to leave the administration of his estate to the officer of the Indian Affairs Branch appointed as

4. (1) Dès notification du décès ou le plus tôt possible après le reçu de cet avis, le surintendant doit faire parvenir au Ministre un état détaillé de l'inventaire en la forme prescrite, qui doit indiquer les biens meubles et immeubles du défunt, la valeur de chaque article appréciée aussi exactement que possible, et toutes les dettes de la succession et les réclamations des créanciers connues à ce moment-là. Le surintendant doit aussi déclarer dans cet état si le défunt a fait un testament et donner les noms de toutes les personnes ayant droit à une part de la succession et toute autre information pertinente que peut exiger le Ministre.

(2) Aux fins du présent article, le surintendant doit agir en qualité d'administrateur et prendre toutes les mesures qui s'imposent pour assurer la bonne garde ou protection des biens du défunt et le recouvrement des sommes dues ou exigibles et disposer des deniers recouvrés ou détenus, de la manière que détermine le Ministre.

6. Le surintendant doit envoyer au Ministre une demande en vue de l'administration d'une succession en la forme prescrite, avec la demande prévue à l'article 5, ou avec l'état de l'inventaire s'il n'existe pas de testament.

11. (1) Le Ministre peut nommer un fonctionnaire de la Division des affaires indiennes comme administrateur des successions et pour surveiller l'administration des successions et de tous les biens des Indiens décédés; afin de régler une succession, il peut autoriser que l'administration en soit transférée au surintendant de la réserve à laquelle appartenait la personne décédée.

(2) L'administrateur nommé conformément au présent article ou la personne qui agit en qualité d'administrateur en vertu de l'article 4 doit rendre compte au Ministre de la préparation adéquate de l'inventaire, de la signification de tous les avis et de l'exécution de toutes les enquêtes et fonctions qui peuvent s'imposer ou être ordonnées à l'égard de toute question mentionnée dans les présents règlements.

(14) En général, un administrateur doit avoir tous les pouvoirs nécessaires pour s'acquitter des fonctions spécifiées ci-dessus et doit exécuter les ordres ou instructions et maintenir toute conclusion établie ou donnée par le Ministre à l'égard de toute matière et cause testamentaires.

Ce règlement en lui-même, lu sans la Loi, semblerait ne donner au Ministre d'autre choix, lorsqu'un Indien meurt intestat, que de laisser l'administration de la succession au fonctionnaire de la Division des affaires indiennes qui a été nommé

the administrator of estates of deceased Indians or to direct that the administration of such an estate be transferred to the Superintendent of the Reserve to which the deceased belonged.

If that be the case, the effect of the Regulations would be to prevent all Indians in all circumstances from being appointed administrators of the estate of an Indian who died intestate and I would have grave doubts as to whether the Regulations are not *pro tanto* rendered inoperative by the *Canadian Bill of Rights*.

However, this would not deprive the Minister of his jurisdiction, which he could still exercise in a quasi-judicial manner and in accordance with the requirements of the *Canadian Bill of Rights*, and this would not validate Mrs. Canard's appointment by the Surrogate Court, if it were otherwise invalid.

Also, when the Regulations are read in conjunction with s. 44(2) of the Act, it would seem that Indians are not necessarily precluded from being appointed administrators since the Minister may direct that an application for letters of administration shall be made to the court that would have jurisdiction if the deceased were not an Indian. (It is to be noted, on the other hand, that a decision of the Minister under s. 44 of the Act is not one which s. 47 mentions as being appealable to the Federal Court).

None of these possible constructions and their consequences was discussed before us; the Regulations were hardly mentioned at all during the argument.

Be that as it may, in her statement of claim, the respondent alleges that she was not even notified of the appointment of appellant Rees as administrator by the Department of Indian Affairs and Northern Development. This forms no part of the agreed statement of facts and is denied in the appellant's counterclaim but it was taken for granted by the Court of Appeal.

While there might have been reasons why the respondent should not have been appointed administratrix, why another next of kin should not

administrateur des successions des Indiens décédés ou de transférer l'administration de cette succession au surintendant de la réserve à laquelle appartenait la personne décédée.

Si tel est le cas, l'effet du règlement serait d'empêcher tous les Indiens dans tous les cas d'être nommés administrateurs de la succession d'un Indien mort intestat et j'aurais de sérieux doutes sur la question de savoir si le règlement n'est pas pour autant rendu inopérant par la *Déclaration canadienne des droits*.

Cependant, cela ne priverait pas le Ministre de sa juridiction qu'il pourrait encore exercer d'une manière quasi judiciaire et en conformité des exigences de la *Déclaration canadienne des droits;* cela ne rendrait pas non plus valide la nomination de Mme Canard par le cour de vérification, si cette nomination est nulle par ailleurs.

De plus, lorsque le règlement est lu avec le par. (2) de l'art. 44 de la Loi, il semblerait que les Indiens ne sont pas nécessairement écartés de la nomination au poste d'administrateur puisque le Ministre peut ordonner qu'une demande de lettres d'administration soit présentée à la cour qui aurait juridiction si la personne décédée n'était pas un Indien. (En revanche, il faut signaler qu'une décision du Ministre en vertu de l'art. 44 de la Loi n'est pas une décision que l'art. 47 mentionne comme pouvant être portée en appel devant la Cour fédérale).

Aucune de ces interprétations possibles ni leurs conséquences n'ont été discutées devant nous; le règlement a été à peine mentionné au cours des plaidoiries.

Quoi qu'il en soit, l'intimée allègue dans sa déclaration qu'elle n'a même pas été avisée de la nomination de l'appelant Rees comme administrateur par le ministère des Affaires indiennes et du Nord canadien. Ce fait ne figure pas dans l'exposé des faits adopté par les parties et il est nié dans la demande reconventionnelle de l'appelant; cependant, la Cour d'appel l'a tenu pour admis.

Bien qu'il y ait pu avoir des raisons de ne pas nommer l'intimée ou un autre proche parent administrateur et de nommer un fonctionnaire à leur

have been appointed either and why a public servant was appointed in their stead, yet, the respondent was judged capable of being so appointed by a court which is in the habit of deciding these matters.

Given all the circumstances of this case, I might have been inclined to form the opinion that the burden of showing cause why the respondent should not be appointed administratrix was a burden which rested upon the appellants: in view of their failure to discharge that burden, the appointment of appellant William Barber Rees could then have been deemed to have been made contrary to the principles of fundamental justice and to the *Canadian Bill of Rights* and the matter could have been referred back to the Minister for determination.

I am however prevented from taking this course by what appears to be an insuperable jurisdictional difficulty. Once it is conceded that the Minister has jurisdiction to appoint an administrator, the exercise of this jurisdiction can only be reviewed in accordance with the *Indian Act* and the *Federal Court Act* and not by the Courts of Manitoba. It is true that the latter's jurisdiction had not been questioned by the appellants, presumably because the action taken by the respondent challenged the constitutional validity and the operation of the *Indian Act* and the Manitoba Courts had jurisdiction to adjudicate upon this issue as well as upon appellants' counterclaim. The Courts of Manitoba could not on the other hand hear an appeal from the Minister's decision or otherwise review it. We sit in appeal from the decision of the Manitoba Court of Appeal and our own jurisdiction is limited to giving the judgment that it could and should have given, (*Supreme Court Act*, R.S.C. 1970, c. S-19, s. 47), but not the one that could and should have been given had the issue been raised in the Federal Court.

As to the letters of administration issued to the respondent by the Surrogate Court of the Eastern Judicial District of Manitoba, their nullity makes no doubt. The Court which issued them was without jurisdiction to do so as this jurisdiction is

place, il reste que l'intimée a été jugée apte à être nommée administratrice par un tribunal qui a l'habitude de juger ces matières.

Vu toutes les circonstances de l'espèce, j'aurais pu être porté à croire qu'il incombait aux appelants de prouver pourquoi l'intimée ne devrait pas être nommée administratrice: étant donné qu'ils ne l'ont pas fait, la nomination de l'appelant William Barber Rees aurait pu alors être tenue pour contraire aux principes de justice fondamentale et à la *Déclaration canadienne des droits* et la question aurait pu être renvoyée au Ministre pour décision.

Cependant, un obstacle insurmontable sur le plan de la juridiction m'empêche d'adopter ce point de vue. Une fois admis que le Ministre est compétent pour nommer un administrateur, l'exercice de cette compétence ne peut être examiné que conformément à la *Loi sur les Indiens* et à la *Loi sur la Cour fédérale* et non par les tribunaux du Manitoba. Il est vrai que la juridiction de ces derniers n'a pas été mise en question par les appelants, probablement parce que l'action intentée par l'intimée contestait la constitutionnalité et l'application de la *Loi sur les Indiens* et que les tribunaux du Manitoba ont juridiction pour disposer de cette question aussi bien que de la demande reconventionnelle des appelants. En revanche, les tribunaux du Manitoba ne pouvaient pas entendre un appel à l'encontre d'une décision du Ministre ni examiner celle-ci de quelque façon. Nous entendons un pourvoi à l'encontre d'un arrêt de la Cour d'appel du Manitoba et notre propre juridiction se limite à prononcer l'arrêt qu'elle aurait pu ou aurait dû prononcer (*Loi sur la Cour suprême*, S.R.C. 1970, c. S-19, art. 47) mais non pas l'arrêt qui aurait pu ou qui aurait dû être rendu si la question avait été soumise à la Cour fédérale.

Quant aux lettres d'administration accordées à l'intimée par la cour de vérification du District judiciaire de l'est du Manitoba, il n'y a pas de doute qu'elles sont invalides. Le tribunal qui les a émises n'avait pas juridiction pour le faire puisque

vested exclusively in the Minister by ss. 42 and 43 of the *Indian Act* and could not, under s. 44, be exercised by the Surrogate Court without the consent of the Minister. This consent was not given.

I would allow the appeal, set aside the judgments of the Manitoba Court of Appeal and of the Manitoba Court of Queen's Bench, dismiss respondent's action and maintain appellants' counterclaim except para. (a) of their counterclaim on which I would refrain from expressing a view.

As to costs, we were informed that the Crown would pay the party and party costs of the respondent before this Court and would forego all costs in the lower Courts. I would so order.

Appeal allowed, LASKIN C.J. *and* SPENCE J. *dissenting.*

Solicitor for the defendants, appellants: D. S. Thorson, Ottawa.

Solicitor for the plaintiff, respondent: William Rachman, Winnipeg.

la juridiction en cette matière est dévolue exclusivement au Ministre par les art. 42 et 43 de la *Loi sur les Indiens* et ne pouvait, en vertu de l'art. 44, être exercée par ce tribunal sans le consentement du Ministre. Ce consentement n'a pas été donné.

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel du Manitoba et le jugement de la Cour du Banc de la Reine du Manitoba, de rejeter l'action de l'intimée et de maintenir la demande reconventionnelle des appelants sauf l'al. a) sur lequel je m'abstiens d'exprimer un point de vue.

Quant aux dépens, nous avons été avisés que le ministère public paierait les dépens de l'intimée devant cette Cour, applicables entre les parties, et qu'il renoncerait à tous les dépens devant les instances inférieures. J'émettrais une ordonnance en ce sens.

Pourvoi accueilli, le JUGE EN CHEF LASKIN *et le* JUGE SPENCE *étant dissidents.*

Procureur des défendeurs, appelants: D. S. Thorson, Ottawa.

Procureur de la demanderesse, intimée: William Rachman, Winnipeg.

[PRIVY COUNCIL.]

CUNNINGHAM AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . } APPELLANTS;

AND

TOMEY HOMMA AND ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENTS.

J. C.*
1902
July 4;
Dec. 17.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

British North America Act, s. 91, sub-s. 25; s. 92, sub-s. 1—Naturalization and Aliens—British Columbia Provincial Elections Act, s. 8—Powers of Provincial Legislature—Privileges conferred or withheld after Naturalization.

Sect. 91, sub-s. 25, of the British North America Act, 1867, reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted.

The provincial legislature has the right to determine, under s. 92, sub-s. 1, what privileges, as distinguished from necessary consequences, shall be attached to it.

Accordingly, the British Columbia Provincial Elections Act (1897, c. 67), s. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not ultra vires.

APPEAL from an order of the above Supreme Court (March 9, 1901) affirming an order of the Chief Justice, sitting as county court judge (Nov. 30, 1900), which reversed the decision of the collector of voters, and ordered that the name of Tomey Homma be placed on the register of voters for the Vancouver electoral district.

In October, 1900, the said T. Homma, a native of the Japanese empire, not born of British parents, but a naturalized British subject, by notice given in the prescribed manner to the appellant, made the application now in question.

By the Provincial Elections Act of British Columbia (Revised Statutes of British Columbia, 1897, c. 67) it is enacted (amongst other things) as follows:—

"3. The following terms shall in this Act have the

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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meanings hereinafter assigned to them unless there is something in the context repugnant to such construction, that is to say—"

* * * * *

"The expression 'Chinaman' shall mean any native of the Chinese empire or its dependencies not born of British parents, and shall include any person of the Chinese race naturalized or not.

"The expression 'Japanese' shall mean any native of the Japanese empire or its dependencies not born of British parents, and shall include any person of the Japanese race naturalized or not.

"The expression 'Indian' shall mean any person of pure Indian blood."

* * * * *

"7. Every male of the full age of twenty-one years, not being disqualified by this Act or by any other law in force in this province, being entitled within this province to the privileges of a natural-born British subject, having resided in this province for twelve months, and in the electoral district in which he claims to vote for two months of that period immediately previous to sending in his claim to vote, as hereinafter mentioned, and being duly registered as an elector under the provisions of this Act, shall be entitled to vote at any election: provided that no person shall be entitled to be registered or to vote as aforesaid who shall have been convicted of any treason, felony, or other infamous offence, unless he shall have received a free or conditional pardon for such offence, or have undergone the sentence passed upon him for such offence.

"8. No Chinaman, Japanese, or Indian shall have his name placed on the register of voters for any electoral district, or be entitled to vote at any election. Any collector of voters who shall insert the name of any Chinaman, Japanese, or Indian in any such register shall, upon summary conviction thereof before any justice of the peace, be liable to a penalty not exceeding $50."

By the Provincial Elections Act Amendment Act, 1899

(Statutes of British Columbia, 1899, c. 25), it is enacted (amongst other things) as follows:—

"3. Section 7 of said chapter 67 is hereby amended by striking out the word 'twelve' in the fourth line thereof and substituting therefor the word 'six,' and by striking out the words 'two months' in the fifth line thereof and substituting therefor the words 'one month,' and by adding thereto as sub-s. 2 thereof the words following:—

"2. No judge of the Supreme or County Court, no sheriff or deputy sheriff, no employee of the provincial government who is in receipt of salary of at least $300 per annum, no sailor, marine, or soldier on full pay in the Imperial service, and no officer in the Imperial service on full pay, shall be entitled to have his name placed upon the register of voters for any electoral riding. This sub-section shall not apply to Ministers of the Crown, Mr. Speaker, members of the Legislative Assembly, or school teachers."

On October 19, 1900, the appellant, in obedience to s. 8 of the said Provincial Elections Act, disallowed the claim of Tomey Homma.

The County Court and the Supreme Court held that s. 8 of the Provincial Elections Act of British Columbia related to a matter, namely, "naturalization," which, by virtue of the British North America Act, 1867, s. 91, was within the exclusive legislative authority of the Parliament of Canada, and not within the jurisdiction of the legislature of British Columbia.

Robinson, K.C., and *C. A. Russell, K.C.*, for the appellants, the Attorney-General for the province having been joined as an intervenor with the collector, contended that the orders of the County and Supreme Courts were wrong, and should be reversed. They contended that it should be declared that Homma was not entitled to be placed on the register of voters. Sect. 8 referred to was not within the exclusive legislative authority of the Dominion. It does not relate to any matter declared by s. 91 of the British North America Act, 1867, to belong to the Dominion jurisdiction. See particularly sub-s. 25,

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which relates to naturalization and aliens—that is, to the mode in which naturalization is to be conferred, not to the rights which may or may not follow according to the electoral law of the district. That is a matter which is within the exclusive competence of the provincial legislature, being within the classes of subjects assigned to it by s. 92: see sub-s. 1. It is the provincial, and not the Dominion, legislature which has power to regulate the electoral law of the province, and to decide whether the respondent, naturalized by force of the Dominion Act, shall have a right to vote at the elections of members to serve in the provincial legislature. Such a right is not inherent in the respondent either as British born or as a naturalized British subject. It is a right and privilege which belongs only to those classes of British subjects upon whom the provincial legislature has conferred it. Reference was made to *Union Colliery Co.* v. *Bryden* (1); *Fielding* v. *Thomas.* (2)

Blake, K.C., for the respondent (*Newcombe, K.C.*, and *Loehnis*, with him, for the Attorney-General for the Dominion), contended that s. 8 in question is in respect of the respondent ultra vires of the provincial legislature. It trenches on the subject of aliens and naturalization. It attempts to impose on naturalized aliens of the Japanese race, on the score of their alien origin alone, a perpetual exclusion from the electoral franchise. It does so in spite of their being entitled within the province to all the privileges of natural-born British subjects, and in spite of their fulfilling all the conditions under which natural-born British subjects are entitled to the franchise. It thus nullifies, as it were, the Dominion legislation on the subject. Provincial legislatures are limited to matters of local as distinguished from Imperial concern. This legislation is calculated to create difficulties between the British and Japanese nations; but at the same time it cannot be checked by Imperial authority, which has a veto on Dominion but not provincial legislation: see British North America Act, 1867, ss. 56, 90. The Act should be so construed as to maintain to the full all limitations on provincial power in respect of matters

(1) [1899] A. C. 580, 586. (2) [1896] A. C. 600.

affecting Imperial relations, and to retain them within the exclusive power of the Dominion.

Robinson, K.C., replied.

Dec. 17. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. In this case a naturalized Japanese claims to be placed upon the register of voters for the electoral district of Vancouver City, and the objection which is made to his claim is that by the electoral law of the province it is enacted that no Japanese, whether naturalized or not, shall have his name placed on the register of voters or shall be entitled to vote. Application was made to the proper officer to enter the applicant's name on the register, but he refused to do so upon the ground that the enactment in question prohibited its being done. This refusal was overruled by the Chief Justice sitting in the county court, and the appeal from his decision to the Supreme Court of British Columbia was disallowed. The present appeal is from the decision of the Supreme Court.

There is no doubt that, if it is within the capacity of the province to enact the electoral law, the claimant is qualified by the express language of the statute; but it is contended that the 91st and 92nd sections of the British North America Act have deprived the province of the power of making any such provision as to disqualify a naturalized Japanese from electoral privileges. It is maintained that s. 91, sub-s. 25, enacts that the whole subject of naturalization is reserved to the exclusive jurisdiction of the Dominion, while the Naturalization Act of Canada enacts that a naturalized alien shall within Canada be entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in Canada. To this it is replied that, by s. 92, sub-s. 1, the constitution of the province and any amendment of it are placed under the exclusive control of the provincial legislature. The question which their Lordships have to determine is which of these two views is the right one, and, in determining that question, the policy or impolicy of such an enactment as that which excludes a particular race from

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the franchise is not a topic which their Lordships are entitled to consider.

The first observation which arises is that the enactment, supposed to be ultra vires and to be impeached upon the ground of its dealing with alienage and naturalization, has not necessarily anything to do with either. A child of Japanese parentage born in Vancouver City is a natural-born subject of the King, and would be equally excluded from the possession of the franchise. The extent to which naturalization will confer privileges has varied both in this country and elsewhere. From the time of William III. down to Queen Victoria no naturalization was permitted which did not exclude the alien naturalized from sitting in Parliament or in the Privy Council.

In Lawrence's Wheaton, p. 903 (2nd annotated ed. 1863), it is said that "though (in the United States) the power of naturalization be nominally exclusive in the Federal Government, its operation in the most important particulars, especially as to the right of suffrage, is made to depend on the local constitution and laws." The term "political rights" used in the Canadian Naturalization Act is, as Walkem J. very justly says, a very wide phrase, and their Lordships concur in his observation that, whatever it means, it cannot be held to give necessarily a right to the suffrage in all or any of the provinces. In the history of this country the right to the franchise has been granted and withheld on a great number of grounds conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign.

Could it be suggested that the province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law ultra vires, such a construction of s. 91, sub-s. 25 would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to

what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

This, indeed, seems to have been the opinion of the learned judges below; but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of *Union Colliery Co.* v. *Bryden*. (1) That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.

For these reasons their Lordships will humbly advise His Majesty that the order of the Chief Justice in the county court and the order of the Supreme Court ought to be reversed, except so far as the respondent, Tomey Homma, is entitled to his costs under those orders. Having regard to the terms of the Order in Council giving special leave to appeal, their Lordships direct the appellants to pay the costs of Tomey Homma in this appeal, but that otherwise the parties shall pay their own costs.

Solicitors for appellants: *Gard, Rook & Winterbotham.*
Solicitor for respondent Homma: *S. V. Blake.*
Solicitors for Attorney-General for the Dominion: *Charles Russell & Co.*

(1) [1899] A. C. 587.

nature and quality of her act or of knowing it was wrong, then they should find the accused not guilty by reason of insanity.

I thought it important that counsel be aware of my intention in this regard before they addressed the jury.

So very briefly, then, it is my decision that the defence of non-insane automatism is not open for the consideration of the jury and so far as the state of mind of the accused is concerned, the issue is whether or not she was insane at the time of the death of her husband.

QUEBEC COURT OF APPEAL

Owen, Brossard and Bernier JJ.A.

Diabo v. The Queen

Juries — Challenge — Composition — Whether accused Indian entitled to be tried by jury composed of Indians — Whether The Jury Act, R.S.Q. 1964, c. 26, repugnant to the Canadian Bill of Rights, R.S.C. 1970, App. III — The Criminal Code, R.S.C. 1970, c. C-34, s. 554, as amended by 1972, c. 13, s. 46.

The appellant was charged with armed robbery and elected trial by judge and jury. His preliminary motion declining the jurisdiction of the Court and challenging the array of jurors was dismissed. Appellant had alleged that as an Indian of the Six Nations (Iroquois) residing on the Caughnawaga Reserve he was being discriminated against since: (a) there was no valuation roll on the reserve and consequently no one residing there could be placed on the jury list; (b) he could not be judged by his peers; (c) he had the right to be tried by jurors whose civilization, tradition, and life style were similar to his own.

Held, the appeal should be dismissed.

The Reservation of Caughnawaga was not a municipality and hence had no valuation roll. The Jury Act, which was incorporated into the Criminal Code by reference (Code s. 554), provided in s. 2 [am. 1971, c. 15, s. 2; 1972, c. 6, s. 61]:

"2. No one may act as a juror unless he is a Canadian citizen, at least twenty-one years of age, domiciled in a municipality and entered on the valuation roll of the municipality as owner, tenant or occupant."

While this meant that no other Caughnawaga Indian could sit on the jury at the appellant's trial, the reason for this was not that any such person was an Indian, but rather that such person did not reside in a municipality that had a valuation roll. A registered Indian living on the Caughnawaga Reserve was not excluded from the jury list on the basis of race, but of geography. An Indian living in another municipality could be on the jury list if he were on that municipality's valuation roll; so too, a non-Indian who did not live in a municipality with a valuation roll could not be on a jury list. The Jury Act was not repugnant to the Canadian Bill of Rights as legislation which had different application to Indians.

APPEAL from dismissal of preliminary motion challenging array of jury panel.

G. Robert and *H. Marx*, for appellant.

H. Keyserlingk, for the Crown.

30th December 1974. Le jugement de la Cour fut rendu par

OWEN J.A.:—This is an appeal from a judgment of the Court of Queen's Bench (Crown Side), District of Montreal, 14th January 1974, which dismissed a preliminary motion entitled "REQUETE POUR DECLINER LA JURIDICTION DU TRIBUNAL ET POUR RECUSATION DU TABLEAU DES JURES". The purpose of this motion was to challenge the array of the panel of jurors, to decline the jurisdiction of the Court and to obtain the liberation of the accused.

The appellant, Diabo, was faced with four charges of armed robbery involving sums of $3, $3, $8 and $5. He chose to be tried by a judge and jury and did not change his option.

The preliminary motion, made on behalf of Diabo before the jury was chosen, reads as follows:

"REQUETE POUR DECLINER LA JURIDICTION DU TRIBUNAL ET POUR RECUSATION DU TABLEAU DES JURES

"L'accusé expose respectueusement;

"1. Tel qu'il appert au présent dossier, la poursuivante a logé contre l'accusé une accusation de vol qualifié, à l'encontre de laquelle il a enregistré un plaidoyer de non-culpabilité, a choisi d'être jugé par un juge et un jury, à renoncé à l'enquête préliminaire, et a alors été envoyé pour procès devant la présente Cour composée d'un juge et d'un jury;

"2. Pour la confection du tableau des jurés, le Code Criminel se réfère à la Loi des Jurés, et c'est en vertu de cette dernière loi que le tableau des jurés devant être choisi pour constituer le jury en la présente instance a été formé;

"3. Ce tableau des jurés provient des noms apparaissant aux rôles d'évaluations des municipalités du district judiciaire de Montréal;

"4. Les Indiens de la Réserve de Caughnawaga, dont fait partie l'accusé, n'ont pas de rôle d'évaluation, en sorte qu'aucun indien demeurant sur ladite Réserve de Caughnawaga, ne peut être membre d'un jury;

"5. De plus, ladite Réserve de Caughnawaga n'est pas une municipalité au sens de la Loi des Jurés, et elle n'a pas non plus de secrétaire-trésorier, sa constitution ne relevant pas des lois provinciales;

"6. Il découle de ce que sus dit, que le fait qu'aucun indien de ladite Réserve de Caughnawaga ne peut être membre d'un jury, ce qui constitue une discrimination au sens de la Loi ayant pour objet la reconnaissance et la protection des droits

de l'homme et de liberté fondamentale sanctionnées le 10 août 1960;

"7. Il découle aussi de ce que sus dit, que l'accusé ne peut être jugé par ses pairs, contrairement à l'esprit et à la philosophie du Code Pénal, et qu'il n'a pas ainsi la même égalité que les autres citoyens devant la Loi;

"8. L'accusé a d'autant plus droit d'avoir la possibilité d'être jugé par un jury pouvant comprendre un ou plusieurs membres de sa nation, à savoir la Confédération des Six Nations dite Iroquoise, que la civilisation, la culture, la mode de vie, les traditions de sa nation sont fort différents de la civilisation blanche;

"9. Le tableau des jurés ayant été constitué pour les fins du présent procès, devrait être récusé parce que le shérif ou ses adjoints, par qui la liste a été rapportée, ont été coupables de partialité, de fraude ou de mauvaise conduite volontaire.

"PAR CES MOTIFS, PLAISE AU TRIBUNAL:

"Récuser le tableau des jurés constitué en vue du procès devant juge et jury, en la présente instance;

"Décliner la juridiction du présent Tribunal à entendre le procès devant juge et jury, en la présente cause;

"Libérer l'accusé des accusations portées contre lui au présent dossier;

"Le tout avec dépens contre la poursuivante".

An enquête was held on the motion and five witnesses were heard. From this evidence it appears that the appellant, Diabo, is a registered member of the band and resides on the Indian reservation at Caughnawaga which is not a municipality and has no valuation roll because the resident Indians do not pay taxes.

The name of a registered member of the band residing on the reservation could not appear on the jury list as formed in accordance with the provisions of The Jury Act, R.S.Q. 1964, c. 26, ss. 1 [am. 1971, c. 15, s. 1; 1972, c. 6, s. 60] and 2 [am. 1971, c. 15, s. 2; 1972, c. 6, s. 61] of which provided:

"1. In this act:

"(*a*) 'municipality' means any municipality situated wholly or in part within a radius of forty miles from the chief place of each judicial district; . . .

"(*e*) 'valuation roll' means, for each municipality, the valuation roll in force and, as the case may be, the collection rolls of personal taxes in force; . . .

"2. No one may act as a juror unless he is a Canadian citizen, at least twenty-one years of age, domiciled in a municipality and entered on the valuation roll of the municipality as owner, tenant or occupant."

It was argued on behalf of Diabo that the provisions of The Jury Act which prevent an Indian living on the reserve at Caughnawaga from being on the jury are repugnant to s. 1 of the Canadian Bill of Rights, R.S.C. 1970, App. III.

In the appellant's factum it is stated:

"Cette requête préliminaire de l'accusé-appelant était essentiellement basée sur le fait qu'aucun indien demeurant sur une réserve indienne située dans le district judiciaire de Montréal ne pouvait être membre du jury appelé à juger l'accusé, lui-même indien et domicilié sur la Réserve indienne de Caughnawaga, en sorte que ce dernier ne jouissait pas de l'application régulière de la loi, de l'égalité devant la loi et de la protection de la loi, contrairement à l'article 1 de la Déclaration canadienne des droits, sanctionnée le 10 août 1960 (8-9 Elizabeth II, S.C. Chap. 44). En fait, les indiens demeurant sur des réserves sont le seul groupe ethnique au Québec à être exclu des jury, et ce, à cause de leur race, contrairement à l'article 1 de la sus dite Déclaration canadienne des droits, et bien qu'ils soient comme tout le monde citoyens canadiens."

It is further stated in the appellant's factum:

"Donc, si la Loi des jurés du Québec était inapplicable aux réserves indiennes, lors de la confection du tableau des jurés, en la présente instance, il s'ensuit que l'accusé-appelant ne jouissait plus de l'application régulière de la loi, de l'égalité devant la loi et de la protection de la loi au sens de la Déclaration canadienne des droits, comme les autres citoyens canadiens."

Section 1(*b*) of the Canadian Bill of Rights provides as follows:

"1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe: . . .

"*b*) le droit de l'individu à l'égalité devant la loi et à la protection de la loi".

The main contention of the appellant was that The Jury Act created racial discrimination in providing that no member of the Indian race could have his name on the jury list and have a chance to sit on a jury.

It was also argued that the provisions of The Jury Act deprived Diabo of his right to be tried by a jury of his peers.

Finally it was contended that in the circumstances the sheriff or his deputies in returning the panel showed partiality, fraud or wilful misconduct within the meaning of the provisions of s. 558(1) of the Criminal Code, R.S.C. 1970, c. C-34, which reads as follows:

"558. (1) The accused or the prosecutor may challenge the array of petit jurors only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or his deputies by whom the panel was returned."

The trial Judge dismissed the preliminary motion on the ground that The Jury Act as it stood in December 1973 was not repugnant to the Canadian Bill of Rights and that the accused had the right to be judged by a jury constituted in accordance with the law but no right to be judged by a jury of his peers.

The basic fallacy in the presentation on behalf of Diabo is the claim that racial discrimination is involved in the present case. It is true that no registered Indian living on the reservation at Caughnawaga could sit as a juror at the trial of Diabo. The reason for this is not the fact that he belongs to the Indian race but rather the fact that he does not reside in a municipality that has a valuation roll. The basis of the exclusion from the jury list under the terms of The Jury Act of a registered Indian living on the Caughnawaga Reserve is geographical, not racial. An Indian living in the neighbouring municipalities, for example, Lachine or Ville Lasalle, if his name was on the valuation roll, could be on the jury list for the District of Montreal. A citizen of any other race living elsewhere than in a municipality within a radius of 40 miles of the chief place of the judicial district could not be on the jury list for that district.

Even if for the sake of argument we accept the proposition that The Jury Act should be considered as equivalent to a federal statute, by reason of the fact that it is incorporated in the Criminal Code by virtue of the provisions of s. 554(1), The Jury Act is not repugnant to the Canadian Bill of Rights on the ground of racial discrimination.

This is a case where an Indian living on the reservation has been charged with having committed a criminal offence on the reservation. He comes marching into Court waiving the flag of racial discrimination and rattling the saber of "Drybones". He is flying false colours because this is clearly not a case of racial discrimination.

In cases where discrimination is really involved the principles laid down in cases dealing with the Canadian Bill of Rights, such as *Regina v. Drybones,* [1970] S.C.R. 282, 10 C.R.N.S. 334, 71 W.W.R. 161, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473, and *A.G. Can. v. Lavell* (1974), S.C.R. 1349, 23 C.R.N.S. 197, 11 R.F.L. 333, 38 D.L.R. (3d) 481, are of the utmost importance. However in the present case where there is no question of racial or any other discrimination I see no point in discussing such cases.

In my opinion all the grounds of appeal with respect to racial discrimination, the right of the accused to be tried by a jury of his peers, and partiality, fraud or wilful misconduct of the sheriff or his deputies in returning the panel (Code s. 558(1)) are unfounded and the preliminary motion to challenge the array and to decline the jurisdiction of the Court was properly dismissed by the trial Judge.

I would dismiss the present appeal.

NOVA SCOTIA COUNTY COURT

O Hearn Co. Ct. J.

Regina v. Doherty

Breathalyzers — Refusing to provide breath sample — Right to instruct counsel in private — Telephone conversation with lawyer overheard in part by constable — Interview between lawyer and accused held in area without door some distance from guard — Police having duty to supply adequate interview facilities.

In an accused's appeal against his conviction for refusing a breath sample, the issue was whether his refusal was justified in view of the facilities made available for an interview with defence counsel. The Appeal Division, 25 C.R.N.S. 289, 16 C.C.C. (2d) 494, unable to determine whether the trial Judge had made a finding on the privacy issue, ordered a new trial.

Held, the appeal should be allowed.

There was a duty on the public authorities, including the police, to furnish private facilities for a prisoner to confer with counsel; it was not for the accused to find the accommodation. Confidentiality was the paramount feature of the solicitor-and-client consultation and this relationship could not be achieved unless the parties were reasonably sure that their discussions were not being overheard.

Dealing with the facts of the case at bar, the telephone conversation which had taken place between the accused and counsel was insufficient for a proper oral interview in that a constable had been in a position to overhear at least part of the accused's side of the conversation. The situation might well have been otherwise had a sound-proof telephone booth been utilized. The subsequent consultation, which had taken place in an anteroom without a door, was not such as to afford the accused any confidence in the integrity

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conditions, his assignee can have no higher right than he had, but on this point also I do not intend to give a definite opinion at present. It will be for the trial Judge to determine it if raised before him.

I have read the reasons for judgment of Cameron, J.A., and concur in his statement of the law, but for the reason given above I do not think any question of priorities arises in this case.

I would allow the appeal with costs.

PRENDERGAST, J.A. concurred in the result.

Appeal allowed.

DOUGLAS v. MILL CREEK LUMBER Co.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. January 9, 1923.

Appeal IIC — Woodman's lien for wages — Judgment in County Court—Appeal—Amount necessary to give jurisdiction.

Under sec. 116 (a) of the County Court Act, R.S.B.C. 1911, ch. 53, there is no appeal from a County Court judgment under the Woodman's Lien for Wages Act, R.S.B.C. 1911, ch. 243, where the individual claims are below $100, although for purposes of convenience and economy they may have been consolidated for trial, and the consolidated amount exceeds that sum.

[*Gabrielc v. Jackson Mines* (1906), 15 B.C.R. 373, followed.]

Indians I — Right to claim lien under the Woodman's Lien for Wages Act, R.S.B.C. 1911, ch. 243.

Under the Indian Act, R.S.C. 1906, ch. 81, Indians and non-treaty Indians are given the right to sue for debts due them or to compel the performance of obligations contracted with them. This right is given without qualification and there is nothing in the Woodman's Lien Act, R.S.B.C. 1911, ch. 243, or in the County Court Act, R.S.B.C. 1911, ch. 53, excluding this right.

Logs and Logging — Woodmen's Lien for Wages—Affidavit in support of claim—Requisites of.

Where an affidavit on which a claim under the Woodman's Lien for Wages Act is based has been sworn before the plaintiff's solicitor and is afterwards sworn before another commissioner it is not necessary to re-write the jurat or add the prefix "re" where the name of the claimant is struck out and it is resigned both as to the claim and the affidavit verifying it. It is not necessary that the form in Schedule "A" of the Act be strictly complied with, but something must be set out which shews that the claimant comes within the class entitled to a lien under the Act.

APPEAL by defendants from a County Court judgment in regard to nine claims under the Woodman's Lien for Wages Act, R.S.B.C. 1911, ch. 243. Affirmed except as to one claim.

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DOUGLAS
v.
MILL CREEK LUMBER CO.

Martin, J.A.

Chas. Wilson, K.C., for appellant; *E. A. Dickie*, for respondent.

MARTIN, J.A.:—This is an appeal by the defendants from a judgment of the County Court of Vancouver, declaring that nine separate claimants for a lien under the Woodman's Lien for Wages Act, R.S.B.C. 1911, ch. 243, against two swifters of cedar logs of the defendant company, are entitled thereto. Only one of the claims are "for the sum of one hundred dollars or over," to quote sec. 116 (a) of the County Court Act, R.S.B.C. 1911, ch. 53, which allows an appeal from judgments upon claims for that amount, and it is objected that no appeal lies here against the judgment in favour of those claims which are below $100, in accordance, it is submitted, with the decisions in *Gabriele* v. *Jackson Mines* (1906), 15 B.C.R. 373; *Gillies Supply Co.* v. *Allan* (1910), 15 B.C.R. 375; and *Boker* v. *Uplands Ltd.*, *Vannatta* v. *Uplands Ltd.* (1913), 12 D.L.R. 133, 12 D.L.R. 669, 18 B.C.R. 197, because though there is only one judgment the claims are individual and the adjudication thereupon is separate though for purposes of convenience and economy they may have been consolidated for trial. But the appellant submits that these decisions do not apply to this case because sub-sec. (d) of 116 allows an appeal in "interpleader, replevin, or attachment proceedings, when the subject-matter shall equal or exceed one hundred dollars," and it appears that here the first four claimants on January 20, 1922, joined together in issuing one writ of attachment under secs. 10 and 13 against the two swifters of cedar logs in question, and the sheriff seized the logs which were later released by order of the Court, on February 1, 1922, by consent of all the present nine claimants, after the sum of $900 had been paid into Court; after the seizure the five later claimants began one action by writ of summons in the ordinary way (sec. 8) joining their claims under sec. 32, and when the two sets of claims came on for trial they were tried together by consent and one judgment given as aforesaid.

It must be conceded that apart from the attachment proceedings the claims below $100 are not appealable according to our said decisions, and the question is, does the fact that the "subject-matter" was attached before the ordinary proceedings alter the principle? After careful consideration I am unable to take the view that it does; I apprehend that a mechanic's lien for the "work or service" he does upon the "subject-matter" of his employment is upon the same plane as the lien for "labour or service" that the woodman acquires upon

the logs or timber he is working on, and I am unable to take the view that because (to meet the case of the removal of the logs) an additional and speedy remedy of attachment is provided so as to secure the subject-matter pending the hearing, thereby the principle of appeal from individual claims is altered; and hence I am of opinion that we have no jurisdiction to entertain the four appeals from claims under $100, and as to them the appeal should be dismissed.

This leaves five claims to be considered, *viz.*, those of Achill Mack, Moses Antone, Bobbie Baker, Moses Williams and Ellen Joe. These claimants are Indians living on the Capilano Reserve, Burrard Inlet, and several objections are taken to the statements to support their liens, as required by secs. 4 and 5 of the Act. The first objection which merits attention is that the *jurat* of the affidavits verifying the statement have not been sworn anew, but assuming such to be the case, still the affidavits were in fact received and acted upon by the Judge below under sec. 62 of the Evidence Act, R.S.B.C. 1911, ch. 78, and though he did not direct a memorandum of his reception to be made on the affidavit as he "may" do under said section, yet that provision is, in my opinion, merely directory and would only go to the surer proof of the fact of reception in case that were disputed.

With respect to the statement of the claimants' residence, as required to the form in Schedule A; the claimants are all Indians, and they are stated to be "of North Vancouver, Capilano Reserve, in the Province of British Columbia," which is a proper address for such persons.

The required statement of the "kind of logs and timber . . . . and where situate" is satisfied by the statement that they are "composed of two swifters of cedar saw logs or bolts now situate at North Vancouver, in the Province of British Columbia, marked 40j"; there could be no practical difficulty in identifying such logs so marked and boomed in the water in that locality.

As to the "name and residence" of the owner of the logs not being stated; it is to be observed that the form only requires it "if known," and here as the name of the company is given without more it is to be presumed that its "residence" was not known to the deponent.

As to the "name and residence of the person upon whose credit the work was done," that is stated thus: "which work was done for Chief Mathias Joe, William Baker, and Isaac Jacob at North Vancouver in the Province aforesaid." This

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Martin, J.A.

may well be read as meaning that said persons are "at" that place, and is therefore sufficient.

It is now well established that in cases of this sort at least a substantial and not a meticulous compliance with the statute is what the Court will require, the test being, were the parties concerned misled in the circumstances? This general principle has recently been applied to caveats by the Manitoba Court of Appeal, in *Union Bank of Canada* v. *Turner* (1922), 1 D.L.R. (N.S.) 790, [1922] 3 W.W.R. 1138.

There is, however, one objection of a substantial kind to the lien of Ellen Joe, *viz.*, that though sec. 5 requires the "nature of the debt, demand or claim" to be "set out briefly," and the form requires "a short description of the work done for which the lien is claimed," yet there is a total lack of anything of that kind, all the information given of the "work" being: "To two months and ten days at $70 per month . . . $160." Now while "any person performing any labour or service" is given a lien by sec. 3, and the definition of a person in sec. 2 is extended to include "cooks, blacksmiths, artisans, and all others usually employed in connection with such labour and services," yet there must obviously be something to shew the "nature" of the claim, *i.e.*, in what capacity the "labour or service" was performed, so that an interested inquirer could inform himself from the face of the claim if it *primâ facie* can be founded on the Act. It is impossible, however, to tell from the language here employed what was the "nature" or "description" of the work upon which the claimant founds her claim, and therefore I am constrained to find that the statement does not comply substantially with the statute and hence the lien ceased to have any validity as provided by sec. 4.

As to the merits, I am of opinion that the claims have been sufficiently found.

There remains one general objection to the claims of all the plaintiffs, that as they admittedly are unenfranchised Indians, from the said Capilano Reserve, they cannot maintain these actions. And it is submitted that though sec. 103 of the Indian Act R.S.C. 1906, ch. 81, confers upon Indians "the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them, or to compel the performance of obligations contracted with them," yet it does not extend to the obtaining of a lien upon property which belonged to some person other than the one who employed them to work. But this is a misconception of the situation because the lien was conferred by sec. 3 of the Woodman's Lien for Wages Act, and though Indians are wards of the Crown yet they are also citizens of

Canada and entitled, unless prevented by legislation, to enjoy civil rights in common with their fellow citizens, whether such rights are acquired at common law or by statute. No one would contend that an Indian was not entitled to a possessory lien at common law for the value of his work upon an article given to him to repair, such as a fish net, and I see no difference in principle between that lien and a statutory lien upon logs got out of the woods by his labour. In order to preserve his right as a lien holder under the statute, he is required (secs. 4-7) to record his lien by filing a statement in the County Court within 30 days, and to "enforce the same by suit" in that Court within 30 days thereafter, which he may do, as already noted, by writ of attachment or by writ of summons. giving particulars of his claim, and the case proceeds to trial in the usual way. If his claim for wages be against the owner of the logs he may obtain a judgment against him *in personam* as well as in establishment of his lien—secs. 8, 23, 26, 31, but only the latter remedy against the owner where he was not employed by him.

The judgment and lien are enforced "by sale under the execution" (sec. 9), and even though no lien is declared yet the plaintiffs may obtain judgment as in an ordinary case.

It will thus be seen that all these proceedings are founded upon the debt that is due to the claiming lien holder—and it is the existence of that debt and the necessity for suing upon it which enables him to obtain satisfaction of his lien or other appropriate judgment to recompense him for his "labour or service" according to the facts established at the trial; hence it becomes manifest that he is within the scope of said sec. 103 in the assertion of his rights to sue for his debt and in so doing obtain also the benefit of his statutory rights as a lien holder.

It follows that the appeal is dismissed save as to the claim of Ellen Joe as to which it is allowed.

GALLIHER, J.A.:—This is an appeal from Grant Co. Ct. J., who gave judgment in favour of certain unenfranchised Indians who had performed services in connection with the taking out of timber for the Mill Creek Co. who had let the contract to the defendants Chief Mathias Joe, William Baker and Isaac Jacob.

Four of these plaintiffs, Achill Mack, Moses Antone, Moses Joseph and Bobbie Baker took attachment proceedings under the Woodman's Lien Act, R.S.B.C. 1911, ch. 243, and the remaining plaintiffs brought action in the County Court.

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Two swifters of logs were seized under the attachment proceedings, and then all the claims were consolidated and tried in one action, and judgment given, setting out the respective amounts found due each of the claimants.

The Mill Creek Co. whose property the logs were, and in order that they could market same, paid $900 into Court and called upon the claimants to establish their claims. The logs being released the matter went on to judgment as above stated.

Mr. Dickie took the preliminary objections that all claims under $100 are not appealable. That point was settled by the Old Full Court in *Gabriele* v. *Jackson*, *supra*, with which I agree. This excludes from appeal the claims of William Billy, $48.08, Moses Joseph $76.17, Gus Douglas $21.08, and Dominick Charles $88.03, and as to the amount awarded them by the trial Judge, the judgment stands.

As to the balance of the claims, Achill Mack $187.98, Moses Antone $118.70, Bobbie Baker $228.78, Moses Williams $115.74 and Ellen Mathias Joe $160.

Mr. Wilson for the appellants the Mill Creek Lumber Co. objects first:

That unenfranchised Indians cannot claim a lien under the Act, and if they can it can only be established by making the Crown a party. I cannot assent to either of these submissions.

Under the Indian Act, Indians and non-treaty Indians are given the right to sue for debts due them, or to compel the performance of obligations contracted with them. (sec. 103). This right is given without qualification and there is nothing excluding this right in the Woodman's Lien Act, or in our County Court Act.

But Mr. Wilson says an Indian is not a person within the Act.

Our Woodman's Lien Act, sec. 3, says: "Any *person* performing any labor, service, etc., shall have a lien, etc.," and the word "person" thereon referred to is defined in sec. 2, as follows:—

"'Person' in sec. 3 of this Act shall include cooks, blacksmiths, artisans, and *all others* usually employed in connection with such labor and services."

No exclusion there, but rather in inclusion in the words "all others," etc.

Since the hearing Mr. Wilson has (by leave) cited the following cases: *Atkins* v. *Davis* (1917), 34 D.L.R. 69, 38 O.L.R. 548, and *Re Caledonia Milling Co.* v. *Johns* (1918), 42 O.L.R. 338. Neither of these cases, as I read them are in point here.

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Mr. Wilson then takes exception to the affidavits filed. With regard to these affidavits, three of them, Achill Mack, Moses Antone and Bobbie Baker were originally sworn before their solicitor, and afterwards sworn before Charles M. Woodworth. a commissioner on the date on which the writ of attachment was issued, *viz.*, January 26, 1922.

Mr. Wilson's first objection to these affidavits is that a new jurat should have been written out or the prefix "re" placed before the word "sworn."

I notice that the name of the claimant in each was struck out and re-signed both as to the claim and the affidavit verifying same, and in my opinion where that is done it is not necessary to re-write the jurat or add the prefix "re." And further, the trial Judge is by sec. 62 of the Evidence Act, empowered to receive these affidavits. This Mr. Wilson does not contest, but says that a memorandum that they were so received should be endorsed on the affidavit. That provision I consider directory.

Mr. Wilson takes the further ground that all these affidavits are defective.

Section 5 of the Woodman's Lien Act, is as follows:—

"Such statement (referring to the statement in sec. 4) shall set out briefly the nature of the debt, demand or claim, the amount due to the claimant as near as may be, over and above all legal set-offs or counter-claims, and a description of the logs or timber upon or against which the lien is claimed and may be in the form in Schedule "A" to this Act, or to the like effect."

First, supposing there had been no Schedule "A", I would hold that sec. 5 had been complied with. That schedule is no doubt given as a guide and if it has to be strictly followed then in one or two particulars, especially as to residence it has not been so followed.

I attach no weight to the objection that the amounts are incorrectly stated in this case.

Now, there may be Acts where the very wording of the Act compels us to adopt a strict construction and require strict compliance, but I do not regard this as one of them, and in dealing with the objections *seriatum*, in all cases except Ellen Mathias Joe, I would hold (a) sufficiently stated; (c) sufficiently stated; (d) sufficiently stated; (e) sufficiently stated, leaving only (b) that the residence of the owner is not stated, and with regard to that even Schedule "A" says, state if known. In the case of Ellen Mathias Joe, the nature of the debt, de-

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mand or claim (following the words of the statute) is not stated—I take it something must be set out which shews that she comes within the class entitled to a lien and this is not done. As stated, the services rendered might have been entirely outside the contract.

I am of course considering these cases under the wording of this particular Act.

The only remaining point argued was as to the sufficiency of proof of the claims, and I think that sufficient.

In the result the appeal succeeds as to the claim of Ellen Mathias Joe and is dismissed as to the others.

McPHILLIPS and EBERTS, JJ.A. agree in dismissing the appeal except as to the claim of Ellen Joe, which is allowed.

Appeal dismissed with variation; claim of Ellen Joe allowed.

SEIBEL AND DAY v. CUMMINS.*

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay and Martin, JJ.A. December 20, 1922.

Liens II—Priorities—Seed grain mortgage—Thresher's lien—Vendor's interest under crop payment agreement.

A seed grain mortgage takes priority over a thresher's lien under the provisions of the Chattel Mortgage Act, R.S.S. 1920, ch. 200, sec. 20 (5) and a thresher's lien under the provisions of the Threshers' Lien Act, R.S.S. 1920, ch. 208, takes priority over a vendor's interest under a crop payment agreement or lease, a vendor therefor who makes a seizure under crop payment agreement and a seed grain mortgage, may in the absence of any direction by the purchasers of the land as to how the proceeds are to be applied, apply such proceeds on the agreement for sale if he desires to do so but after a thresher has exercised his right to his thresher's lien and taken steps to secure and sell sufficient grain to satisfy his lien, and the vendor makes a second seizure under his seed grain mortgage, he must apply the grain so seized upon the seed grain mortgage and cannot apply such proceeds on the agreement for sale, to the prejudice of the thresher's claim.

APPEAL by defendant from the trial judgment on an interpleader issue. Reference ordered.

D. Fraser, for appellant.

F. W. Turnbull, for respondents.

The judgment of the Court was delivered by

MARTIN, J.A.:—By agreement for sale bearing date March 4, 1921, the plaintiffs sold certain lands to one H. E. Craig and one George Maheim. The agreement provided that the vendor should receive half the crop each year, delivered in his name at elevators or in cars, and in the event of half the crop not

*The revised judgment of Martin, J.A., herein was not released for publication until late in January, 1923.

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RE FARDELLA AND THE QUEEN

Federal Court of Appeal, Jackett, C.J., Mackay and Sweet, D.JJ.
August 1, 1974.

Civil rights — Freedom of religion — Child care worker employed at Indian student residence operated by Government of Canada required to oblige students to attend denominational worship services — Employee not required to attend services himself — Whether infringement of employee's and students' freedom of religion — Whether maintenance of religious services of one denomination at institution operated by Government of Canada unlawful — Canadian Bill of Rights, ss. 1(c), 2.

Administrative law — Boards and tribunals — Jurisdiction — Regulations providing that a person may be "rejected" for cause during probationary period of employment — Statute providing adjudication procedure where employee discharged as a result of disciplinary action — Employment terminated for failure to obey orders of superior — Whether employee rejected or discharged — Whether adjudicator has jurisdiction under statute — Public Service Staff Relations Act (Can.), s. 91 — Indian School Residence Administrators and Child Care Workers Employment Regulations (Can.), s. 5.

The applicant was appointed for a one-year probationary period of employment as a child care worker at an Indian student residence operated by the Department of Indian Affairs and Northern Development since 1969 when it was taken over from the Anglican Church of Canada. Because of its denominational background, Anglican religious services continued to be conducted at the residence and in fact these were either actively requested or tacitly accepted by the parents of the resident children. The residence administrator was an Anglican priest. Child care workers were required by the administrator to oblige the students under their charge to attend the religious services. The child care workers themselves were not required to attend, and in the event that parents should request that their children not be required to attend the services, the request would be complied with. The applicant objected to the requirement that he oblige his students to attend the services on the ground that he could not accept any coercion in the matter of religious observance, and he refused to comply with the requirement on repeated occasions despite the residence administrator's insistence that he do so. As a result of his failure to carry out his duties he was informed that his employment was being terminated. A grievance procedure instituted by the applicant under s. 90 of the *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35, did not result in his reinstatement and accordingly he commenced a reference to adjudication under s. 91 of the Act. The adjudicator found that the orders given to the applicant by the residence administrator were lawful. The applicant thereupon made a reference to the Public Service Staff Relations Board under s. 23 of the Act on the ground that the adjudicator made an error of law in his decision. The Board having decided against him, the applicant applied under s. 28 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), to set aside the decision of the Board. *Held*, the application should be dismissed.

Per Jackett, C.J., Mackay, D.J., concurring: The evidence is such that the adjudicator could properly reach the conclusion that the applicant was dismissed as a result of disciplinary action rather than rejected

under s. 5 of the *Indian School Residence Administrators and Child Care Workers Employment Regulations*, P.C. 1969-613, SOR/69-137 (under the *Public Service Employment Act*, R.S.C. 1970, c. P-32), under which a person may be rejected during his probationary period of employment. Accordingly, the adjudicator and, as a result, the Board, had jurisdiction in the matter. However, while the residence may be said to be operated under federal statutory authority which must be so construed and applied, by reason of s. 2 of the *Canadian Bill of Rights* so "as not to abrogate, abridge, or infringe or to authorize the abridgment or infringement" of, *inter alia*, freedom of religion, guaranteed under s. 1(*c*) of the Act, the freedom of religion of the applicant had not been infringed since his right to believe and worship or not to believe and worship as he pleased had not been interfered with in any way. The requirement that he oblige the students under his charge to attend denominational religious services was not an infringement of his religious freedom, although it might be an infringement of the religious freedom of the children or of their parents if they were compelled to attend. In fact they were not. Furthermore, the holding of denominational services in an institution operated by the Canadian Government was not in itself illegal. Accordingly, the requirement imposed upon the applicant by the residence administrator was a lawful one.

Per Sweet, D.J.: If an employer's order to an employee infringes the "freedom of religion" of the employee or of another person, the order is unlawful and need not be obeyed. However, the determination of the meaning of the term "freedom of religion" as it is used in s. 1(*c*) of the *Canadian Bill of Rights*, does not lie with the conscience of the employee but is determined by law. Furthermore, it is not unlawful to conduct religious services of a particular denomination at an institution operated and financed by the Canadian Government. That does not infringe anyone's right to practise his own religion or not to worship at all. Finally, it is not unlawful to require an employee of the Canadian Government to require others to attend religious services in an institution operated by the Canadian Government. Such a requirement is not an infringement of the religious freedom of the employee or of the persons under his charge under the *Canadian Bill of Rights*.

[*Robertson and Rosetanni v. The Queen* (1963), 41 D.L.R. (2d) 485, [1964] 1 C.C.C. 1, [1963] S.C.R. 651, 41 S.C.R. 392; *Saumur v. City of Quebec and A.-G. Que.*, [1953] 4 D.L.R. 641, 106 C.C.C. 289, [1953] 2 S.C.R. 299; *R. v. Drybones* (1969), 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, [1970] S.C.R. 282, 10 C.R.N.S. 334, 71 W.W.R. 161, refd to]

APPLICATION to set aside a decision of the Public Service Staff Relations Board.

J. S. Midanik, Q.C., for applicant.
M. Bonner, for respondent.

JACKETT, C.J.:—This is an application under s. 28 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), to set aside a decision of the Public Service Staff Relations Board on a reference under s. 23 of the *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35.

On October 18, 1972, the applicant was appointed, in accor-

dance with and subject to the *Indian School Residence Administrators and Child Care Workers Employment Regulations*, P.C. 1969-613, SOR/69-137 [under the *Public Service Employment Act*, R.S.C. 1970, c. P-32], a child care worker at the La Tuque Student Residence operated by the Department of Indian Affairs and Northern Development. Although his appointment did not become effective until October 18th, the applicant, in fact, started work towards the end of September, 1972.

On November 10, 1972, a letter was written to the applicant by the Department of Indian Affairs and Northern Development, reading as follows:

> On October 17, 1972 you were advised by Mr. R. Michaud, Regional Superintendent of Personnel, of your appointment as a child care worker, WP-1, effective October 18, 1972 at the La Tuque Student Residence.
>
> In the second paragraph, it was specified that your appointment was subject to a probation period of one (1) year.
>
> As your supervisor and the residence administrator have reported that you have failed at many occasions, to carry out duties, which were part of your job, we advise you that your appointment in your present position, will terminate on December 11, 1972.

The applicant presented a grievance in respect of such action as contemplated by s. 90 of the *Public Service Staff Relations Act* and, that grievance having been presented up to and including the final level in the grievance procedure and not having been dealt with to his satisfaction, on February 12, 1973, by a document entitled "Notice of Reference to Adjudication", the applicant referred the grievance to adjudication as contemplated by s. 91 of that Act.

After a hearing on March 20, 1973, the adjudicator, on April 10, 1973, delivered a decision embodying his decision on the grievance and his reasons therefor.

In the first place, the adjudicator dealt with an objection to his jurisdiction based on the contention that the applicant had been an employee on probation who was rejected under s. 5 of the aforesaid Regulations and that the applicant had not been discharged as a result of "disciplinary action" so as to be entitled to refer his grievance to adjudication under s. 91. The adjudicator dismissed the objection to jurisdiction by making a finding, "on the basis of the exhibits filed and the testimony of the witnesses who were heard at the hearing" that the reference to adjudication concerned a grievance with respect to disciplinary action resulting in discharge.

The adjudicator found as a fact on the evidence that the primary reason for the applicant's dismissal was his refusal to

take all of the boys in his charge to chapel services on Sunday mornings notwithstanding direct orders to this effect received from his superior, Fr. Bonnard.

The surrounding circumstances and relevant facts are set out in the following portions of the adjudicator's decision:

> In order to understand the circumstances leading to Mr. Fardella's dismissal it is necessary to have some awareness of the background and history of the student residences presently under the jurisdiction of the Department of Indian Affairs and Northern Development. The education of Indian children was at one time entirely organized by various religious denominations and churches and was their entire responsibility. In recent years the situation has changed and those persons formerly employed by various churches and denominations have become public servants. In the case of the residence at La Tuque, this was formerly under the control and jurisdiction of the Anglican church, and this explains why its administrator, a public servant, classification WP-3, is an Anglican priest, and why there is still a religious component. There has been a continuing and ongoing relationship between the Department and the various churches after the direct involvement of the government, and the churches continue to play an important role in matters of recruitment of personnel, determination of policy, administration, etc., at least indirectly.
>
> The Indian residence for students at La Tuque does not itself engage in the formal education of the children who reside there, these being sent to various schools, French or English, Catholic or Protestant, in the La Tuque area. Fr. Bonnard arrived at the La Tuque residence in 1968 after a lengthy experience as a missionary and educator, and he presently has a total staff under his jurisdiction of fifty-two, including eighteen Child Care Workers. The residence was taken over by the Department of Indian Affairs in 1969, having been originally built, administered and financed by the Anglican church. Thus, in 1969 the staff of the residence became public servants, and the church continued to have a say in the hiring of the administrator and thereby in the hiring of the Child Care Workers who came under his jurisdiction. Under section 39 of the Public Service Employment Act, the Public Service Commission has exercised its discretion to decide that it is not practicable nor in the best interests of the public service to apply the Public Service Employment Act to the positions of Residence Administrator and Child Care Worker in the Indian school residences of the Department of Indian Affairs and Northern Development, and in consequence the Governor in Council, on the recommendation of the Commission, has enacted regulations under section 35 of the Public Service Employment Act describing how these positions and persons excluded under section 39 shall be dealt with. These regulations are cited as the Indian School Residence Administrators and Child Care Workers Employment Regulations and they permit the hiring of personnel without going through the normal procedures involving competitions, etc. This then results in continuing to give the churches a very strong role in the recruitment and hiring of personnel.
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When Fr. Bonnard arrived at La Tuque in 1968, there was apparently a daily compulsory religious service and two compulsory religious services on Sunday with substantial pressure on staff and students not only to attend but to take communion. The student population in the residence comes primarily from two Indian Bands which are part of the Cree nation, the Mistassini and Waswanipi Bands. There was some evidence at the hearing which indicates substantial parental desire for the children to attend religious services, particularly in the case of the Waswanipi Band. Perhaps forty-five per cent of the students come from each of these Bands and ten per cent from other Bands. On his arrival Fr. Bonnard cut out the daily services and began decreasing and phasing out the degree of compulsion involved both for students and staff. There is now only one service for each group of children on Sunday, one for junior children and one for senior children. These services on alternate Sundays involve either a communion service or a morning prayer service. From the evidence at the hearing it would seem that there has not been any objection by any parents or any request for exemption of children from religious services, nor have such formal requests for exemption from services been made at any time to the Administrator. The situation is thus one in which services appear to be accepted by the Administrator, by the parents, by all the other Child Care Workers except the grievor, and by the children, as part of the regular routine, which they attend as a matter of course. The degree of compulsion involved seems to be that attendance on the part of the children at least is expected unless a request for formal exemption from the attendance at services is made, and presumably such requests would be made by the parents in the case of younger children, or by the child himself in the case of older children such as teenagers. All this appears from the evidence offered at the hearing by Fr. Bonnard.

The grievor was on duty with senior boys, ranging in age from 11 to 13, on Sunday, September 24, and he took them all to the chapel services. On Sunday, October 1, he was off, and on Sunday, October 8, he was again on duty with senior boys and brought them to services. The grievor himself was present at services although he is apparently not required to be present. In fact the grievor appears to be quite religious himself and has taken communion at these services on one or two occasions, although he is a Roman Catholic and the services are Anglican services. The grievor states that subsequently he preferred to go to Anglican or Catholic services in the town of La Tuque itself rather than at the chapel at the residence, because of the fact that the children were *obliged* to attend these services and he cannot accept any coercion with regard to religious observance. On Sunday, October 15, the first problem arose when Fr. Bonnard noticed that only about one-third of the boys under the grievor's charge were present at the Chapel. This began a series of discussions and arguments between the grievor and Fr. Bonnard in the course of which Fr. Bonnard kept reminding the grievor of his duties and expectations and the grievor kept enunciating his own views as to rights of the children to make their own decisions with regard to attendance at services, and the grievor's philosophy of religion and theological views. Of course Fr. Bonnard also gave considerable expression in these discussions to his own theological views

about the role of religion in the education of the children, and other matters. Fr. Bonnard continually explained to the grievor that he considered that there was a mandate from the parents to have the children attend services while the grievor felt that he could not accept that these students be obliged to attend religious services. There is no evidence whatsoever there has been any other objection to the attendance at services, and the policy of having the children attend services and not giving them a choice seems to arise from a tacit assumption, which has not been contradicted by any evidence, that the parents desire their children to attend services. Fr. Bonnard stated that if any one objected to the services the policy would immediately be changed in order to conform with parental wishes. In the case of the Mistassini Band there appears to be a school committee which allows the parents to participate formally in decision-making with regard to policy, and they have never made any comment which would indicate a desire for the policy to be changed. In the case of the Waswanipi Band, as already mentioned, the Chief appears to have made positive statements supporting the policy and stating that he has the support of the parents in this connection.

The students involved on October 15 were super senior boys ranging in age from 13 to 18 years, with an average age of 15. From the evidence it may be that the grievor had more difficulty in getting the super-seniors to go to chapel, or perhaps he simply felt that these boys could make personal decisions with regard to church attendance. In any event we have mentioned that on October 15, the majority of the super senior boys did not attend services, having apparently been told by the grievor simply that there was a service which they could attend if they wished. Fr. Bonnard had reminded the grievor of the history and traditions of the student residence, the views of the parents, the role of the church in the past, the duties and responsibilities of the Child Care Workers, etc., but the grievor continued to insist that he could not oblige students to attend services, as it was contrary to his conscience, and he felt that there were strong moral grounds for allowing children freedom of choice. It may even be that the grievor felt that the students should have the right of choice in other areas than religion, such as attendance at classes, etc. Obviously Fr. Bonnard could not accept this philosophy, and in his evidence at the hearing Fr. Bonnard mentioned that in his view attendance at services was very similar in many respects to other activities which the boys were more or less obliged to participate in, such as cleaning up, taking showers, etc., and that boys will often not wish to do many things for reasons which have nothing to do with religion. In Fr. Bonnard's view, any resentment that students may have felt with regard to attending services had nothing to do with religion but merely reflected the fact that they would have preferred to remain in bed or engage in other activities. Fr. Bonnard felt that the students got spiritual nourishment and substantial value from attendance at services, on the basis of his discussions with former students, whereas the grievor disagreed completely. Finally Fr. Bonnard told the grievor that the latter may have had a position which was entitled to respect but that the grievor was none the less expected to carry out the policies as he had on the previous Sundays when he had brought his children to the services.

On Sunday, October 22, the grievor was again in charge of the se-

nior boys and Fr. Bonnard noticed that a sizable number were missing at the chapel service. At the end of the service Fr. Bonnard had a talk with the grievor who again insisted that he coud not do what was expected of him, that he himself had no objection to attending services and even participating in communion but that he should not be forced to bring all of the children. At this point the grievor made what appears to he a reasonahle suggestion, namely, an exchange of duties with another Child Care Worker for the period of the Sunday service only, so that someone clse could perform these duties which he found objectionable and violations of his conscience. Fr. Bonnard stated that this was impracticable and unreasonable as it was part of the grievor's duties to bring the children to services and that it would mean calling in another Child Care Worker who was off on Sunday morning. Again Fr. Bonnard attempted to convince the grievor on theological and educational grounds, putting forward for example the argument that children of the ages involved needed substantial guidance and could not just be told that it was their free choice, etc. At this point the grievor stated that he might have to resign in the light of the situation and the discussion terminated. There had as yet been no discussion of any possible disciplinary action against the grievor.

On Monday, October 23, 1972, thc grievor approached Fr. Bonnard and told him that he would not modify his position in any way, but that he had changed his mind about resigning and would continue in his job. Fr. Bonnard mentioned that the grievor's stand left him little choice but to recommend termination of the grievor's employment, in the light of the grievor's attitude. On October 25, the grievor again confirmed his stand to Fr. Bonnard and was advised that steps would be taken to reject him on probation.

. . . . .

Subsequent to October 23, tlie machinery to terminate the grievor's appointment had of course already been put in motion. Further discussions occurred between the grievor and Fr. Bonnard in which the grievor took at times a more conciliatory attitude and at other times a harder line in which he absolutely refused to budge from what he considered to be a moral stance. On November 5, 1972, a Sunday, the grievor was suspended without pay for the balance of the day because he had refused to bring his group of boys to the chapel services that morning, and this was confirmed by letter of November 7, 1972, which has been filed as Exhibit 3. On November 6, 1972 Fr. Bonnard filed a further report with the Department in connection with events which had occurred subsequent to his previous report, this new addendum being filed as Exhibit 12. This second report to the Department by Fr. Bonnard reports on the grievor's attitude, his intention to fight any dismissal in the courts if necessary, the fact that the grievor had informed Fr. Bonnard on Sunday, November 5, that he would not attend the chapel service or take his boys there, although he would remind them that the service was taking place, etc. The grievor was suspended a second time for insubordination for refusal to take his boys to chapel on Sunday, November 12, only five out of twenty-four super senior boys under the grievor's jurisdiction being present at that service. The grievor was again suspended for the day of November 19, whcn he informed Fr. Bonnard before the service that he would not bring his boys to

> the service. On Sunday, November 26, the grievor was off duty and no disciplinary suspension was imposed; on Sunday, December 3, the grievor again advised Fr. Bonnard before the service that he would not be present in chapel with his group of boys and he was again suspended for the balance of the day. Of course the grievor had known since approximately November 10, 1972, that his employment would terminate on December 11, 1972, and all of these suspensions except the first occurred after his official notification of the termination of his employment; the first suspension occurred after he knew that the machinery had already been set in motion for termination of his employment. On Saturday, December 9, the grievor saw Fr. Bonnard and it was apparently agreed that since the grievor was not going to perform his duties on Sunday, December 10, with regard to chapel, and since his employment would terminate on the 11th, in any event, Fr. Bonnard had no objection to his leaving on that day and so the grievor departed from the student residence on Saturday, December 9, and did not return to work on December 10 or 11.

Having so found the facts, the adjudicator dealt with the applicant's grievance which was, in effect, that the applicant was justified in refusing to obey the order from his superior because it was illegal by reason of that part of the *Canadian Bill of Rights* that deals with freedom of religion.

With reference to the applicant's contention that his own right to religious freedom had been violated, the adjudicator found that it was not supported by the facts because he was merely required to bring the students under his control to religious services with no obligation himself to remain there. He had been disciplined "for his refusal to bring the students to services" and "not because he refused to participate in the services himself". With reference to the applicant's contention that it violated his conscience to carry out the order to bring the children to services because "on moral grounds he could not engage in an activity which he considered coercive in so far as the children were concerned", the adjudicator reasoned as follows:

> What he is really saying is, I suppose, that his religious beliefs prevent him from obliging someone to attend religious services against their will. As a matter of policy and principle, his position may be well founded, but I do not think there can be any question of a violation of the Bill of Rights or of his own right to freedom of religion. When the Bill of Rights speaks of freedom of religion, I do not think it is talking in terms of absolute freedom, which would clearly be inconsistent with the realities of life if it were carried to an extreme. If, for example, the grievor felt that his religious beliefs compelled him to physically coerce other persons to do certain things, this would not be protected by the federal Bill of Rights. Freedom of religion implies the freedom for the individual to worship as he pleases and to believe as he pleases, without any external coercive power being applied to oblige him to worship or

> believe in any way inconsistent with his own wishes. It also implies a freedom not to believe and not to worship if he so chooses. The evidence in the present case does not disclose that the grievor's right to worship or not to worship as he pleases, and to believe or not to believe as he pleases, has in any way been abrogated, abridged, or infringed upon. At most, he has been required to perform duties which he finds to be morally objectionable, and if he were right in arguing that this was an infringement of his religious rights under Canadian law, this would imply that any person who at any time was called upon to do something which he found morally objectionable, could refuse to do so and claim the protection of the Canadian Bill of Rights. I think this position is unfounded, and in certain instances an individual who stands on moral grounds may perhaps be required to assume the risks and consequences of his actions, and we may in fact admire him for so doing. On the other hand, he may well be in violation of the law. The law that is is not always the law that ought to be, and the law that ought to be is not the subject of a uniform consensus, but is perceived differently by every individual. Thus the moral law which the grievor may feel to be binding on him is not necessarily that which another individual would feel to be binding. In fact none of the other Child Care Workers at any time objected to bringing their charges to religious services on Sunday.

In connection with the position from the point of view of the children, the adjudicator dealt with the matter, in part, as follows:

> Let us now look at the argument that the religious freedom of the children under the grievor's care has in some way been infringed upon, abrogated, or abridged. There is no evidence to show any objections on religious grounds by either the students concerned or their parents. It is in evidence and uncontradicted that were any such objection made the administrator would grant an exemption from either religious instruction or attendance at religious services. In the absence of any such evidence, the reasons which impelled certain children not to attend services on certain days, when they were given this option by the grievor, are strictly a matter of conjecture. One can assume that a child who is given a choice of attending a class or not, playing baseball or not, taking a bath or not, etc., may very often decide not to do something rather than to do it, because he may have a more pleasant or desirable alternative in mind. I am inclined to the belief that this may well be the case with regard to many of these children who may prefer to engage in other activities at the time services are held, perhaps not on a regular basis, but on occasion. Is attendance at religious services then something which is left entirely to the will of the individual child, so that he can attend on one Sunday and not on another, depending on what mood he is in? If one does not grant this kind of freedom to the child in residence at the school, is the child being subjected to an infringement, abrogation or abridgement of his fundamental freedom of religion under the Canadian Bill of Rights? I think one must here distinguish between younger and older children. In the case of the seniors, for example, I would be inclined to think that perhaps it is the desires of the parents which would be taken into account as providing a better criterion than the desires of the child. It seems to me

that should any parent indicate the desire that a child not receive religious instruction or not attend religious services, then that desire should certainly be respected. If such a desire were not respected, then I think a violation of the Bill of Rights would have taken place. However, there is no evidence of any such situation in the present case.

. . . . .

There is no evidence of any request for exemption from attendance by any parent, and there is evidence that any such request would be honoured. I therefore conclude that there has been no abrogation, abridgement or infringement of the rights to religious freedom of these Indian children. With regard to the super seniors, the eldest of whom is 18, it could be argued that in this case the option should be given, not to the parents, but to the children themselves, along lines similar to those I have suggested above. But again we are confronted with the reality that, according to the evidence made at the hearing, no request for exemption has been made.

. . . . .

With regard to the Indian children concerned, there has been no evidence of coercion or any violation of their rights, as they certainly had the right to refuse to attend services, as stated by Fr. Bonnard at the hearing. In any event, if the rights of the children had been violated in some way, I believe I would lack jurisdiction to correct any such violation, and it would be necessary to go to some other forum; what I am seized of is simply the grievor's complaint that his dismissal was unjustified, that his refusal to obey orders was justified. I am not at all sure that even if the children's rights to freedom of religion had been violated, this would have entitled the grievor to refuse to obey the orders received, although I do believe that if the grievor's right to freedom of religion had been violated he would have had the right to disobey. In any event, as I have already stated, there is no proof that the rights of either the grievor or of the children to freedom of religion under the Canadian Bill of Rights have been violated in any way. Within the context of this institution, and in the light of its history, attendance at services on Sunday would appear to be a normal activity, somewhat like attendance at classes, etc., and I think the grievor would be wrong if he pretended, as it appears he may have done, that a child was free to refuse, not only to attend religious services, but also to attend classes, as the child must be given total freedom of choice in these matters.

The adjudicator found, therefore, that the "orders . . . were perfectly legal". He thereupon pronounced the following decision:

1. On the basis of the facts proved at the hearing and the exhibits filed, I find that the evidence discloses that in fact this matter is a disciplinary one concerning a discharge for insubordination and refusal to obey orders, and that therefore I have jurisdiction under section 91 of the Public Service Staff Relations Act.
2. The grievor is hereby required to file with the Registrar, within ten (10) days from being informed of the present decision, a written undertaking to comply with orders received from Fr.

Bonnard in the future with regard to bringing the children under his care to religious services on Sunday morning. It is understood that such an undertaking does not require the grievor himself to attend such services if he does not wish to do so on religious grounds, but if so he should request exemption from the duty of attending services. It is also understood that he is not obliged to apply any coercive measures to those who do not wish to attend services and that such problems should be dealt with by the administrator.

3. Should the grievor provide the aforesaid undertaking within the delay just mentioned, I hereby order his reinstatement in his former position at the La Tuque residence within ten (10) days of the date such undertaking is received by the Registrar. His discharge would in such case be reduced to a suspension without pay to terminate on the date of such reinstatement.
4. Should such undertaking not be given by the grievor within the delay aforementioned, then the discharge shall stand and the grievance is dismissed.
5. I shall remain seized of the present case in order to make any modifications of this decision or issue any further orders which may be required or desirable in order to give effect to the intent and purposes of the present decision.

By a document dated May 30, 1974, entitled "Statement of Questions of Law and Jurisdiction and Representations in Relation thereto" the applicant purported to make a reference to the Public Service Staff Relations Board under s. 23 of the *Public Service Staff Relations Act*. Section 23 reads as follows:

> 23. Where any question of law or jurisdiction arises in connection with a matter that has been referred to the Arbitration Tribunal or to an adjudicator pursuant to this Act, the Arbitration Tribunal or adjudicator, as the case may be, or either of the parties may refer the question to the Board for hearing or determination in accordance with any regulations made by the Board in respect thereof, but the referral of any such question to the Board shall not operate to suspend any proceedings in connection with that matter unless the Arbitration Tribunal or adjudicator, as the case may be, determines that the nature of the question warrants a suspension of the proceedings or unless the Board directs the suspension thereof.

On November 7, 1973, the Public Service Staff Relations Board delivered "Reasons for Decision".

The following paragraphs from the Board's reasons indicate the matters that were put before it for decision:

> 9. Following the issuance of the decision of the adjudicator, the aggrieved employee failed to comply with the conditions of his reinstatement and subsequently made the instant reference to the Board. In his reference, the aggrieved employee alleges *inter alia* that the adjudicator erred in law in finding that the requirement that the Indian children concerned attend chapel services on Sunday morning was not an infringement of their religious freedom contrary to the

Canadian Bill of Rights. He further alleges that the adjudicator erred in law and acted in excess of his jurisdiction in holding that the aggrieved employee was under any legal obligation to carry out the order of Fr. Bonnard to bring the children to the services and in failing to reinstate the aggrieved employee unconditionally in his employment with full back pay for all the time lost by him as a result of his discharge and preceding suspensions imposed on him by Fr. Bonnard for refusing to bring the children to chapel.

10. The Employer submits that the reference must be dismissed on the grounds that the adjudicator did not have jurisdiction to entertain the grievance, or in the alternative, if he is found to have had jurisdiction, he did not err in law in the manner alleged by the aggrieved employee in this reference.

The Board rejected the objection to the adjudicator's jurisdiction and then disposed of the matter on the merits as follows:

38. Counsel for the aggrieved employee based his allegation that the evidence in certain instances did not support the adjudicator's findings of fact on certain correspondence that was filed as exhibits at the hearing before the adjudicator. Counsel, however, admitted that he had no knowledge or record of any kind as to the *viva voce* evidence given by the aggrieved employee or Fr. Bonnard, who according to the adjudicator's decision were the only two persons who testified in the proceeding before him with respect to the documents. Let us assume, for purposes of argument only, that in a reference under section 23 of the Public Service Staff Relations Act, the Board has the authority to question or review the findings of fact made by an adjudicator. Clearly in circumstances such as the instant case where there is no record upon which the Board can place reliance, indeed no record at all other than hearsay, as to the *viva voce* testimony which was given with respect to the correspondence by both the aggrieved employee and Fr. Bonnard, the Board cannot do other than accept the interpretation placed upon it by the adjudicator. The Board accordingly accepts at face value the findings of fact made by the adjudicator in his decision.

39. Having considered the representations of counsel, we agree with the position of the Employer that in the instant reference to the adjudicator, he was not called upon to make any determination as to whether there had been an infringement on the religious freedom of the Indian children in the charge of the aggrieved employee or their parents or any other employee of the residence as none of them were parties to the proceedings. This Board, therefore, is not called upon in the instant reference to make any determination as to whether there has been an infringement on the religious freedom of the children concerned, their parents, or any other employee of the residence.

40. With regard to the aggrieved employee, we are satisfied that the adjudicator did not err in law, based on his findings of fact, in determining that the order given to him by his superior, Fr. Bonnard, was legal and that the order in no way abridged, abrogated or infringed on the aggrieved employee's personal religious freedom.

This s. 28 application is an application to set aside the aforesaid decision of the Public Service Staff Relations Board.

With reference to the question as to whether the Board erred in law in deciding that the adjudicator did not err on the merits, the relevant provisions of the *Canadian Bill of Rights* are:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist ... the following human rights and fundamental freedoms, namely,
>
> (*c*) freedom of religion;
>
> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared ...

The basis of the applicant's contention, which I am prepared to accept at least for the purpose of this s. 28 application, is that the La Tuque Student Residence is operated under statutory authority which must be so construed and applied, by virtue of the *Canadian Bill of Rights*, "as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement" of "freedom of religion". What this means, as I understand it, as far as this application is concerned, is that nothing in the statute and nothing done under authority of the statute can affect "the liberty of religious thought and practice of any citizen" or in any way curtail "untrammelled affirmations of religious belief and its propagation": see *Robertson and Rosetanni v. The Queen* (1963), 41 D.L.R. (2d) 485, [1964] 1 C.C.C. 1, [1963] S.C.R. 651. On that view of the law, the conclusion of the Board as to the correctness of the adjudicator's view is, in my opinion, not open to attack and nothing is to be gained by attempting to improve on the adjudicator's treatment of the matter.

The only propositions seriously put forward in this Court, as I understood counsel for the applicant, were, in effect,

(a) that the holding of denominational services in a residence operated by the federal Government was, in itself, illegal, and

(b) in any event, it was an infringement on the freedom of religion of a child to require him to attend such a service.

The first proposition was not supported otherwise than by reference to the authorities referred to in the *Robertson and Rosetanni* case, *supra*. I have not been able to find any basis in law for it. Ordinarily, one would not expect to find the State

financing or operating religious services in a country such as Canada. However, there are obvious exceptions such as services in the armed forces and penal institutions and I do not find it difficult to conceive of a rational reason for continuing such activities when the Government takes over a system of residences for Indian students operated by several different religious denominations as apparently occurred here. If such residences have been operated on the basis that they will supply their inhabitants with religious and spiritual guidance and teaching one would not expect too radical a change made suddenly on the occasion of a Government take-over.

With reference to the submission made by the applicant that it was an infringement on the freedom of religion of a child to require him to attend a denominational service, I am of opinion that this would only be so if such a requirement would be contrary to his religious beliefs or views as put forward by the child himself, if he were old enough, or by his parents or guardian on his behalf. There was no claim that there was in fact any such situation here and the onus of making out his case before the adjudicator was on the applicant.

With reference to the objection to the adjudicator's jurisdiction in this case, in my view, it could only have succeeded if, as a matter of law, on the material before us, it appeared that the applicant was not dismissed but was rejected under s. 5 of the *Indian School Residence Administrators and Child Care Workers Employment Regulations*, which read as follows:

> 5(1) A person who has been appointed to the position of residence administrator or child care worker is on probation for a period of twelve months from the date of his appointment.
>
> (2) The deputy head may, at any time during the probation period, give notice to a person that he intends to reject that person for cause on the day stated in the notice, which day shall not be less than thirty days from the date of the giving of the notice and, that person ceases to be an employee on that day.

While the question is not free from doubt on the material in this case, I am not prepared to disagree with the conclusion of the adjudicator and of the Board that there was a dismissal. In coming to that conclusion, I do not wish to be taken as expressing an opinion that, where there has been, in fact, a rejection under s. 5 or under s. 28 of the *Public Service Employment Act*, R.S.C. 1970, c. P-32, it can be classified as a dismissal in order to create jurisdiction under s. 91 of the *Public Service Staff Relations Act*. Insubordination during a probationary period might well be "cause" for rejection, either of itself or taken with other matters, just as it might be ground

for disciplinary action even during a probationary period. There should, however, be no room for doubt, if the matter is handled as it should be handled, as to which action has been taken. In this case, while there are references to rejection, I cannot find fault with the adjudicator's finding that, on balance, the applicant was really dismissed for insubordination.

MACKAY, D.J.:—I agree with the reasons and conclusions of my Lord the Chief Justice.

SWEET, D.J.:—I wish to add some comments of my own on submissions of counsel for the applicant in connection with the right to freedom of religion.

Facts applicable to the matters in respect of which I comment follow.

The applicant was a child case worker employed by or through the Department of Indian Affairs for a residence for Indian students at La Tuque, Quebec. The residence was at the relevant time a Canadian Government institution. The applicant's immediate superior was the administrator of the residence, the Reverend Jean-Maurice Bonnard, an Anglican priest.

Religious services were conducted at the residence on Sundays. It would appear that the order and nature of the services were the Anglican. They were the only religious services available at the residence.

In connection with those services there are the following in the decision of the adjudicator:

> The situation is thus one in which services appear to be accepted by the Administrator, by the parents, by all the other Child Care Workers except the grievor, and by the children, as part of the regular routine, which they attend as a matter of course. The degree of compulsion involved seems to be that attendance on the part of the children at least is expected unless a request for formal exemption from the attendance at service is made, and presumably such requests would be made by the parents in the case of younger children, or by the child himself in the case of older children such as teenagers.

and

> Fr. Bonnard stated that if any one objected to the services the policy would immediately be changed in order to conform with parental wishes.

The applicant informed Fr. Bonnard that he could not oblige students to attend services as it was contrary to his conscience. Fr. Bonnard insisted that it was the applicant's duty to bring students under his care to the services. Ultimately, the applicant informed Fr. Bonnard that he would not modify his position in any way.

A letter dated November 10, 1972, from A. Blouin, District Superintendent, Indian & Eskimo Affairs, Pointe-Bleue District, to the applicant contains:

> As your supervisor and the resident administrator have reported that you have failed at many occasions, to carry out duties, which were part of your job, we advise you that your appointment in your present position, will terminate on December 11, 1972.

The following are extracts from the "Memorandum of the points to be argued by the applicant":

> By reason of the residences for Indian students (and La Tuque in particular) becoming federal governmental residences, then federal governmental funds cannot be used to push religion or religious practices upon Indian children and, in particular, such funds cannot be used to require conformity by Indian children to the practices of one particular denomination, namely, the Anglican Church. The La Tuque residence is a federal government residence and no longer an Anglican institution. Consequently, the requirement of Chapel attendance at an Anglican service is unlawful; the requirement that Fardella bring all his children there is unlawful; and the refusal to obey an unlawful order cannot therefore be grounds for dismissal.

and

> The applicant stated that he would attempt to persuade the boys to attend but would not oblige or require them to attend on a compulsory basis. He was ordered so to do and was dismissed for refusal to obey this order. This was both an infringement on the freedom of religion of the boys in the care of the Applicant and also contrary to the conscience and belief of the Applicant which was a belief justly and properly held and communicated to the Administrator. The Applicant should not be compelled to carry out an order which he conscientiously believed to infringe on his own beliefs as to everyone's freedom of religion in Canada and which he conscientiously believed to infringe on the freedom of religion of the Indian resident boys and which in fact so infringed.

The applicant's counsel referred to s. 1 of the *Canadian Bill of Rights*:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (c) freedom of religion;

It is a commonplace that the right of everyone in this nation to freedom of religion is part of this nation's law.

In *Saumur v. City of Quebec and A.-G. Que.*, [1953] 4 D.L.R. 641 at p. 668, 106 C.C.C. 289, [1953] 2 S.C.R. 299, Rand, J., put it this way:

> From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an es-

tablished church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.

In *Robertson and Rosetanni v. The Queen* (1963), 41 D.L.R. (2d) 485 at p. 492, [1964] 1 C.C.C. 1, [1963] S.C.R. 651, Ritchie, J., delivering the judgment of Taschereau, Fauteux, Abbott and Ritchie, JJ., referred to "the following observations of Taschereau, J., as he then was, speaking for himself and Kerwin, C.J.C., and Estey, J., in *Chaput v. Romain*, 1 D.L.R. (2d) 241 at p. 246, 114 C.C.C. 170 at p. 175, [1955] S.C.R. 834 at p. 840 . . . :

"All religions are on an equal footing, and Catholics as well as Protestants, Jews, and other adherents to various religious denominations, enjoy the most complete liberty of thought. The conscience of each is a personal matter and the concern of nobody else."

However, the caution of Ritchie, J., in *Robertson and Rosetanni* is to be borne in mind, namely:

It is to be remembered that the human rights and fundamental freedoms recognized by the Courts of Canada before the enactment of the *Bill of Rights* and guaranteed by that statute were the rights and freedoms of men living together in an organized society subject to a rational, developed and civilized system of law which imposed limitations on the absolute liberty of the individual.

In the same case Ritchie, J., also said [at p. 493]:

Although there are many differences between the constitution of this country and that of the United States of America, I would adopt the following sentences from the dissenting judgment of Frankfurter, J., in *Board of Education et al. v. Barnette*, 319 U.S. 624 at p. 653, as directly applicable to the "freedom of religion" existing in this country both before and after the enactment of the *Bill of Rights*:

"The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."

Freedom of religion is a part of the mores of this nation. It is a vital and cherished ingredient of our culture. However, its concept and its actuality would be ill-served without an understanding of its meaning and its range.

It is against that background, so briefly sketched, that this case falls for decision.

As I understand the main submissions of counsel for the applicant related to the *Canadian Bill of Rights*, as developed in oral argument, they may be summarized as follows:

1. If an employee conscientiously believes that an order of

his employer abrogates, abridges or infringes upon the freedom of religion of himself or of another he may, with impunity, refuse to carry out that order and without being subject to discharge from his employment because of such refusal.

2. It is unlawful to conduct or cause to be conducted or permit to be conducted in any Canadian Government institution a religious service conforming exclusively with the beliefs and practices of one religious denomination without, at least, also providing religious services in conformity with the beliefs and practices of the religion or religions of all in that institution who are of a different religious persuasion.

3. It is unlawful to issue an order to an employee working in a Canadian Government institution directing that employee to require others to attend a religious service and if such an order is given it may be refused with impunity.

Those submissions will be referred to by their respective numbers above.

1. In my opinion if an employer's order to an employee does abrogate, abridge or infringe upon the religious freedom of the employee or of another within the meaning of "freedom of religion" in the *Canadian Bill of Rights* the order would be unlawful and the employee could, with impunity, refuse to obey it. Such a refusal would not be a valid ground for discharging the employee from his employment. That, of course, is something quite different from counsel's submission.

The determining factor is not what the employee believes, however conscientiously, freedom of religion to be. The determining factor is what freedom of religion indeed is within the meaning of the *Canadian Bill of Rights*. Otherwise an employee could, and based solely on his own belief, make unilateral decisions which would be binding on his employer.

If it were left to each individual to decide for himself what freedom of religion is there could be so many points of view that the result could be chaos. In such resulting chaos the existence of freedom of religion could be threatened. It might even be destroyed.

It must have been the intention of Parliament that the "freedom of religion" guaranteed by the *Canadian Bill of Rights* is to be untrammelled and unfettered, that it is not to be confined by rigid rules, that in concept it is to be sufficiently flexible so that all will benefit from it and that to achieve those ends it is to be construed broadly. However, it must also have been intended that its interpretation be or-

derly. Its interpretation could not be orderly if each individual were to be his own interpreter.

If an employee refuses to follow his employer's order because he believes it contravenes the right to freedom of religion and if the employee is correct in that belief the order, being then unlawful, is not enforceable. If the employee refuses to comply with it he may then do so with impunity. If the employee is not correct in that belief and refuses to obey it he runs the risk of the result of disobedience of an employer's order properly given.

2. If it were unlawful to conduct the religious service at the residence under the circumstances here then, in my opinion, the order that the applicant bring children to the service would have been unlawful and the applicant would have been entitled to refuse to comply with it.

To support his argument that it was unlawful to hold the service the applicant's counsel referred to *Robertson and Rosetanni v. The Queen, supra,* and *R. v. Drybones* (1969), 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, [1970] S.C.R. 282.

Certainly *Robertson and Rosetanni* makes it clear beyond peradventure that everyone is free to practice his own religion and to worship if he wishes and as he wishes. It is made clear, too, that no person is required or obliged in any way to follow or practice or to worship in accordance with another's religion. To this all are entitled by right and not only by grace.

On the other hand as I read *Robertson and Rosetanni* there is no finding in it that it is unlawful for a religious service exclusive to one religious denomination to be held in a Canadian Government institution or for it to be financed with public funds.

If Parliament wishes to extend "freedom of religion" to areas beyond those which it now occupies it is for Parliament to do it.

Although *Robertson and Rosetanni* is referred to in *Drybones* the issue in *Drybones* was the right of the individual to equality before the law within the meaning of the *Canadian Bill of Rights.*

3. Every case must, of course, be decided in accordance with the applicable law. Each case of the same nature as this is to be decided on its own facts.

From the available material it appears that there was something in the nature of evidence that it was the wish of the parents of most children in residence that there be the religious service which was conducted and that the children attend that service.

There is also the factor that the residence had previously been a project of the Anglican Church and that Anglican religious services were conducted there. It would seem probable that parents of children in residence would know that and would know that an Anglican Church service was still being conducted there.

The applicant did not object to attending the service. He had attended willingly and participated.

There is the evidence of Fr. Bonnard to the effect that if any one objected to the services the policy would immediately be changed in order to conform with parental wishes.

Quoting from the adjudicator's decision:

> There is no evidence to show any objections on religious grounds by either the students concerned or their parents.

and

> In the case of the seniors, for example, I would be inclined to think that perhaps it is the desires of the parents which would be taken into account as providing a better criterion than the desires of the child. It seems to me that should any parent indicate the desire that a child not receive religious instruction or not attend religious services, then that desire should certainly be respected.
>
> . . . . .
>
> If such a desire were not respected, then I think a violation of the Bill of Rights would have taken place. However, there is no evidence of any such situation in the present case.

and

> There is no evidence of any request for exemption from attendance by any parent, and there is evidence that any such request would be honoured.

On the situation as disclosed in the material made available on this application it is my opinion that the adjudicator was not in error in the result when he concluded that the applicant was "in error in trying to characterise the orders received as a violation of his rights to religious liberty or the rights of the children under his control, under the Canadian Bill of Rights."

I would dismiss the application.

Application dismissed.

[BRANT COUNTY COURT]

Re Froman

FANJOY, Co.Ct.J. 15TH FEBRUARY 1973.

Civil rights — Equality before the law — Indians — Entitlement of illegitimate children of Indian parents to be registered as Indians — Whether illegitimate children of female persons treated differently from illegitimate children of male persons — Whether discrimination on basis of sex of parents of children — Indian Act (Can.), ss. 11(1)(c), (d), (e), 12 — Canadian Bill of Rights, s. 1(b).

Indians — Registration — Entitlement of illegitimate children of Indian parents to be registered as Indians — Whether illegitimate children of female persons treated differently from illegitimate children of male persons — Whether discrimination on basis of sex of parents of children — Indian Act (Can.), ss. 11(1)(c), (d), (e), 12 — Canadian Bill of Rights, s. 1(b).

Section 11(1)(*c*) of the *Indian Act*, R.S.C. 1970, c. I-6, providing that a male person who is a direct descendant in the male line of a male person described in para. (*a*) or (*b*) is entitled to be registered as an Indian does not include an illegitimate child of a male person. Consequently, except in so far as by s. 12(2) of the Act the registration of the name of an illegitimate child of a female person may be removed if, upon protest, it is determined that the father of the child is not an Indian, illegitimate children of male persons are not treated differently from illegitimate children of female persons and there is no discrimination by reason of the sex of the Indian parents of the child in question. Further, s. 12(2) providing for protest does not discriminate on the basis of sex. The availability of the protest procedure with respect to paternity (and not with respect to maternity) recognizes the fact that, while maternity is always identifiable, paternity has a degree of uncertainty and since, in the normal course of events, when a non-Indian mother bore an illegitimate child, the question of the registration of that child under the *Indian Act* would not arise, no provision was made in the Act for the protesting of such registration.

[*Re Makein*, [1955] 1 All E.R. 57; *Sydall v. Castings Ltd.*, [1967] 1 Q.B. 302, apld; *Re Lavell and A.-G. Can.* (1971), 22 D.L.R. (3d) 188, [1971] F.C. 347; *Bedard v. Isaac et al.*, [1972] 2 O.R. 391, 25 D.L.R. (3d) 551, refd to]

REVIEW of a decision of the Registrar under the *Indian Act* (Can.).

M. B. Daboll, for Children's Aid Society.
B. H. Kellock, for Six Nations Band Council.
C. D. Wilson, for Mary Gilchrist.
E. A. Bowie, for Attorney-General of Canada.

FANJOY, Co.Ct.J.:—This matter comes before me as a review of the decision of the Registrar pursuant to s. 9(3) of the *Indian Act*, R.S.C. 1970, c. I-6, on the request of the Six Nations Band Council. The Registrar, in his decision, con-

cluded that he was not satisfied that David Froman, born on January 12, 1970, to Ruth Ann Froman was of non-Indian paternity and, accordingly, declared him to be entitled to be registered in the Upper Mohawk Nations Band. At the conclusion of the review, I indicated that the issue on the law merited careful study and consideration and accordingly reserved my decision. Counsel suggested that the decision might be delayed pending the results of an appeal to the Supreme Court of Canada on *Bedard v. Isaac et al.* referred to hereafter. However, it would appear that the issue in the *Bedard* case is not similar to that in the instant matter and in any event the parties are entitled to a decision without further delay.

The facts are straightforward. Ruth Ann Froman was an unmarried Indian. She gave birth to David Froman, hereafter referred to as the "child". The simple factual question is whether the father of the child is an Indian or a non-Indian. The burden of proof as set out in s. 9(6) of the Act rests on the Six Nations Band Council of establishing that the Registrar is erroneous in his decision.

The Registrar made his decision solely on the basis of documentary evidence. At the hearing I had the benefit not only of this evidence but of oral evidence as well. The mother of the child, Ruth Ann Froman, testified that one William Gilchrist was the father. She stated that she had had sexual intercourse with no person other than William Gilchrist for a period of one year prior to the birth of the child and that the pregnancy was of normal duration. Mrs. Margaret Yake, the sister of Ruth Ann Froman, at whose home Ruth Ann Froman was living for approximately two years prior to the birth of the child, corroborated the evidence of Ruth Ann Froman. She stated that the said William Gilchrist was "going with" Ruth Ann Froman during the relevant period of time and after the birth of the baby and to her knowledge was "going with" no one else. She stated that if her sister had gone out with another man or other men, she would have known. Furthermore, she testified that shortly after the birth of the child, when Miss Froman returned from the hospital to the Yake home, William Gilchrist came to her house and acknowledged paternity. When he was informed that Miss Froman planned to have the child adopted, he expressed some unhappiness with the decision and referred to the child as "his child".

There is no question that William Gilchrist was not an Indian. I accept the evidence not only of Miss Froman but of her sister, Mrs. Yake, who impressed me as a truthful, reliable and very careful witness. I have no difficulty whatsoever in

finding on the evidence that the father of David Froman is William Gilchrist who is not an Indian.

However, the matter does not rest there. Counsel for the Children's Aid Society submitted that the *Indian Act* deprives an illegitimate child of a female Indian band member of his registration right and does not effect a similar result with respect to the illegitimate child of a male Indian band member. He argues that as a result such illegitimate child of a female does not have equality before the law and that the sections of the *Indian Act* which effect this result are inoperative under the provisions of the *Canadian Bill of Rights*.

Counsel's specific argument is that by the provisions of s. 11(*c*) and (*d*) of the *Indian Act*, a male person, whether legitimate or illegitimate, who is a direct descendant of a male band member is entitled to be registered on the band list and there is no further provision in the *Indian Act* for protests of such registration and for removal of that person's name from the band list.

He points out further that pursuant to s. 11(*e*) of the *Indian Act*, the illegitimate child of a female band member is in the first instance entitled to be registered on the band list. However, pursuant to s. 12(2), the addition of the name of that illegitimate child to the band list may be protested and, if it is decided that the father of the child is not an Indian, the child is not entitled to be registered. He argues, therefore, that the effect of the legislation is to discriminate within a class (Indians) by reason of the sex of the Indian parent of the child in question; that such discrimination leads to inequality before the law with the consequent comparable loss of property and other rights to the illegitimate child of a female band member.

He suggests that the *Lavell* and *Bedard* decisions (referred to hereafter) which declare s. 12(1)(*b*) of the *Indian Act* inoperative because it prescribes a different result with respect to the rights of an Indian woman who marries a person other than an Indian or an Indian from another band from that which is to obtain when a male Indian marries a person other than an Indian or an Indian who is a member of another band, support the proposition put forth in his argument concerning illegitimate children. He suggests further that the Indian adult who chooses to marry within or without the band exercises a certain amount of freedom of choice, whereas on the other hand an illegitimate child whose Indian parent is either male or female faces a situation entirely beyond his own control.

Both the Attorney-General of Canada and the Attorney-General of Ontario were served with notice by Mr. Daboll of his submissions and the Attorney-General of Canada was represented at the hearing.

In the light of this submission, it is necessary to carefully examine both the *Indian Act* and the *Canadian Bill of Rights*, as well as the decisions referred to by counsel for the Children's Aid Society. Sections 11 and 12 of the *Indian Act* read as follows:

> 11(1) Subject to Section 12, a person is entitled to be registered if that person
>
> (*a*) on the 26th day of May 1874 was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;
>
> (*b*) is a member of a band
>
> (i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or
>
> (ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;
>
> (*c*) *is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b)*;
>
> (*d*) *is the legitimate child of*
>
> (i) *a male person described in paragraph (a) or (b)*, or
>
> (ii) *a person described in paragraph (c)*;
>
> (*e*) *is the illegitimate child of a female person described in paragraph (a), (b), or (d)*; or
>
> (*f*) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (*a*), (*b*), (*c*), (*d*) or (*e*).
>
> (2) Paragraph (1)(*e*) applies only to persons born after the 13th day of August 1956.
>
> 12(1) The following persons are not entitled to be registered, namely,
>
> (*a*) a person who
>
> (i) has received or has been allotted half-breed lands or money scrip,
>
> (ii) is a descendant of a person described in subparagraph (i),
>
> (iii) is enfranchised, or
>
> (iv) is a person born of a marriage entered into after the 4th day of September 1951 and has attained the age

of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(*a*), (*b*) or (*d*) or entitled to be registered by virtue of paragraph 11(1)(*e*), unless, being a woman, that person is the wife or widow of a person described in section 11, and

(*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

(2) *The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.*

(3) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

(4) Subparagraphs (1)(*a*)(i) and (ii) do not apply to a person who

(*a*) pursuant to this Act is registered as an Indian on the 13th day of August 1958, or

(*b*) is a descendant of a person described in paragraph (*a*) of this subsection.

(5) Subsection (2) applies only to persons born after the 13th day of August 1956.

(I have italicized the subsections with which we are particularly concerned.)

The relevant sections of the *Canadian Bill of Rights* are as follows:

1. *It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of* race, national origin, colour, religion or *sex*, the following human rights and fundamental freedoms, namely,

(*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(*b*) *the right of the individual to equality before the law and the protection of the law*;

(*c*) freedom of religion;

(*d*) freedom of speech;

(*e*) freedom of assembly and association; and

(*f*) freedom of the press.

2. *Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared,* and in particular, no law of Canada shall be construed or applied so as to

(*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;

(*c*) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(*g*) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

I have been referred to the following cases: *R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355; *Re Lavell and A.-G. Can.* (1971), 22 D.L.R. (3d) 188, [1971] F.C. 347, and *Bedard v. Isaac et al.*, [1972] 2 O.R. 391, 25 D.L.R. (3d) 551. For convenience I will refer to these decisions as *Drybones, Lavell and Bedard* respectively.

In all of these decisions the respective Courts found that because of discrimination, particular sections of the *Indian Act* were inoperative. In the *Drybones* case the discrimination was between the rights of Drybones as an Indian to whom the *Indian Act* applied and those of other Canadians.

In the *Lavell* case the discrimination was one where it was found that the consequences of a marriage of an Indian woman to a person who was not an Indian were worse than for males marrying non-Indians. The *Bedard* decision was on a similar principle to that of *Lavell*. In all three decisions certain sections of the *Indian Act* were declared to be inoperative. Mr. Daboll does not argue that the entire *Indian Act* is inoperative and in none of these decisions do I find any dicta which would lead to such a conclusion.

In the instant case the question is a different one. Obviously, the sex of the child whose registration privileges are under question has no bearing on the child's status. If the child had been female, the result would be no different. The alleged discrimination could only arise with respect to the sex of the parent. The question must, therefore, be considered and examined as to whether there is actual discrimination with respect to the parent.

Does s. 11(1) (*c*) include an illegitimate child of a male person? If it does, there is obviously discrimination of the basis of sex, since the result would be that no right of protest would exist in the event that the mother of the illegitimate child was a non-Indian.

It becomes necessary to determine the meaning of the word "descendant". The word "descendant" has been continually interpreted as referring only to legitimate issue. This interpretation has continued to the present day, as indicated in the more recent English authorities, *Re Makein*, [1955] 1 All E.R. 57, and *Sydall v. Castings Ltd.*, [1967] 1 Q.B. 302.

In my opinion, s. 11(1) (*c*) has reference only to male legitimate children. It therefore follows that there is no difference under the *Indian Act* between an illegitimate child of a male Indian and an illegitimate child of a female Indian when the other parent is a non-Indian, subject, of course, to the fact that there is the right of protest contained in s. 12(2) of the Act which applies only to the illegitimate child of a female person and has no application to the illegitimate child of a male person.

I now pass to the question whether this right of protest leads to inequality under the law in that it discriminates against the illegitimate child of a female person.

The general scheme of the *Indian Act* must be considered. One of its general objects is to preserve Indian reservations and benefits to Indians and to no one else. I would go so far as to state that these rights are intended to be confined to full-blooded Indians. This proud and dignified race is thus given some opportunity to retain its identity and culture in the face of the onslaught by an alien society on its way of life.

In my opinion, the provision for protest contained in s. 12(2) is not discrimination on the basis of sex. The fact that the protest procedure is available with respect to paternity and not with respect to maternity is simply recognition of the facts of life. Maternity is always identifiable. Paternity always has a degree of uncertainty, even for legitimate issue. No Legislature can change the fundamental biological dif-

ferences between men and women. These differences as they affect children have been recognized through the centuries by the common law and in recent years by child welfare legislation in all the Provinces of Canada.

In the normal course of events, when a non-Indian mother bore an illegitimate child, the question of the registration of that child under the *Indian Act* would not arise. Accordingly, no provision was made in the Act for the protesting of such registration. I, therefore, conclude that s. 12(2) of the *Indian Act* is not inoperative in the face of the *Canadian Bill of Rights*.

I, therefore, find that the infant, David Froman, is not entitled to have his name included in the Indian Register under the provisions of the *Indian Act*, because his father was not an Indian.

Order accordingly.

[COURT OF APPEAL]

Regina v. Caccamo and Caccamo

GALE, C.J.O., McGILLIVRAY AND ARNUP, JJ.A. 26TH JANUARY 1973.

Criminal law — Possession of counterfeit money — Sufficiency of evidence — Whether Crown must prove knowledge by accused that money counterfeit in absence of explanation by accused for possession — Cr. Code, ss. 3(4), 408.

On a charge of possession of counterfeit money it is not encumbent upon the Crown to prove in the first instance that the accused knew the money was counterfeit, but merely that the money was in fact counterfeit and the accused had it in his possession to his knowledge. It is then encumbent upon the accused to give an explanation for that possession. While the explanation may be in the form of a statement by the accused tendered into evidence by the Crown, a ludicrous explanation can be rejected by the trial Judge notwithstanding that he accepts other portions of the statement.

[*Beaver v. The Queen*, [1957] S.C.R. 531, 118 C.C.C. 129, 26 C.R. 193, distd]

Criminal law — Trial — Duty of Crown counsel to disclose evidence to defence before trial — Failure of Crown to disclose evidence not affecting validity of trial.

Criminal law — Offensive weapons — Possession of weapon for dangerous purpose — Proof of dangerous purpose — Crown introducing allegedly secret document indicating membership in Mafia — Expert witnesses called by Crown to establish authenticity and meaning of document — Document relevant and admissible and prima facie evidence

THE QUEEN v. HOWSON.

Indian Act—Halfbreed—Meaning of "Indian."

The Indian Act R. S. (1886) c. 43, defines (s. 2 *h*) "Indian" as meaning *inter alia* "any male person of Indian blood reputed to belong to a particular band."

Held, (1) Against the contention that "of Indian blood" means of full Indian blood, or at least of Indian blood *Ex parte paterna*—that a half breed of Indian blood *Ex parte materna* is "of Indian blood."

(2) Against the contention that the defendant having been shown to have *actually* belonged to a particular band, this disproved, or was insufficient to prove, that he was *reputed* to belong thereto—that the intention of the Act is to make proof of mere repute sufficient evidence of *actual* membership in the band.

(3) Against the contention that by virtue of s. 11 the mother of the defendant by her marriage to his father, who was a white man, ceased to be an Indian, and that therefore the defendant was not a person of Indian blood—that while the mother lost her character of an Indian by such marriage, except as stated in that section, it did not affect her blood which she transmitted to her son.

[*Court in banc, June 13th, 1894.*

Statement.

This was a case stated for the opinion of the Court *in banc* by Justices of the Peace, who had convicted defendant under section 94 of the Indian Act for selling liquor to an Indian. From the evidence it appeared that the person to whom the liquor was sold was not an Indian of pure blood, being the son of a Frenchman by an Indian mother, but he was a member of a band of Indians and was living on a reserve and sharing in the Indian Treaty payments.

N. F. Davin, Q.C., and *T. C. Johnstone*, for the defendant.

D. L. Scott, Q.C., for the Crown.

[*June 13th, 1894.*]

WETMORE, J.—The defendant was convicted under R. S. C. c. 43, s. 94, of selling an intoxicant to an Indian, a case was signed and stated to this Court by the convicting Justices.

The only question submitted by such a case is whether the person to whom the intoxicant was sold was an Indian

Judgment.
Wetmore, J.

within the meaning of the Act. This person goes by the name of Henry Bear. The evidence shows that he is a half-breed, his father having been a Frenchman and his mother an Indian, that he belongs to and is a member of Mus-cow-e-quan's Band of Indians and lives on his reserve and has taken treaty-money for a number of years past since a period before the railway came into the Territories. The only question raised by the defence was that Bear being a half-breed was not an Indian within the meaning of the Act,

1st. Because he was a half-breed.

2nd. Because the evidence showed that he actually belonged to the band, not that he was "reputed to belong thereto."

Section 2 paragraph (*h*) defines what the expression "Indian" means when used in the Act unless the context requires a different meaning to be given to the word.

I can find nothing in the context of section 94 which requires a different meaning to be given to the word from that provided in section 2.

Now paragraph (*h*) defines the expression "Indian" shall mean "any male person of Indian blood reputed to belong to a particular band." Paragraph (*d*) of the same section provides what the expression "band" when used in the Act shall mean.

The evidence shows that Bear belongs to a band as so defined. But it is urged that where in paragraph (*h*) the words "any male person of Indian blood" are used they mean any person of full Indian blood, or failing that, that the blood of the father, is to govern, and therefore that Bear's father, having been a white man, Bear is not an Indian. A number of sections of the Act were cited with a view to showing that it was not the intention of the Legislature that a half-breed was to be embraced by the expression "Indian" as defined in paragraph (*h*). I am however of opinion that by every rule of construction that can be applied to the expression as so defined "half-breeds" were intended to be included in it if they fitted the definitions.

concert" to do certain specified things is guilty of a misdemeanor. That section is so framed because admittedly there are half-breeds who would not be embraced by the term "Indian" or "Non-Treaty Indian," as defined by the Act. For instance, a half-breed who was not "reputed to belong to a particular band," would not be an Indian within the meaning of the Act. Nor would a half-breed, who did not belong to an "irregular band" as defined in the Act and who did not follow the Indian mode of life be a "non-treaty Indian" as defined by paragraph (*i*) of section 2. So by section 13 of the Act "no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian." Nor under the same section shall the half-breed head of a family anywhere with certain specified exceptions except under certain specified circumstances be considered an Indian. The very provisions of this section which I have mentioned show that it was the intention of the Legislature that there are half-breeds who must be considered Indians within the meaning of the Act; because if the word "of Indian blood" in paragraph (*h*) of section 2 meant "of full Indian blood," then these provisions in section 13 were entirely unnecessary.

Judgment.
Wetmore, J.

Assuming that there may be a section or so of the Act which might render such a construction apparently doubtful, the Act must be construed according to its general provisions, not to make it fit into one or two exceptional sections. See the consequences of a different construction from that which I have adopted and if that urged for the defendant were accepted. A prosecution is brought against a person for doing or omitting to do something with respect to an Indian under the provisions of the Act for which a penalty is provided; if the defendant's contention is adopted it would be necessary in every case to prove that such Indian was a full blooded Indian, because the burthen of proof is on the prosecutor, and he is bound to show that the person with respect to whom the offence was committed is an Indian as defined by the Act, and that is according to his contention a full blooded Indian—how in the world could that be done? Or in the other view, if he had some

Judgment.
Wetmore, J.

The first and golden rule of construction is that the words of a statute are to be construed according to their popular and ordinary meaning. I understand the popular and ordinary meaning of the words "any male person of Indian blood" to mean any person with Indian blood in his veins, and whether such blood is obtained from the father or mother. This rule of construction, however, has its exceptions and undoubtedly as urged at the argument another rule of construction is that we are to consider the evil which the statute is intended to remedy, and having discovered that, so to construe the words as to give effect to the intention of the Legislature, and in that case if necessary the ordinary and popular meaning of the words are sometimes departed from and some other meaning which they may bear from the context or otherwise is accepted.

But applying that rule, what was the intention of Parliament in enacting The Indian Act.

It is to be borne in mind that this Act is not only applicable to the Indians in the North West, but it is also applicable to Indians throughout the whole of Canada.

It is intended to apply to a body of men who are the descendants of the aboriginal inhabitants of the country, who are banded together in tribes or bands, some of whom live on reserves and receive monies from the Government, some of whom do not. It is notorious that there are persons in those bands who are not full blooded Indians, who are possessed of Caucasian blood, in many of them the Caucasian blood very largely predominates, but whose associations, habits, modes of life, and surroundings generally are essentially Indian, and the intention of the Legislature is to bring such persons within the provisions and object of the Act, and the definition is given to the word "Indian" as aforesaid with that object.

In some instances possibly the Act goes further than I stated, and in some of its provisions applies to half-breeds, as for instance in s. 111, which provides that "every one who induces, incites, or stirs up any three or more Indians, non-treaty Indians or half-breeds apparently acting in

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white blood in him, he would have to prove that he got his Indian blood from his father, and possibly have to go generations back, because the alleged Indian might so far as his skin was concerned be as white as a Spaniard or an Italian or as many Englishmen or Frenchmen for that matter, and yet not understand a word of any European language, and be in thought, association and surrounding altogether Indian.

I am of opinion, therefore, that Bear was a person of Indian blood within the meaning of the Act, and I am of opinion that there was evidence which warranted the Justices in finding that he was "reputed to belong to a particular band" within the meaning of the Act, because as a matter of fact it was found that he did belong to a particular band. The words "reputed to belong" in paragraph (h) are used so as to provide facility of proof, that is, that proof of mere repute that he so belongs is sufficient not merely for the purposes of section 94, but for all the purposes of the Act; *a fortiori* evidence that he actually belongs is sufficient. I am not impressed with the view that Bear's mother being married to his father ceased to be an Indian by virtue of section 11.

Assuming that she did marry as alleged, and I have doubts whether there is any evidence of any such marriage, while she herself lost her character of an Indian by such marriage, it did not affect her blood which she transmitted to her son. I think the conviction must be affirmed with costs.

RICHARDSON, MACLEOD, ROULEAU and MCGUIRE, JJ., concurred.

Conviction affirmed with costs.

défenderesse, en date des 11 octobre et 13 novembre 1923, sont illégales et *ultra vires*;

Considérant que le dommage causé à la propriété du demandeur par la coupe de ses arbres et la diminution de valeur qui en résulte, peut être estimé à deux cents dollars ($200.00);

Considérant que le demandeur a établi les allégations essentielles de sa déclaration, et que la défenderesse n'a pas établi les allégations essentielles de ses défenses;

Considérant cependant qu'il y a lieu de donner à la défenderesse un délai supplémentaire pour se conformer au présent jugement ou exproprier le demandeur:—

Rejette les dites défenses; maintient l'action; déclare illégales et *ultra vires* les résolutions votées par le conseil de la défenderesse les 11 octobre et 13 novembre 1923, et les annule; condamne la défenderesse à déguerpir du terrain du demandeur, etc.

JACOBS *v.* UNITED POWER COMPANY LIMITED.

Indiens du Canada — Status — Sujets britanniques, sauf exception pour certains droits — Non étrangers—Droit de poursuivre et exécuter jugements sans cautionnement.

Les Indiens du Canada étant sujets britanniques de par la loi, sauf exception à l'égard de quelques-uns non compris dans les traités, peuvent intenter des actions en recouvrement de créances, réparation de torts, et exécution des engagements contractés. En conséquence, ils ne doivent pas être considérés comme étrangers au regard de la loi décrétant le cautionnement pour frais. C. C., art. 179, S. R. C., 1906, ch. 81.

M. le juge Bruneau.—Cour supérieure, Montréal.—No 13138.—7 février 1927.—Albert Goodstone, avocat du demandeur.—Elliott et David, avocats de la défenderesse.

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1. Voir Doherty, es-qual. v. Giroux, 24 B. R., 433; Sanderson v. Heap, 19 Manitoba Law Rpts, (1909-1910), 122, Mathers, J.; Gibb v. White, 5 P. R., 315; Rex v. Hill (1907) Q. L. R. 410.

Montréal

1927

Jacobs v. United Power Company Limited.

La défenderesse, par exception dilatoire, réclame cautionnement pour frais du demandeur, alléguant qu'il est indien, habitant une réserve du Canada, dont la loi rend ses biens non saisissables, et lui non résident de la Province de Québec.

La Cour, statuant:—

Attendu que la défenderesse se pourvoit par exception dilatoire alléguant les moyens suivants:

Attendu que le demandeur réclame une somme de $105.00 pour la perte d'une vache, qui aurait été tuée par la faute de la défenderesse;

Considérant que les Indiens du Canada ont tous les droits et les privilèges de sujets britanniques, à l'exception de ceux que la loi leur a enlevés;

Considérant que la section 103 de la Loi des Sauvages, (S. R. C. 1906, ch. 81), décrète que les sauvages et les sauvages non compris dans les traités ont le droit d'intenter des actions pour le paiement de leurs créances, ou la réparation des torts qu'ils ont subis, ou pour obtenir l'exécution des engagements contractés envers eux;

Considérant que les biens des Sauvages ne sont exempts de saisie que dans les cas spécifiés par la loi précitée (Sect. 102, 104, 105; Doherty, es-qual vs Giroux, 24 B. R. 433);

Considérant que l'action du demandeur est de la nature de celles que la loi lui donne le droit d'intenter;

Considérant que la réserve de Caughnawaga, située dans la province de Québec, fait partie du territoire de celle-ci;

Considérant que le domicile du demandeur est dans la dite réserve, c'est-à-dire dans la Province de Québec;

Considérant que le cautionnement pour frais ne peut être demandé, en vertu de l'article 179 du Code de Procédure, que dans le cas où le demandeur est un étranger, qui ne réside pas dans la Province de Québec;

Considérant que l'exception dilatoire de la défenderesse est mal fondée;

Par ces motifs: rejette la dite exception dilatoire de la défenderesse, avec dépens.

CASTONGUAY *v.* BOYER.

Montréal
1926
3 novembre.

Accident du travail — Faute inexcusable de l'accidenté —Faute contributoire du patron gardant à son emploi un ouvrier désobéissant — Instructions précises.

Le patron reste responsable pour partie de l'accident survenu à son employé, même par la faute inexcusable de ce dernier, négligeant de suivre les instructions formelles reçues pour se garer du danger de son travail, lorsqu'il garde cet ouvrier à son emploi malgré ces manquements.

La Cour, sur le mérite de cette cause;

Attendu que le demandeur, en sa qualité de tuteur à son enfant mineur, réclame du défendeur la somme de $2500.00 à titre de dommages survenus à ce fils à la suite d'un accident de travail dans la manufacture du défendeur, alléguant que ce fils a eu un doigt de la main droite coupé à la deuxième phalange par les dents du rouleau d'une machine sur laquelle il travaillait; qu'il gagnait un salaire de $7.00 par semaine; que le demandeur a droit de toucher, comme indemnité temporaire, $32.00, et comme indemnité pour incapacité permanente, $2468.00;

Attendu que le défendeur admet l'accident pendant que le fils du demandeur était à son emploi, mais ajoute que cet accident est dû à la faute du fils du

M. le juge Albert de Lorimier.—Cour supérieure.—No 9178.—3 novembre 1926.—Beaulieu, Gouin, Marin et Mercier.—avocats du demandeur.—J. Arthur Mathewson, avocat du défendeur.

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1. Loi des accidents du travail, sec. 5; Dominion Quarry Company v. Morin, 21 B. R., pp. 147 et 152; Dame Fontaine v. Paradis, 54 C. S., p. 468; Karavokiris v. Canadian Rubber Co., 36 C. S., en Rev. p. 425 et s., et p. 435 et s.

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fenderesse; le fait d'avoir accepté des versements de Pronovost ne crée pas une novation ni un acquiescement à un changement de débiteur. Evidemment, du moment qu'il était payé, que ce fût par la défenderesse ou Pronovost, cela lui était indifférent, mais du moment que les payements cessaient, il avait le droit d'exercer son recours contre la défenderesse;

Considérant que le demandeur a prouvé qu'il lui était dû la somme de $533.80;

Action accueillie ($533.80).

JOHN MURDOCK LIMITEE v. LA COMMISSION DE RELATIONS OUVRIERES DE LA PROVINCE DE QUEBEC et Autres et LA FRATERNITE UNIE DES CHARPENTIERS MENUISIERS D'AMERIQUE, Mise en cause

Législation ouvrière — Fonctions de la Commission de relations ouvrières Salariés — Indiens — Bref de prohibition — Loi des relations ouvrières (S. R. Q. 1941, ch. 162A), art. 4, 6, 7, 8, 29, 36, 38 et 41a Loi des commissions d'enquête (S. R. Q. 1941, ch. 9) — C. P. art. 1003.

La Commission de relations ouvrières ne peut exercer ses fonctions que dans les limites de la loi; elle n'agit pas ainsi quand elle pose un acte que la loi n'autorise pas ou, à plus forte raison, un acte qui est contraire à la loi. Elle est soustraite au recours par bref de prohibition lorsqu'elle pose un acte relevant de ses fonctions; elle ne l'est pas quand elle outrepasse ses pouvoirs et ses attributions.

Elle n'a pas le droit d'ignorer les salariés indiens, sous prétexte qu'ils sont les pupilles de l'Etat à certains points de vue et, qu'après leur travail, ils vivent en commun dans des camps; rien dans la loi ne la justifie de les exclure du groupe de salariés dont ils font partie, d'en faire une classe à part de salariés incapables qui ne peuvent bénéficier des lois ouvrières de la Province.

Cette tentative de ségrégation raciale n'est appuyée sur aucun texte de loi. C'est une atteinte à la liberté de travail et au droit qu'a tout salarié de faire partie d'une association et de bénéficier de la législation ouvrière.

M. le juge Oscar-L. Boulanger. — No 75,030. — Québec, 31 octobre 1955. — Jacques Dumoulin c.r., pour la requérante. —Victor Trépanier c.r., pour les intimés.

Les décisions de cette commission, dans l'espèce, n'ont pas été rendues dans l'exécution de ses fonctions, sont illégales, nulles de nullité absolue, inexistantes et, par conséquent, donnent ouverture au bref de prohibition.

BREF de prohibition.

Motifs du jugement : Le 15 juillet 1954, la compagnie Murdock fit émettre un bref de prohibition ordonnant à la Commission de relations ouvrières de la province de Québec de suspendre toutes procédures quelconques à propos de décisions rendues par elle, le 10 mars et le 3 juin 1954, dans un différend entre la compagnie Murdock et la Fraternité unie des charpentiers-menuisiers d'Amérique, local 2817 (Bûcherons et employés de scieries) et de suspendre toutes négociations en vue de la conclusion d'une convention collective de travail entre les mêmes parties.

Le bref fut signifié le 16 juillet 1954, et dûment rapporté.

En même temps que le bref de prohibition la société fit signifier une requête libellée . . .

Les faits que la compagnie allègue à l'appui de ses conclusions peuvent se résumer comme suit :

La compagnie fait l'abattage du bois particulièrement à Monet, dans le comté d'Abitibi.

La fraternité est un groupement ouvrier dont l'un des objets est la défense et la protection des intérêts des bûcherons et autres travailleurs en forêt.

La commission, entre autres fonctions, a le pouvoir de reconnaître un syndicat comme représentant d'un groupe d'ouvriers et de le nommer agent du groupe pour négocier avec l'employeur.

Le 16 novembre 1953, la commission rejeta une demande de la fraternité pour être nommée (certifiée) agent négociateur des employés de la compagnie à Monet, excepté les techniciens. La raison du refus, c'était que la fraternité ne représentait pas la majorité des employés salariés de la compagnie à Monet.

La fraternité demanda à la commission de reconsidérer sa décision et, le 18 mars 1954, la commission rescinda sa première décision et accorda la reconnaissance syndicale à la fraternité et la nomma agent négociateur des employés de la compagnie à Monet, malgré les objections de la compagnie.

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La compagnie fit une requête à la commission pour la reconsidération de la seconde décision, mais cette requête fut rejetée par la commission, le 3 juin 1954.

Toute la difficulté de l'affaire provient de l'emploi d'Indiens comme bûcherons par la compagnie depuis quelques saisons. Au mois de novembre 1953, sur environ deux cent quatre-vingt-dix bûcherons que la compagnie employait à Monet il y avait quatre-vingt-douze Indiens.

La fraternité soutient que les Indiens, à cause de leur statut particulier, constituent une entité en marge de la nationalité canadienne, que les lois ouvrières de la province ne leur sont pas applicables, qu'ils ne vivent pas dans les mêmes conditions que les ouvriers ordinaires, qu'ils sont réfractaires à l'organisation ouvrière, qu'ils sont à tous points de vue des intouchables et qu'ils doivent être mis hors de compte quand il s'agit de déterminer si une organisation ouvrière représente la majorité d'un groupe de salariés dont ils font partie.

D'un autre côté, la compagnie prétend que les bûcherons indiens sont des bûcherons et des salariés comme les autres et travaillent dans les mêmes conditions avec les mêmes outils, pour les mêmes salaires et selon les mêmes méthodes que les autres bûcherons, même si certaines de leurs coutumes sociales peuvent différer (pour le mieux) de celles des Blancs.

La commission refusa d'abord d'accepter le point de vue de la fraternité et décida que cette dernière ne représentait pas la majorité du groupe ouvrier de Monet en comptant les Indiens. Mais la commission se déjugea par la suite, exclut les Indiens du groupe, décida que la fraternité avait la majorité et la certifia comme agent négociateur . . .

La première question à décider, c'est celle de savoir si l'art. 41*a* de la Loi des relations ouvrières (S. R. Q. 1941, ch. 162A) est une fin de non recevoir absolue et une entrave complète au recours de la compagnie.

Cet article se lit comme suit :

> Aucun bref de *quo warranto*, de *mandamus*, de *certiorari*, de prohibition ou d'injonction ne peut être émis contre la commission, ni contre aucun de ses membres, en raison d'une décision, d'une procédure ou d'un acte quelconque relevant de l'exercice de leurs fonctions.
>
> L'art. 50 du Code de procédure civile ne s'applique pas à la commission.

Pour décider la question il faut trouver si, oui ou non, l'acte reproché à la commission par la compagnie est un acte relevant de l'exercice de ses fonctions.

Quelles sont les fonctions de la commission ? Les textes officiels, même en les interprétant avec la bonne volonté que nous recommande le chapitre premier des Statuts refondus de la province de Québec, ne nous renseignent guère là-dessus.

L'art. 29 de la Loi des relations ouvrières décrète qu'est institué un organisme sous le nom, en français, de Commission de relations ouvrières de la province de Québec et, aux art. 36 et 38, la loi dit que la commission a tous les pouvoirs de commissaires nommés en vertu de la Loi des commissions d'enquête (S. R. Q. 1941, ch. 9) et qu'elle peut faire des règlements pour l'exercice de ses pouvoirs.

Si l'on va voir au ch. 9 susmentionné, on n'est pas beaucoup plus avancé. On y trouve que les commissaires, afin de découvrir la vérité, peuvent, par tous les moyens qu'ils jugent les meilleurs, s'enquérir des choses dont l'investigation leur a été déférée.

Mais je crois que les tribunaux doivent prendre pour acquit *(take judicial notice)* que la commission s'occupe de l'application des lois ouvrières et est chargée, en particulier, d'accorder la reconnaissance syndicale aux associations de salariés qui veulent être habilitées à agir comme agents négociateurs pour la conclusion de conventions collectives de travail.

La Loi des relations ouvrières définit le mot « salarié » comme signifiant tout apprenti, manoeuvre ou ouvrier non spécialisé, ouvrier qualifié ou compagnon, artisan, commis ou employé qui travaille individuellement, en équipe ou en société; mais ne comprenant pas les gérants, surintendants, contremaîtres, représentants de l'employeur, directeurs et administrateurs, les avocats, les notaires, les médecins, les anatomistes, les homéopathes, les pharmaciens, les dentistes, les vétérinaires, les ingénieurs, les arpenteurs, les architectes, les ingénieurs forestiers, les optométristes et opticiens, les domestiques de maison et les ouvriers agricoles.

Une association, selon la Loi des relations ouvrières, comprend un syndicat professionnel, une union de tels syndicats, un groupement de salariés ou d'employeurs *bona fide*, ayant pour objet l'établissement de relations ordonnées entre employeurs et salariés ainsi que l'étude, la défense et le développement des intérêts économiques, sociaux et moraux de ses membres dans le respect des lois et de l'autorité.

Quant à la convention collective de travail, la loi la définit comme étant une entente relative aux conditions de travail conclue entre des personnes agissant pour une ou plusieurs associations de salariés, et un ou plusieurs employeurs ou personnes agissant pour une ou plusieurs associations d'employeurs.

Tout employeur est tenu de reconnaître comme représentant collectif des salariés à son emploi les représentants d'une association groupant la majorité absolue desdits salariés et de négocier, de bonne foi, avec eux une convention collective de travail (art. 4).

Toute association qui désire être reconnue comme représentante d'un groupe de salariés doit s'adresser par requête écrite à la commission et celle-ci, après enquête, détermine si cette association a droit d'être ainsi reconnue et quel groupe de salariés elle représente (art. 6). Pour s'assurer du caractère représentatif d'une association, la commission peut en examiner les livres ou ordonner le vote au scrutin secret des salariés que l'association veut représenter (art. 7 et 8).

Quand la commission s'est convaincue que l'association groupe bien la majorité absolue du groupe de salariés au nom de qui elle veut négocier, elle lui décerne un certificat de reconnaissance syndicale pour ce groupe.

Il résulte de cette analyse des textes que la fonction principale de la commission c'est d'accorder la reconnaissance syndicale dans le cadre et les conditions de la loi. Aussi le règlement de la commission (et je n'en connais pas d'autre) traite-t-il des conditions auxquelles une personne peut être reconnue membre d'une association de salariés et du certificat de reconnaissance.

D'après ce règlement, pour être reconnu membre d'une association ouvrière, il faut avoir seize ans, avoir été admis membre régulièrement, avoir signé une carte d'adhésion, avoir payé son droit d'entrée ou d'initiation, s'être engagé à payer les cotisations et les avoir payées pour, au moins, un mois dans le cas d'un nouveau membre, ne pas devoir plus de trois mois d'arrérages de cotisation, occuper régulièrement un emploi dépendant d'un employeur.

Il n'y a rien dans ces conditions, ni dans celles de la loi, concernant l'origine ethnique ou raciale, la couleur, les croyances, le mode de vie, les coutumes, les moeurs ou la conduite, en dehors des heures de travail, des salariés.

Comme tout autre organisme judiciaire, la commission doit prendre la loi comme elle est; elle ne peut ni la refaire ni la modifier; elle ne peut changer les définitions de la loi; elle ne peut distinguer là où la loi ne distingue pas; elle ne peut faire d'exception là où la loi n'en fait pas.

Les salariés de race indienne ou aborigène qui font le même travail que les salariés de race blanche, avec les mêmes outils, avec les mêmes méthodes, pour le même prix et dans les mêmes conditions que les ouvriers de race blanche sont compris dans la définition des salariés que donnent la Loi des relations ouvrières et le règlement de la commission. Cette dernière ne peut arbitrairement les mettre de côté, quand il s'agit de déterminer si une association représente la majorité absolue du groupe de salariés dont ils font partie.

La commission ne peut exercer ses fonctions que dans les limites de la loi; elle n'exerce pas de fonctions, quand elle fait un acte que la loi n'autorise pas ou, à plus forte raison, un acte qui est contraire à la loi. La commission est protégée contre un recours par bref de prohibition par l'art. 41*a* de la loi, lorsqu'elle fait un acte relevant de ses fonctions; elle ne l'est pas, quand elle outrepasse ses pouvoirs et ses attributions.

Par conséquent, l'art. 41*a* de la Loi des relations ouvrières n'est pas un obstacle au recours intenté par la compagnie contre la commission.

Rien dans la loi n'autorise ou ne justifie la commission d'exclure les bûcherons indiens du groupe de salariés, à l'emploi de la compagnie à Monet, dont ils font partie, avant de déterminer quelle est la majorité de ce groupe, et de faire de ces bûcherons indiens une classe à part de salariés incapables qui ne peuvent bénéficier des lois ouvrières de la province.

La commission n'a pas plus le droit d'ignorer les salariés de race aborigène, sous prétexte qu'ils sont des pupilles de l'Etat à certains points de vue et qu'après leur travail ils vivent paisiblement chacun sous sa tente avec sa famille, au lieu de vivre en commun dans des camps, qu'elle n'aurait le droit d'exclure certains salariés, sous prétexte qu'ils sont protestants, chauves ou tchécoslovaques, qu'ils comprennent la théorie du crédit social, qu'ils se couchent en chien de fusil ou qu'ils bûchent avec la vieille hache et l'ancienne *sciotte*, au lieu de se servir d'une scie mécanique.

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Cette tentative de ségrégation raciale ne peut être appuyée sur aucun texte de loi. C'est une atteinte à la liberté de travail et au droit qu'a tout salarié de faire partie ou non d'une association et de bénéficier de la législation ouvrière.

Car, si on laisse la commission exclure les bûcherons indiens de la définition des salariés et les priver des droits que ce titre leur donne, ce ne sera pas long avant que quelque petit tyranneau de village (comme il y en a tant qui veulent l'être) se mette en tête, sous prétexte qu'ils sont réfractaires au syndicalisme, de vouloir les empêcher de travailler par le moyen d'une clause d'atelier fermé, d'atelier syndical, de maintien d'affiliation, de préférence syndicale ou de formule Rand dans les conventions collectives, ou autrement.

Il n'y a rien dans la loi autorisant la commission à déterminer la majorité d'un groupe de salariés après en avoir défalqué, à sa guise, un nombre plus ou moins important. Rien n'autorisait la commission à décider que les Indiens à l'emploi de la société ne sont pas des salariés comme les autres et à ne pas en tenir compte en établissant quelle est la majorité du groupe dont ils font partie. En agissant ainsi la commission a commis une illégalité.

La commission n'avait ni le droit ni le pouvoir de rendre les décisions attaquées. Ces décisions n'ont pas été rendues dans l'exécution des fonctions de la commission et elles sont, par conséquent, illégales, nulles de nullité absolue et inexistantes.

La commission existe pour administrer la loi et non pour la violer et elle a manifestement violé la loi en refusant de reconnaître les Indiens travaillant pour la compagnie Murdock comme des salariés selon la définition de la loi. Si l'article 41*a* de la Loi des relations ouvrières, comme le prétend la commission, autorise cette dernière à violer impunément la loi, ce texte est immoral et contraire à l'ordre public et, s'il n'y a pas de recours contre les actes illégaux et injustes de la commission, autant vaudrait proclamer en dogme tout de suite l'infaillibilité de la commission et l'excommunication de ceux qui osent mettre cette infaillibilité en doute.

En conséquence et pour ces motifs: le tribunal accueille la requérante dans ses conclusions et, partant, accueille le bref de prohibition; enjoint aux intimés et à la mise en cause de s'abstenir de tout acte et de toutes procédures, négociations ou autres démarches en vue de donner suite ou effet aux décisions illégales rendues par les intimés, le 18 mars et le 3 juin 1954; déclare

nulles et de nul effet (en leur texte entier) lesdites décisions comme étant *ultra vires* des pouvoirs de l'autorité et des fonctions des intimés; révoque et annule, à toutes fins que de droit, comme illégal le certificat de reconnaissance syndicale accordé par les intimés à la mise en cause, par suite de la décision du 18 mars 1954; révoque et annule, à toutes fins que de droit, comme illégale la concession réitérée par les intimés à la mise en cause dudit certificat de reconnaissance syndicale par l'effet de la décision du 3 juin 1954; déclare illégale et *ultra vires* des pouvoirs, attributions et juridiction des intimés le considérant essentiel de la décision du 3 juin 1954 portant que les bûcherons indiens à l'emploi de la requérante doivent constituer une entité séparée; le tout avec dépens contre les intimés (1).

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(1) Autorités : BEAULIEU, *Législation de travail* [1955] R. du B. 218; LAURENDEAU, *Prohibition et certiorari* [1955] R. du B. 211; *Giroux* v. *Maheux* [1947] B. R. 163; *L'Alliance des professeurs catholiques de Montréal* v. *The Labour Relations Board of Quebec* [1953] 2 S.C.R. 140, à la p. 149; *Toronto Newspaper Guild* v. *Globe Printing Company* [1953] 2 S.C.R. 18, à la p. 23; Indian Act (1951, 15 Geo. VI, ch. 29), art. 87; *Canadian Copper Refiners Ltd.* v. *Labour Relations Board of the Province of Quebec* [1952] C. S. 295; *Price Brothers and Co. Ltd.* v. *Letarte* [1953] B.R. 307; *Coca-Cola Ltd.* v. *Ouimet*, C.S. Montréal, no 312,314; *Walker* v. *International Brotherhood of Electrical Workers et R.C.A. Victor* [1953] B.R. 441; *Brique Citadelle Ltée* v. *Gagné* [1955] B.R. 384 infirmant [1954] C.S. 262; *Honan* v. *The Bar of Montreal* (1900) 30 S.C.R. 1; *Segal* v. *Montréal* [1931] 4 D.L.R. 603; *Labour Relations Board for British Columbia* v. *Canada Safeway Ltd.* [1953] 3 D.L.R. 641; *International Union of Operating Engineers, Local no. 827* v. *Manitoba Labor Board* [1952] 4 D.L.R. 397; *Canadian Canners (Western) Ltd.* [1954] 4 D.L.R. 78; *Labour Relations Board (Nova Scotia), International Union of Operating Engineers, Local no. 721* v. *Municipal Spraying and Contracting Ltd.* [1955] 1 D.L.R. 353.

RE MANITOBA HOSPITAL COMMISSION AND KLEIN AND SPENCE

Manitoba Court of Appeal, Smith, C.J.M., Freedman and Monnin, JJ.A. October 2, 1969.

Indians — Treaty Indian injured in car accident on Indian reserve — Hospital expenses paid by Manitoba Hospital Commission — Indian recovering judgment for damages — Commission entitled to reimbursement of hospital expenses — Indian an insured person under Hospital Services Insurance Act, 1962 (Man.), c. 30.

APPEAL from a judgment of Wilson, J., 4 D.L.R. (3d) 532, 67 W.W.R. 440, allowing an application by the Manitoba Hospital Commission to recover from a fund held by a solicitor expenses paid by it for hospital services provided to a Treaty Indian.

V. L. Baird, Q.C., for applicant, respondent, Manitoba Hospital Commission.

W. E. Norton, Q.C., for respondent, Kenneth D. Klein.

J. F. O'Sullivan, for respondent, appellant, Emma Spence.

The judgment of the Court was delivered by

SMITH, C.J.M.:—The learned Judge, Wilson, J., in the Court below, made a specific finding that Emma Spence was an insured person under the *Hospital Services Insurance Act*, 1962 (Man.), c. 30. Before this Court her counsel accepted that finding and acknowledged that Mrs. Spence was such an insured person.

Counsel argued, however, that, as a Treaty Indian, Mrs. Spence was not "legally liable to pay to a hospital for care, treatment . . ." that she received. He submitted that an obligation to pay for hospital services, in the absence of an express agreement, may only be implied from the circumstances, and that since for a long period of time Indians had been supplied with hospital services at the expense of the federal Government, without such Indians ever being asked or expected to pay for them, no agreement to pay could be implied on the part of Mrs. Spence in this case.

Whether prior to the *Hospital Services Insurance Act* a Treaty Indian was not liable for the payment of hospital services, or whether the true position was that he was liable for them but was being indemnified by the federal Government, is not a matter we need to decide in this case.

The present position must be decided in the light of the *Hospital Services Insurance Act*. That Act applies to all

residents, including Indians. See s. 7 of the Act and also s. 87 of the *Indian Act*, R.S.C. 1952, c. 149.

Dominion Order-in-Council, P.C. 1958-15/879, authorized the Minister of National Health and Welfare to pay on behalf of Indians premiums "required to be paid as a condition of eligibility for receiving hospital care under the plan in operation in the province . . .". This indicates that Indians were to be in the same position as other persons in the Province with respect to hospital services. In the present case such premiums were so paid for Mrs. Spence during such period as she was not employed. When she was employed her premiums were deducted by her employer and remitted to the Manitoba Hospital Commission in the same way as for any other employee in the Province.

We find it impossible to say that Mrs. Spence was not a person falling within the provisions of s. 28(1) of the Act. The case for the Manitoba Hospital Commission is strengthened by the circumstance that the damage settlement expressly identified the amount of hospital expenses. Mrs. Spence signed the authority for the settlement with this information in it.

In addition to what we have already said, it is difficult to see that Mr. Klein, who acted as counsel for the plaintiff in the original litigation, was not an agent of the Manitoba Hospital Commission in respect of its claim.

We dismiss the appeal with costs. The matter of costs against Mr. Klein in the Court below is the subject of a special application, and we leave that matter open for disposition there.

Appeal dismissed.

RE GIORGARAS AND STUART
[8 D.L.R. (3d) 120]

NOTE: An appeal from the above judgment of Lieff, J., to the Ontario Court of Appeal (Gale, C.J.O., MacKay and McGillivray, JJ.A.) was dismissed without costs on January 13, 1970.

Ian G. Scott, for appellant.

N. A. Chalmers, Q.C., for respondent.

ignore the multitude of risks which the plaintiff would run before the project could have been successfully completed.

The action is dismissed with costs.

Action dismissed.

RE MANITOBA HOSPITAL COMMISSION AND KLEIN AND SPENCE

Manitoba Queen's Bench, Wilson, J. January 28, 1969.

Indians — Treaty Indian injured in car accident on Indian reserve — Hospital expenses paid by Manitoba Hospital Commission — Indian recovering judgment for amount including hospital expenses — Commission entitled to recover from Indian amount paid for hospital expenses — Hospital Services Insurance Act, 1962 (Man.), c. 30.

[*Vermett v. Winning* (1960), 26 D.L.R. (2d) 765, 33 W.W.R. 188; *Clelland v. Godon and Conway* (1962), 38 W.W.R. 372; *R. v. Johnston* (1966), 56 D.L.R. (2d) 749, 49 C.R. 203, 56 W.W.R. 565; *Bell Bros. v. Hudson's Bay Ins. Co.* (1909), 11 W.W.R. 633, refd to]

APPLICATION by the Manitoba Hospital Commission to recover from a fund held by a solicitor expenses paid by it for hospital services provided to a Treaty Indian.

V. L. Baird, Q.C., for applicant.
J. F. O'Sullivan, for respondent, Emma Spence.
Kenneth D. Klein in person.

WILSON, J.:—This matter comes before me pursuant to an application for interpleader by Mr. Klein, who was counsel for Mrs. Spence in her action sued against one Parisien (Suit No. 728/65). That action (which succeeded) was concerned with injuries suffered by Mrs. Spence when she was struck down by an automobile operated by Parisien, and the proceeds of judgment were paid into Klein's trust account. The simple issue before me is the right of the Commission to receive from that fund the sum of $4,920, being the cost of the hospital services provided Mrs. Spence at the expense of the Commission. Mrs. Spence says that because she is a "Treaty Indian" she is not required to pay for hospital services nor is she affected by the provisions of the *Hospital Services Insurance Act*, 1962 (Man.), c. 30, to which legislation the Commission points in support of its claim to the amount in question. Klein interpleaded, of course, because each of them — Mrs. Spence and the Commission — demanded payment of the amount in question from him.

The phrase "Treaty Indian" is nowhere defined, but in its context before me was used to indicate a person (Mrs. Spence) who is a member of an Indian band, or more precisely, who is an "Indian" within the meaning of the *Indian Act*, R.S.C. 1952, c. 149. While the fact was not formally proved, the case proceeded on the footing that Mrs. Spence was such a person.

When the matter first came on it was stood over in order that the federal Minister of Justice and the Attorney-General for Manitoba might, if they wished, appoint counsel; in each case, the concerned officer of the Crown asked only to be advised of the result; and see Mr. Baird's affidavit of November 18, 1968.

At the time she was run down (the date of the accident was June 27, 1964), Mrs. Spence was walking along a road within the boundaries of the reserve occupied by Peguis Indian Band 1348; she and the automobile driver were both ordinarily resident on the reserve.

First admitted to the Fisher River Hospital on the reserve, Mrs. Spence was transferred to St. Boniface General Hospital and, before her final discharge in the fall of 1966, she was from time to time a patient in each of these hospitals. Details of the hospital account, all of it paid by the Commission, appear from the statements exhibited to the affidavit sworn July 25, 1968, by the witness Bailey, who is the Commission's officer for the recovery of those accounts for which a third party may be liable. The full amount paid by the Commission was $4,950; three small accounts of $10 each, however, were overlooked when judgment was entered, so that Klein demanded and received payment of $4,920; and see the Commission's letter to Klein, ex. 5 to Bailey's affidavit.

Mr. Klein issued his statement of claim on June 24, 1965; identified in para. 13 thereof as "Particulars of the special damage incurred by the Plaintiff" Mrs. Spence, there appears "Hospital Account $4,232.00", this being the amount at that time; and see the Commission's letter to Klein of June 8, 1965, ex. 4 to Bailey's said affidavit. The action was defended but seemingly liability was conceded and on June 1, 1966, judgment was entered by consent (Judgment Roll 351/66) awarding to Mrs. Spence "special damages in the sum of $7,982.40" and general damages of $10,000. Her husband and co-plaintiff was allowed $1,000 general damages, making $18,982.40 in all.

In anticipation of this result of his litigation, on May 24, 1966, Mr. Klein obtained the written authority of his clients to

accept in full of their claims the amounts recited in ex. A to Klein's affidavit of December 12, 1968, namely:

Loss of wages to 24th June, 1965	$ 2144.40
Hospital accounts	4920.00
Doctors' accounts	780.00
Anaesthetists	60.00
Ambulance	78.00
Additional loss of wages of Emma Spence from date of Statement of Claim to present date	2000.00
General damages — Emma Spence	8000.00
General damages — Clifford Spence	1000.00
Total —	$18,982.40

Clearly, the "special damages" awarded to Mrs. Spence reflects — it is the sum of — the initial five items listed above; the basis for her general damages of $10,000 is likewise apparent.

Because the defendant had no means, and was not insured, there ensued the usual proceedings under the *Unsatisfied Judgment Fund Act*, 1965 (Man.), c. 89, and on September 23, 1966, Klein received from the Provincial Treasurer the full amount of judgment plus interest to date of payment and costs.

When he outlined to his clients the destination of the money so received by him, Mrs. Spence, as Klein puts it in his affidavit, "then for the first time, objected to the payment of the hospital accounts and stated she had been advised by her Band to refuse payment of the hospital accounts on the grounds that she was a Treaty Indian". Payment of the ambulance account of $78 was likewise protested.

Klein did not review his statement of claim with Mrs. Spence before issuing same, did not discuss with her the various headings under which damages were claimed on her behalf, and, in particular, he did not ask her if he might, or ought to, include a claim for hospital costs. While Mrs. Spence did not deny signing the form of consent to judgment presented to her by Klein as aforesaid, she now says that she was unaware of the contents of that document — it is on a single sheet of paper — and had no understanding or appreciation of what she was being asked to do.

She was not, of course, asked to, nor did she, pay any part of her hospital expenses. In effect, her position before me is that the amount paid under the judgment on hospital account should be regarded as money received by her for her own use, as general damages.

While it may not be a decisive point, the amount in question was throughout treated as "special damages", that is to say by way of an express loss, particular damage, or damage in fact, to denote an actual temporal loss suffered by Mrs. Spence; and see 11 Hals., 3rd ed., p. 218, para. 386, and Jowitt's Dictionary of English Law, p. 1659. And where there was in fact no such loss, to plead and recover for it would be tantamount to a fraud upon the defendant save under special circumstances, *e.g.*, where one who enjoys an indemnity by way of accident insurance may, in some cases, nevertheless recover yet again from the wrongdoer.

Another "special circumstance" occurs where, as here, there is direct statutory authority which enables a plaintiff to claim, as if it were her own loss, an expense borne on her behalf by another, to wit, the Commission. This appears from s. 28(1) of the *Hospital Services Insurance Act*, no doubt adopted in answer to the decision of Campbell, J., in *Vermett v. Winning* (1960), 26 D.L.R. (2d) 765, 33 W.W.R. 188. This, of course, is akin to the notion of subrogation whereby an insurer, upon indemnifying its insured pursuant to the terms of the contract between them, may stand in the shoes of the insured vis-à-vis the rights of the latter to recover from the third party whose wrongdoing occasioned the loss.

Indeed, until he learned of the attitude taken by the Band, as expressed to him by Mrs. Spence, Klein approached the case exactly as for others where, before and since the event, the client's claim included hospital costs paid by the Commission. He knew the Commission would expect the statement of claim to include a demand for Mrs. Spence's hospital account and knew that, should the action succeed, the Commission would look to him to exploit the remedies appropriate to enforce payment and, in due course, pay over the amount allowed and recovered on hospital account less the percentage of that amount allowed to him by the Commission as his fee.

Incidentally, counsel for Mrs. Spence challenged the right of the Commission to fix, or of counsel to accept, payment on this basis. Whatever the validity of that objection, it cannot affect the merits of the application before me and must be decided elsewhere.

Because of its correspondence with Klein and exchanges between them from time to time, the Commission assumed that its interests were being protected in the litigation sued by Klein on behalf of Mrs. Spence. To that extent the Commission was in a position similar to that which it occupied in *Clelland v. Godon and Conway* (1962), 38 W.W.R. 372, where May-

bank, J., found it was entitled to "rest secure" in the belief that its claim would be duly proved.

No obligation rests upon a plaintiff to protect the Commission in this way. On the other hand, by s. 28(2), the Act requires that if a plaintiff does *not* intend to include in his claim the amount of hospital costs paid by the Commission, he shall advise the Commission accordingly, in which case no doubt the Commission would consider taking action itself, as s. 29 provides. The Act goes on to require — s. 28(3) — that a person who recovers such amount shall receive and hold it in trust for the Commission, and shall pay same to the Commission forthwith. Indeed, the judgment debtor (or, in this case, the Provincial Treasurer as custodian of the Unsatisfied Judgment Fund) may pay the amount direct to the Commission, whose receipt is a discharge of liability to that extent. One may wonder what would have been the position of Mrs. Spence had this been done.

Counsel for Mrs. Spence argued, however, that the Act does not apply in her case. His argument did not proceed on the simple ground that she is an Indian; indeed, he could hardly do so in the face of s. 87 of the *Indian Act*, which says:

> 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.

By s. 72(1)(*g*) of the *Indian Act*, the Governor in Council may make regulations to provide medical treatment and health services for Indians. Assuming such regulations to exist, however, there was not a shred of evidence to suggest their purport or effect was such as to oust the operation of the *Hospital Services Insurance Act* of this Province where the same would otherwise extend to an Indian; as will be seen, the evidence is to the contrary.

Rather, the contention was that Mrs. Spence is not an "insured person" as defined by s. 2(1)(*n*) of the *Hospital Services Insurance Act*. That definition reflects a status described under s. 7 of the Act, limited to persons ordinarily resident in the Province (and surely Mrs. Spence is such a person) by whom or on whose behalf has been paid the premiums required by the Act. As to this, from Bailey's affidavit of November 7, 1968, Mrs. Spence was registered

under the Act on May 7, 1958, through her husband's certificate No. 72620 along with their three children, and she has been continuously registered and entitled to benefits as an insured person since that time, that is to say, since the inception of the hospital plan in the spring of 1958.

On occasion, Mrs. Spence was gainfully employed, at which times her employer withheld from her wages and remitted to the Commission the cost of the monthly premiums, apparently without protest from Mrs. Spence; and see Bailey's affidavit of December 19, 1968. Exhibited to that affidavit is a copy of the federal Order in Council of June 26, 1958, approving a recommendation by the Treasury Board of the Government of Canada for payment on behalf of Indians and Eskimos of premiums or other specific levies made against residents generally in the Province where the Indian or Eskimo resides, as a condition of eligibility for receiving hospital care under the plan in operation in such Province. According to Bailey, save when the same were paid by way of deduction from her wages, Mrs. Spence's premiums were paid regularly by the Government of Canada.

And if the foregoing were not enough, there was filed the certificate of the Minister of Health and Public Welfare of the Province of Manitoba, his "Ministerial Order No. 19" of July 19, 1960, declaring all persons resident in Manitoba and not otherwise insured under the Act to be and to enjoy the status of "insured persons" within the Province of Manitoba.

But, protests counsel, because Mrs. Spence is entitled as of right to hospital services, whatever these outward formalities which seemingly bring her within the operation of the Manitoba hospital plan, in her case this legislation is redundant and so nugatory.

As to that, I can only say that I saw no evidence to demonstrate this supposed absolute right to hospital care. To the extent the *Indian Act* touches the question at all, s. 72(1)(*g*) is permissive only. Indian Treaties Nos. 1 and 2, applicable to Indians in Manitoba, say nothing about medical or hospital care or services. Indian Treaty No. 6 relates to Indians in what is now the Province of Saskatchewan and would not seem applicable, although it is signed by the Honourable Alexander Morris, as Lieutenant-Governor of the Province of Manitoba and the Northwest Territories, but no doubt in the second of these capacities. This treaty provides, *inter alia*:

> That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.

While I do not think that Treaty No. 6 has any application to the facts in this case, I would, if I may, adopt the language of Culliton, C.J.S., in *R. v. Johnston* (1966), 56 D.L.R. (2d) 749, 49 C.R. 203, 56 W.W.R. 565, where, having said that no significance was to be given to the "medicine chest" agreement other than that conveyed by the words themselves in the context in which they are used, he went on to say, at pp. 753-4:

> Again, on the plain reading of the "medicine chest" clause, it means no more than the words clearly convey: An undertaking by the Crown to keep at the house of the Indian agent a medicine chest for the use and benefit of the Indians *at the direction* of the agent. (The italics are mine.) The clause itself does not give to the Indian an unrestricted right to the use and benefit of the "medicine chest" but such rights as are given are subject to the direction of the Indian agent. Such limitation would indicate that the obligation was to have physically on the reservations, for the use and benefit of the Indians, a supply of medicine under the supervision of the agent. I can find nothing historically, or in any dictionary definition, or in any legal pronouncement, that would justify the conclusion that the Indians, in seeking and accepting the Crown's obligation to provide a "medicine chest" had in contemplation provision of all medical services, including hospital care.
>
> Mr. Justice Angers, of the Exchequer Court of Canada, in an unreported judgment in *Dreaver v. The King*, gave an extended interpretation to the "medicine chest" clause of the treaty when, at p. 20, he said:
>
> > "The clause might unquestionably be more explicit but, as I have said, I take it to mean that all medicines, drugs or medical supplies which might be required by the Indians of the Mistawasis Band were to be supplied to them free of charge."

In my opinion, the Manitoba *Hospital Services Insurance Act* extends to persons in the position of Mrs. Spence and I find she was an insured person with all that that implies.

In that event, says counsel, the judgment in her case was improperly entered as being a "settlement" of the action rather than a decision on the merits, and, by s. 28(6) of the Act, the settlement of a claim is void unless the Commission consents thereto. I cannot see how this assists Mrs. Spence. "Void" is a strong word, and if indeed the judgment is to be so impeached, then everything done under its authority is a nullity and the money in Mr. Klein's trust account must be returned whence it came.

Be that as it may (and without deciding the import of the following subsection, s-s. (7)) I cannot believe that because the Commission was not asked to give its consent to payment of the full amount of its claim (for that is what it amounts

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to) the settlement is void. The notion offends common sense and such, I apprehend, is not to be the presumed intent of the Legislature.

In *Bell Bros. v. Hudson's Bay Ins. Co.* (1909), 11 W.L.R. 633 at p. 636, Wetmore, C.J., pointed out that "settlement" of a claim does not necessarily mean a payment, but rather an adjustment of the amount that is due; and in my view, such is the meaning of the word for present purposes where it appears in s. 28(6), namely, the disposition of a claim or suit upon terms short of the full repayment of the Commission's expense. I therefore see no reason to question the validity of a judgment which, from the Commission's standpoint, gave everything that could be asked.

In the result, the Commission succeeds in its request for payment of $4,920, with costs if asked.

I should not close this judgment without referring to the evidence of Albert Thompson, Chief of the Peguis Band. In polite but direct language, Chief Thompson sought to recall me to a sense of the obligations owed to his people by others. And while it is not for me to comment here upon the position of the Indian in society, I would hope that, upon pursuit of the invitation offered in course of the hearing, the misunderstandings which seemed to flow from a perhaps inadequate communication between those affected by the legislation before me will be removed.

Application granted.

RE FIXTER

Saskatchewan Queen's Bench, MacPherson, J. August 8, 1968.

Executors and administrators — Probate — Resealing — Testator's will probated in Ontario — Testator's executrices dying without resealing probate in Saskatchewan with respect to land situate there — Whether executors of surviving executrix entitled to reseal probate in Saskatchewan.

Where the testator's executrices died without either of them applying in Saskatchewan, with respect to the testator's real property situate there, to reseal letters probate of the testator's will issued in Ontario, the executors of the surviving executrix cannot apply to have the letters probate of the testator's will resealed in Saskatchewan.

[*Re Aikins Estate* (1963), 41 W.W.R. 226; *Re Gaynor* (1869), L.R. 1 P. & D. 723, apld; *Re Johnson Estates*, [1942] 2 W.W.R. 190, ovrd; *Re O'Gorman* (1965), 51 D.L.R. (2d) 284, 51 W.W.R. 762 *sub nom. Re O'Gorman (otherwise Gorman) Estates*, disaprvd; *Re Estate of Rankine*,

[CHANCERY DIVISION.]

RE METCALFE.

Canada Temperance Act—Voters—Repeal—Indians—Indian reserves—R. S. O. 1887, ch. 5, sec. 1—R. S. C. ch. 106, sec. 12.

Held, that Indian electors resident in the township of Tuscarora, in the county of Brant, being an Indian reserve, had no right to vote upon the question of repeal of the Canada Temperance Act in that county.

Semble, that R. S. O. 1887, ch. 5, sec. 1, is to be interpreted as meaning that the townships named shall be townships for municipal purposes, when it becomes possible to make them such, as, *e. g.*, in such a case as the present, when the Indians become enfranchised.

The Canada Temperance Act can have no operation where the Indian Act is in force.

R. S. C., ch. 106, sec. 12, refers to white men, but not to Indians.

Statement.

THIS was a motion for a prohibition against Mr. Bullock, the returning officer appointed to take the vote upon the question of repeal of the Canada Temperance Act, R. S. C. c. 106, in the county of Brant, prohibiting him from receiving the votes of the electors resident in the township of Tuscarora, in the said county, or of those possessing only the special Indian Franchise conferred by the Electoral Franchise Act, R. S. C., ch. 5.

The township of Tuscarora is an Indian reserve under the Indian Act, and possessing no form of municipal government. The Canada Temperance Act had been brought into force in the county of Brant, pursuant to the provisions of that Act. The questions, therefore, arose whether the township of Tuscarora is a part of the county of Brant for municipal purposes, it being a part of such county territorially; and also, whether, seeing that the Indian Act, R. S. C. c. 43, provides a liquor law itself more stringent than the Canada Temperance Act, R. S. C. c. 106, the Indians were bound by the prohibitory provisions of the former Act, and had no voice as to the introduction or the subsequent repeal of the less stringent Canada Temperance Act.

The present motion came on for argument on March 25th, 1889, before BOYD, C.

Argument.

A. H. Marsh, for the applicant. We contend that R. S. O. c. 5, s. 1, in so far as it includes Tuscarora in the county of Brant for municipal purposes, is *ultra vires*. Before confederation Tuscarora was not a part of the county for municipal purposes, and the Province had no title to an Indian Reserve: B. N. A. Act, s. 91, class 24, s. 109; Dominion Sessional Papers, 1877, No. 89, p. 2; *Church* v. *Fenton*, 28 C. P. 384, at pp. 398, 400, 4 A. R. 159; *Regina* v. *St. Catharines Milling Co.*, 10 O. R. pp. 224, 230.

Irving, Q.C., for the Attorney-General of Ontario. Although Tuscarora is not able to organize itself into a municipality by reason of its being an Indian Reserve, yet it was and is part of Brant, and municipally under the jurisdiction of the County Council, as for example, in the matter of roads and bridges. See *Regina* v. *Shavelear*, 11 O. R. 727; Canada Temperance Act, R. S. C. c. 106, secs. 2, 13.

Marsh. If the reference to municipal purposes in R. S. O. c. 5, s. 1, is to be interpreted as referring to an organizing of the township as a municipality when it becomes possible to do so, *i. e.*, by the Indians becoming enfranchised, we do not contest its validity.

[BOYD, C. It is a reasonable construction to give the statute, and it is not necessary to hear Mr. Irving further. I agree with his argument as to Tuscarora being part of the county for certain purposes.]

Marsh. Then as to our mode of proceeding here, the returning officer has been advised by the Minister of Justice to receive the Indian votes, and intends to do so, and therefore it is our proper course to move for a prohibition, instead of allowing the votes to be received and then pursuing any remedy there might be against the returning officer. Under the Canada Temperance Act itself there is no remedy. A question of this kind could not be considered on a recount under that Act: *Re Canada*

Temperance Act v. *City of St Thomas*, 9 O. R. 154, 12 A. R. 677. Section 12 of that Act defines who may vote for the adoption of the Act, and 51 Vic. c. 35, s. 3 (D.) shows that the same persons are to be entitled to vote for its repeal. The chief difficulty is as to the construction of section 12. "Township" in sec. 2 (*b*) must mean "Township for municipal purposes" which Tuscarora is not now. Then again sec. 34, sub-s. 2, of the Canada Temperance Act, shows that the oath to be administered to a voter is the same as that to be taken by a voter at a Provincial election, and by sec. 42, no man refusing the oath can vote, and certainly no Tuscarora Indian could take the oath prescribed by R. S. O. 1887, vol. 1, p. 168. Then the provisions of the Indian Act, R. S. C. c. 43, are inconsistent with those of the Canada Temperance Act, in many respects, as well as to the introduction of intoxicating liquor upon reserves. They are much more stringent. The Indians are under the Indian Act, not under the Canada Temperance Act, and have nothing to do with the adoption or repeal of the latter. Argument.

Masten, for the returning officer, expressed his readiness to abide by any order that the Court might make.

BOYD, C.:—

The arguments are insuperable, and prohibition must go. The special Act governing the Indians was more stringent than any law governing the white population, and the Canada Temperance Act can have no operation where the Indian Act is in force. The Indians are supposed, and properly supposed, not to be able to govern themselves as to the use of "fire-water," as they call it, and therefore the Legislature has wisely placed a stringent law upon the Statute book. The township of Tuscarora is under that law, and the Indians dwelling there have nothing to do with the Canada Temperance Act. It is a violation of the first principles of justice to say that

Judgment.

BOYD, C.

Indians should be allowed to vote upon the repeal of the Act. It would be another phase of the wrong done in the taxation of the Colonies. I accede to Mr. Marsh's argument as to the 12th sec. of R. S. C., ch. 106. It is to be read, not as referring to Indians, but to white men, and "county" and "township" [sec. 2 (*b*)] must be read as meaning for municipal purposes so far as they are legal and necessary. Prohibition should go, and I do not think I should give costs.

The learned Chancellor further remarked that no question had been raised as to prohibition being the proper form of remedy in the case, and that, therefore, he would assume for the purposes of this judgment that it was a proper mode.

Afterwards, also, on settling the order, he pointed out that his judgment was directed only against the Indians, and not against white residents of the township of Tuscarora, who might be electors.

A. H. F. L.

ALTA.

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unless he acted in collusion with officials of the department in open violation of the regulations. It was quite open to the plaintiff to have had the claims staked by parties who had not exhausted their right to do so and to have had them transfer to Lessard the interest to which he was entitled upon issue of the grant and that is in effect what he contracted to do. I do not think that the acquisition of these claims was a speculation or a joint venture on the part of the contracting parties. The contract certainly contemplated that it should eventually ripen into one, for it provides for a sale upon the grants being received and a division of the purchase money in specified proportions and declares that in the event of there being no sale the plaintiff and Scriver should contribute to the loss to the amount of $250. But until then the matter rested in the contract of the plaintiff and Scriver to procure these grants and as to that there was no speculation or joint venture or anything but a covenant on their part to do it. There was to be no element of speculation in the procuring of the coal lands. They were to be secured, and then and not until then was the arrangement to assume the guise of a joint venture.

Lessard paid the plaintiff $500 for which he agreed to procure for him a certain specified thing and this the plaintiff failed to do and Lessard is entitled to a return of his money.

Lessard sent the plaintiff $75 to Montreal to cover the expenses of a trip which the plaintiff said he intended to make to New York with a view to the sale of these coal claims. This trip was never made. Apart from this fact I should think Lessard entitled to the return of this money for the reason that it was obviously sent in reliance upon the plaintiff's agreement to secure these coal lands and which agreement he failed to perform. I would dismiss the appeal with costs.

Appeal dismissed.

MAN.

K. B.
1913

PRINCE v. TRACEY.

Manitoba King's Bench, Prendergast, J. September 27, 1913.

1. INDIANS (§ I—2)—STATUS—BRITISH SUBJECTS WITH CIVIL RIGHTS, LIMITED HOW.

Indians in Manitoba are British subjects enjoying full civil rights as such, except as specially limited by statute.

2. MAXIMS (§ I—21)—"NOSCITUR A SOCIIS"—"PRODUCE" IN INDIAN ACT, CONSTRUED.

The word "produce" in the phrase "grain, root crops, or other produce" embraced in sec. 39 of the Indian Act, R.S.C. 1906, ch. 81, is, under the maxim *noscitur a sociis*, limited to the meaning which it shares with its antecedents "grain" and "root crops" and should not be taken to cover "wild hay."

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ACTION by an Indian to set aside a mortgage executed against his property under a power of attorney obtained by alleged false representations and fraud.

Judgment was given for the plaintiff.

C. P. Fullerton, K.C., for plaintiff.

R. B. Graham, for defendant.

PRENDERGAST, J.:—The plaintiff is an Indian, the defendant Helen Maude Tracey, a spinster, and the defendant George N. Tracey, a trader, and the action is brought to have declared null and void a mortgage on the plaintiff's land, purporting to have been made by George N. Tracey as plaintiff's attorney in favour of Helen Maude Tracey, to secure the sum of $250 and interest thereon—the grounds being fraud and false representation by George N. Tracey in procuring the power of attorney under which he executed the said mortgage.

William Frank, a real estate agent, who subsequently purchased the land in question from the plaintiff, was made a defendant to recover from him a balance of the purchase price which he withholds owing to the registration of the said mortgage against the property. The defence of the two defendants Tracey is, that on January 4, 1908, the plaintiff being indebted to George N. Tracey in the sum of $250, executed a power of attorney authorizing him to execute a mortgage on lands of which he was about to receive patent to secure payment of the said indebtedness, and that on April 9, 1908, he consequently executed to Helen M. Tracey a mortgage for the said amount covering the land in question for which patent had in the meantime issued to the plaintiff. The defence also sets forth that the said mortgage has since been assigned by Helen M. Tracey to George N. Tracey. I may say at once that George N. Tracey did not receive any money from Helen M. Tracey, who is his sister, the mortgage having been made in her favour, as he says, merely for the sake of convenience as he was advised that he could not make it to himself.

As to the power of attorney, of which a certified copy was produced, James Moody, the subscribing witness thereto, swears that he saw the plaintiff sign the same. The document reads in part as follows:—

> Whereas I, Henry Prince, am . . . entitled to a patent from the Government for certain lands. . . .
>
> And whereas I am indebted to George N. Tracey . . . in the sum of $250 and I have requested the same George N. Tracey to grant me a certain extension of time for payment of the said indebtedness . . . and interest thereon at 12 per cent. . . .
>
> Now therefore I appoint . . . George N. Tracey, my true and lawful attorney for me and in my name, place and stead, as soon as the patent shall have been issued, to sign, seal and deliver a mortgage of

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all the lands covered by the said patent . . . to such person . . . as shall advance me by way of loan . . . the amount of my indebtedness and all interest thereon. . . . My said attorney is authorized to receive the proceeds of such mortgage loan . . . and also to give such promissory notes as collateral to the said mortgage as may be necessary . . . or to sell all or any of the real estate . . . either by public auction or private sale . . . and also to execute to the purchasers all deeds of grant, agreements of sale, etc.

And for all and every of the purposes aforesaid to grant unto my said attorney full and absolute power . . . to do all acts and things necessary . . . and also to commence, institute and prosecute all actions, suits and other proceedings. . . .

The plaintiff says that in July and August of last year, he agreed with George N. Tracey on three separate occasions to put up for him on St. Peter's Indian Reserve ten tons of hay at $2 a ton, of which on each occasion he received one half or $10, being $30 in all, the balance payable when the hay was measured by Tracey which the latter was bound to do upon notice that the hay was put up. The plaintiff says he put up the hay and called several times on Tracey to come and measure it. Having received from Tracey in the last days of December a letter saying that he did not want the hay, he says he went to see him on January 4, 1908, and that Tracey told him that "the man he had sold it to had gone back on it." The plaintiff then said, "What am I to do?" and Tracey answered, "You can give me security on your land and when you sell it you will pay me. I don't want any money now." The plaintiff then signed a document, which is the power of attorney in question. The plaintiff says, "I signed a paper which he said was security for what I got." He says he signed only one paper, and Moody's evidence seems rather to support that. He says that all that he had got from Tracey was the $30 above-mentioned, then $4, and finally $1, at the time of signing, or $35 in all. He says:—

It was at Moody's store, at night. . . . He didn't read the paper over and he gave no explanation except that he said, "Give me security and when you sell your land you can pay me."

He also says, whatever that may mean:—

I knew there was a security, that is all; but I didn't know the nature of the security.

George N. Tracey's version is that, after he bought the hay at $2, the price of it went up and that on January 4, following, on the occasion referred to, which was at Moody's store, he sold the 30 tons back to the plaintiff at $8. He says he then took from the plaintiff a promissory note for $250 and had him sign the power of attorney after explaining to him the contents of the document. As to how the $250 was made up, the defendant is very indefinite. There was, of course, $240, being for

the 30 tons at $8; but he says he had also advanced a little to the plaintiff besides the $30, and that he gave him a little more at the time of settling. He says, on examination for discovery (questions 131 and 132):—

> I took the note for $250, and gave him the difference on what I owed him on the hay, the difference between $240 and $250 in money right then. . . . It was only small . . . between $8 and $12, somewhere there.

Assuming Tracey's version to be correct, this reselling of hay at $8 a ton to the same Indian from whom he had purchased it at $2 seems, of course, very harsh and excessive—more so when one considers that he did not have as much trouble about it as to go and measure it or look at it, and that he withheld for nearly six months from this man one-half of the $2 per ton, in order that, as he says, he wouldn't run chances and if a fire occurred, the loss would not be his. That he made the same bargain with thirty other Indians that same fall, involving some $13,000, as I understood him to say, only seems to shew a deliberate design to systematically take advantage of the well-known improvidence of that class of people. It is true that the plaintiff speaks very good English, is able to read and write and does quite a little business in Selkirk in the way of laying sidewalks, moving houses and building small bridges. He, moreover, states that at one time he was willing to settle for $50. But besides the above direct statements of the plaintiff and Tracey, there are other considerations which lead me to believe that the former's contention is right. First of all, Tracey keeps no books to shew his numerous transactions of last summer with the St. Peter's Reserve Indians. Nor was he able to produce the $250 note which he says the plaintiff signed. Apparently, Moody only saw the plaintiffs execute the one document in his store. I must believe that Tracey, as he says, left with a firm of solicitors in Winnipeg, certain papers connected with this suit which have since been lost; but there is nothing but his word as to there being a promissory note among them. Then, Tracey would, unmistakably, convey the general impression that it was the plaintiff who took the initiative in the matter of purchasing the hay back, which would make it more believable that he was taking it back at an advance; but Tracey's own letter of December 19 (exhibit 2), is very fair evidence that this was not so, as well as of the truth of the plaintiff's testimony to the effect that Tracey told him that the man who was to buy it had gone back on it, and that he, the plaintiff, could have it to sell it, without mention of an advance in price.

Finally, assuming that the hay was sold back at $8, Tracey has not made out at all how the $250 was arrived at. I am fully satisfied that this amount does not take into account the $30, being the second half of the purchase of the 30 tons at

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$2 which he owed the plaintiff. It is preposterous to say, on the face of his own evidence, that he had paid that to the plaintiff in small advances prior to January 4. He says himself that he was particular to provide in his written agreement (also not produced), that he was to pay the plaintiff the second half of the purchase price only on taking delivery, so as not to run the risk of a fire. His evidence as to the amount which he paid to the plaintiff at the time of settling, I take to be purposely indefinite and evasive, and it is impossible to say whether the $8 or $12 which he mentions was all paid on January 4, or whether some of it had been paid before. Tracey realized, I am sure, that to make quite plain what advances he had already made to the plaintiff, would have amounted to a confession that if there was such a sum as $250 mentioned at all, the $30 which he owed on the first purchase was not taken into account.

I find as a fact that at the time of the settlement, January 4, the plaintiff owed Tracey $35 only, and that the power of attorney which the latter took was altogether different from the security which the plaintiff was led to believe he was signing at the time.

On the other questions raised, I would only say that, subject to the special statutory limitations, Indians are British subjects enjoying full civil rights as such, and I am also of opinion that the words "grain, root crops or other produce" in secs. 38 and 39 of the Indian Act, on the principle *noscitur a sociis*, should not be taken to cover wild hay.

There will be an order declaring the mortgage null and void and vacating the registration thereof, with costs to the plaintiff.

Judgment for plaintiff.

B. C.

C. A.
1913

McKISSOCK v. McKISSOCK.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. July 22, 1913.

1. HUSBAND AND WIFE (§ II A—50)—PROPERTY RIGHTS—TRANSACTIONS BETWEEN—PURCHASE OF LAND BY WIFE WITH MONEY FURNISHED BY HUSBAND FOR INVESTMENT FOR JOINT BENEFIT.

A married woman who purchases land in her own name with money furnished her from time to time by her husband from his wages and other sources, will be required to convey a half interest therein to her husband, where the money was given her for the express purpose of being invested in land for their joint benefit, share and share alike.

[See Annotation at end of this case on property rights between husband and wife.]

Statement

APPEAL by the defendant from a judgment requiring the conveyance to the plaintiff of a one-half interest in land purchased by the defendant after her marriage to the plaintiff with money furnished by him from his wages and other sources under an

April 14, 1891.

Coram TASCHEREAU, J.

TIOROHIATA ès-qual. v. TORIWAIERI alias BARNES.

Rights of Indians, how determined—Minors—Appointment of tutor.

HELD:—1. That the rights of Indians are regulated and determined by the Indian Act, (R. S. C. Ch. 43), and not by the common law, which does not apply to them.

2. That a tutor to an Indian minor, should be appointed through the ministry of the Superintendent General of Indian affairs, as indicated in said Act (Sec. 20, Sub. Sec. 8), and such tutorship conferred by the prothonotary, in the ordinary way, is of no effect.

The following is the judgment, in which the facts are fully set forth:—

"Attendu que la présente action est portée par un sauvage, en sa prétendue qualité de tuteur nommé en justice, en la manière ordinaire, à un sauvage mineur, et est dirigée contre un autre sauvage, pour réclamer des dommages de ce dernier à raison d'une poursuite malicieuse qu'il aurait commencée contre le dit mineur au criminel, en mai 1890, à Caughnawaga;

"Attendu que le défendeur a plaidé par dénégation générale et par un plaidoyer de justification;

"Considérant que les parties en cette cause, savoir, le demandeur ès-qualité, le mineur qu'il prétend représenter et le défendeur, étant tous des 'sauvages,' aux termes de l'acte des sauvages (Statuts Révisés du Canada, chapitre 43), leurs droits sont régis et déterminés par le dit acte, et non par le droit commun qui ne leur est pas applicable;

"Considérant que le demandeur poursuit en sa qualité de tuteur nommé en justice au mineur Peter Tihontonho par acte de tutelle déféré par le protonotaire de cette cour le 12 mai 1890, sur avis des parents du dit mineur;

"Considérant que les mineurs sauvages doivent être

pourvus de tuteurs en la manière indiquée au dit acte (section 20, sous-section 8), savoir, par le ministère du surintendant général des affaires des sauvages, qui seul a le pouvoir de nommer aux dits mineurs des personnes aptes et propres à prendre soin d'eux et de leurs biens; ainsi que de destituer ces personnes et d'en nommer d'autres, s'il y a lieu;

"Considérant que le demandeur n'ayant pas été nommé tuteur au dit mineur par le dit surintendant général des affaires des sauvages, n'est pas le tuteur légal du dit mineur, et que la tutelle déférée par le protonotaire est nulle et de nul effet, étant en contravention aux dispositions du dit acte;

"Considérant que le demandeur ne représente ni la personne ni les biens du dit mineur, et ne pouvait porter la présente action;

"Maintient la défense et renvoie la dite action avec dépens, distraits, etc."

H. A. Hutchins for plaintiff.

McCormick, Duclos & Murchison for defendant.

(R. L. M.)

June 18, 1891.

Coram WURTELE, J.

LABBÉ v. FRANCIS ET AL.

Sale—Building materials.

HELD:—That the words "building materials," in a contract of sale of material to be removed from a certain lot of ground, do not include fixtures and appliances contained in the building, for supplying heat, for lighting by gas, and for the distribution of water.

The judgment is as follows:—

"The Court, having heard the parties, by their counsel, upon the merits, having examined the proceedings and the exhibits filed, and having heard the witnesses in open Court;

have initiated a representative action designating Mr. Davidson as the representative.

On the plain wording of M.R. 131 no order is needed for one or more persons of a class to initiate a representative action. The editors of Lord Atkin's *The Encyclopaedia of Court Forms and Precedents in Civil Proceedings* in writing about representative actions (under O. 16, r. 9) point out at p. 11, vol. 6, that where one or more members of a class sue on their own behalf and on behalf of others no leave to represent is needed. I think it plain that if it is considered that a representative action is not properly brought, the defendant or defendants may move to set aside.

In *Von Hellfeld v. Rechnitzer et al., supra,* it is clear that the plaintiff was given leave to amend. However, Buckley, L.J., declined to suggest the form of the amendment. At p. 753 he said: "I am not going to suggest the amendment which ought to be made, ...". I adopt a similar course. I do so because I do not think it advisable to approve the proposed amendment in terms without fuller argument than I have been given. As well the material is not directed to the issues arguable under M.R. 131. Assuming that counsel do not wish to be heard again on the matter of amendment, the plaintiff may amend as advised. The amendment will doubtless be in the form suggested in argument. If counsel for the defendants advises that the suit cannot properly be brought under M.R. 131, the defendants can move again.

The writ will not be set aside. Subject to counsel not wishing to be heard again the plaintiff may amend as advised. I see no reason why costs should not follow the event; the defendants should have the costs of the motion. I would be remiss if I did not thank counsel for very helpful and thorough written arguments.

Motion dismissed.

RE TURNER AND PRINCE ALBERT PULP CO. LTD.

Saskatchewan Queen's Bench, Hughes, J. September 9, 1974.

Civil rights — Discrimination — Statute forbidding discrimination in employment because of, inter alia, race and colour — Human Rights Commission finding discrimination against Indian — Whether evidence supports finding — Fair Employment Practices Act, R.S.S. 1965, c. 293, s. 3.

Courts — Jurisdiction — Appellate Courts — Statute providing for final appeal from decision of Human Rights Commission to superior Court — Whether Court restricted on appeal to record of hearing be-

fore Commission — Whether Court can substitute its own opinion — Saskatchewan Human Rights Commission Act, 1972 (Sask.), s. 11.

The individual respondent, a Treaty Indian, was employed by the appellant company from September, 1968, until he resigned on August 30, 1972, having become a permanent employee in January, 1969. He was first employed in the wood room section of the company as a labourer and was promoted several times until January, 1971, when he successfully applied to move up to the machine room section of the plant. He started at the most junior level in this section, but in April, 1971, he was promoted to the next level, that of car loader, a position he held at the time of his resignation. It was the practice in the plant to train junior employees for more senior positions while on the job and the individual respondent received such training. The point of this was that if a temporary vacancy occurred at a more senior level, the junior man would be moved up temporarily and be paid accordingly. It was agreed between the company and the union that a person would not be called in from another section in such cases if there was a man "trained up" in the section short of manpower. The individual respondent benefited from this system on several occasions. His complaint of discrimination was based on two separate sets of incidents. The first incident occurred when he commenced work in the machine room section. At that time, one of his supervisors said to him: "I hope you're not like that Chipewyan we had working here ... who phoned in drunk every odd day ... I hope you're a better man." The second set of incidents occurred in August, 1972. During this month the individual respondent was working under a temporary shift supervisor who at the same time filled a more senior management post. It was proved that during this time the individual respondent was twice passed over on occasions when he should have been moved up. The respondent Commission concluded that these two sets of incidents in their total effect amounted to "real discrimination against him because of his race and colour". On appeal from that decision, *held*, the appeal should be allowed.

Under s. 11 of the *Saskatchewan Human Rights Commission Act*, 1972 (Sask.), c. 108, a final appeal from a decision of the Saskatchewan Human Rights Commission lies to a Judge of the Court of Queen's Bench. The section does not provide for a hearing *de novo* and thus the Court is restricted on an appeal to the evidence taken before the Commission. While racial discrimination can be of an insidious and concealed nature and thus requires a close look at the evidence, it was clear from the evidence that there was a total lack of discrimination because of the individual respondent's race or colour. The remark made by his supervisor when he commenced work in the machine room, while objectionable, was an isolated remark and it was neither alleged, nor shown, that this supervisor discriminated against the individual respondent on any other occasion. In fact, the evidence shows that this supervisor instructed the men under his charge to stop calling each other by nicknames suggestive of racial origins. As for the incidents during the last month of the individual respondent's employment, his temporary supervisor candidly admitted that he had made a mistake in the first case, not knowing that the individual respondent was trained to move up, since the supervisor was not in his regular job. The supervisor's evidence was not called into question in the Commission's decision. The evidence about the second incident in which a similar thing happened and which occurred shortly after the first, was unclear. The individual respondent reported this in-

cident to his shop steward but nothing was done about it since the former went on vacation and when he returned he called in to say that he was resigning. It was clear from the evidence that had a grievance been presented with respect to the two incidents, it would have been resolved in favour of the individual respondent. Furthermore, the fact that he was not rehired when he changed his mind the day after resigning was in accordance with general company policy in the case of employees who resigned without giving notice. In summary, therefore, the complaint of discrimination because of the individual respondent's race and colour was not, on the balance of probabilities, "supported by the evidence" as required by s. 10(5) of the *Saskatchewan Human Rights Commission Act, 1972*. On appeal, the Court is entitled to substitute its decision for that of the tribunal of first instance which is discharging a judicial function, where the decision of the lower tribunal is not explicit and is clearly wrong on the evidence. Furthermore, under s. 11(6) of the Act, the Judge sitting in appeal from that decision may substitute his own opinion for that of the Commission. In the circumstances of the case this right should be exercised and the decision of the Commission reversed.

[*Maryland Casualty Co. v. Roland Roy Fourrures Inc.* (1973), 35 D.L.R. (3d) 591, [1974] S.C.R. 52, folld; *Lucyk v. Clark*, [1945] 2 D.L.R. 306, 83 C.C.C. 192, [1945] 1 W.W.R. 481; *Holden v. Moskovitch* (1920), 55 D.L.R. 317, [1920] 3 W.W.R. 825, 13 S.L.R. 487; *Clarke v. Edinburgh and District Tramways Co., Ltd.*, [1919] S.C. (H.L.) 35; *Re Glassman and Council of the College of Physicians and Surgeons* (1966), 55 D.L.R. (2d) 674, [1966] 2 O.R. 81; *Hood v. Hood* (1971), 19 D.L.R. (3d) 669, [1972] S.C.R. 244; 5 R.F.L. 301, refd to]

APPEAL from a decision of the Saskatchewan Human Rights Commission finding that the appellant company discriminated against the individual respondent because of his race and colour and directing his reinstatement.

D. K. MacPherson, Q.C., for appellant.
Irwin B. Carson, for William J. Turner.
Nicholas Sherstobitoff, for Saskatchewan Human Rights Commission.
D. G. Bogdasavich, for Attorney-General of Saskatchewan.

HUGHES, J.:—This is an appeal pursuant to s. 11 of the *Saskatchewan Human Rights Commission Act*, 1972 (Sask.), c. 108. Subject to the direction of the member of the Executive Council to whom administration of the statute is assigned, the Saskatchewan Human Rights Commission established under the statute (hereinafter called "the Commission") is directed to administer a number of Saskatchewan statutes including the *Fair Employment Practices Act*, R.S.S. 1965, c. 293, and amendments thereto. Section 3 of that statute as amended [by 1972, c. 43, s. 4], provides:

> 3. No employer shall refuse to employ or to continue to employ, or otherwise discriminate against, any person in regard to employ-

ment or any term or condition of employment because of his race, religion, religious creed, colour, sex, nationality, ancestry or place of origin.

Following the making of a complaint to the Commission and an inquiry into same as contemplated by s. 9 of the *Saskatchewan Human Rights Commission Act, 1972*, a formal inquiry thereof was conducted by the Commission pursuant to s. 10 of the Act. The fifth subsection of that section is relevant and it reads:

> 10(5) Immediately after a direction under subsection (1) to conduct an inquiry, the commission shall inquire into the matters complained of and shall give full opportunity to all parties to present evidence and make representations and, in the case of a matter involved in the complaint in which settlement is not effected in the meantime, if it finds that the complaint is supported by the evidence may order any party who has contravened any Act administered by the commission to do any act or thing that in the opinion of the commission constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.

The notice convening the inquiry reads as follows:

SASKATCHEWAN HUMAN RIGHTS COMMISSION
NOTICE OF FORMAL INQUIRY

To: Prince Albert Pulp Company Ltd.

and

Mr. William J. Turner,
Sturgeon Lake, Sask.

TAKE NOTICE that the Saskatchewan Human Rights Commission, at its meeting on July 19, 1973, in the Court House at Saskatoon, Saskatchewan, DIRECTED A FORMAL INQUIRY BE HELD under Section 10 of The Saskatchewan Human Rights Commission Act, c. 108, 1972, into the complaint of William J. Turner of Sturgeon Lake, Saskatchewan, that due to discrimination he resigned from his employment as a "Car Loader" in the Machine Room of the Prince Albert Pulp Company Ltd. as of August 28, 1972; that the discriminatory treatment he received was because of his race and colour, and that the company did refuse his request to rehire him, contrary to Section 3 of The Fair Employment Practices Act, c. 293, R.S.S. 1965 as amended.

You are hereby advised that the Saskatchewan Human Rights Commission directs a Formal Inquiry into the above complaint to hear and decide the matter, commencing at TEN (10) a.m. on Tuesday, October 9, 1973 in the Banquet Room of the Avenue Hotel, 1015 Central Avenue, Prince Albert, Saskatchewan.

"Tillie Taylor, J.M.C."
(Judge Tillie Taylor),
Chairman,
Saskatchewan Human Rights
Commission.

To: Mr. M. R. Goulard,
Production Manager,
Prince Albert Pulp Company Ltd.,
Prince Albert, Saskatchewan.

Mr. William J. Turner,
Sturgeon Lake, Saskatchewan.

The complainant is a Treaty Indian of the Cree tribe. The inquiry lasted three and one-half days. When transcribed, the evidence covered something in excess of 450 foolscap pages. Aside from opening formalities and a closing paragraph ordering reinstatement and back pay, the majority decision of the Commission which by statute becomes *the* decision of the Commission, is found in 10 short paragraphs which I believe bear repeating at this point:

> Mr. Turner alleged in his evidence that at the time of his transfer into the machine room, Mr. Facco told him "I hope you're not like that Chipewyan, Louis Wolverine, who phoned in drunk every other day".
>
> Mr. Facco, in his evidence, denied making this statement. He also claimed that he did not remember anything substantial about Louis Wolverine, a man with whom he worked on occasion, as the evidence shows.
>
> It is difficult to see how a man with a record like Wolverine's, about whom many complaints were on file, could have been forgotten so easily. Turner's credibility, on the other hand, was in no way shaken during his evidence. The Commission is satisfied upon hearing both witnesses that the statement relating to Wolverine was indeed made by Mr. Facco.
>
> Mr. Turner also alleged that he was not allowed to move up on shift as he should have been, and that no one else was experiencing the same treatment at this time.
>
> Witnesses for the pulp mill claimed that such failure to be moved up on shift was of frequent occurrence, resulting in many grievances being filed. To this effect the company tabled a number of grievances.
>
> On examination of these exhibits the Commission found that only one of them alleged treatment similar to that of which Mr. Turner complained. That particular exhibit dated back to 1969, when procedures at the mill were still in the process of being established.
>
> Evidence was received that clearly established policy of moving people up on shift existed prior to August, 1972, the time of Turner's complaint; therefore it is difficult to understand why the foreman did not immediately recognize and rectify Turner's complaint when it occurred.
>
> Being singled out in this manner was given by Mr. Turner as the most immediate reason for his being depressed and discouraged. It was while in that frame of mind that he quit his job at the mill. The following day he requested to be rehired, but the pulp mill declined his request.
>
> In its total effect, the treatment Mr. Turner received at the hands

of pulp mill management amounts to real discrimination against him because of his race and colour.

The Commission has evaluated the cumulative effect on Mr. Turner of his treatment by those in pulp mill management. That treatment, in its judgment, constitutes a substantive case of discrimination. It judges also that an injustice has been done him which must be rectified.

A minority decision was filed, the nub of which is a finding that "if there was any discrimination, it was not due to Turner's racial origin". Since this is not the decision under attack in these proceedings there is no need to refer further to it.

It is s. 11 of the statute by which I am governed. It reads:

11(1) Any party to a formal inquiry before the commission may appeal from the decision or order of the commission to a judge of the Court of Queen's Bench.

(2) If a person proposes to appeal under subsection (1) he shall, within thirty days after the decision or order of the commission from which he proposes to appeal, serve on the commission a notice of motion in accordance with the rules of the Court of Queen's Bench to vary or set aside the decision or order.

(3) Where notice of an appeal is served under this section, the commission shall forthwith file in the office of the local registrar of the Court of Queen's Bench the record of the proceedings before it in which the decision or order appealed from was made which, together with a transcript of the oral evidence taken before the commission if it is not part of the record of the commission, shall constitute the record in the appeal.

(4) A judge may direct that notice of the appeal be served on such persons other than the commission as he deems advisable.

(5) The minister is entitled to be heard, by counsel or otherwise, upon the argument of an appeal under this section.

(6) An appeal under this section may be made on a question of law or fact or both and the judge may affirm or reverse the decision or order of the commission or direct the commission to make any decision or order that the commission is authorized to make under this Act and the judge may substitute his opinion for that of the commission.

(7) There shall be no appeal from an order or decision of the judge of the Court of Queen's Bench under this section.

Anticipating the problems that could exist in this type of a proceeding I, at the outset, explored with counsel the question of whether they considered I would be restricted to the evidence given before the Commission or whether I could either hear further evidence or conduct a hearing *de novo*. They were unanimous in their view, and correctly so, that I would be restricted to the transcript of evidence and the exhibits previously filed. To allow otherwise would require statutory authority such as is found for instance, in a section of a stat-

ute under which I recently heard an appeal, to wit, s. 23 of the *Children of Unmarried Parents Act*, 1973 (Sask.), c. 12. Now that I have given the 450 pages of evidence my best possible attention I can only say that the problems that I anticipated could exist, certainly were found to exist in this instance. That will become obvious to the reader of this judgment.

The complainant Turner first went to work with the appellant in September, 1968. His employment over the balance of that year was on an "on-off" basis as often is the case with temporary help. However, he was hired as a wood-room labourer on January 9, 1969, and he remained with the appellant as a permanent employee until resigning on the evening of August 30, 1972. His first promotion was to slasher discharge man in May of 1970. Further promotions followed in the wood room to the positions of peeler and then sorter. Two years and two days after going on permanent staff, to wit, on January 11, 1971, Turner successfully bid out of the wood room into the machine room.

As I read the decision of the Commission, there is no suggestion of discrimination against Turner in regard to his employment because of race, colour, nor indeed for any other reason until the time of transfer to the machine room. That is to say, the appellant, who on May 1, 1974, was adjudged by the Commission to have treated Turner in a manner that "amounts to real discrimination against him because of his race and colour" is clear of any hint or suggestion thereof for the initial two years of Turner's permanent employment with the company. Indeed, that corresponds with Turner's view of the situation as evidenced by his answer to the following question:

> Q. Up to this point in time, did you have any difficulties in your employment at all?
>
> A. It wasn't really too bad because there was quite a bit of Metis and Indian boys working there. So I had it pretty good there, no problem.

It becomes important to set out the lines of progression in the machine room. From senior to junior positions, it is as follows: machine tender; backtender; pulp grader; balerman; shipper; carloader; scale and utility (starting point). As would be expected, Turner commenced his work in the machine room in the junior position of scale and utility man. At the time of commencement of work in the machine department one of his superiors with whom he had initial contact was Mr. Dave Facco, then assistant pulp mill superintendent. At the initial meeting, prior to Turner doing his first day's work in the new

department, Turner says that Facco passed the following remark to him: "I hope you're not like that Chipewyan we had working here, Louis Wolverine who phoned in drunk every odd day . . . I hope you're a better man." The Commission found, notwithstanding a denial by Facco, that this statement was indeed made. I proceed on the basis that this is so for the Commission saw and heard the witnesses and evidence on which it could make that finding is certainly there. That such a statement carries reprehensible racial overtones there is no question. Without doubt, this must be an event to be considered when determining the question of whether, as alleged by Turner, "that due to discrimination he resigned from his employment as a 'Car Loader' in the machine room of the Prince Albert Pulp Company Ltd. as of August 28, 1972; that the discriminatory treatment he received was because of his race and colour" (as recorded in the formal notice of inquiry, *supra*). Not to lend a flavour of justification to the uttering of this remark but rather to indicate that such an incident was not apparently confined, the following evidence of Mr. H. A. Brassard, Turner's union shop steward, is recorded, which incidentally puts Facco in a better light in this regard than does the foregoing statement attributed to him when standing alone:

Q And that, in fact, following that Mr. Facco spoke to the crew on which Kipling worked and cautioned them against calling each other names which would embarrass because of race or anything of that nature. Are you aware of that, or did you hear of that?

A He told not only Kiplain but between ourselves also.

Q What did he say?

A Well he told us, well we got a pretty big crew for names, you know, like they'll call me "The Frog" and I'll call him "A Koobasa" — and you name it, you know.

Q What was the last one?

A "A Koobasa", because there's me for a Frenchman, my top operator is Ukrainian and then we had Kipling for a bottom-man, well we called him "Tomahawk", and they called me "Frog" and this was on every day, you know. Actually, half the time I don't think we even know each other by names. That's an every day operation, so he told us to quit that. He did not refer back to "Tomahawk" or anybody.

Q I see. You had to quit calling each other embarrassing nicknames?

A That's right.

Q So in other words, he didn't want anybody calling you "Frog", or anybody calling Mr. Kipling "Tomahawk", he didn't want anybody calling somebody else "Koobasa", which I understand means sausage. Whatever these nicknames were that were called, I take it that at least Mr. Kipling had reached the point of becoming

> sensitive about being called "Tomahawk" and he had spoken to Facco and this resulted in Facco speaking to you and then speaking to the whole crew?
>
> A Correct.

That intervention by Facco would indicate to me that his own ill-flavoured comment to Turner came through unthoughtful recklessness on his part in using the plant jargon of the day, rather than from a rooted prejudice of a racial nature. Subsequent events that I will review bear out this conclusion.

The second and final incident, if I may call it that, that the Commission apparently found to exist, which led to its determination of "real discrimination against him because of his race and colour" appears to be its concurrence with Turner's allegation "that he was not allowed to move up on shift as he should have been, and that no one else was experiencing the same treatment *at this time*". [Italics added.] (The quotation is from the fourth paragraph of the decision as recorded, *supra*.) A reading of the sixth paragraph thereof indicates that the time referred to, *i.e.*, the time that Turner considered that this was happening to him was in August, 1972, the month in which he quit his job. Because of, according to my reading of the transcript, a complete and total absence of any apparent evidence linking the August, 1972 events to discrimination on the basis of race and colour, it becomes necessary not only to reveiw those events but indeed all relevant events during Turner's 19-month stay in the machine department and this I will do shortly. I am conscious of the fact that racial discrimination could be of an insidious and concealed nature but none the less real and hence my determination to take an in-depth look at these events to see if what the Commission found to be apparent to it, is in any possible way, no matter how slight, indicated to me.

On April 20, 1971, Turner was promoted to the position of car loader. Turner testifies that up to this point he was not experiencing difficulty in his employment. While on the job he was given the opportunity of upgrading himself and in fact became qualified to fill the next two positions on the scale, *i.e.*, that of shipper and balerman. As to how he obtained on-the-job training for these positions, Turner stated:

> Well I was given a few days on with the regular shipper and he showed me how to look after the records on which car I was loading. It was quite a while until I could make out a slip and know which car was loaded and after that I was on my own.

From time to time during short periods of vacancy on his

shift, Turner was moved up to these more senior positions on a temporary basis for which he was qualified, as and when the need arose. He acknowledges that he was paid accordingly.

In February of 1972, two situations arose which prompted Turner to file grievances with the company. Each grievance was settled in favour of Turner. While he vaguely suggested in giving evidence that racial discrimination could be read into the circumstances giving rise to those grievances I fail to see any basis at all for such a suggestion and I assume the Commission was like-minded for there is a total lack of reference to these incidents in its decision. I therefore do not see any point in dwelling further on them.

Thus we arrive at August, 1972, the month in which Turner quit his job, with the Facco statement of January, 1971, as the sole tangible piece of evidence with respect to the allegation of racial discrimination. A reading of the evidence would indicate that Facco, for whatever reason, did not enjoy a totally harmonious working relationship with many of the men, including Turner. For instance, Brassard testified that he, like Turner, apparently got under Facco's skin and that he "had a poor relationship with him also". Notwithstanding this situation and the January, 1971 remark, Turner arrived at the month of August, 1972, without a basis for suggesting that Facco had acted in a manner towards him to indicate that racial discrimination was either present or practised. The following of Mr. Turner's evidence so indicates:

> Q Yes but what I am getting at is that following the statement that you say he made there is nothing that Mr. Facco has done which constitutes actual discrimination insofar as your job is concerned, isn't that correct?
>
> A Well as long as I did my work he had nothing that he could say.
>
> Q That is what I am saying, that you were treated the same as everybody else, is that right?
>
> A Not when it is time for moving up.
>
> Q Leaving aside the moving up that week in August, you were treated the same as everybody else except for the incidents that we know about, you were treated the same as everybody else, isn't that right?
>
> A Yes.

From a reading of the evidence up to this point the "incidents" referred to by counsel could only be those that were the subject of the aforestated two grievances in the month of February, 1972.

The foregoing evidence of Turner is borne out by Brassard's evidence, as follows:

Q If Mr. Turner was being ridden by Dave Facco it was because he was an employee; not because he was an Indian?

A Correct.

A close look at the August, 1972 events now becomes necessary. In this regard it is paramount to appreciate that Turner does not lay his problems of that month at Facco's door but rather with his then temporary shift supervisor or superintendent R. A. Bradford. Turner's regular shift supervisor since February, 1972, had been Ray Landry and under whom he had always been moved up at what Turner considered to be the appropriate times. In fact Turner went so far as to say that the events of August, 1972, would never have developed if Landry had been there. To me that is tantamount to him saying that racial discrimination was not being practised, at least not to his detriment, by the appellant. He then went on to say:

Q But you have already told us that you were moved up from time to time, when Mr. Landry was there.

A Yes when Landry was there.

Q And Mr. Landry had been your shift superintendent since the previous February so that from the previous February up until the summer of 1972 when Mr. Bradford was temporarily taking over the shift you had always been moved up whenever you were supposed to have been moved up?

A Yes.

Q Then suddenly when you had a temporary superintendent and there are two situations in one week where you are not moved up you then conclude it is a form of discrimination against you?

A Yes.

Q So it is your conclusion that Mr. Bradford is the one who is deliberately discriminating against you because you are Indian?

A Yes.

So, as the examination of the events of August, 1972, is carried out, Bradford's conduct must be carefully assessed. That is very important because if the appellant was practising any racial discrimination against Turner whatsoever, its actions had to be through Bradford's actions on one or possibly two occasions during a one-week period. I come quickly to the point and say that nowhere in the transcript is there one tittle of evidence to suggest discrimination by Bradford against Turner on account of his race. I could see how it is possible that a conclusion could be reached that Bradford did for some unexplained reason discriminate but if he did, he lied when he gave his evidence and a reading of his evidence does not show him to be that kind of a person although it must be emphasized that I was without the benefit of seeing and hearing the

witness. However, if this is the conclusion that the Commission reached with respect to Bradford, surely it would have said so. The fact is that other than Turner and Facco, the five other persons giving evidence before the Commission were never mentioned by name in the body of the decision and only Bradford of this group was alluded to by description when referred to as "the foreman". In the absence of some indication from the Commission as to how it assessed the credibility of Bradford, the very man against whom Turner directly pointed the finger of racial discrimination, surely I must be free, if so disposed, to accept his explanation of an honest mistake, as discussed in the following paragraphs hereof, with respect to the August event or events. As I look at those events on the key issue of honest mistake or intentional discrimination, it must be remembered that if the latter, there is a total and complete lack of evidence to suggest or even infer race or colour as the the reason therefor.

Bradford freely concedes he made a mistake with respect to one shift, the result of which worked to the detriment of Turner. While many pages of evidence are devoted to this incident, the basic facts as detailed by Turner were put to him in summary form by counsel for his concurrence as follows:

> Q Okay, let's just be clear. I understood your evidence that two things happened during that week of August 13th. According to your evidence yesterday, two things happened during that week of August 13th to 19th of 1972 which caused you concern. The first was when Mr. McDougal was brought in as a balerman and it was found out that Pellerin was trained up, so Pellerin did the balerman's work, McDougal did the shipper's work and you remained on the car-loader job?
>
> A Yes.

Bradford concedes that he was in error in causing this situation to happen. He says when bringing in McDougal, he was unaware that Pellerin, the shipper on shift, was trained up as a balerman and that Turner was trained up as a shipper. He agreed with counsel that had he been possessed with this knowledge, the following is what would have happened:

> Q If you had been aware that Pellerin was trained up as a balerman, and Turner trained up as a shipper, then you would have moved both these people up — Pellerin to the balerman's job; Turner into the shipper's job and you would have tried to find somebody to fill the car-loader's job. If the scale and utility man was trained up as a car-loader you would have moved him up into the car-loader's job and would have tried to find somebody for the scale and utility job, is that right?
>
> A Exactly, right.

Turner, speaking of Bradford, acknowledged that "Maybe he didn't know that I was trained as a shipper too." It is a fact that Bradford was, as well as continuing with his usual job of senior shift superintendent which involved supervising the shift superintendents such as Landry, filling in on this occasion for the vacationing Landry. That is to say, at the time in question, Bradford was doing the work of two men and I am satisfied that his knowledge of the personnel whom he was supervising in Landry's place was limited simply because his regular duties did not call for him being in close touch with the men on shift. Let me make it clear that I am satisfied that the events that Turner alleges happened on this occasion did in fact happen. I am equally satisfied that if a grievance had been taken it would have been resolved in Turner's favour and for the shift in question he would have been awarded the difference in pay between that of a car loader and shipper.

Turner says a second event of a similar nature occured two days later. He agreed with counsel's summation of his evidence relating to this event as follows:

> Q And you said, two days later in that same week that Mr. Rapin was brought in on your shift and I think you said he was kept on overtime and kept on as a shipper while you were kept on as a car-loader in your usual classification and you felt that you should have been classified or you should have taken the shipper's job because you were senior to Rapin. Is that correct?
>
> A Yes.

The evidence is not quite so clear as to whether this contravened existing policy for it is suggested that a different situation exists where an overtime employee is kept at work rather than being called in afresh. Nevertheless, I could see the matter taking the grievance procedure route in order to be resolved.

The dates when these events happened are unclear. Turner was in error in fixing them in the week of August 13th, but certainly the McDougal incident did occur earlier in the month of August or late in July. Whatever occurred in so far as the Rapin incident is concerned, and the evidence indicating just what it was lacks the clarity that exists in the McDougal situation, it would nevertheless, from a time standpoint, be shortly after the former happening.

Mr. Turner did in fact contact his union steward, Brassard, about the difficulty he considered that he was then encountering. Turner tells it this way:

> Q Did you speak to a Union representative about this last incident?
>
> A Well I seen our Shop Steward, Henry Brassard. I don't recall the

day I talked to him but it was during that week and I told him about this and he said he was going to look into it.

Q Did you hear anything further from him?

A No, I didn't hear nothing.

Mr. Brassard tells it as follows:

Q Did you do anything about it?

A Well, the man went on holidays and he never come back. I never did see Bill after.

Q Did he have ...

A You see — I couldn't give — file no grievance, because I never seen the man after.

Q I see. You were waiting for him to come back so that you could file a grievance?

A Yes, because he's got no phone; I don't know where he lives.

On a consideration of all that evidence I am not prepared to conclude that Bradford knowingly, wilfully or intentionally practised discrimination against Turner. That he did wrong by him in at least one of the two alleged incidents there is no doubt. Beyond that conclusion I do not carry the matter, nor is it relevant to do so, particularly considering the fact that the charge against Bradford relates to racial discrimination of which I emphasize again there is not one tittle of evidence.

I now go directly to the event of August 30th. Turner left on holidays soon after August 19th. He was due back to work at midnight on August 30th. At 9:45 p.m., on that day, he telephoned the shift superintendent then on duty and advised that he was quitting his job and would therefore not report for duty at midnight, some two and one-quarter hours later. There is no question that the superintendent, H. J. Whitson, tried his very best to discourage Turner from taking this action but Turner was definite. The next day the paper work commenced to wind up his affairs and to pay him money then owing to him. At 7:00 p.m., on August 31st, Turner again called Whitson indicating a desire to have his job back. Whitson investigated the possibility of this happening but in due course Turner was told that company policy was against the rehiring of any employee who had previously quit the company employ without notice.

The Commission has found that Turner was "singled out" with respect to the events of August just reviewed. While the number and content of the employee grievance forms filed as evidence could well leave that impression, such a conclusion in my opinion, overlooks the evidence of shop steward Brassard when he said:

Q I got the impression, Mr. Brechard, that this business of moving

up on shift has been a problem with employees and has resulted in a lot of grievances over the last number of years — not in the last few months but in the period of two or three years there when the pulpmill company got going, that this moving up on shift was a problem that occurred time and time again, and resulted in a lot of grievances?

A Yes.

Q And it was not unusual for employees to be grieving because he claimed he was not properly moved up on shift?

A I wouldn't say a lot but there was some that did grieve.

Q I take it there were a lot of them settled without actually filing a grievance?

A Yes.

This is verified by the following evidence of the 1972 union president, Mike Evanision:

Q You referred in evidence as to company policy where a vacancy occurs on a shift and a man is brought in, what do you know with respect to what company policy would be when a vacancy occurs and a man is brought in to cover?

A Well, from start-up in 1968 to approximately 1970-71 we had immense problems with this moving up on shift. Finally in consequent meetings with management we had a letter of understanding, and also the contractual verbage that the individual would be moved up on shift wherever possible and wherever possible would only pertain to the individual not being trained up to the position above him.

Q That was the only exception?

A Right, and also the fact that if a block occurred, if he wasn't trained up and wasn't capable of moving into the position above him in the line of progression, the individual would then be brought in to that position for overtime. In fact this was the recommendation of the Union which was accepted by the company, and that is the practise that was followed.

Q I see. After — when was this policy established?

A I would presume in 1969-70.

Q I see. Was there any variance from that policy that you know of after it was established?

A From time to time there was variance; usually it was the inability of the immediate supervisor to distinguish if the man was trained up or not trained up, and certain supervisors would immediately contact the Department where the vacancy occurred, and find out if the individuals were trained up, to move up; I was used to this type of procedure on my own shift where the supervisor in charge would immediately phone up and say — who is trained up, and who isn't and are you capable of moving up. As soon as that was determined, then the individual or supervisor would attempt to bring in the individual of that classification to replace.

Q Do you know of any incidents where the supervisor knew if the man was trained up — just moved him up — what I really mean is, knew that the man was trained up and didn't move him up?

A I don't think it has ever been done deliberately, that I know of. It might have been accidentally done once or twice — but the company had to pay the penalty and under those circumstances the usual thing was the individual, even though he was called in for a certain position, moves back in and lets the people move up.

While in the light of this evidence I question the conclusion of Turner being "singled out" I have no reason to doubt Turner's sincerity when he says he quit his job when depressed and discouraged over the event or events that occurred two or three weeks before he left on vacation. Turner explained it this way:

Q How did you feel about all this that you were kept down while the other fellow, Pellerin, was being moved up and the fact that you should have been moved up?

Mr. MacPherson: I'm sorry, did we get the date that this incident happened.

Mr. Carson: Two days after the ... which would have made it what Mr. Turner?

A Anywhere from the 13th to the 19th, August '72. I was left out pretty badly on that shift. It seemed that every time that I should have moved up I had to contact the Shift Supers and explain to them, look here, I'm the one that should have been moved up and I felt that I shouldn't have had to do that because nobody else did that, nobody else had that problem.

Q You were the only one that had the problem?

A Yes.

Q What did you think about that?

A Well, I felt pretty bad, discouraged.

Q Did you attribute any reason to it at that time, why you were being treated that way?

A Well, the reason why I thought was because I knew maybe on account of my nationality, otherwise they never did it to somebody else.

Q You thought it was because of your race?

A Yes.

Q You felt that way because nobody else has a problem?

A Nobody else.

. . . . .

Q Then what happened Mr. Turner?

A It was just getting to the place where I was taking that one-week holiday, that's when I left for one-week holiday and it was during that time, through that week's holiday that I was saying to myself, what's the use of working if I have to keep getting up — guys to move me up when I'm supposed to be moved up and it didn't happen to anybody else. That's the time I took that holiday and before I came back I phoned into the mill and I said I was quitting. There was nobody else that I was close to that I could talk with and on the reserve I was the only one that was working at the mill and there was no body else that was there ...

. . . . .

Q You came into Prince Albert to phone?

A Yes. I was planning to go to work that night but from here on I phoned and I said I was quitting and I headed back home. During the time I was driving home I felt the impression that I should go and report for work anyway but I managed to get home. So next day, the first thing I tried to do is come back and phone the same foreman up to ask him if there was any possible chance of coming back to work and I realized what I had done to my family and myself. I phoned the mill and asked them if they would give me a chance, even reprimand me, maybe three months or so long for discipline. But I phoned in again and Harold said he'd contact somebody higher up. That's when I gave them the number if they tried to call me back and he spoke to me and he asked me if I had another job and I said, just to get my work back I told him it fell through, hoping I'd get back my job. But he said what I'll do is I'll call you back and I gave him the number. Later on he called back. He told me before he hung up that he was going to contact someone higher up, so I gave him my number and he called back and told me to come in in the morning to get my slips and my holiday pay, I was through. They had all the slips and everything ready the next morning.

I do not suppose anyone reading that evidence could do other than have sincere feeling for this man, particularly in light of the Commission's finding that he was a credible witness. But, the depression and the discouragement felt by Turner does not necessarily go to prove racial discrimination. As I view the decision of the Commission, the inescapable conclusion must be that those subscribing their names to it accepted Turner's surmise that the events had come to pass "maybe on account of my nationality" as the reason for those events and proceeded to find racial discrimination on that account. I have no reason to conclude that that decision was reached by the Commission in other than the best of faith but what Mr. Turner thought "maybe" was the reason for the McDougal and the suggested Rapin incidents is in no way, in my opinion, supported by the evidence. I say that with full appreciation of what I said at the outset, that racial discrimination while very real can be of an insidious and a concealed nature, but I cannot detect its presence here even in such a form as that. I have already alluded to Bradford's disclaimer of any suggestion of intentional discrimination on his part. I have stated my reason for rejecting any such a charge against him. My impression of this witness, in so far as one is able to conclude from the printed word alone, is a good one which prompts me to favour his explanation of honest mistake. I do not consider that to be other than a reasonable conclusion, particularly in light of the fact that Turner, while pointing as I say, the finger of racial discrimination at Bradford, ac-

knowledged in his evidence that Bradford had never spoken to him in a manner that could be construed as discriminatory. Such is the only conclusion to be drawn from what he said when his attention was directed in the following manner to the January, 1971 remark by Facco:

Q ... Now did anyone beside Mr. Facco make any statements that you thought were discriminatory?

A I don't recall.

Q So really as much as you can recall Mr. Facco is the only one who did that?

A Yes.

Other company witnesses, not suprisingly, were consistent in their denial of such a form of discrimination. However, the evidence on this question that has really left the clinching impression on me is that of the two union men, Brassard and Evanision called by Turner when they, very fairly and honestly in so far as I am able to tell, expressed their belief as to the absence of racial discrimination on the part of the appellant. Mr. Brassard said:

Q So other than those three incidents, are you aware of any way which Mr. (and without asking you to say whether those three incidents constitute, in your mind, discrimination or not) but other than those three incidents, are you aware of any other manner in which the company discriminated against Mr. Turner, either as an individual or as an Indian?

A No.

Q Are you aware, Mr. Brassard, of the company ever discriminating against anybody of the Indian race?

A No — well, what do you mean by company — as individuals or ...

Q Well, anybody — management of the company?

A I would say that probably Dave hated me just as much as he hated him — is that what you're asking.

Q You don't consider that to be discrimination because he is an Indian?

A Not because of race, no.

Q So I take it you're not aware of any instance where the company has discriminated against an employee because he is an Indian?

A No.

Mr. Evanision said:

Q You heard Mr. Brassard who worked very closely with the picture, say that as far as he is concerned there has never been a racial discrimination in the plant — a discrimination comes because an individual is the kind of individual that he is.

A I am not saying that there is racial discrimination there, either. What I am claiming is there was a certain form of discrimination.

Q I take it then you are not sitting in the witness box under oath stating that in your view there is racial discrimination by Prince Albert Pulpmill management against Indian employees?

A No, I have nothing to substantiate that type of claim.

Q I see. Your posistion then is that as an employee and as president of the Union at P. A. Pulpmill, you have nothing — you know of nothing to substantiate that the company is — has discriminated against persons because they are Indians?

A No.

Mr. Evanision's evidence was given in cross-examination after he stated that he was satisfied that the company had discriminated against Turner but for what reason he was not prepared to say because he did not know.

Having found a total absence of evidence of racial discrimination with respect to the August, 1972 events, the January, 1971 remark of Facco stands alone as the sole thread on which it could possibly be suggested that racial discrimination was responsible for Turner's employment problem which developed at the end of August, 1972. As objectionable as that remark must be, all other facts militate against a conclusion that that one comment made 19 months earlier is evidence in August, 1972, that goes to prove the charge against the appellant "that due to discrimination he resigned from his employment as a Car Loader in the Machine Room of the Prince Albert Pulp Company Ltd. as of August 28, 1972; that the discriminatory treatment he received was because of his race and colour, and that the company did refuse his request to rehire him". Not only is there the 19-month time interval itself to consider but also the subsequent conduct by Facco in intervening in such kind of objectionable talk in the plant, and as well Turner's ackowledgement that from the day of that remark Facco did now show or practise racial discrimination towards him. When considered in total, the remark of January, 1971, is, in my opinion, without in any way minimizing its objectionableness, without significance, in so far as having any weight is concerned in reaching a conclusion that the appellant in August, 1972, practised racial discrimination against Turner.

It must now be obvious that my conclusion from a full consideration of the evidence, on the question of racial discrimination, is in sharp contrast to that of the majority of the Commission. Indeed it approaches the opposite thereto. The question to which I must now address myself is whether I am empowered, sitting in appeal, to adjudicate as I feel the evidence warrants. If I were sitting as a Court of first instance I would have no hesitation in holding, notwithstanding any feel-

ings of compassion that I might have towards Turner, that, within the language of s. 10(5) of the Act, the complaint that Turner received discriminatory treatment at the hands of his employer because of his race and colour is not "supported by the evidence". I say that with full appreciation that, since this is a proceeding under a provincial statute where the relief sought is compensatory in nature, in this instance reinstatement and back pay, the rule in civil cases applies, *viz.*, that the decision should be on the balance of probabilities and not in accordance with the more formidable requirements of a criminal prosecution: *Lucyk v. Clark*, [1945] 2 D.L.R. 306, 83 C.C.C. 192, [1945] 1 W.W.R. 481. Elwood, J.A., in a dissenting judment in *Holden v. Moskovitch* (1920), 55 D.L.R. 317, [1920] 3 W.W.R. 825, 13 S.L.R. 487, many years ago put the proposition in its proper perspective when he said [at p. 319], while considering an action in negligence: "In a civil action it is not necessary that the plaintiff should exclude every possibility of some person else having caused the accident, it is quite sufficient if he shews that the defendant is the one who probably is responsible for it." Has it been shown that racial discrimination by the appellant probably is responsible for Turner's loss of employment at the Prince Albert Pulp Mill bearing in mind that the pursuer or these proceedings need not exclude every other possibility or reason for that loss? The answer to that question must be a blunt no.

Appreciating, however, that I am not sitting as a Court of first instance — that role, although not of course constituted as a formal Court of law, having been filled by the Commission, am I now free to do what I would have done if I had fulfilled that role? The phrase "what I would have done" must be subject to the qualification that demeanour and deportment could have dictated other than what is conveyed by the printed word. As stated by Lord Shaw of Dunfermline in *Clarke v. Edinburgh and District Tramways Co., Ltd.*, [1919] S.C. (H.L.) 35 at p. 36:

> ... witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page.

To return to the question posed at the commencement of this paragraph, I believe that I am free to do what I would have done had I fulfilled the role of the Judge of first instance. I say that for two reasons.

First, case authority at the level of the Supreme Court of

Canada exists to warrant such action on my part. In its most recent pronouncement, in so far as I have been able to find, the Supreme Court of Canada, through the judgment of Pigeon, J., in *Maryland Casualty Co. v. Roland Roy Fourrures Inc.* (1973), 35 D.L.R. (3d) 591, [1974] S.C.R. 52, said at p. 593: "In order for the Court to give the findings of the trial Judge their proper weight, he must be sufficiently explicit." I interpret the words "their proper weight" to mean support for those findings under usual and normal circumstances. I believe that all and sundry would have to agree that the decision of the Commission was anything but explicit. In fairness it should be noted that the statute in question is a relatively new one. As I understand it, this is the first appeal under it to this Court and it may be that the decision now under consideration represents the first such pronouncement of the Commission — if not, it surely was close to being the first one. Then too, it should be appreciated that the signatories to the decision are not, as I understand it, persons trained in the law. The chairman of the Commission who signed the notice of formal inquiry is a person so trained and while she is shown as having been present in the capacity of an observer on the day the inquiry opened, she apparently did not participate therein.

Notwithstanding my reference to: the Commission not being constituted as a formal Court of law; its product lacking explicitness; its membership participating in its decision being untrained in the law and the Commission itself being newly born; it nevertheless, when exercising the powers conferred on it by statute, was discharging a judicial function. As Schroeder, J.A., said in *Re Glassman and Council of the College of Physicians and Surgeons* (1966), 55 D.L.R. (2d) 674 at p. 682, [1966] 2 O.R. 81, when referring to the discipline committee of the College of Physicians and Surgeons of Ontario and with the College's governing Council in dealing with disciplinary matters pursuant to statutory authority, "In the discharge of those functions (those provided for by statute) both bodies must act judicially." Likewise the Commission in the instant situation.

It was a reading of the judgment of Pigeon, J., in *Maryland Casualty Co. v. Roland Roy Fourrures Inc., supra*, that led me to the dissenting judgment of Laskin, J. (now C.J.C.), in *Hood v. Hood* (1971), 19 D.L.R. (3d) 669, [1972] S.C.R. 244, 5 R.F.L. 301, where, as Pigeon, J., pointed out, Laskin, J. (as he then was), had in 1971 in this judgment, reviewed the Supreme Court decisions on the question of intervention by an

appeal Court to vary a judgment rendered by a Judge "who had the decided advantage, in weighing the facts and the question of credibility, of having heard the witnesses and viewed their reactions himself", *per* Pigeon, J., at p. 592. I am not certain from reading the judgment of Laskin, J., that he would give to Mr. Justice Pigeon's "sufficiently explicit" qualification the prominence that the author of those words and those associated with him were prepared to give to them. Nevertheless, having indicated, I believe, a leaning to the proposition that the initial findings of fact are to be supported unless clearly wrong, Laskin, J., expresses the following proposition, which, while perhaps seemingly general at first blush, represents, it seems to me, a sensible pronouncement and one that is in accord with the action that I feel is warranted on my part in this instance. At p. 676, after reviewing the authorities he said:

> This short canvass leaves me with no sense of accomplishment, other than to encourage me in my view that on factual issues the proper starting point, even in this Court, is deference to a trial Judge's findings. That being said, it remains a mere homily, from which each Judge can proceed in his assessment of the appeal as he sees fit. Whatever sense of restraint flows from the starting point is too individual a matter to be susceptible of a generalized rule that would be of any help. The exercise becomes, if anything, circular.

Secondly, I am expressly empowered under s. 11(6) of the Act to substitute my opinion for that of the Commission. The right to do so follows the provision in the same subsection that an appeal may be taken on a question of fact alone with power clearly vested in the appeal Judge to reverse the decision of the Commission in such a situation. With this wide power clearly before me, I propose to exercise it in this instance in light of the existing circumstances as herein reviewed. I am not at all certain, however, that the availability of what I have described as a "wide power" should be interpreted as an open invitation to adopt it just because the view of the appellate Judge as to what he would have done if sitting in first instance differs from what was in fact done if a reasonable basis for the initial decision manifests itself in the record before the appeal Court. I do not, however, have to concern myself further with that problem because in this instance not only is the decision of the Commission something less than adequate in the sense already reviewed, particularly following the presentation of a full three and one-half days of evidence, but most important, the evidence itself is void of the content required to give a basis for the conclusion arrived at. That is to say, a clear case seems to exist for invoking the power of reversal and substitution as provided for in the statute.

As is obvious, I have dealt with this appeal on its merits. Once I had studied the transcript of evidence it seemed only reasonable that I do so, notwithstanding a number of other objections taken by the appellant, mostly preliminary in nature. These included the questions of:

(i) lack of jurisdiction on the part of the Commission to conduct an inquiry due to the alleged absence of ministerial direction to the Commission to administer the *Fair Employment Practices Act* (see s. 8 of the *Saskatchewan Human Rights Commission Act, 1972)*;

(ii) whether the Commission acted contrary to the rules of natural justice in having investigated under s. 9 of the Act the matters complained of, prior to the formal inquiry proceeding;

It should be noted that the Attorney-General of Saskatchewan limited his appearance on this appeal to those two points.

(iii) whether with Turner having quit his job there could be a breach of s. 3 of the *Fair Employment Practices Act* and related to that question whether an amendment to the notice of formal inquiry asked for at the outset of the hearing by including the words "and that the Company did refuse his request to rehire him" was in fact ever made.

The result on the merits being as indicated, there was no reason for me to give consideration to these questions and for assistance in future occasions I make it clear that I have not addressed my mind to these questions and therefore, as far as I am concerned, they remain open for consideration if and when they should again be raised, although I would be less than frank if I did not say that with respect to some of the preliminary points, a very superficial glance at the arguments advanced did not reveal to me an overload of substance thereto.

The appeal is allowed; the decision of the Commission is reversed and accordingly set aside and in particular those portions of it finding "real discriminations against him (Turner) because of his race and colour" and that portion ordering reinstatement and "payment of monetary loss". I wish to emphasize what a reading of this full judgment will indicate, I trust, to the careful reader, namely, that in so far as employment in this Province is concerned, there is no change in the statutory injunction against racial discrimination. The law in this regard is, I believe, clear and definite but in this instance it is the facts, not the law, that has prompted the change in the decision previously arrived at.

Appeal allowed.

would mean by December 1st. Considering the relevant evidence and that for seven weeks following the accident he had to take nourishment through a straw, I do not agree with counsel. The evidence also disclosed that the plaintiff had to travel from his home in the Dafoe district to his work at Raymore, which of necessity involved expense. After considering all the relevant evidence and taking into consideration the possible contingencies which might have interrupted his employment even if there had been no accident, I allow the plaintiff damages for the loss of earning power resulting from his injuries in the sum of $1,000, which sum is included in the amount hereafter allowed for general damages.

I think that I should state that I found the plaintiff to be an honest and credible witness who did not attempt to exaggerate his injuries and their effects.

Taking all these matters into consideration, and after making an appropriate reduction for the pre-existing condition of the plaintiff's teeth, but including therein the allowance of $1,000 for loss of earnings, I assess the plaintiff's general damages at the sum of $7,250.

At the beginning of the trial learned counsel agreed and the defendant admitted that the plaintiff had suffered special damages in the amount of $744.20, there being included in that amount the sum of $200 with respect to damage to the plaintiff's automobile.

There will therefore be judgment for the plaintiff against the defendant for general damages in the sum of $7,250, and special damages in the sum of $744.20, making a total judgment for $7,994.20.

The defendant's counterclaim is dismissed.

The plaintiff will also have judgment against the defendant for his costs of and incidental to this action and the counterclaim, such to be taxed and allowed under col. 5 of the Tariff of Costs.

Judgment accordingly.

WHITFIELD v. CANADIAN MARCONI CO.

Quebec Court of Queen's Bench, Appeal Side, Casey, Owen and Brossard, JJ. September 21, 1967.

Civil rights — Clause in contract of employment placing Indian and Eskimo villages out of bounds and prohibiting fraternization — Whether infringement of employee's "right to liberty" or "freedom of assembly or association" — Canadian Bill of Rights, s. 1(a), (e).

Contracts — Illegality — Clause in contract of employment placing Indian and Eskimo villages out of bounds and prohibiting fraternization — Whether illegal as contrary to Canadian Bill of Rights, s. 1(a), (e), or Civil Code, art. 13.

A clause in a contract of employment placing Indian and Eskimo villages out of bounds to the employee and prohibiting his fraternization or association with the native population except in special circumstances is not an infringement of the employee's "right to liberty" within the meaning of s. 1(a) or his "freedom of assembly or association" within the meaning of s. 1(e) of the *Canadian Bill of Rights*, 1960 (Can.), c. 44. Nor does the clause contravene any "laws of public order or good morals" within the meaning of art. 13 of the Quebec *Civil Code*.

Civil rights — Quaere whether Canadian Bill of Rights (Can.) applies either directly or indirectly to a contract of employment entered into in the Province of Quebec.

APPEAL by the plaintiff from a dismissal of his action for damages for wrongful dismissal.

Philip Cutler, for plaintiff, appellant.
H. Hansard, Q.C., for defendant, respondent.

CASEY, J.:—I agree with Owen, J.

OWEN, J.:—This is an appeal from a judgment of the Superior Court, District of Montreal, rendered November 19, 1965, which dismissed, with costs, the plaintiff's action claiming $25,000 damages for wrongful dismissal from his employ.

The conclusions of plaintiff's declaration read as follows (J.C., pp. 7-8):

> THEREFORE MAY IT PLEASE THE COURT:—
>
> TO DECLARE that the contract of hire produced herein as Exhibit P-1, with regard to the following quoted part only, is illegal, null and void, and in any case annulled, that is:—
>
> > "Indian and Eskimo villages are considered out of bounds and personnel are prohibited from fraternization or association with the native population except in special circumstances. Infringement of these orders is cause for discharge";
>
> TO DECLARE that the dismissal by Defendant of Plaintiff was illegal and constitutes a breach of contract, and therefore, because of Defendant's acts, to declare the contract annulled; and TO ANNUL said contract;
>
> TO CONDEMN Defendant to pay Plaintiff the sum of $25,000.00 with interest from the date of service;
>
> THE WHOLE WITH COSTS.

The plaintiff-appellant, Whitfield, was employed by the defendant-respondent, Canadian Marconi Company, to work at a secret air force radar base near the mouth of Great Whale

River on the Quebec side of Hudson Bay. The base formed part of the "Mid-Canada Line", which was the middle of three early warning defence lines. Whitfield, a civilian, was employed as maintenance electrician to work in the Department of Northern Affairs boiler house. Approximately half a mile from the base were two small native settlements, loosely referred to as villages, one occupied by Indians and one occupied by Eskimos. At the base there were both Marconi personnel (approximately 200) and R.C.A.F. personnel.

Whitfield's employment contract contained the following clauses (J.C., p. 41):

> As these are RCAF Stations, it is emphasized that this project requires close liaisen with the RCAF Staff, and that we consider the existing good relations the concern of each member of our staff. This automatically implies strict observance of Station Standing Orders.
>
> . . . . .
>
> Indian and Eskimo villages are considered out of bounds and personnel are prohibited from fraternization or association with the native populations except in special circumstances. Infringement of these orders is cause for discharge.

Whitfield made unauthorized visits to the Eskimo "village" and associated with a young Eskimo woman named Annie Witaltuk. After discussions and warnings Whitfield persisted in these actions and was dismissed from his employ.

Before this Court it was contended that the appellant was illegally dismissed because the clause in the contract of employment was illegal as contrary to the *Canadian Bill of Rights*, 1960 (Can.), c. 44, and contrary to art. 13 of the Quebec *Civil Code*.

It was argued that the clause placing Indian or Eskimo villages out of bounds and prohibiting fraternization or association with the native population except in special circumstances was contrary to paras. (*a*) and (*e*) of s. 1 of Part I of the *Canadian Bill of Rights* which reads:

> PART I
>
> Bill of Rights
>
> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (*b*) the right of the individual to equality before the law and the protection of the law;

(*c*) freedom of religion;
(*d*) freedom of speech;
(*e*) freedom of assembly and association; and
(*f*) freedom of the press.

In my opinion Whitfield's "right to liberty" is not infringed by the clause in question. In order to obtain unusual and remunerative employment at a particular place Whitfield entered into a contract whereby he agreed, under pain of dismissal, that as a general rule the villages adjoining the radar base were to be considered out of bounds and that he would not fraternize or associate with the native population. I do not see that it matters whether the purpose of this clause was to protect the native population or to preserve morale at the radar station or to realize some other objective or combination of objectives. The clause does not contravene Whitfield's right to liberty, whatever its source may be.

Furthermore, I am of the opinion that the clause in question should not be said to infringe Whitfield's "freedom of assembly or association" within the meaning of para. (*e*) of s. 1 of Part I of the *Canadian Bill of Rights*.

In view of my conclusion that the clause complained of is not contrary to the *Canadian Bill of Rights* I do not propose to discuss whether the *Canadian Bill of Rights* applies either directly or indirectly to the contract of employment passed in the Province of Quebec between Whitfield and Canadian Marconi Co.

Article 13 of the Quebec *Civil Code* provides:

> 13. No one can by private agreement, validly contravene the laws of public order and good morals.

In my opinion the private agreement between Whitfield and Canadian Marconi Co. providing that, as a general rule, Whitfield would not go to the neighbouring Indian or Eskimo villages and would not associate with the native population does not contravene any laws of public order or good morals.

My conclusion is that the clause in question is not contrary to either the *Canadian Bill of Rights* or art. 13 of the Quebec *Civil Code*. This is sufficient to dispose of the appeal. Accordingly, I do not propose to discuss such questions as what would be the effect of the nullity of the clause in question, or whether appellant made any satisfactory proof of damages.

In my opinion, the clause in the employment contract was valid, Whitfield persisted in his refusal to abide by the terms of the clause, he was legally discharged, and his action for damages was properly dismissed.

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In the circumstances I would dismiss the present appeal with costs.

BROSSARD, J. (translation):—I concur with my colleague, Owen, J.

The clause in the contract of employment violated by the appellant cannot be looked at apart from the character of the employment relationship fixed by that contract between the appellant and the respondent, nor can it be dissociated from the purposes for which this employment relationship was established. The validity of the clause, looked at from the point of view of public order whatever the source of the latter might be, must be analysed in the light of this relationship and these purposes. Now, the restrictions placed upon the appellant's activities by the clause in question would seem to me to have but one purpose only, that of insuring as far as possible that these activities are carried in such a way as to permit the complete, full, and certain realization of the fundamentally legal purposes for which the employer-employee relationship was established; nothing in the contract or the record would justify our concluding that these restrictions were imposed with a view to depriving the native population of the Indian and Eskimo villages of any rights whatsoever.

Furthermore, I am of the opinion that the appellant's right to freedom of assembly or association has not been fundamentally violated by his voluntarily agreeing for legal purposes to give up certain rights for a period of time limited by the length of the contract; this renunciation of certain rights by the appellant is similar to what is done by members of certain religious or other communities or associations who voluntarily consent, under pain of dismissal from the community and subject to their right to retire therefrom, to abstain, as long as they remain in the community, from engaging in certain activities or entering into relationships with certain groups or individuals or associating with them.

There is no evidence in the record that this clause was agreed upon by either the appellant or the respondent for an immoral purpose, for a purpose contrary to public order, or with a view to discriminating racially or otherwise against the above-mentioned population.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

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THE QUEEN v. "BEAR'S SHIN BONE."

Criminal law—Criminal Code, s. 278 (a)—Polygamy — Indian marriage.

An Indian who according to the marriage customs of his tribe takes two women at the same time as his wives, and cohabits with them, is guilty of an offence under section 278 of the Criminal Code.†

[ROULEAU, J., *March 9th, 1899.*

Statement.

The prisoner, a Blood Indian, was charged before ROULEAU, J., at Macleod under section 278 of the Criminal Code, ss. (*a*) (i.) and (ii.), with practising polygamy with two women belonging to the same band of Indians, and also with having, according to the marriage customs of the Blood Indian tribe, agreed to enter into a kind of conjugal union with more than one person at the same time.

The evidence showed that the prisoner had beeen married according to the marriage customs of the Blood Indians to two women, "Free Cutter Woman," and "Killed Herself," both of whom were living with him as his wives, and that there was a form of contract between the parties which they supposed binding upon them.

The portion of section 278 considered is as follows,—

278. Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars, who

(*a*) Practices, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into

(i.) Any form of polygamy;

(ii.) Any kind of conjugal union with more than one person at the same time;

† See section substituted by 63-64 Vic. (1900) c. 46, s. 3, sched.; and see notes to this case in 3 Can. Crim. Cas. 329.

Statement.

(iii.) What among the persons commonly called Mormons is known as spiritual or plural marriage;

(iv.) Who lives, cohabits or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union.

C. F. P. Conybeare, Q.C., for the Crown.

M. MacKenzie, for the prisoner.

[*March 9th, 1899.*]

ROULEAU, J.—Held that the marriage customs of the Blood Indian Tribe came within the provisions of sub-section (*a*) of section 278 of the Criminal Code, whether their ceremonies are those of a denomination, sect or society, or not, as their marriages are a form of contract, and recognized as valid, and referred to *Regina* v. *Nan-e-quis-a-ka*.[1]

The prisoner was accordingly convicted.

[1] 1 N. W. T. Rep. Vol. 1, pt. 2, p. 21; 1 Terr. L. R. 211.

OWEN v. JAMES.

Master and servant — Wages — Monthly rate — Entire contract—Behavior of master to servants.

It was found as a fact, on contradictory evidence, that the plaintiff hired with the defendant at $18 for the first month, and, if each party was satisfactory to the other, for $20 for the whole working season including the first month, and that the wages, though fixed with reference to the months, were payable only at the end of the period of hiring. The plaintiff after working for some months left, and sued for the wages for the number of months he had worked, less the wages for the first month, which had been paid.

Held, that the contract was an entire one and that the plaintiff could not succeed.

Nature of behavior of master towards servant justifying the servant in leaving, discussed.

[WETMORE, J., *March 23rd, 1899.*

Trial of an action before WETMORE, J., without a jury.

F. F. Forbes, for plaintiff.

J. T. Brown, for defendant.

SUPERIOR COURT, 1867.

MONTREAL, 9TH JULY, 1867.

Coram MONK, J.

No. 902.

Connolly vs. *Woolrich* and *Johnson* et al., defendants *par reprise d'instance*

INDIAN MARRIAGE—QUESTION AS TO VALIDITY.

William Connolly was born about 1786, at Lachine, in Lower Canada, which was his original domicile, and remained there till the age of 16, when he went to the North West territories, where he resided at different posts of the North West Company for 30 years. In 1803, at the age of 17 years, he took to live with him, as his squaw or Indian wife, an Indian girl, the daughter of an Indian Chief, with the consent of her father, and cohabited with her as his squaw or Indian wife, according to the usages and customs of the Cree nation to which she belonged. They cohabited in the Indian country, and were faithful to one another there for 28 years, and had a family of six children. They came to Lower Canada in 1831 and cohabited there for a short time as husband and wife. In 1832 Connolly left his squaw and had a marriage ceremony, after a dispensation by the Bishop, celebrated between himself and his second cousin Julia Woolrich, according to the rites of the Roman Catholic Church in Lower Canada where he continued to be, and from that time, till his death, in 1849, cohabited with her as his wife.

HELD:—1°, That though the Hudson's Bay Company's Charter is of doubtful validity, yet, if valid, the chartered limits of the company did not extend westward beyond navigable waters of the rivers flowing into the Bay;

2°. That the English Common law prevailing in the Hudson's Bay territories, did not apply to natives who were joint occupants of the territories; nor did it supersede or abrogate even within the limits of the Charter, the laws, usages, and customs of the aborigines;

3°. That no other portions of the English Common law than that introduced by King Charles' Charter obtains in Hudson's Bay Territories;

4°. That the English law was not introduced into the North West territories by the cession by France to England, nor by royal Proclamations subsequent to that date;

5°. That neither the decrees of the council of Trent, nor the ordinances of the French kings, nor the British Marriage Acts, were law nor in force at Rat River, or in any part of the North West Territories, in 1803;

6°. That a marriage contracted where there are no priests, no magistrates, no civil or religious authority, and no registers, may be proved by oral evidence, and that the admission of the parties, combined with long cohabitation and repute will be the best evidence;

7°. That such a marriage, though not accompanied by any religious or civil ceremony, is valid.

SEMBLE:—That polygamy and divorce, or repudiation at will, prevail among the Cree Indians who are pagans;

8°. That an Indian marriage between a Christian and a woman of that nation or tribe is valid, notwithstanding the assumed existence of polygamy and divorce at will, which are no obstacles to the recognition by our Courts of a marriage contracted according to the usages and customs of the country;

9°. That a Christian marrying a native according to their usages, cannot exercise in Lower Canada the right of divorce or repudiation at will, though SEMBLE:—He might have done so among the Crees;

10°. That an Indian marriage, according to the usage of the Cree country, followed by cohabitation and repute, and the bringing up of a numerous family, will be recognised as a valid marriage by our Courts, and that such a marriage is valid;

11°. That *Connolly* never lost his domicile of birth and never acquired one in the Indian Territory;

12°. That, under the circumstances, a community of property existed between him and his Indian wife or squaw, as to all property subject to such law in Lower Canada.

The facts of this most important case appear from the remarks of the Court (Mr. Justice MONK) in giving judgment for plaintiff, at Montreal, the 9th July, 1867, as follows:

This is an action instituted the 13th of May, 1864, for the recovery by the plaintiff of the sixth portion of one-half of the estate in defendant's possession

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and claimed by plaintiff as his share in a community of property alleged by him to have existed between his father, the late William Connolly, and *Susanne*, Connolly's wife, mother of the plaintiff. The case is one of importance, and involves a great number and variety of questions, both of law and fact. The Court has considered it an imperative duty, as the decision is one of much interest to the parties, and, in some measure, to the public, to enter at length into a review of the peculiar circumstances of the case, and also of the law by which it must be determined.

The declaration sets forth in substance, that in the year 1803, the late Wm. Connolly, at the *Rivière-aux-Rats*— Rat River— in the Rebaska, or Athabaska country, in that part of British America, known and distinguished as the Hudson's Bay Territory, married an Indian woman, called *Susanne Pas-de-nom*, of the Cree tribe or nation; that this marriage was celebrated according to the usages and customs of the Territory, and could not be otherwise solemnized, as there were no priests or ministers residing there at that time; that these parties lived together continuously and happily as husband and wife from 1803 till 1832, during which period there were born of this marriage several children, of whom plaintiff is one; that Wm. Connolly died at Montreal on the 3rd June, 1849 leaving a large amount of property in Upper and Lower Canada, which is in part enumerated and described. It is then averred that there was no contract of marriage between the parties, and that consequently a community of property existed between them according to the law of Lower Canada, and that the real and personal estate was acquired during the existence of the marriage; that Mrs. Connolly died at Red River, in the Hudson Bay Territory, on the 14th August, 1862, leaving the plaintiff, and several other children, her heirs-at-law; that Wm. Connolly, the father, left a will, dated in 1848, by which he bequeathed all his property to one Julia Woolrich and to two children, issue of a connection between Wm. Connolly and the said Julia Woolrich; and that the latter took possession of all the estate, and still holds it; that Connolly, the father, could dispose of only one-half of the property, inasmuch as his lawful wife was living at the time of his death, and she was, consequently, entitled to the other half of the estate, as *commune en biens* with her husband; then, alleging baptism of children in December, 1831, the plaintiff concludes that he be declared proprietor of the sixth part of his mother's half share of the estate belonging to the community, and that defendant do account.

It is to be remarked, that Rebaska or Athabaska is stated (whether in 1803, or at the time of the bringing of the action, does not appear very certain) to be situated within the Hudson's Bay Territory; and it is also to be noted that the plaintiff does not pray to be declared the legitimate offspring of Wm. Connolly and the Indian woman, plaintiff's mother.

Defendant pleads that Connolly was never married to Susanne; that, on the 16th May, 1832, he was married to the defendant, Julia Woolrich, according to the rites of the Church of Rome, from which date they enjoyed the *status* of husband and wife, and that in this marriage there was continual aquiescence on the part of Susanne and her family, and among others by the plaintiff; that by the laws of the Hudson Bay Territory, and particularly such as were in force at

the *Rivière-aux-Rats*, and by the law which has prevailed in that country for the last 100 years, no community of property resulted from a marriage there.

The plaintiff answers, that at the time of Connolly's pretended marriage to Julia Woolrich, 16th May, 1832, Susanne, Connolly's lawful wife, was living, she having died long after, that is, on the 14th August, 1862; that Wm. Connolly was born at Lachine, in Lower Canada; that he had not resided in the H. B. Territory with the intention of remaining, but intended always to return; that he was in the employ of the Company, returned to Montreal in 1831, and remained in Lower Canada till his death in 1849.

The plaintiff has ignored entirely the marriage between Wm. Connolly and Julia Woolrich, and the suit has been directed against her as an unmarried women;—as a *spinster*. Neither by his declaration, nor by his special answer, has the plaintiff prayed that this alleged marriage be declared null. It is also to be observed, that the defendant has not, by her plea, asked that the marriage existing between Connolly and the Indian be declared a nullity, or that the Court should hold that such a marriage never legally existed. The only questions, therefore, raised by the pleadings and presented for my adjudication, are 1° was there a legal marriage between Connolly and the Cree woman; and if so 2° did a community of property result from that marriage, under the circumstances of this case?

Upon this restricted, but intelligible issue, the parties proceeded to the adduction of evidence which will receive the careful consideration of the Court hereafter. But before entering upon an examination of this testimony in regard to those points where it may prove concurrent and conclusive; where it may conflict, or bear a less clear and direct proof of important facts, it may be proper, with a view to a more complete understanding of the real difficulties of the case, to state generally but briefly, what the testimony of record establishes indisputably as matters of fact, in the opinion of the Court.

The late Wm. Connolly went to the Indian country as a clerk in the service of the North-West, not the Hudson's Bay, Company, in the year 1802 or 1803. He was stationed at the *Rivière-aux-Rats*, or Rat River, in the Athabaska district, which is situated, according to Judge Johnson's evidence, about 2000 miles from York Factory, and over 1200 miles from the Red River Settlement. In the year 1803 he, by his own admission, married, according to the customs of the country, the daughter of an Indian chief of the Cree nation, named Susanne *Pas-de-nom*. The Cree Indians are a tribe whose territory is on the Elk or Athabaska River, near the lake of the same name, and which is about 300 miles from the Rocky Mountains. They were both minors. After their alleged marriage, and up to the summer of 1831, they appear to have lived together as husband and wife at Rebaska and other posts in the North-West country. It is proved that he continually acknowledged and treated this Cree woman as his wife during twenty-eight years, and also that they had several children. They lived happily, and their conjugal relations, so far as the evidence goes, were those of inviolable fidelity to each other.

In the year 1831, Wm. Connolly, (who, after the amalgamation of the two Companies had become a chief factor and member of Council of the Hudson Bay

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Company in 1825,) came to Lower Canada with his Indian wife and several of his children. He first went with them to reside at St. Eustache, where two of his daughters were baptized by a Catholic priest, to whom, and the principal people of the locality, it seems, Connolly introduced Susanne as his lawful wife. She passed by the name of Mrs. Connolly, and associated with the people of St. Eustache as his wife. After remaining there four or five months, Connolly came with Mrs. Connolly and children to Montreal, and there boarded first with his sister, and afterwards with a Madame Pion. There is no proof to show that any intimation was given to Mrs. Connolly of the occurrence which was about to take place on the 16th May, 1832. She was still in Montreal when Connolly on that day married his second cousin, the present defendant, Julia Woolrich, a lady of good social position and of high respectability. It would appear that the Indian wife felt very sensibly this desertion, and Connolly's marriage to another woman.

The plaintiff contends that this was a repudiation by Connolly of his lawful wife, and the second marriage is void. The view which the Court takes of this summary proceeding on the part of Wm. Connolly, and of his subseqnent union with Miss Woolrich, will appear in the sequel of these remarks, and by the judgment to be rendered in this case. Some time after these occurrences, Susanne was sent to the Red River Settlement, and was there supported in a convent until her death, in 1862, first by Mr. Connolly and after he died, in 1849, by the defendant, Julia Woolrich. Of the marriage of Wm. Connolly and Julia Woolrich, there was issue two children. Julia Woolrich died on 27th July, 1865, after making a will dated 28th January, 1861, by which she left several legacies, and amongst others, £30 to *Susanna* and two small legacies to the Indian children. William and Henry Connolly; but the principal part of the property, which was considerable, she bequeathed to her children.

Having adverted thus briefly to a series of facts clearly established, it is proper now to set forth the pretensions of the defendant more completely than they have been developed in the pleas.

The defendant's counsel, Mr. Cross, has urged in argument at great length, that the Common law of England prevailed at Rehaska in 1803, and that the testimony in this case does not establish a legal marriage between Wm. Connolly and the Cree woman under and according to that law; that the usages and customs of marriage observed by uncivilized and pagan nations, such as the Crees were, cannot be recognised by this Court as giving validity to a marriage even between the Indians themselves, and more particularly, and much less, between a Christian and one of the natives; that there can be no legal marriage between two parties so situated under the infidel laws and usages of barbarians; that the broad and well recognized principle that the *lex loci contractus* determines the validity of marriages solemnized in Christian countries, according to the laws, sanctions and ceremonies of such countries, does not apply in the present case; can have no application to the connection existing between Mr. Connolly and this Indian woman; that even if the plaintiff could successfully urge this principle of the law of all christian nations, and one so well known to the common law of England, yet there is no sufficient proof of the existence of any such usage as that contended for, or that the plaintiff's parents were ever married even ac-

cording to the customs of the Cree nation; that there is no contract, verbal or written, proved; no solemnization of any marriage established; that the connection of the plaintiff's parents was fugitive, temporary, dissolvable at pleasure, and had none of the legal or religious characteristics of marriage; that polygamy is one of the incidents or privileges of barbarian life, and that a law in regard to marriage which sanctions such an anti-Christian usage, cannot be regarded as a foreign law deserving of recognition by this Court; that no presumption of a marriage can result from the connection of the plaintiff's parents because it was broken off by Connolly and was not persisted in till his death: and this argument is urged with double force in this case, as it is proved that by the Indian law marriage was dissolvable at the will of either party; that the *status* of husband and wife between Connolly and Julia Woolrich is undoubted, is beyond all question, by a marriage of 30 years; that Susanne and the plaintiff, her child, acquiesced in this marriage, and that by general repute, and by his baptismal certificate, it is shown that his *status* was that of illegitimacy; that before he could bring this action he should have established a *status* of legitimacy; that the marriage with Julia Woolrich was solemnized according to law, that it is and was legal, and must be so considered till the contrary is judicially declared; that this marriage is an effectual bar to the plaintiff's pretensions, and finally, that there is not and cannot be by law any community of property resulting from this Indian marriage, evidently not to be regarded as valid by this Court; and if legal, that none exists by the law of England, which prevailed at Rat River in 1803. There is also another difficulty of a technical character. It was urged that this action should have been brought by all the children issue of Connolly's first marriage, and could not be instituted by the plaintiff alone.

These are succinctly the chief grounds taken by the defendant; they will be more fully explained hereafter.

Proceeding now to a more minute and lengthened examination of this case, the first question to be disposed of, is whether the law of England in regard to marriage prevailed at *Rivière-aux-Rats* in 1803, or whether the law of France or of her contiguous colonies, or the Canon law, or the decrees of the Council of Trent, were in force; or finally, whether the Indian customs and usages constitute the only rule by which this Court can be guided in determining the validity of this marriage between Connolly and the Cree maiden.

Mr. Justice Aylwin and Mr. Justice Johnson have been examined in this cause as witnesses. The former gentlemen, produced by the defendant says: "At the time of the birth of the plaintiff at Rat River, in 1803, the English law "prevailed in the Hudson Bay territory, and has done so ever since—that "is to say, it has prevailed since the Patent of King Charles, which regulated that country."

Judge Johnson, witness for plaintiff, in cross-examination, says: "The laws "which prevailed throughout the Hudson Bay territories are the laws of Eng- "land, with such modifications as have been made by the local Councils having "authority under the Charter to pass such laws. The English common law was "introduced into the country at the date of the granting of the Charter to the "company by King Charles."

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From this evidence, and according to this high authority, we are led to infer that the common law prevails throughout the Hudson Bay territory in virtue and by the terms of the Charter generally, and in regard to all the inhabitants or occupants of the territory, both natives and Europeans.

Mr. Hopkins, witness for defendant had been in the service of the Hudson Bay Company for twenty-five years, and is a gentlemen of great intelligence; he testifies that "the laws by which the Hudson Bay territory is governed are "the laws of England, modified by certain regulations passed by the Council of "the Hudson Bay Company." Mr. Hopkins adds: "*I know the place called "Rebaska from official intercourse, and from having been in the vicinity of it. "It is one of the most remote districts, and is without the limits of the Hudson "Bay Company territories proper; the jurisdiction of the Company extended "over this post, and still extends over it. We held it up to within a recent date "by separate license.* If the late William Connolly was stationed there, it was "long before my time. I have no knowledge of the regulations of the Company (if any), with regard to marriage in that country in 1803."

This evidence, though proceeding from good authority, leaves the Court in doubt:—

1st. As to what portion of the laws of England prevailed at *Rivière-aux-Rats* in 1803; to whom they were applicable, and how they were introduced into that particular district of country, though all those gentlemen seem to imply that these laws, whatever they may be or have been, were extended to that locality by the Charter of Charles II.

2nd, As to what modifications had taken place in 1803 and since, in these laws, within the Hudson Bay territory, or at *Rivière-aux-Rats.*

3rd, Whether the Athabaska District, within which is situated *La Rivière-aux-Rats*, was or was not, in 1803, within the chartered limits of the Hudson Bay territories, or under the jurisdiction of the Company, in such a way as to subject it to the laws of England generally, and as stated by the two learned Judges.

4th, As to whether there exists a native usage or law of marriage among the Indians, either at *Rivière-aux-Rats* or elsewhere within the chartered limits of the Hudson Bay territories, distinct from the law of England prevailing in that country.

The Court is bound to respect the testimony of these witnesses so far as it proves any thing; but I shall proceed to show, I think clearly and conclusively, that the Athahaska District never was within the chartered limits of the Hudson Bay Company; and, moreover, admitting it to be doubtful whether the common law of England obtained even within the last-mentioned territory to the full extent stated by the witnesses, still it is beyond controversy that this law did not prevail in the Athabaska region at *Rivière-aux-Rats* at the time of Connolly's alleged marriage with the Cree woman; and, in any case, that the customs of the Cree Indians relative to marriage were in force there at that time. In doing so, it will be necessary for me, in the first place, to advert briefly to the discoveries made and trading posts established in those vast and remote regions of the North-

West, previous to the Charter granted by Charles II. to the Hudson Bay Company in 1670.

Spain, England, and France have been the most conspicuous among the European States in the discovery and colonization of America. About the year 1627 the authority of France was successfully established on the banks of the St. Lawrence, though discovery, hunting, and trading by these Europeans had extended farther west previous to that time. Forty-three years after this date, the Charter of King Charles II. was granted to the Hudson Bay Company; and one hundred years later, the whole of North America belonging to France was finally ceded to Great Britain. Long prior to 1670, and so far back as 1605, Quebec had been established, and had become an important settlement. In the early part of the seventeenth century, anterior to 1630, the Beaver and several other companies had been organized at Quebec for carrying on the fur trade in the West, near and around the great Lakes, and in the North-West territory. The enterprise and trading operations of these companies and the French colonists generally extended over vast regions of the northern and western portions of this continent. They entered into treaties with the Indian tribes and nations, and carried on a lucrative and extensive fur trade with the natives. Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and then only by persuasion, and as the fiercer and more barbarous of the Indian nations receded, or in the lapse of time, when their barbarism had been subdued by contact with the whites, or mitigated by the influences of European civilization. It is quite true, it is contended, they had no right, no lawful authority to do so; yet, as a matter of fact, they appear to have wholly abstained from the exercise of any unjust or arbitrary power in this respect. In the prosecution of their trade and other enterprises, those adventurers evinced great energy, courage and perseverance. How far they carried their hunting and trading explorations into the interior, I am unable precisely to determine; but I am inclined to think they had extended them to the Athabaska country, though perhaps not to *Riviere-aux-Rats*, where Connolly was stationed in 1803. The Rat River locality is, so near as I can ascertain, situate in latitude 58° north and longitude west from Greenwich about 111°. It is on the north shore of the lake, and about 600 miles from the Hudson Bay coast. It is due east 300 miles, from the Rocky Mountains, and due north from the boundary line of the United States 650 miles, and it is nearly the same distance, due south, from the Arctic or Frozen Ocean. Of course the deviations along the existing lines of travel would make the distances by these routes much greater than the estimate here made. As before stated, I have no positive evidence that any French trader or hunter visited *Rivière-aux-Rats* during the sixteenth, or the first half of the seventeenth century, though there is every reason to believe they had been there. It is in my opinion, more than probable, from all I can collect, or learn from a careful examination of the authorities at my command, that some portions of the Athabaska country had, before 1640, been visited and traded in, and, to some extent, occupied by the French colonists and traders in Canada, and their Beaver Company

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formed in 1629. From that date, during the thirty years which immediately preceded the grant of King Charles II. in 1670, these discoveries and trading settlements had considerably increased in number and importance. If this be true, it will be seen hereafter that, apart from the question of the Company's limits, the Athahaska region was, by a general clause, excepted, from the grant of King Charles; for although neither the laws of France, nor those of her contiguous colonies, may have obtained at those distant posts in 1670, the date of the Hudson Bay Charter, yet I think it is beyond all doubt that the Athahaska, and other regions bordering on it, belonged to the Crown of France at that time, to the same extent and by the same means, as the countries around Hudson Bay belonged to the Crown of England—that is to say, by discovery, by hunting, and trading explorations—with this difference, that in the case of the French traders there was a kind of occupation, whereas the English never occupied or settled any part of the Hudson Bay coast till 1669. I will assume, however, for the purposes of argument, that, in both these cases, the principle of public law applied, viz., that in the case of a colony (though they were not plantations or colonies in the proper or legal sense of the terms) acquired by discovery and occupancy, which is a plantation in the strict and original meaning of the word, the law of the parent states then in being was immediately and *ipso facto* in force in these new settlements—that is to say, at Athabaska and on the Hudson Bay; and that the discoverers and first inhabitants of these places carried with them their own inalienable birthright, the laws of their country. Yet they took with them only so much of these laws as was applicable to the condition of an infant colony. For the artificial refinements and distinctions incident to the property of a great and commercial people, the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, were neither necessary nor convenient for them, and therefore not in force. The whole of their institutions were also liable to be new modelled and reformed by the general superintending power of the legislature in the mother country, and even this doctrine would apply only to newly discovered and uninhabited regions.

But in both cases under consideration, the discoverers and first settlers found these wild regions occupied and held by numerous and powerful tribes of Indians;—by aboriginal nations, who had been in possession of these countries for ages; and in regard to the Cree Indians, it is stated by a writer who professes to have a familiar knowledge of the natives, (Martin's Hudson Bay, pp. 84-85):

"The Crees are the largest tribe or nation of Indians, and are divided into "two branches—the Crees on the Saskatchewan, and the Swampies around the "borders of Hudson Bay, from Fort Churchill to East Main. Forty years ago, "in consequence of their early obtainment of firearms, they carried their vic- "tories to the Arctic circle and across the Rocky Mountains, and treated as "slaves the Chipewyans, Yellow Knives, Hares, Dogribs, Loucheux, Nikanies, "Dahotanies, and other tribes in the adjoining regions."

Now, as I said before, even admitting for the sake of argument, the existence, prior to the Charter of Charles, of the common law of France, and

that of England, at these two trading posts or establishments respectively, yet, will it be contended that the territorial rights, political organization such as it was, or the laws and usages of the Indian tribes, were abrogated—that they ceased to exist when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not—that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives. As bearing upon this point, I cannot do better better than to cite the decision of a learned and august tribunal—the Supreme Court of the United States. In the celebrated case of *Worcester against the State of Georgia*, (6th Peters Reports, pages 515–542), Chief Justice Marshall—perhaps one of the greatest lawyers of our times—in delivering the judgment of the Court, said:

"America, separated from Europe by a wide ocean, was inhabited by a dis-
" tinct people, divided into separate nations, independent of each other and of
" the rest of the world, having institutions of their own, and governing them-
" selves by their own laws. It is difficult to comprehend the proposition, that the
" inhabitants of either quarter of the globe could have rightful original claims
" of dominion over the inhabitants of the other, or over the lands they occupied;
" *or that the discovery of either by the other should give the discoverer rights in*
" *the country discovered, which annulled the pre-existing rights of its ancient*
" *possessors.*

"After lying concealed for a series of ages, the enterprise of Europe, guided
" by nautical science, conducted some of her adventurous sons into this western
" world. They found it in possession of a people who had made small progress
" in agriculture or manufactures, and whose general employment *was war, hunt-*
" *ing and fishing.*

"Did these adventurers, by sailing along the coast, and occasionally landing
" on it, acquire for the several governments to whom they belonged, or by
" whom they were commissioned, a rightful property in the soil, from the Atlantic
" to the Pacific; or rightful dominion over the numerous people who occupied
" it? Or has nature, or the great Creator of all things, conferred these rights
" over hunters and fishermen, *on agriculturists and manufacturers?*

"But power, war, conquest, give rights, which, after possession, are conceded
" by the world; and which can never be controverted by those on whom they
" descend. We proceed, then, to the actual state of things, having glanced at
" their origin, because holding it in our recollection might shed some light on
" existing pretensions.

"The great maritime powers of Europe discovered and visited different parts
" of this continent at nearly the same time. The object was too immense for
" any of them to grasp the whole; and the claimants were too powerful to sub-
" mit to the exclusive or unreasonable pretensions of any single potentate. To
" avoid bloody conflicts, which might terminate disastrously to all, it was neces-
" sary for the nations of Europe to establish some principle which all would ac-
" knowledge, and which should decide their respective rights as between themselves.
" This principle, suggested by the actual state of things, was, 'that discovery
" 'gave title to the government by whose subjects or by whose authority it was

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" ' made, against all other European governments, which title might be consum-
" ' mated by possession." Johnson *vs.* McIntosh, 8 Wheaton's Rep., 543.

" This principle, acknowledged by all Europeans, because it was the interest
" of all to acknowledge it, gave to the nation making the discovery, as its in-
" evitable consequence, the sole right of acquiring the soil and of making settle-
" ments on it. It was an exclusive principle which shut out the right of competi-
" tion among those who had agreed to it; *not one which could annul the pre-*
" *vious rights of those who had not agreed to it.* It regulated the right given by
" discovery among the European discoverers, *but could not affect the rights of*
" *those already in possession, either as aboriginal occupants,* or as occupants by
" virtue of a discovery made before the memory of man. It gave the exclusive
" right to purchase, but did not found that right on a denial of the right of the
" possessor to sell.

" The relation between the Europeans and the natives was determined in each
" case by the particular government which asserted and could maintain this pre-
" emptive privilege in the particular place. The United States succeeded to all
" the claims of Great Britain, both territorial and political; but no attempt,
" so far as is known, has been made to enlarge them. So far as they existed
" merely in theory, or were in their nature only exclusive of the claims of other
" European nations, they still retain their original character, and remain dormant.
" So far as they have been practically exerted, they exist; in fact, are understood
" by both parties, are asserted by the one, and admitted by the other.

" Soon after Great Britain determined on planting colonies in America, the
" king granted charters to companies of his subjects who associated for the purpose
" of carrying the views of the crown into effect, and of enriching themselves. The
" first of these charters was made *before possession* was taken of any part of the
" country. They purport, generally, to convey the soil, *from the Atlantic to the*
" *South Sea.* This soil was occupied by numerous and warlike nations, equally
" willing and able to defend their possessions. The extravagant and absurd
" idea, that the *feeble settlements made on the sea coast, or the companies under*
" *whom they were made, acquired legitimate power by them to govern the people*
" *or occupy the lands from sea to sea, did not enter the mind of any man.* They
" were well understood to convey the title which, according to the common law
" of European sovereigns respecting America, they might rightfully convey, and
" no more. This was the exclusive right of purchasing such lands as the natives
" were willing to sell. The crown could not be understood to grant what the
" crown did not affect to claim; nor was it so understood. * * * * * * * *

" Certain it is, that our history furnishes no example, from the first settle-
" ment of our country, *of any attempt on the part of the crown to interfere with*
" *the internal affairs of the Indians,* farther than to keep out the agents of
" foreign powers, who, as traders or otherwise, might seduce them into foreign
" alliances. The king purchased their lands when they were willing to sell, at a
" price they were willing to take; but never coerced a surrender of them. *He*
" *also purchased their alliance and dependence by subsidies; but never intruded*
" *into the interior of their affairs, or interfered with their self-government, so*
" *far as respected themselves only.*"

Though speaking more particularly of Indian lands and territories, yet the opinion of the Court as to the maintenance of the laws of the Aborigines, is manifest throughout. The principles laid down in this judgment, (and Mr. Justice Story as a member of the Court concurred in this decision), admit of no doubt.

Phillimore in his International Law CCXLI. p. 208, Ed. of 1854, says:—

"The nature of Occupation is not confined to any one class or description: it must be a *beneficial use and occupation (le travail d' appropriation)* "but it may be by a settlement for the purpose of prosecuting a particular trade, "such as a fishery, or for working mines, or pastoral occupations, as well as "agriculture, though Bynkershoek is correct in saying, '*cultura* utique et *cura* "*agri* possessionem quam maximè indicat."'

"Vattel justly maintains that the pastoral occupation of the Arabs entitled "them to the exclusive possession of the regions which they inhabit. 'Si les "Arabes pasteurs voulaient cultiver soigneusement la terre, un moindre espace "pourrait leur suffire. Cependant, aucune autre nation n'est en droit de les res"serrer, à moins qu'elle ne manquât absolument de terre; car enfin ils *possèdent* "leur pays; ils s'en servent à leur manière; ils en tirent un usage convenable "à leur genre de vie; sur lequel ils ne reçoivent la loi de personne.'"

"It has been truly observed that, 'agreeably to this rule, the North American "Indians would have been entitled to have excluded the British fur-traders from "their hunting grounds; and, not having done so, the latter must be considered "as having been admitted *to a joint occupation of the territory*, and thus to have "become invested with a similar right of excluding strangers from such portions "of the country as their own industrial operations pervade.'"

Authorities might be accumulated on this point, concerning which all writers agree.

Mr Fox in the great Debate upon his system of Government for India said:

"It had been often suggested that it would be advisable to give to the Gen"toos the laws of England; but such an attempt would be ridiculous and chime"rical. The customs and religion of India clashed too much with them."

I have no hesitation in saying that, adopting these views of the question under consideration, (and acquiescing, for the sake of argument, in the pretensions of the defendant) the Indian political and territorial rights, laws, and usages remained in full force—both at Athabaska and in the Hudson Bay region, previous to the Charter of 1670, and even after that date, as will appear hereafter. I come now to the consideration of that Charter; for it was incidentally and impliedly contended that it not only introduced the common law of England, but also rendered it applicable to all the inhabitants, and abrogated the Indian customs and usages, within the territories.

Hudson's Bay had been discovered prior to the attempt in which Hudson perished in 1610; but from the voyage of Sir Thomas Button, 1611, till the year 1667, it appears to have been wholly neglected by the English Government and nation. In the latter year, the communication between Canada and the Bay was discovered by two Canadian gentlemen, Messrs. Raddisson and De Groseilliers, who were conducted thither across the country by Indians. Succeeding in

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this, they returned to Quebec, and offered the merchants to conduct ships to Hudson's Bay, the proximity of which to the principal Fur districts, was now ascertained. This proposal was rejected, as well as a subsequent one to the French Government at Paris; there they were persuaded by the English Ambassador to go to London, where they were favourably received by some merchants, and persons of high rank, who commissioned a Mr. Gillam, long accustomed to the Newfoundland trade, to prosecute the discovery. Mr Gillam sailed in the Nonsuch, in 1667, into Baffin's Bay, to the height of 75° north latitude, and thence to 51°, where he entered a river, to which he gave the name of Prince Rupert's; *and finding the Indians friendly*, erected a small Fort. The persons interested in this vessel, upon the return of Gillam, applied to Charles the Second for a Patent, who granted them the Hudson's Bay Charter, dated the 2nd May, 1670, and from which I make the following extracts:—

The Charter declares— "WE have given, granted, and confirmed, and by "these presents, for us, our heirs, and successors, do give, grant, and confirm, "unto the said Governors and Company, and their successors, *the sole trade and* "*commerce of all those seas, straits, bays, rivers, lakes, creeks, and sounds, in* "*whatsoever latitude they shall be, that lie within the entrance of the Straits* "*commonly called Hudson's Straits, together with all the lands and territories* "*upon the countries, coasts, and confines of the seas, bays, rivers, lakes, creeks,* "*sounds, aforesaid, that are not already actually possessed by or granted to* "*any of our subjects, or possessed by the subjects of any other Christian Prince* "*or State,* with the fishing of all sorts of fish, whales, sturgeons, and all other "royal fish in the seas, bays, inlets, and rivers, within the premises, and the fish "therein taken together with the royalty of the sea upon the coasts within the "limits aforesaid, and all mines royal, as well discovered as not discovered, of "gold, silver, gems, and precious stones, to be found or discovered within the "territories, limits and places aforesaid, and that the said land be from hence-"forth reckoned and reputed as one of our plantations of colonies in America, "called 'Rupert's Land.'"

"And further we do by these presents, for us, our heirs and successors, make, "create, and constitute the said Governor and Company for the time being, and "their successors, the true and absolute lords and proprietors of the same terri-"tory, limits, and places aforesaid, and of all other the premises, saving always "the faith, allegiance, and sovereign dominion due to us, our heirs and succes-"sors, for the same to have, hold, possess, and enjoy the said territory, limits, "and places, and all and singular other the premises hereby granted as afore-"said, with their and every of their rights, members, jurisdiction, prerogatives, "royalties, and appurtenances, whatsoever, to them the said Governor and Com-"pany, and their successors for ever to be holden of us, our heirs and successors, "as of our manor of East Greenwich, in our County of Kent, *in free and com-* "*mon soccage, and not in capite or by knights service; yielding and paying* "*yearly to us our heirs, and successors the rame, two elks, and two black* "*beavers, wheresoever and so often as we, our heirs and successors, shall happen* "*to enter into the said countries, territories, and regions hereby granted.*

"And further our will and pleasure is, and by these presents, for us, our

"heirs and successors, we do grant unto the said Governor and Company, and "to their successors, from time to time, to assemble themselves, for or about "any the matters, causes, affairs, or business of the said trade, in any place, or "places for the same convenient, within our dominions or elsewhere, and there "to hold Court for the said Company, and the affairs thereof; and that, also, it "shall and may be lawful to and for them, and the greater part of them, being "so assembled, and that shall then and there be present, in any such place or "places, whereof the Governor or his Deputy for the time being to be one."

And the Company has the right "to make, ordain and constitute such and so "many reasonable laws, constitutions, orders and ordinances as to them, or the "greater part of them, being then and there present, shall seem necessary and con-"venient for the good government of the said Company, and of all governors of co-"lonies, forts and plantations, factors, masters, marines and other officers employed "or to be employed in any of the territories and lands aforesaid, and in any of "their voyages; and for the better advancement and continuance of the said "trade or traffic and plantations, and the same laws, constitutions, orders and "ordinances so made, to put in, use and execute accordingly, and at their plea "sure to revoke and alter the same or any of them, as the occasion shall re-"quire: And that the said Governor and Company, so often as they shall make, "ordain or establish any such laws, constitutions, orders and ordinances in such "form as aforesaid, shall and may lawfully impose, ordain, limit, and provide "such pains, penalties and punishments upon all offenders, contrary to such "laws, constitutions, orders and ordinances, or any of them, as to the said Go-"vernor and Company for the time being, or the greater part of them, then and "there being present, the said Governor or his Deputy being always one, shall "seem necessary, requisite or convenient for the observation of the same laws, "constitutions, orders, and ordinances; and the same fines, and amerciaments "shall and may, by their officers and servants from time to time to be appointed "for that purpose, levy, take and have, to the use of the said Governor and "Company, and their successors, without the impediment of us, our heirs, or "successors, or of any the officers or ministers of us, our heirs, or successors, "and without any account therefore to us, our heirs, or successors to be made: "All and singular which laws, constitutions, orders and ordinances, so as afore-"said to be made, WE WILL to be duly observed and kept under the pains and "penalties therein to be contained; so always as the said laws, constitutions, "orders and ordinances, fines and amerciaments, *be reasonable, and not contrary "or repugnant, but as near as may be agreeable to the laws, statutes or customs "of this our realm.*"

And the "Governor and Company shall have liberty, full power and "authority to appoint and establish Governors and all other officers to govern "them, and that the Governor and his Council of the several and respective pla-"ces where the said Company shall have plantations, forts, factories, colonies or "places of trade within any the countries, lands or territories hereby granted, "may have power to judge *all persons belonging to the said Governor and Com-"pany, or that shall live under them,* in all causes, whether civil or criminal, according to the laws of this kingdom, and to execute justice accordingly; and

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"in case any crime or misdemeanour shall be committed in any of the said Com-
"pany's plantations, forts, factories or places of trade within the limits aforesaid,
"where judicature cannot be executed for want of a Governor and Council there,
"then in such case it shall and may be lawful for the chief Factor of that place
"and his Council to transmit the party, together with the offence, to such other
"plantation, factory or fort where there shall be a Governor and Council, where
"justice may be executed, or into this kingdom of England, as shall be thought
"most convenient, there to receive such punishment as the nature of his offence
"shall deserve."

From these extracts it will be seen:

1. What description of territory, rivers, and sea coasts were ceded; and that the tenure of these extensive regions was to be that of free and common soccage.

2. That the Company had power to make laws and regulations agreeable, in so far as might be, to the laws and customs of the realm.

3. That English law, civil and criminal, was introduced and made applicable within the territory to all persons belonging to the Company, or living under them; and,

4. That territories then already actually possessed or granted to any British subjects, or possessed by the subjects of any other Christian Prince or State, were excepted from the grant.

It is no part of my duty, upon the present occasion, to offer any opinion upon the validity of this extraordinary charter, though that point is not without interest in this case; and it is worthy of note, that some of its clauses have given rise to doubts among lawyers, and have been the occasion for considerable controversy both in England and in this country. Several modes of testing the question have been suggested; but as yet none have been adopted. Apart from the immense and irresponsible powers conferred upon the Company, it has been contended that the grant in free and common soccage, in fee simple, of such extensive regions of territory in the actual possession of aboriginal and powerful nations, was not in the power of the crown, and was a violation of the plainest principles of public international law. Some have gone further, and contended that without the authority of Parliament, such a grant of land and exclusive privileges and monopoly could not be made; that the concession of the exclusive right of trade with the Indian tribes was an illegal exercise of the Royal Prerogative; that the Company have never carried out the intentions of the Crown, either by proper attempts to find a north-west passage to the Southern Ocean, or by making useful discoveries and planting, settling, and colonizing the territory; that they have not attempted, by even ordinary means, to civilize the natives; nor have they, by judicious and appropriate regulations, laws, and government, endeavoured to render such a vast and important dominion of the Crown beneficial to the Parent State. The Company, when called upon from time to time, have answered these charges more or less successfully; and they have further urged, that in the reign following that in which this Charter was granted, the cession received the confirmation of Parliament; however, it was specially provided that the act of confirmation should only remain in force for the period of seven years, "and from thence to the next session of Parliament; and no longer."

After this, no re-confirmation of the Charter by Parliament ever took place, though its existence has frequently been incidentally recognized in Acts of that body, and among others may be noticed the following:—By an act of Parliament of Great Britain (43 George III., chap. cxxxviii.), passed in August, 1803, it was provided that crimes committed within the Indian territories, which, though not conveyed by Charter to the Company, have long been leased to them, should be cognizable by the Courts of Upper and Lower Canada. The preamble of this Act recites that crimes and offences committed within the Indian territories were not cognizable by any jurisdiction whatever. In 1821, an Act (1 and 1 George IV., chap. lxvi.) was passed extending the provisions of the above-named Act to crimes and offences committed within the territory covered by the Company's Charter, anything "in any grant or Charter to the Company to the contrary "notwithstanding." This latter Act also gave to the Canadian Courts a right of jurisdiction within the Indian territory, as well as over Rupert's Land, which is covered by the Company's Charter. The existence of the Charter has also been referred to in royal Proclamations. All this may give rise to interesting investigations hereafter.

But for the purpose of this case, I take the Charter as I find it, and regard it as legally conceding territory and introducing the Common Law of England, with a restricted application within the limits of the grant. And conceding this, it becomes necessary, in the first place, to enquire whether the Athabaska region was included within the Chartered limits of the Company or not. Mr. Hopkins, a witness for the defendant, says it was not; but there is a qualification in his evidence which renders his meaning in some degree doubtful. Let us look a little closer into this matter, and see if the fact can be ascertained, or the doubt be reasonably solved. And here it may be proper to remark, once for all, that the western boundaries of the territory have never, so far as I can ascertain, been clearly settled or defined by either judicial decision or otherwise. Before proceeding, however, to advert more particularly to this question, it may not be out of place to refer to the opinions of some of the most eminent lawyers in England in regard to this difficulty of boundary which is not new, and which has arisen under circumstances to which it is unnecessary for the Court to advert.

Lord Brougham and his associate counsel, consulted in 1814 by the North-West Company, were of opinion, that the territorial grant was not intended to comprehend all the lands and territories that might be approched through Hudson's Straits by land or by water, but must be limited to the relation of proximity to the Straits, and to the confines of the coasts of the Bay within the Straits; and likewise, that the bonndary must be such a one as is consistent with that view, and with the professed objects of a trading company, intended, not to found kingdoms and establish states, but to carry on fisheries in their waters, and to trade and traffic for the acquisition of furs, peltries, &c.; and they add, that as one hnndred and fifty years had then elapsed since the grant of the Charter, it must have been ascertained by the actnal occnpation of the Company what portion or portions of lands and territories in the vicinity, and on the coast and confines of the waters mentioned and described as within the Straits, they had found necessary for their purposes, and for forts, factories, towns, villages, settle-

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ments, or such other establishments in such vicinity and on such coasts and confines as pertain and helong to a company estahlished for the purposes mentioned in their charter, and necessary, useful and convenient to them, within these prescribed limits, for the prosecution of these purposes; and they say, that the enormous extension of land now claimed (and they had reference only to the Red River District transferred in 1812 by the Company to Lord Selkirk; for no pretence was ever made by the Hudson Bay Company that Rehaska, Rat River, or Athabaska, was within the Chartered Boundaries, till it was first put forth in this case,) appears therefore, not to be warranted by any sound construction of the Charter.

Sir Samuel Romilly, Scarlett, afterwards Lord Abinger, and others consulted, in 1814, by the Hudson's Bay Company, were of opinion that the grant of the land contained in the charter was good; and that, moreover, it would include all the conntries, the waters of which flow into Hudson's Bay.

All this is pretty vague; and what is most apparent and precise, in these opinions, is the different way in which they view the charter and the Western limits of the Company's territories. The charter grants the right of exclnsive trade and commerce of all *seas, straits, rivers, &c.*, that lie within the entrance of *Hudson Straits;* also together with all the lands and territories *upon* the countries, coasts and confines of the sea, bays, lakes, rivers, creeks, and sounds aforesaid. It seems to me, if these words, taken together, are susceptihle of any reasonable construction or interpretation, they were intended to concede a vast extent of conntry, round the whole coast of Hudson's Bay and the rivers flowing into it. That all the regions westward from the shores of the Bay along the great rivers, tributaries of that inland sea, so far as those streams are navigahle for the purpose of trade and commerce, are included in tho grant; in other words, their limits extend as far west as the head of the water-shed, where navigation ccases, in longitnde west, 95.

Assuming this view to be correct, yet the Athabaska region would not be included within the western houndaries of the Company's territory. The Elk, or Athabaska River, rises in the Rocky mountains; and after flowing north and west 300 miles, discharges its waters into lake Athahaska, otherwise known as the lake of the Hills. By two outlets, the waters of lake Athabaska flow into Peace River, an affluent of the MacKenzie, through it to the Frozen Ocean. It is idle, therefore, in the opinion of the Court to contend that Rat River or the Athahaska County are or were ever within the chartered limits of the Hudson's Bay territories.

Before leaving this hranch of the case, it may be proper to refer to the treaty of Ryswick, in 1697, between Great Britain and France, and also to the treaty of Utretcht, hetween the same powers, in 1713.

By the 7th and 8th articles of the former treaty it is declared and agreed that:—

"VII. And in like manner the Kings of Great Britain shall restore to the "most Christian King all conntries, islands, forts, and colonies, wheresoever "situated, which the French did possess before the said declaration of war; "and this restitution shall he made on both sides, within the space of six months,

" or sooner if it can be done. And to that end, immediately after the ratifica-
" tion of its treaty, each of the said Kings shall deliver, or cause to be delivered,
" to the other, or to commissioners authorized in his name for that purpose, all
" acts of concession, instruments, and necessary orders, duly made and in proper
" form, so that they may have their effect."

" VIII. Commissioners shall be appointed on both sides, to examine and
" determine the rights and pretensions which either of the Kings had to the
" places situated in Hudson's Bay; but the possession of those places which were
" taken by the French, during the peace that preceded this present war, and
" were retaken by the English during this war, *shall be left to the French*, by
" virtue of the *foregoing article*." These commissioners were named, but never reported.

By the 10th article of the treaty of Utretcht it is provided that :—

" X. The said most Christian King shall restore to the kingdom and Queen
" of Great Britain, *to be possessed in full right for ever, the bay and straits of*
" *Hudson, together with all lands, seas, sea-coasts, rivers, and places situate in*
" *the said bay and straits, and which belong thereunto, no tracts of lands or of*
" *sea being excepted, which are at present possessed by the French subjects of*
" *France*."

The Hudson's Bay territory, as described in the latter treaty, would seem to be restricted to the limits contended for by Lord Brougham, rather than to those laid down by Sir Samuel Romilly; and in any case, I believe, as before stated, that the Athabaska region was beyond and without the chartered limits of the Company, and could not therefore come under the operation of that grant. There may, moreover, be urged another reason, and, in my opinion, successfully, why the Athabaska country should be excluded from the limits of the Hudson Bay territory, and an argument more cogent than that to be found in the vague and doubtful terms of the Charter. It is declared by that remarkable instrument, that the grant is made of all those seas, bays, straits, &c., together with all lands and territories, &c., that are not already actually possessed by or granted to any of our subjects, *or possessed by the subjects of any other Christian Prince or State*. Now, as I have before remarked, it appears to me to be beyond controversy that, in 1670, the Athabaska country belonged to the Crown of France. It had previously been discovered by French colonists, and been more or less explored by these adventurers and the trading companies of New and Old France. It is true their settlement and occupation was not precisely that of colonists; but they were traders with trading posts, explorers, hunters, discoverers, carrying on a trading intercourse with the natives. If this be true, and there can be no doubt of it, the region in question was expressly excepted out of that grant; and such was the opinion of Lord Brougham and his associate Counsel.

But admitting, for the purpose of conceding to the defendant all that can be granted, that in 1803, the Athabaska district was included within the western limits of the Hudson Bay territories, still that portion of the Common Law of England which would prevail there, had a very restricted application—it could be administered and enforced only among, and in favor of, and against those

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"*who belonged to the Company or were living under them.*" It did not apply to the Indians, nor were the native laws or customs abolished or modified, and this is unquestionably true in regard to their civil rights. It is easy to conceive, in the case of *joint occupation* of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. History is full of such instances, and the dominions of the British Crown exhibit cases of that kind. The Charter did introduce the English law, but did not, at the same time, make it applicable generally or indiscriminately—it did not abrogate the Indian laws and usages. The Crown has not done so. Their laws of marriage existed and exist under the sanction and protection of the Crown of England, and Mr. Connolly might bind himself as well by that law, as by the Common Law of England.

It is still further contended that, by the treaty of Paris, in 1763, by which all the French possessions on the continent of America were ceded by France to Great Britain, the North-West was brought, not only under the dominion of England, but the common law of the realm was *ipso facto* introduced into that country.

As a matter of fact and of public law, the treaty in question effected no such change in the laws of the territory. It will be observed that between 1670 and 1763 nearly one hundred years had elapsed, and during that period the French colonists, and French trading companies, had made settlements and established trading posts as far as the Rocky Mountains; that these countries were in the occupation of the French, and that no change could take place in their laws, or in the Indian usages, except by the express will of the conqueror, or of the sovereign to whom the cession was made. I find in the proclamation in pursuance of that treaty, dated 7th October, 1763, the following clauses:—

"And we do further declare it to be our royal will and pleasure, for the pre-
"sent, as aforesaid, to reserve under our sovereignty, protection, and dominion,
"for the use of the said Indians, all the land and territories not included within
"the limits of our said three new governments, or within the limits of the terri-
"tory granted to the Hudson's Bay Company; as also all the land and territories
"lying to the westward of the sources of the rivers which fall into the sea from
"the west and north-west as aforesaid; and we do hereby strictly forbid, on pain
"of our displeasure, all our loving subjects from making any purchases *or settle-*
"*ments whatever*, or taking possession of any of the lands above reserved without
"our especial leave and licence for that purpose first obtained."

There is nothing to be found in this, or in any subsequent proclamation, abolishing or changing the customs of the Indians or the laws of the French settlers, whatever they may have been; nothing which introduced the English common law into these territories. When Connolly went to Athabaska, in 1803, he found the Indian usages as they had existed for ages, unchanged by European power or Christian legislation. He did not take English law with him, for his settlement there was not preceded by discoveries made either by himself or English adventurers, nor was it an uninhabited or unoccupied territory. This pretension of the defendant, therefore, that, to the exclusion of the laws and customs of the natives, the common law of England prevailed at Rat River, in 1803, or

at any subsequent period, must be over-ruled, and in doing so the Court may remark that it was not competent in any case for Mr. Connolly to carry with him this common law of England to Rat River in his knapsack, and much less could he bring back to Lower Canada the law of repudiation in a bark canoe. If he could in this way carry the law of England there, he is bound by it, as I view the fact of this case; and coming back to Canada, he cannot bring with him, or invoke the Cree law of divorce at will.

I have dwelt upon this branch of the case at greater length than it would seem to require through deference for the arguments of the defendant's counsel, and not because the question is one presenting any difficulty, or in the opinion of the Court susceptible of a doubt. The plaintiff's counsel seemed to attach very little importance to it, either because they thought it too clear, or perhaps immaterial.

I come now to the facts, and the law of the case claiming more close and anxious consideration.

Before, however, proceeding any further, it may be well to state some general principles applicable to the law of marriage; how that institution was considered, and what were the ceremonies observed in solemnizing matrimony among the principal nations of Europe prior to the Council of Trent, the ordinances of the French Kings, and the British Marriage Acts as they are called. As none of these laws were ever promulgated, or in force at Rat River, we need not carry our investigations into the religious customs or observances of more recent times.

By the law of nature, a man and a woman without religion or law have the right, it is said, to form a union upon such conditions as they may choose to impose. By the law of nations, all communities which observe that law, have agreed to recognize as husband and wife persons of the opposite sexes, who in their union have observed and fulfilled all the laws in force relative to matrimony, in the country which they inhabit or where the union is formed; and by the Civil law, each nation has established certain formalities upon the observance of which the validity of marriage depends. In a state of nature the contract has been defined as *Contractus quo personæ corporum suorum dominium mutuo tradunt et recipiunt.* By the Civil law it has been regarded as *Contractus quo legitimatæ personæ ritè et mutuo corporum suorum dominium tradunt et recipiunt.* So far as marriage requires religious sanction it may be considered *maris and feminæ conjunctio individuæ vitæ retinens secundum prescripcum legun divinarum et humanarum ad usum conjugalem.*

Among the chosen people and the heathen nations of antiquity, before the teachings of Christ, marriage in many respects was not unlike that described as existing among the aboriginal inhabitants of this continent. We must in regard to many of these nations always except the facility of divorce and repudiation. Among some of the barbarians of North America, marriage is said to be dissolvable at pleasure—at the will or caprice of either party—the meaning of which is, I presume, that the causes which justify divorce are very numerous; and that the formalities to be observed in the exercise of this mutual right of repudiation, are very few. It is a question of degree, more or less; and so far it is different from the law of divorce as it obtains and has obtained among many civilised and christian nations.

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It seems to be admitted among all christians, that our Saviour imparted to marriage a more solemn and sacred character than it previously possessed; and the Roman Catholic theologians and councils hold, that it was elevated by Him to the dignity of a sacrament, and that the bond was rendered indissoluble. I have no good reason to doubt but that this has been the doctrine of the Church of Rome, upon the first two points from the time of the Apostles to the present day; in fact we have the authority of Tertullian, who wrote in the middle of the second Century, and of many later fathers, that this was the doctrine of the Church; though of course, it was extremely difficult to impress these religious solemnities in all their stength and purity upon nations passing from paganism to christianity, or to enforce their strict observance amidst the corruptions and violence of a vast Empire, perishing from the effeminacy and licentiousness of its people. The Church came in at the decline; while she prepared to encounter with weapons more powerful than those of man, the wrath of the barbarians, advancing now to the destruction of roman power and roman civilization, her work of conversion was still incomplete, and her doctrines were not entirely or adequately asserted. Perhaps during the centuries of disorder, anarchy and barbarism, which preceded and followed the final overthrow of the Western Empire, it was impossible to inculcate or to enforce those doctrines which were defined and promulgated in later and more christian times. I am not, however, called upon to determine that question; but in order to appreciate in a religious point of view one peculiarity of this Indian marriage, *viz;* that of having taken place by mere consent without rites or ceremony, it may be interesting to refer to some of the laws of the christian Emperors and to epistles and decretals of the Popes. Constantine, the first Emperor who acknowledged Christianity on the throne, and many of his successors, expressly recognize divorce in their laws, and also marriage by consent alone. We have several collections of Roman laws since the Empire became christian, which define what marriage was under these laws:—1st. The Theodosian Code which was published in 438, and 2nd, the Code of Justiniau and other parts of his legislation; in them will be found, in the greatest detail, what constituted a legal marriage. In the Institutes, we find the following:

"Justas nuqtias inier se cives romani contrahunt, *qui secundùm præcepta* "*legum coeunt:* masculi quidem puberes, fœminæ autem viripotentes; sive patres- "familiarum sint, sive filii-familiarum. Dum tamen, si filii-familiarum sint, "consensum habeant parentum, quorum in potestate sunt. *Inst. lib.* I, *tit.* X, "*in princ.*"

This is what the Digest calls the nuptial—the essential and legal rite. In a law of Theodorius, we find the following:

"Si donationum antè nuptias, vel dotis instrumenta defuerint, pompa etiam "*aliaque nuptiarum celebritas* omittatur, nullus æstimet ob id deesse, rectè aliàs "inito matrimonio, firmitatem, vel ex eo natis liberis jura posse legitimorum "auferri, si inter pares honestate personas, nullâ lege impediente, fiat consortium, "*quod ipsorum consensu, atque amicorum fide firmatur. Cod. Theod. lib.* III, "*tit.* 7 *l.* 3."

This is the famous doctrine of Theodosius, the younger, promulgated 428,

and inserted in the Theodosian Code. It was afterwards adopted by Justinian. We find these words in the third chapter of the 22nd Novel:

"*Nuptias* itaque *affectus alternus facit, dotalium* non egenis augmento. Cùm "enim semel convenerint sub puro nuptia affectu, sive etiam oblatione dotis, et "propter nuptias donationis; oportet causam omnino sequi etiam solutionem aut "innoxiam, aut cum pœnâ."

It will be borne in mind that these pecuniary arrangements were not essential to the marriage contract; but they were regarded as evidences of consent, and their omission gave rise to serious difficulties. In his 74th Novel, (App. 4) we find the law which defines more in detail than any other what shall constitute a legal marriage; but nothing is said there about any religious ceremony. He says:

"Et antiquis promulgatum est legibus, et à nobis ipsis sunt hæc eadem con- "stituta, *ut utiam nuptiæ extrà dotalia documenta ex solo affectu valeant et rate* "*sint.* Cap. IV. in princ.

"Introeuntes testes sine periculo mentientes, quià vir vocabat *dominam* "cohœrentem, et ista illum similiter nominabat; et sic eis finguntur matrimonia "non pro veritate confecta. *Ibid.*

"In majoribus itaque dignitatibus, et quæcumque usque ad nos et sen- "atores et magnificentissimos illustres, neque fieri hæc omnino patimur; sed "sit omnino et dos, et antenuptialis donatio, et ad omnia quæ honestiora decent "nomina. Quantùm vero in militiis, honestioribus et negotiis, et omnino profes- "sionibus dignioribus est: si voluerit legitimè uxori copulari, et non facere nup- "tialia documenta: non sic quomodocumque et sine cautelâ effusè, et sine pro- "batione hoc agat, sed veniat ad quantum orationis domum, et fateatur sanc- "tissimæ illius ecclesiæ defensori: ille autem adhibens tres aut quatuor exinde "reverendissimorum clericorum, attestationem conficiat declarantum, *quia sub* "*illâ indictione, illo mense, illa die mensis, illo imperii nostri anno, consule illo,* "*venerunt apud eum in illam orationis domum ille et illa, et conjuncti sunt* "*alterutri, etc.* Eod. cap. § 1."

This legislation continued until the reign of Leon VI, Emperor of the East, n 911. In the West the nuptial benediction was rendered necessary much earlier. In his Capitularies, Charlemagne, in 802, established by law the necessity of this nuptial benediction and the indissolubility of marriage. But, notwithstanding these laws I think it is beyond doubt that marriages were held to be valid without this religious ceremony, and that, too, immediately and long after the promulgation of the Capitularies. The authority of Popes and Bishops would perhaps be considered sufficient to establish that fact in a matter of this kind. I find in the reply of Nicholas I, in 866, to the Bulgarians, after stating the ceremonial required in the Catholic Church to be very much the same as it now is, the following words are to be found in the conclusion:

"Hæc sunt jura nuptiarum; hæc sunt, præter alia quæ nunc ad memoriam "non occurrunt, pacta conjugionum solemnia. Peccatum autem esse, si hæc "cuncta in nuptiali fœdere non interveniant, non dicimus, quemadmodùm "Græcos vos æstimare dicitis; præsertim cùm tanta soleat arctare quosdam rerum "inopia, ut ad hæc præparanda, nullum his suffragetur auxilium: *ac per hoc*

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" *sufficiat secundùm leges malus earum consensus, de quorum conjunctionibus* " *agitur.* Qui consensu ssi solus in nuptiis fortè defuerit, cætera omnia, etiam " cum ipso coitu celebrata, frustrantur; Joanne Chrysostomo, magno doctore, " testante, qui ait; Matrimonium non facit coitus, sed voluntas. Ibid."

Pope Adrian the Second, successor of Nicholas, was applied to, that he might determine whether a certain marriage, celebrated without the presence of a priest, was or was not valid; and he wrote to the Bishop of the Diocese in the following words:

" Ut autem omnis quæstio super eodem matrimonio de cætero sopiatur, per " apostolica tibi scripta mandamus, quatenùs hujusmodi connubium dissolvi " nullatenùs patiaris, sed firmum facias atque inviolabile permanere. Si enim " alliàs personæ convenientes et legitimæ fuerint, et contractus ipse legibus con- " cordans, ita quod non videatur ei de sacris canonibus obviare; *pro eo quod* " *sacerdos fuerit, tale matrimonium non debet ullatenùs impediri.*" Ibid.

There does not appear to have been any peculiar circumstances about this marriage, except the absence of the priest; it is to be remembered, however, that several witnesses were present. Pope Alexander the Third, writing to the Bishop of Salerno, says:—

" Inquisitioni tuæ taliter respondemus, quo si legitimus consensus à solemni- " tate quæ fieri solet, præsente sacerdote, *aut etiamejus notario, sicut etiam in* " *quibusdam locis adhuc observatur,* eorum idoneis testibus interveniat de " præsenti, ita quod unus alium in suum mutuo consensu verbis expressis " recipiat, utrinque dicendo: Ego te recipio in meam, et ego te in meum; sive " sit juramentum, sive non, non licet mulieri alii nubere, etc.—Conc. Labb. t. " X, col. 1574."

The same Pope in writing to an English Prelate, the Bishop of Norwich, makes the following remarks:—

" Super eo quod ex tuis litteris intelleximus virum quemdam et mulierem, de " mandato Domini utriusque, sese invicem recepisse, *nullo sacerdote præsente,* " *nec adhibitâ solemnitate, quam solet Anglicana ecclesia exhibre* et aliam " mulierem ante carnalem commixionem solemniter duxisse et cognovisse; tuæ " prudentiæ taliter duximus respondendum, quod si primus vir et mulier ipsa " pari consensu de presenti sese receperint, dicendo unus alteri: Ego te recipio " in meum, et ego te recipio in meam; etiamsi non intercesserit ulla solemnitas, " nec vir mulierem carnaliter cognoverit, mulier ipsa primo debet restitui, cum " nec potuerit, nec debuerit, post talem consensum, alii nubere.—Antonii " Augustini antiquæ decretalium collectiones. Paris. 1621, p. 103."

Innocent the Third, replying to the Bishop of Brent, says:—

" Postulâsti utrum ex solis verbis, et ex quibus matrimonium contrabatur. " Nos igitur inquisitioni tuæ taliter respondemus, quod matrimonium in veri- " tate contrahitur per legitimum viri et mulieris consensum: sed necessaria " sunt, quantum ad ecclesiam, verba consensum exprimentia *de presenti.*— " Decretal. Greg. IX, de spons. et matr. cap. 25."

In the decretals we find the marriage *per verba de præsenti* referred to in language the most precise. It may take place before the priest, or before the relatives and friends of the parties: this kind of marriage may be contracted

without witnesses, provided both parties admit the fact, and even may be proved by simple presumption, arising from cohabitation.

In support of what I have here stated, the Court deems it interesting to make the following citations from the decretals:—

"Ex parte C. mulieris nobis intimatum est quod Andreas juramentum præ-
" stitit, quod eam ab eo tempore pro conjuge teneret, et ei sicut uxori suæ fidem
" servaret, Ipsa quoque eidem Andreæ juravit se illum pro marito habiturum, et
" fidem tanquam viro proprio servaturam; quo facto prænominatus A. reliquit
" eamden. Quia igitur nemini licet uxorem suam sine manifestâ causâ forni-
" cationis dimittere, et tunc eam sibi reconciliare debet, aut ipsâ vivente continere;
" mandamus, quatenùs eundem ut superinductâ dimissâ, et ad uxorem suam re-
" deat, et eam maritali affectione pertractet, monitione præmissâ, per eccles. cens.
" cogatis., *Eod. tit. cap* 9., *Voy. aussi le chap. II.* de præsumptionis, *et le chap.*
" 6. de eo qui cognovit consanguineam, *etc.*

" Si matrimonia ità occultè contrahuntur quod exindè legitima probatio non
" appareat, ii qui ea contrahunt, ab ecclesiâ non sunt aliquatenùs compellendi.
" Verùm si personæ contrahentium hæc voluerint publicare, nisi rationabilis
" causa præpediat, ab ecclesiâ recipienda sunt et comprobanda, tanquàm à
" principio in ecclesiæ conspectu contracta. *Ibid.* de clandestinâ disponsatione,
" *cap.* 2.

" Veniens ad nos Gu. suâ nobis relatione monstravit, quod in domo suâ mulie-
" rem quandam receperit, de quâ prolem habuit, cui fidem coram pluribus præstitit
" quod eam duceret in uxorem. Interim autem cùm apud domum vicini sui per-
" noctaverit, ejus filia nocte illâ secum concubuit, quos pater puellæ simul in uno
" lecto inveniens, ipsum eam per verba de præsenti desponsare coëgit. Ideoque
" mandamus, quatenùs si inveneris quod primam post fidem præstitam cognoverit,
" ipsum cum eâ facias remanere: alioquin secundæ (nisi metu coactus qui posset
" in virum constantem cadere, eam desponsaverit) adhærere facias, ut uxori.
" *Ibid* de sponsal et matrium: *cap.* 15.—Is quid fidem dedit M. mulieri super
" matrimonio contrahendo, carnali copulâ subsecutâ, si in facie ecclesiæ ducat
" aliam et cognoscat, ad primam redire tenetur: quia licet præsumptum primum
" matrimonium videatur, contra præsumptionem tamen hujusmodi non est probatio
" admittenda. Ex quo sequitur, quod nec verum nec aliquod censetur matrimo
" nium quod de facto est postmodo subsecutum. *Eod. tit. cap.* 30."

In conclusion, I quote the opinion of M. Agier., in his Treatise on Marriage, vol. I., pp. 122 and 123:

" Le concile de Trente, pour faire cesser l'inconvénient de la clandestinité, a
" ordonné que les mariages ne seraient contractés valablement qu'en présence du
" propre curé. Mais, sans examiner pour l'instant si le concile en ce point n'a
" pas excédé son pouvoir, j'observe d'abord qu'à cet égard il introduisait un droit
" nouveau; et en conséquence le décret porte qu'il ne sera exécuté dans chaque
" paroisse que *trente jours apres sa publication.* Ainsi, jusqu'à ce moment,
" et dans toutes les paroisses où il n'avait pas encore été publié, les mariages
" ont pu se contracter valablement comme autrefois, sans l'intervention d'aucun
" prêtre.

" J'observe ensuite que le décret du concile de Trente est subordonné, com-

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" me toutes les lois humaines, à la loi supérienre de la nécesssité; d'où il suit " qnc son exécution cesse dans les endroits où il ne se rencontre pas de pasteur " en exercice, ni personne qui en tienne la place; c'est la décision uniforme des " canonistes."

It would be fatiguing to cite authorities in support of this view of the Canon law, as it stood in earlier times. It can be easily understood that, as at Rat River—it was not always possible to have any other form of marriage—and nnder peculiar circumstances there can be no doubt, that such marriages were regarded as valid by the Canon law.

These quotations are given to exhibit some of the legislation of the early Christian Emperors in regard to marriage, and to prove also what were the opinions of some of the most learned and illustrious among the Popes of Rome; and finally what were the principle of the earlier Canon law in this respect. Of conrse neither these laws nor the opinions of the Popes necessarily convey what were the doctrines of the Church, but they are worthy of note in a case like the present; they show that consent was the main element in the contract, that religious or other ceremonies were not, in every case, essential. In the course of time the Ecclesiatical power became more strict; and the doctrines of the Church, on these subjects, among others, were defined and promnlgated in the decrees of the Council of Trent. It is unnecessary for me to speak of these decrees, they were never published in England or France, much less in the North West or Athabaska territory.

We come now to enquire what was the Common law of England in respect to marriage. Previous to doing so the Court deems it right to advert to the forms and solemnities requisite in France and Scotland and Spain.

In France, before the Revolution, the form of marriage was of a mixed nature, and it was held, by lawyers, that the essence of the marriage consisted rather in the civil contract than in the sacrament or religious solemnization; for the marriage law of France was derived from the ancient canon law, subject to regulations of the provincial councils of the kingdom, agreeably to the independence of the Gallican church, and snbject also to the control of the monarch. None of the ordinances and declarations of ancient France embody and enforce, in express terms, the provisions of Papal bulls and the Tridentine decrees relative to marriage. In an edict of Henry IV., 1606, there seems to be a recognition of the authority of the Council. The substitution of the civil magistrate for the ecclesiatics appears to constitute the principal differences betwcen the rules observed dnring the *ancien régime* and those of the *code civil;* each exhibiting an equal precaution in their preliminary forms; and parental right is scrupulonsly maintained; for the declaration of the 24th session of the Council of Trent, which rendered the consent of parents nnnecessary for the validity of marriage, was protested against on the part of France, and was virtually disavowed by the *Ordonnance de Blois*, in 1579, and by the snbseqnent royal edicts on that particular point. According to the civil code of France it seems that a domicile of six months is a necessary qualification for marriage, after which a municipal officer of the commune of the domicile, at the door of the hall of the commune, publishes the names, residence, and age of the parties intended to marry, and the names

and residence of parents. After this publication, a public act is drawn up, setting forth the description of the parties, and the day, time, and place of the publication, a copy of which remains fixed on the door of the hall of the commune, until the end of eight successive days, when the publication is to be repeated with the same formalities. After a lapse of three complete days from the last publication, the marriage may be celebrated on a day appointed by the parties at the hall of the commune, by the municipal officer, in the presence of four witnesses. The officer, after addressing the parties on the subject of their duties, receives their separate declaration that they take each other for husband and wife, and then, in the name of the law, pronounces them to be united in marriage, and a public act is immediately drawn up and recorded. According to the law of France, it is only in virtue of this act that the rights belonging to marriage can be maintained in that country, so that, like the marriage act of England, the law of France, as to the form of marriage, is not merely directory, but prohibitory also; admitting (as it seems) no marriage to be valid that has been contracted within the territory according to any other form than that prescribed by the civil code of the kingdom.

The decree of the Council of Trent was never recognized in Scotland. In marriages at Gretna Green, a blacksmith has supplied the place of a priest or a magistrate.

By the canon law, there is a distinction between the contract *de præsenti*, and the promise *de futuro*; the former constituting a good marriage of itself; the other not unless followed by copula or some other act which is held in law to amount to the carrying the promise into effect: and this canon law prevailing in Scotland, Lord Stowell adjudged that under the Scotch law, the contract *de presenti*, does not require consummation in order to become "very matrimony;" that it does *ipso facto et ipso jure* constitute the relation of man and wife. (Dalrymple *vs.* Dalrymple, 2 Haggard's C. R. 54; 4 Eog. Eccl. Rep., 485.) This position was approved in the House of Lords. (McAdam *vs.* Walker, &c.; 1 Dow. 182.) By force of such a contract in Scotland (without religious celebration), Lord Stowell, in the Dalrymple case, pronounced Miss Gordon the legal wife of Mr. Dalrymple, an English officer, who, after making in Scotland a contract of a marriage with her, was married in England to Miss Manners, the sister of the Duchess of St. Albans.

In Spain the decrees of the Council of Trent were received and promulgated by Philip II, in his European dominions. But the laws applicable to her colonies consisted of a code issued by the Council of the Indies antecedent to the Council of Trent, and are to be found in the code or treatise called *Las Siete Partidas* and the laws of Toro. The law of marriage as contained in the *partidas* is that *consent alone joined with the will to marry, constitutes marriage.*" (10 How., 182.)

It is matter of history that many marriages were contracted in the presence of civil magistrates and without the sanction of a priest in Spanish colonies, which have since been ceded to the United States. (Id. 180.)

Whether an actual contract of marriage, made before a civil magistrate (and followed by cohabitation and acknowledgment), but without the presence of a

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priest, was valid, and the offspring thereof legitimate according to the laws in force in the Spanish colonies previous to their cession to the United States, was a question in Hallett, &c; *vs.* Collins, and it was determined in the affirmative.

But it may be asked, what were the nature and obligatory force of a contract *per verba de præsenti* by the English common law, previous to the passing of the Marriage Act, in the 26 Geo II. It was supposed by Gibbs, C. J. of the Common Pleas, that before that Act, marriages in England were governed by the canon law, and that a contract of marriage entered into *per verba de præsenti* should be considered an actual marriage if followed by cohabitation. (Lautour, &c. *vs.* Teesdale and wife, 8 Taunt. 830, 4 Eng. Com. Law Rep. 299.) Lord Ellenborough also thought that a contract of marriage *per verba de præsenti*, would have bound the parties before that Act. (King *vs.* Brampton, 10 East, 288.) And the opinion of Gibbs, C. J., has some support in the language of Lord Stowell in Dalrymple *vs* Dalrymple. But in that case, it was of no importance whether or no the canon law of Europe was introduced into England as part of its laws; the only question in the Dalrymple case, in respect to the canon law, being whether it was introduced into the law of Scotland.

In the United States, the Courts of several of the States have gone quite as far as Chief Justice Gibbs. Thus it has been laid down by the Supreme Court of New York, that a contract of marriage made *per verba de præsenti* amounts to an actual marriage, and is as valid as if made in *faci ecclesiæ*, (Fenton *vs.* Reed, 4 John. 52; Jackson *vs.* Winne, 7 Wend. 47); and by the Supreme Court of Pennsylvania, that marriage is a civil contract which may be completed by words in the present time without regard to form. (Hantz *vs.* Sealy, 6 Binn. 405; Patterson *vs.* Grines and wife, 4 How., 587.) And upon the ground that parties have power to contract marriage *inter se*, without the intervention of a clergyman—that such is the common law—and the Supreme Court of New York, in the absence of proof to the contrary, presumed this to be law of Connecticut at the time of the marriage, which was in question in Starr, &c. *vs.* Peck, 1 Hill, 271.

To this view of the common law of England, acted upon in the American Union—the same taken by Chancellor Kent in his commentaries, and Judge Story in his treatise on the Conflict of laws—Lord Campbell, in the case of The Queen *vs.* Millis, called attention in the House of Lords to the fact that the United States "carried the common law of England along with them, and jurisprudence is the department of human knowledge, to which, as pointed out by Burke, they have chiefly devoted themselves and in which they have chiefly excelled." (10 Clark & Finn. 777.) A view of the law different from that which Lord Campbell sought to enforce was taken by Chief Justice Tindal. This Judge, whom for learning and ability, Lord Campbell has pronounced, as not inferior to the most distinguished of his predecessors, endeavoured, in the case of the Queen *vs.* Millis, to shew that the law by which the spiritual courts of England have from the earliest time been governed and regulated, is not the general canon law of Europe imported as a body of law into England, and governing those courts *proprio vigore*, but, instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the eccle-

isastical constitutions of the English bishops and archbishops, and by the legislature of the realm, and which has been known from early times by the distinguishing title of the king's ecclesiastical law. (10 Clark & Fin. 78.)

The opinion of a majority of the common law judges of England, as delivered by Chief Justice Tindal, was, that by the law of England, as it existed at the time of the passing of the Marriage Act (1753), a contract of marriage *per verba de præsenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties by application to the spiritual court the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. The opinion delivered by Tindal, C. J., was dissented from by Lord Brougham in the House of Lords; he thought it reasonable to presume that the English law touching marriage was the same with the general law of catholic Europe, until it was shown that England had receded from that law. (P. 722.) He considered that she had not so receded until the Marriage Act; and therefore, that until that Act the English law agreeing with that of all Europe, a marriage *per verba de præsenti* was valid without the intervention of a priest. (P. 732.) With Lord Brougham concurred Lord Campbell (P. 746) and Lord Denman (P. 804). These three judges were of opinion that before Lord Hardwicke's Act of 1753, contract *per verba de præsenti* was, by the English law, a good marriage *ipsum matrimonium*, (P. 829); Lord Campbell distinguishing between the case of a mere betrothment, a mere executory contract *per verba de præsenti* for a marriage thereafter to be solemnized, the parties not meaning to be husband and wife until such solemnization; and the case of *nuptiæ per verba de præsenti* without any contemplation of a future ceremony as necessary to complete the relation of husband and wife, (P. 749.) But the Chancellor (Lord Lyndhurst) did not consider that by the law of England, previous to the Marriage Act, a contract of present marriage had so great an effect as was ascribed to it by these three judges. He considered such a contract a marriage for many, but not for all purposes, and that in order to constitute a marriage in its complete and perfect state, solemnization was necessary. (P. 844, 5.) Lord Cottenham laid down that the consequences of a valid marriage must be, 1st, to give to the woman the right of a wife in respect to dower; 2nd, to give to the man the right of a husband in the property of the woman; 3rd, to give to the issue the right of legitimacy; 4th, to impose upon the woman the incapacities of coverture; 5th, to make the marriage of either of the parties leaving the other with the third person void, and then he proceeded to show by authority that none of these consequences followed from a mere contract of marriage *per verba de præsenti*. (P. 878.)

Lord Abinger concurring with Lords Lyndhurst and Cottenham, the votes were equal—that is, three for reversing and three for affirming. According to the ancient rule in the law, *semper præsumitur pro negante*, the House affirmed the Judgment of the Court of Queen's Bench in Ireland, holding that a contract of marriage *per verba de præsente* in the presence of witnesses does not, in England or Ireland, constitute a valid marriage at the common law, unless it

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be also in the presence of a regularly ordained minister; and consequently, holding the accused who, after such a contract with one woman, married another, not to be guilty of bigamy. (P. 907.) By the authority of this decision, the Court of Exchequer has said it was bound. (Catherwood *vs.* Caslon, 13 M. & W. 261.)

All this presents an amazing spectacle, and no doubt is very unsatisfactory. The decision in the case of the Queen *vs.* Millis, notwithstanding the recognition of it by the Court of Exchequer, is not one by which this Court considers itself bound. Were it necessary for me to determine the point raised in that case, having made a careful examination of the question, it seems to me that I should not hesitate to concur in the opinion expressed by Lords Brougham, Campbell, and Cottenham. But holding as true that the common law of England did not prevail at Rat River in 1808, it becomes unnecessary for me to carry the investigation further. Though even if governed by that law, I should regard the marriage of Connolly with the Cree woman as valid.

The laws which control marriage in civilized countries are intended to operate as a protection and not a prohibition. It is to be presumed that parties in barbarous or foreign countries, are to be entitled to an exemption from the strict rule, whenever it is shown that insupportable obstacles alone had occasioned the deviation from established forms; and if it appears at the same time that the marriage, although irregularly had, is in fact a *bona fide* marriage, free from all suspicion of fraud and clandestinity; for the law of England, in prescribing a form for its own subjects, does not compel them to impossibilities; and it is difficult to suppose, when a marriage is shown to be complete according to general law, that it could be held to be a nullity, merely on account of a deviation in point of local form, arising out of circumstances which it was not in the power of the party to control, more especially as to deny to parties so situated the rights which, according to natural law, belong to every free agent, would have an immediate tendency towards encouraging those unlawful connexions which are injurious to society, and subversive of morals and religion. But however limited the degree of indulgence permitted in this respect by the courts of other countries, it is evident from the valuable judgment in the case of Ruding *vs.* Ruding that those of England (whilst they admit the universal authority of the *lex loci*, in determining the validity of marriage, pleaded to have been had according to law, and acknowledge the validity of marriage, had in conformity to its regulations, without considering whether they are more strict or less cautious than our own) do not admit opposite propositions in an equal extent by laying down a positive rule, that no marriage is valid that has not been had according to the law of the country of its celebration.

After these preliminary observations, it may be well to remind the parties that in 1803, at *Rivière aux-Rats* there were no priests, no ministers, nor is it proved that there were any magistrates at that place, or in the neighbourhood. It was a barbarous country situated in the remote wildernesses of North Western America; religion had not as yet proclaimed her authority; had not inculcated her teachings, nor extended her sanctions to the domestic life of the inhabitants. Christianity had not built her temples, nor had the ecclesiastical power sent

forth decrees for the guidance either of the European, or the native. Civilization had made no serious impression; had exerted no salutary influence over those wild regions and those wilder nations of the forest. Associating with Indian warriors, hunters and fishermen, and trading, bartering in trinkets, muskets, rum and peltries, the servants and clerks of the North West Company, it is easy to suppose, were not very successful in inculcating morality among the natives, or in maintaining their own; it can, without difficulty, be imagined that the intercourse and traffic between these men and the savages were not likely to form a very religious or refined community. The restraints of law, or the sanctions of religion so far as they recognized either, it may be presumed were not extremely effective in controlling such a mixture of barbarism and peculiar civilization as prevailed in the Athabaska country in 1803, and previous to that time. At such a place, surrounded by such influences and such unfavorable circumstances, if Mr. Connolly, whose moral character seems to have been without reproach, desired, whether from feeling or interested motives, to take this Indian maiden to his home, he had one of three courses to pursue; that was, to marry her according to the customs and usages of the Cree Indians—to travel with her between three and four thousand miles, in canoes and on foot, to have his marriage solemnized by a priest or a magistrate—or to make her his concubine. I think the evidence in this case will clearly show which of these three courses he did adopt, and which of them, during a period of twenty-eight years, he honorably and religiously followed. The first enquiry to be made then, is, whether in 1803, at Rat River, in the Athabaska territory, there existed among the Cree Indians there and in the neighbourhood, any native usage, law or custom relative to marriage among the Indians themselves, and also in regard to the European traders and the Indian women; if so, whether that custom has been proved and what is the nature of it. Before proceeding to examine the evidence of record, and that upon which the decision of the Court must of course mainly rest, I may appropriately advert to historical testimony, establishing the existence generally of such a law or custom among the natives; and as there was a striking similarity in forms, ceremonies and usages of marriage among all the tribes and nations of North American Indians (with the exception of some Mexican tribes) from the Gulf of Mexico to Anticosti and the Frozen Ocean, it will be apparent that the law of the Crees was not exceptional, but entirely in harmony with, and conformable to the general usages of the barbarians over the entire continent of North America.

Washington Irving, in his Astoria, says, in reference to this usage: "The "suitor repairs not to the bower of his mistress, but to her father's lodge, and "throws down a present at his feet. His wishes are then disclosed by some "discreet friend employed by him for the purpose. If the suitor and his pre- "sent fine favor in the eye of the father, he breaks the matter to his daughter "and inquires into the state of her inclinations. Should her answer be favor- "able, the suit is accepted, and the lover has to make further presents to the "father—of horses, canoes, and other valuables, according to the beauty and "merits of the bride; looking forward to a return in kind whenever they shall "go to housekeeping."—(Cap. 56, p. 462.)

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Hildreth, in his History of the United States, says (Cap. 2, p. 62): "Marriage was a sort of purchase—the father receiving presents from the husband "in exchange for his daughter, who, after a few months of fondling and favor, "fell to the condition of a domestic servant. Polygamy was not common, except among the chiefs; but there were no objections to it. Every Indian had "as many wives as he could pay for and support. It was indeed, the labor of "their wives that enabled the chiefs to maintain the hospitality proper to their "station. The Indian husband divorced his wife at pleasure. In case she "proved unfaithful, he might put her to death. Unmarried women might follow, with little reserve, the bent of their inclinations; but the Indians of both "sexes, as a general rule, were remarkable for continence. The affection of "the women for their childeren was unbounded; the fathers also were very indulgent."

Bell, in his Statistical and Philosophical Geography of North America, "says: "None of the North American tribes, however rude, are unacquainted "with the institution of marriage. They generally are contented with one wife; "sometimes they take two, but seldom more than three. The women are under the direction of their fathers in the choice of hushands, and very seldom "express a predilection for any particular person. Their courtship is short and "simple. The lover makes a present, generally of game, to the head of the "family to which the woman he fancies belongs. Her guardian's approbation "obtained, he next makes a present to the woman and her acceptance of this "signifies her consent. The contract is immediately made, and the match concluded. All this is transacted without ceremony—without even a feast. The hus"hand generally carries his wife among his own relations, where he either returns "to the tent that he formerly inhabited, or constructs a new one for their own use. "They sometimes, but seldom, remain among the wife's relations. These "contracts are binding no longer than during the will of both parties. If they do "not agree, the woman returns to her relations, and if they have any children, "she takes them along with her; but after they have children, a separation very "seldom takes place. If a woman be guilty of adultery, and her husband be "unwilling to divorce her, he cuts off her hair, which is considered the highest "disgrace which can he put upon a female."—(Vol. 5, cap. 2, p. 274.)

Bancroft, in his History of the United States, says (Vol. III., cap, 22, page 266): "And yet no nation has ever been found without some practicable confession of the duty of self-denial. God hath planted in the hearts of the wildest "of the sons of men a high and honorable esteem of the marriage bed, insomuch "that they universally submit unto it, and hold its violation abominable. Neither might marriages be contracted between kindred of near degree; the Iroquois might choose a wife of the same tribe with himself, but not of the same "cabin: the Algonquin must look beyond those who used the same *totem*, or "family symbol; the Cherokee would marry at once a mother and daughter, "but would never marry his own immediate kindred.

"On forming an engagement, the bridegroom, or, if he were poor, his friends "and neighbours, made a present to the bride's father, of whom no dowry was "expected. The acceptance of the presents perfected the contract; the wife

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" was purchased; and, for a season at least, the husband, surrendering his " gains as a hunter to her family, had a home in her father's lodge.

" But, even in marriage, the Indian abhorred constraint; and, from Florida, " to the St. Lawrence, polygamy was permitted, though at the north it was not " common. In a happy union, affection was fostered and preserved: and the " wilderness could show wigwams where couples had lived together thirty and " ' forty years.' Yet love did not always light his happiest torch at the nuptials " of the children of nature, and marriage among the forests had its sorrows and " its crimes. The infidelities of the husband sometimes drove the helpless wife " to suicide; the faithless wife had no protector; her husband insulted or dis- " figured her at will; and death for adultery was unrevenged. Divorce, also, " was permitted even for occasions beside adultery; it took place without for- " mality, by a simple separation or desertion, and, when there was no offspring, " was of easy occurrence. Children were the strongest bond; for, if the mother " was discarded, it was the unwritten law of the red man, that she should her- " self retain those whom she had borne or nursed." (Vol. III., cap. 22, p. 226.) (See Catlin's Letters on the North American Indians, vol. I., Letter 26, page 213.)

It would be easy to multiply historical authorities on this point, both from English, American, and French historians. They are unanimous, and all go to establish this Indian custom of marriage and its incidents; and among these incidents, divorce at will is no doubt clearly shown. How far this right of divorce or repudiation affects the present case, will be seen in the sequel of these observations.

But we have other evidence of this custom; the Court has proof before it, which I am bound to regard as conclusive; and that is, the clear and concurring testimony of witnesses, produced by both parties, and placed on the record in this cause.

The first witness to whose evidence I shall refer, is that of Amable Dupras. In answer to the question as to the custom of the Cree country, he says: " La " façon de ces pays est que lorsqu'on avait envie d'avoir une femme, *on allait de-* " *mander au père s'il voulait nous la donner, et si le père voulait donner sa fille,* " *on allait leur acheter quelque chose par reconnaissance. Ordinairement, c'était* " *la façon du pays de donner un présent au père de la fille donnée en mariage.* " Ce n'était pas loisible d'avoir plus d'une femme. *Un homme qui était marié,* " *comme cela était regardé, comme étant bien marié et le mariage était regardé,* " *comme les mariages d'ici; et dans le mariage, des noces se faisaient comme* " *dans le mariage et les noces d'ici.* Des Canadiens se mariaient et faisaient des " noces là comme ailleurs. *C'était impossible de se marier autrement,* parcequ'il " n'y avait pas de prêtres ni ministres dans le pays à ce temps-là, les femmes con- " servaient beaucoup d'autres nations. J'ai souvent vu faire des mariages dans " ce pays, et je parle de cette coutume avec connaissance. J'ai été souvent moi- " même à des noces." This witness seems to be a man of considerable intelligence. He is seventy-two years of age, and in earlier life had been fourteen years in the North-West territory. He knew five or six nations; and says that, in regard to marriage, this was the general custom.

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This testimony is, moreover, corroborated by that of a man of the name of Noel Annance, produced on the part of the plaintiff. His evidence is somewhat remarkable, and is to the following effect:—"*The Indian customs do not differ "much with regard to marriages.* The custom of polygamy prevails universally "among the Indians, particularly with the chiefs, in consequence of their ability "to support a number of wives; I do not say that I have ever known of any "persons being murdered in consequence of a regular interconrse between the "sexes. I have myself seen them greatly ridiculed, and have heard the women "talk especially. When a man and a woman live together, they are called man "and wife. I could not say that I ever knew of any distinction being made in "the Indian territory or North-West in regard to any man and woman who "live together. The woman is always called the wife of the man with whom "she lives, *without regard to the manner of marriage. It is always presumed "that she has been regularly bought.* When I say that a man cannot legally "have two wives in the North-West or Hudson Bay territory, I do not mean "that the Indian law prohibits it, but that the law of the civilized people—that "is, the Hudson Bay Company's servants—are against it. It is only sometimes "that the subject of giving away a girl is mentioned to the chief, and that "purely out of deference to him. The term squaw, signifies a woman or wife; a "young woman is called *hunk* squaw. A woman who lives with a man is called "that man's squaw, which, in fact, means a wife. If I had a sqnaw or wife in "the Hudson Bay territory, she would be called Annance's squaw—meaning "my squaw or wife. There was a chief at Fraser River, whom I knew well, "who had ten squaws or wives. His Indian name was Saseatan."

The Rev. Pierre Aubert, Père Oblat, testifies as follows: "Si elle n'était pas "chrétienne lors de son union avec William Connolly, il fandrait une dispense "*selon la règle générale des lois ecclésiastiques.*" But he says that, according to the custom of the conntry, "*l'époux offrait des présents, quand les présents "étaient acceptés les parents donnaient en mariage leur fille à l'époux qui la "prenait alors pour femme.*" This gentleman was several years in the Hudson Bay territory, and his attention had been much directed to the customs of the country in regard to marriage. He adds: Les prêtres ne sont allés jnsqu'à "l'Isle de la Crosse s'y établir, qu'en l'année 1843. Avant ce temps-là, il n'y "avait pas de registres dans ce pays-là."

Another witness of great experience and intelligence, Pierre Marois, thus deposes: "Un homme par là ne ponvait pas prendre plus qu'une femme, et "nous regardions cette nnion comme l'union de mari et femme par ici, et union "aussi sacrée. J'ai été marié là moi-même à la façon du pays. J'ai vécu vingt-"trois ans avec elle, et elle est morte il y a huit ans passés. *Quand on voulait-il "se marier dans le Nord Ouest, il fallait demander au père et à la mère la fille "qu'on voulait avoir, et s'ils consentaient, on demandait après au bourgeois la "permission de se marier, et c'etait la toute là cérèmonie; et après cela, nous nous "considèrions comme marí et femme légitimes comme ici, comme si nous étions "mariés à l'église.*"

This evidence is strongly, entirely corroborated by Alexander Robertson and Mr. Herriott, both men of education and long and varied experience in the North West regions.

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Mr. Robertson was in the employ of the Hudson's Bay Company: he entered the service in 1812, and remained in the North West thirty-six years. He says there was but one form of marriage in the North West, and that was the giving away. He saw his men get wives in the way he mentions, that is, from their relatives; they gave presents if they pleased; he considered this a marriage according to the customs of the country.

Mr. Herriott says: " In 1809 I went up to the Hudson's Bay territory. I " went in the employ of the Company. I have risen from apprentice clerk to " that of chief factor, from the lowest grade of clerks to the highest position in " the Company's employ, except that of governor. I lived in that country up " to September, 1864, constantly. I have met the late William Connolly there " at Stewart's Lake, in the years 1828 and 1829. This was the first time I met " him, he was married then. I think his wife was a pure Indian of the Cree " Tribe. He had three or four children."—" *When I say married, I mean ac-* " *cording to the custom of the country, which was by an agreement between the* " *father of the girl, and the person who was going to take the girl to wife.* " *They lived as married people when married in this manner. I considered it* " *as binding as if celebrated by an Archbishop.* I was married after the " custom of the country myself. The first clergymen that I saw in that country " was in 1838, their names were Blanchet and Damase, they passed me at " Edmonton on the Saskatchewan. These were the first priests I saw since the " year 1809 in that country. Rebaska is from six to seven hundred miles " north from the Saskatchewan. The first clergymen that went up the English " River went up some time in the forties. I was never there myself. None " could have gone there without my knowledge. There was no Court of Justice " in the North West, except at the Red River Settlement, and that at a com- " paratively late date. We followed the English Law; it was not customary " for the Europeans to take more than one wife; it was not customary for the " Europeans to take one wife and discard her, and then take another. *The* " *marriage according to the custom above described was considered a marriage* " *for life.* I considered it so. I know hundreds of people living and dying " with the woman they took in that way and without any other formalities. " According to my opinion this marriage lasted during the lifetime of the par- " ties in as binding a manner as if married by a clergyman. The first missionary " that I ever heard of coming, was to the Red River Settlement, far to the South " of us, it was in the year 1819 or 1820, I will not be sure as to the date, it may " have been in 1816. I never heard of any Jesuit Missionaries, nor of any " Roman Catholic Missionaries having resided at any of the Company's posts " previous to 1840. These last missionaries came to the Saskatchewan and to " the English River. I never heard of, or have met anybody in the North West " territory who had been married by a priest or clergyman in the North West " territory previous to eighteen hundred. There were no Jesuits in that country " when I went there. I resided nearly eleven years at the Red River Settle " ment. I knew all the European settlers there until the last four years. I " never met any person living at Red River Settlement who was married in the " North West territory by a clergyman resident in the North West territory

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" previous to eighteen hundred. I have never seen nor heard of any person " being married at York Factory or Norway House, or at any post on the " Saskatchewan, by a resident clergyman, previous to the year 1817. I know of " instances of persons married after the custom I have described bringing their " wives into civilized countries and re-marrying them according to the forms of " civilization ; but I know of no instance where they have been so brought in- " to civilization without going through that form. I know that William Con- " nolly brought his wife down to Canada. There is no rule amongst the natives " by which a wife is entitled to property by virtue of her marriage. When a " man dies, his family, wife and children inherit whatever he leaves. Had I " come to a civilized community, I believe I should have married according to " the civilized forms of solemnizing marriage. I should have done so to " please people and to conform to the customs of society."

Joseph Larocque, a witness for the defence, in answer to a question in cross-examination, by which he was asked, " How did a chief clerk, partner or hour- " geois take an Indian wife in the North West country ?" says " *He took her* " *by the consent of her parents and relations ; there was no other ceremony ex-* " *cept the giving of a few presents.* The man then lived with her as long as he " liked or she liked. " He adds " that he does not think any of these marriages " were legal, because there were no priests or ministers there. "

The Court has examined with great care the cross-examination of these witnesses, and also the evidence adduced by the defendant on this point, but has found nothing to contradict or, in the slighest degree, to invalidate this testimony. It stands unimpeached, and, in my opinion, is unimpeachable. This law or custom of the Indian nations is not found recorded in the solemn pages of human commentaries, but it is written in the great volume of nature as one of the social necessities—one of the moral obligations of our race—through all time and under all circumstances, binding, essential, and inevitable, and without which neither man, nor even barbarism itself, could exist upon earth. It is, I think, conclusively established in this case, by the evidence of intelligent and experienced men, as being an existing and immemorial usage observed and consecrated in one of the most sacred and delicate relations of human life, even among the barbarians of North America. As such, with all its imperfections in a religious view of the holy sacrament and sanctities of marriage, it is entitled to the respectful consideration of this Court. It exacts the solemn consent of parents, and that of the parties who choose each other, for good or for evil, as husband and wife —it recognizes the tie and some of the sacred obligations of married life; and it would be mere cant and hypocrisy, it would be sheer legal pedantry and pretension, for any man, or for any tribunal, to disregard this Indian custom of marriage, inspired and taught, as it must have been by the law and the religion of nature among barbarians, who, in this essential element of a moral life, approach so near to the holy inculcations of Christianity. I apprehend that it is not much more loose or immoral than the well known laws of Gretna-Green, which not only require no regular religious ceremony, but even dispense with the consent of parents; a marriage according to this usage of the Crees would, in the opinion of the Court, be as solemn and

as binding in the eye of the law, as many which the greatest English judges have declared valid. I shall have occasion to refer to this more particularly hereafter.

But the defendant contends that, even admitting the existence of this Indian law or custom, there is no legal or conclusive evidence in the record to show that William Connolly was ever married to the Cree woman according to this alleged usage. If this be true —if the testimony upon this point be illegal, be not conclusive—then there is an end of the plaintiff's case. I come, therefore, to the consideration of the proof which he has adduced of his father and mother's marriage; and this evidence, if admissible and sufficient in law, results (1st) from a cohabitation of twenty-eight years, during which time they were reputed to be husband and wife—had the *status* of married persons, and were known and acknowledged as such by all the world; and (2nd) from Mr. Connolly's repeated and solemn declarations that he had married his Indian wife according to the usages and customs of her tribe or nation, and also from the statements of Mrs. Connolly herself, that she had been married in the manner described by William Connolly. I shall examine, in the first place, the proof of cohabitation and repute.

Mr. Alex. Robertson, witness for the plaintiff, says: —

"I saw the late William Connolly for the first time in 1815 or 1816, at Cumberland House, in the North-West territory. He was then in the employ of the North-West Company. I entered the service of the Hudson Bay in 1812, and during my service of thirty-six years I saw the said William Connolly very often at different posts in the North-West territory, at which time there were no priests or ministers there. I often saw Susanne at his house at the different posts, and he introduced her to me as Mrs. Connolly. She passed and was universally acknowledged as his wife at the different posts where I met her. She was called Mrs. Connolly, and her children by William Connolly were always acknowledged in public as the lawful issue of their marriage. There were plenty of white people there connected with the Company, and they all lived inside the fort, in the Company's houses, and I heard them and their wives, white and Indian, and their servants, call Susanne Mrs. William Connolly. The fact is, they were acknowledged to be man and wife everywhere I met them. Connolly made money in the company, and brought down his wife and family to Montreal many years after I first saw them in the North-West. She and her children first went to St. Eustache, and then came to Montreal, where they boarded with Madame Poulin, Connolly's sister. She was, when in Montreal, called old Mrs. Connolly.

"I was intimately acquainted with said William Connolly in the North-West, and he never lived with any other woman than his wife, said Susanne. William Connolly and said Susanne were living together as man and wife for about thirty years to my knowledge."

John E. Harriot, witness for plaintiff, says: "The Indian woman that the late William Connolly was living with was regarded by all persons living in that country and by myself as his wife. In speaking of her, the late William Connolly was accustomed to call her his wife, and treated her as his wife."

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Amable Dupras, témoin pour le demandeur, dit: " A ce temps-là, c'est-à-dire " vers 1818, et pendant tout le temps, j'ai connu Monsieur Connolly et Madame " Connolly. J'ai entendu Monsieur Connolly me dire lui-même que c'était sa " femme, et elle était connu par tous les voyageurs comme la femme de Monsieur " Connolly."

" William Connolly et sa femme Suzanne ont vécu paisiblement au vu et au " sçn de toute leur famille prenant la qualité de mari et femme, pendent le temps " que je les ai connu."

Le dit Amable Dupras répond comme suit aux questions qui lui sont faites ce sujet:—

Question.—Pendant quel laps de temps est-il à votre connaissance que M. Connolly et sa femme Suzanne ont vécu ensemble comme mari et femme publiquement, au vu et sçn de leur famille et le public ?—*Rèponse*— Pendant cinq ans, c'est-à-dire pendant que je les ai connu.

Question.—Avez-vous entendu le feu William Connolly lui-même dire qne la dite Suzanne était sa femme ?—*Réponse —Oui, Monsieur.*

" Monsieur Connolly m'a dit que sa femme était la fille d'un chef qu'il avait " *mariée.*"

Noël Annance, witness for plaintiff, says: " I then found at Connolly's post " at New Caledonia the family of said William Connolly, consisting of his wife " as *he told me*, and some girls and boys."

"I remained at New Caledonia, when Mr. and Mrs. Connolly were living " there four or five days, and then returned to my post. They were living there " at that time as man and wife. This I know from what I could see, and from " what Mr. Connolly told me. He told me several times that she was his " wife, and the mother of his children, and that he had been married to her " according to the custom of the country; that at that time he was seventeen " and she fifteen when they were married."

" I boarded at Pion's a week with Mrs. Connolly in Montreal. She was then " called Mrs. Connolly."

" I never knew or heard of any man and woman living together in the North " West without being married."

Rev. François M. Turcotte, de St. Gabriel, dit: " Monsieur Connolly m'a dit " lui-même que le dite Suzanne était sa femme, *sa propre femme.* Je l'ai in- " terrogé sur l'usage de prendre plusieurs femmes, et il m'a répondu qn'il res- " pectait trop sa femme pour se permettre de faire usage d'autres femmes."

Pierre Marois, témoin prodnit par le demandeur, dit: " Je l'ai toujours connu " (Suzanne) pour la femme de feu William Connolly et j'en ai jamais connu d'au- " tres pour sa femme. J'ai été quatre ans dans l'emploi de la compagnie du " Nord Ouest, et dix-sept ans dans la compagnie de la Baie d'Hudson. Pendant " tout ce temps là j'ai connu le feu William Connolly, et sa femme, sauvagesse. " J'ai hiverné quatre ans à Fort Cumberland. Sa femme était avec lui là. " Qnand il nous disait de faire quelque chose pour Madame Connolly, il nous " disait, allez donc faire ceci ou cela pour *ma femme.* Il vivait avec sa femme " comme les autres bourgeois, et elle était connue par tout le monde là comme " Madame Connolly. C'est à ma connaissance que Monsieur et Madame Connol- " ly étaient mariés selon la contume du pays."

Judge Johnson, in his deposition, says: "I cannot tell how long Mr. Con- "nolly lived in the Hudson's Bay Territory. I understand that Mr. Connolly "lived with his Indian wife until the year 1832. I never heard that Mr. Con- "nolly had more than one Indian wife, and always heard that he was a moral "and well-conducted man."

Joseph Maznrette, ancien voyageur, dit: "La femme de Monsieur Connolly "était de la tribu des Crees. Je les ai connus que pendant le cours de deux ans, "c'était tout le temps que j'étais là. Ils ont vécu là comme homme et femme "quand je les ai connu. Madame Connolly était connue entre tous les "bourgeois et entre tous les engagés comme la femme de Monsieur Connolly.

This is the principal evidence of the cohabitation of Mr. and Mrs. Connolly as husband and wife in the Indian country. The Indian woman throughout all the North West territories, at all the trading posts and settlements there, was considered and treated by both natives and Europeans as his lawful wife, during a period of nearly thirty years; the children, moreover, were regarded as legitimate—Connolly acknowledged her as his wife—gave her his name, and bestowed it upon his offspring. It is really very difficult to conceive how, upon such facts proved beyond the possibility of doubt, this connection should be considered by any christian or civilized Court, under the circumstances of this case, as concubinage, and the Indian woman as Mr. Connolly's concubine, branding the children who bore his name as illegitimate. But it may be, and it has been said, that this is precisely the way they do things in the North West. That living with her publicly, treating her and acknowledging her as his wife in that country, amount to nothing; it is an understood thing, a man takes a squaw, lives with her as long as it suits him, and then discards her as he would a mistress. It is true he thereby bastardizes and makes outcasts of his children;—it is also true that when youth and beauty have faded, when the purity and dignity of innocence have been sullied, destroyed by the contamination of unlawful passion, the trader consigns his Indian wife and offspring to the contempt of the world; dismisses her and leaves her to pass the wretched remnant of her life in solitude and despair. That such is the custom of the country among the natives, may or may not be the case; but the European settler cannot act after this fashion. Without contesting this view of the case, without discussing its outrageous and preposterous immorality, but admitting all that is contended for, there is something more in this case. Mr. Connolly did not restrict his conjugal intercourse with this Indian woman to the country where such extraordinary usages prevail; it was not only in the North West that he cohabited with her and treated and acknowledged her as his wife; but he brought her to Canada, and continued the same intercourse and treatment here; and in connection with this branch of the case, there is a fact of considerable importance, and one which, so far as it goes, has received the serious consideration of the Court, not only in regard to this question of repute and cohabitation, but also with reference to another point, the repudiation of the first Mrs. Connolly by her husband, which will require to be carefully examined and decided hereafter. The proof of the facts just adverted to is, in the opinion of the Court, conclusive.

Henriette Routier, produced on the part of the plaintiff, says: "Je demen-

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" rais avec mon père dans la paroisse de St. Eustache en 1831. Le feu William " Connolly venait dans le mois de septembre 1831 à St. Eustache avec sa femme, " une sauvagesse nommée Susanne, et leur famille au nombre de six, et tenait " maison vis-à-vis le magasin de mon père. L'aîné de ses enfants est le deman- " deur en cette cause, qui était alors fermier de M. Smith, mon oncle, à St. " Eustache. Le dit William Connolly introduisait la dite sauvagesse Susanne " à tous les voisins comme sa femme, et l'appelait *Mrs. Connolly*. Elle recevait " des visites là et ma mère y faisait visites. Ils ont resté là jusqu'à l'année " suivante, et quelques-uns de leur enfants ont été baptisés à St. Eustache. " Madame Connolly faisait des achats au magasin de mon père, et M. William " Connolly venait payer pour lui. Le demandeur pouvait avoir alors vingt neuf " à trente ans. Le prêtre qui a baptisé les enfants est M. Turcotte, et il venait " souvent faire visite dans la famille de M. William Connolly."

Mr. Turcotte, the priest, says: " J'ai connu William Connolly, la père du de- " mandeur, dans l'année 1831. Cé'tait à St. Eustache, à la Riviere du Chêne, " dans le Bas-Canada. Mr. William Connolly est arrivé à St. Enstache, avec sa " famille en l'automme de 1831. Sa famille était composée de Madame Connol- " ly et de plusieurs enfants, au nombre de huit ou dix. C'est moi qui ai bap- " tisé les enfants mentionnés dans les exhibits deux et trois. *Je les ai baptisé* " *comme enfants légitimes* de William Connolly. Le nom de le femme de feu " Wil. Connolly, était Susanne, sauvagesse. M. *Wil. Connolly m'a dit lui-même,* " *que la dite Susanne était sa femme, propre femme.*'

The cross-examination of these witnesses elicited nothing which materially, if at all, affects the force of their testimony, from which it is clear that Mr. and Mrs. Connolly lived together as husband and wife at St. Eustache, in Lower Canada; and other witnesses prove that he afterwards brought his wife and children to Montreal, where they remained some time boarding, first with Connolly's sister, and afterwards with a Madame Pion. But there is no satisfactory evidence to show that they lived together as married persons at Montreal.

Besides this, as has already been intimated, there is something more in this part of the case; in addition to the evidence of cohabitation and repute both in the Indian country and in Lower Canada, we have the express declaration of the late William Connolly himself, that he married Susanne according to the usages and custom of the country.

The Honourable Mr. Justice Aylwin, a witness produced by the defence, and intended no doubt to sustain effectually the pretensions of the defendant, deposes " That his (Judge Aylwin's) uncle Connolly told him that he was about thir- " teen years old in the Indian country, and that it was difficult for " him to control the Indians in their trade with the whites; that he " had to get a woman whom he would have to buy from her father; that he " had got a chief who had great interest among the Indians, that this man had " sold the mother of the plaintiff to the late William Connolly; when plaintiff " was born, he, the father, was only fourteen or fifteen years of age, and his " Indian wife (sic) woman was about twelve years of age.

" The late William Connolly's Indian wife (sic) woman, was the daughter of a " chief, of what nation I do not know. The late William Connolly said that he had

"bought the said woman, that after the purchase he had difficulty with the father "in his trade, and upon the strength of it had been obliged to use violence to the "father. After treating him well, he had become tractable."

It does not appear that Mr. Connolly told his nephew, Judge Aylwin, whether he had purchased the Cree woman as a slave, as a concubine, or as a wife. But the Court will give his memory the benefit of the doubt; and as slavery did not exist in the North West, and as concubinage is illicit, and the purchasing a young woman for that purpose is infamous, the Court will assume that Mr. Connolly purchased the Cree maiden from the Indian Chief, her father, intending to make her his wife, according to the custom of the country, and not as a slave or concubine; and there is no difficulty in this presumption, seeing that he lived with her and acknowledged her as his wife, during a period of nearly thirty years after this purchase.

When Mr. Connolly was desirous of having his two daughters baptized at St. Enstache, in 1831, he went to the Rev. Mr. Turcotte, the priest of the parish, and requested him to perform that duty for him. Mr. Turcotte hesitated about baptising the young ladies as the legitimate offspring of William Connolly and the Indian woman. He says he had very serious doubts about the precise character of this connection; he asked a great number of questions in regard to the Indian custom of marriage, and whether he, Mr. Connolly, had married Mrs. Connolly according to that usage. From Mr Turcotte's evidence, Connolly seem to have been very earnest and impressive; for the occasion was rather a serious one, and there could be no compromise, evasion or smoothing matters over, with the priest, who received the assurance from Mr. Connolly that he had married Mrs. Connolly according to the Indian custom; that she was his lawful wife and that he had always respected her too much to take another woman, and thereupon the priest baptised the children as the offspring of William Connolly and Susanne, a squaw.

The witness Annance says, Connolly told him several times that the Indian "woman was his wife and the mother of his children, and that he had been "married to her according to the custom of the country, that at the time of "their marriage he was seventeen and she was fifteen," and it is worthy of remark that, if they were married in 1803, the evidence of record shows that Connolly stated his age correctly to Annance, and erroneously to Judge Aylwin; for he was then seventeen years of age, not fifteen as he told his nephew. The same statement in regard to his marriage was made to other witnesses, and he seemed always particularly desirous of impressing upon those he associated with, that the Indian woman was his wife. Whatever may be thought generally of evidence by the admission of parties, no objection to that description of proof can be urged in the present case; these admissions were repeatedly and solemnly made, and on one occasion of great delicacy and interest to Mr. Connolly. This evidence is, moreover, conclusively corroborated by other testimony of record.

The cross-examination of these witnesses elicited nothing which materially, if at all, affects this testimony. This is the principal proof upon the point by the plaintiff as to the facts connected with the marriage of his parents. I proceed now to examine the evidence adduced on the other side.

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On behalf of the defendant no less than fourteen witnesses have been examined. Two of them, Marie Bourgeois and Marie Poulin, are nieces of the late Mrs. Connolly (Woolrich), and Judge Aylwin, who is her nephew. All these witnesses will have a share in Connolly's estate, provided the present heir dies without children. Another, Elizabeth Woolrich, is the second Mrs. Connolly's sister. Of course all these persons state with a peculiar emphasis that the Indian woman was Connolly's concubine; that all the offspring are illegitimate; and that the Indian family recognized Mrs. Connolly (Woolrich) as the lawful wife of their relative. This was natural, and was to be expected; but the tone of their evidence is somewhat remarkable, and in any view of it, is not very material, except that of Judge Aylwin, who has stated facts of great importance in this case as has been seen already, and as will be seen hereafter.

"Mrs. MacDougall says she knew Mr. Connolly and Julia Woolrich well—her "(Mrs. McD's) brother was a Northwester and very intimate with Mrs. Con- "nolly; he and others blamed him for bringing the Indian woman here at all, "and pitied her. My brother pitied the Indian woman because he brought her "down."

She says the second Mrs. Connolly was known as Connolly's legitimate wife, and the children of the Indian woman as illegitimate. The evidence of Elizabeth Woolrich, the sister who may hereafter share in the estate, (as she says), is very strong in language and in expression of opinion. If the Court were obliged to adopt her testimony, the case would be easily disposed of. It is quite natural that she should entertain very decided views in a case like the present. In my opinion, however, the deposition of this lady must be received with great caution —but even taking a view of it as favourable as reason and common sense would admit, it can have no material effect upon the case. The evidence of the other witnesses, with exception of Mr. Hopkins, Mr. Boucher, and Mr. Larocque, is immaterial. I have already had occasion to refer to Larocque's deposition He is the principal witness for the defence, and it is proper I should give the whole of his evidence. It is very pertinent, and exhibits a state of things in the North-West Territory in some respects remarkable. As he depicts it, there is great room for judicious and perhaps extensive reforms. He was examined at Ottawa City and says:

"I do not know the plaintiff except by repute. I was well acquainted with "the late Julia Woolrich, but do not know the other parties in the cause. I "was well acquainted with the late William Connolly, the one who married "Julia Woolrich. I went up to the North-West with him in 1801. We both "went up as clerks in the North-West Company. I was in the service of this "Company until it was amalgamated with the Hudson's Bay Company, and remain- "ed in the service of the latter Company until 1830. I was partner in the "North-West Company, and shareholder in the Hudson's Bay Company. I was "present at the marriage of Julia Woolrich and William Connolly. I was inti- "mately acquainted with the squaw woman that William Connolly brought down "with him. *He was never reputed to be married to this Indian woman*, but I "do not know that if he had not fallen in with Miss Woolrich that he would "not have married her. *He was fond of his children and the Indian woman*,

"This Indian knew very well at the time that he married Julia Woolrich. I "had conversation with the Indian woman about the marriage. *She laughed and "talked about it, and said that she, Julia Woolrich, had only got her leavings.*

"She was a Cree woman I believe. I understand and speak the language well.

"I had occasion to see her often at this time, and had frequent conversations "with her about William Connolly's marriage with Julia Woolrich. She *did "not seem to care much about it.* She lodged at that time at Pion's, in Mon- "treal. I was not much surprised at her not caring. She had some hopes that "Connolly would have married her: and I think if he had not fallen in with "Julia Woolrich that he would have married her. *But she seemed not surprised "at his marrying a white woman.* But among other things she said 'he will "regret it bye and bye.' It is very common to change women in the Indian "country. The French Canadians in the North-West Company's employ and "the English did it too."

"This practice was common amongst the natives also. There was no "ceremony in those days about taking a woman or leaving her either. The "women themselves did not care about it. They did not care for their husbands "but they were very fond of their children.

"I saw Connolly in the interim a few times, and heard of him often enough. "According to reputation he was not married. *That is, he was married "according to the custom of the country there,*—that is taking a woman and send- "ding her off when he pleased. When I say the custom of the country, I mean "that the people did that as a common practice in those days. There was not a "legal binding marriage, there could not be in those days.

"Some of the servants of the company brought wives or women with them to "Canada and married them there according to the legal forms of Canada. On "the contrary, some lived with women in the interior and did not marry them "and abandoned them, and others lived with them, and abandoned them to marry "white women in the civilized world. One McIntosh, I believe, but I am not sure "that he re-married when he came with her to Canada.

"John McGilvray lived with an Indian woman in the interior, but he did not "marry her. He married a Scotch woman, I do not know where.

"Allan McDonnell brought his Indian wife down with him to Canada, and, I "think, got married to her. I knew old Hughes and his Indian wife who came "to Canada. *I do not think he remarried when he came to Canada.* They "lived together in Canada for some time. I believe there are other instances "but I do not recollect them at present. There were but few of the servants of "the Company who did not take women when in the interior and live with them. "But there were very few who brought them into civilized society, and married "them. The Cree Indians, like all the rest of the tribes, were wild and savage, "but not more so than the other tribes.

"*At the time I conversed with the Indian woman in question she admitted "that she was not married to Mr. Connolly.* It was from her that I understood "that she had hoped that he would marry her, *on account of his children, of "whom he was very fond.* I recollect one John George McIntosh, who had "several women in the Indian country, all fine girls, most of them half-breeds. He

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"changed from one to the other, and had children by most of them. He afterwards "married a Scotch woman. Sir George Simpson had plenty of women every- "where in the interior, whom he lived with when he went to the different places "where they lived. The practice was so very common that it was not thought "strange. It was about the time of Mr. Connolly's marriage with Julia Woolrich "that I had frequent conversations with his squaw."

CROSS-EXAMINED.

Question.—Was Wm. Connolly married to the Indian woman referred to according to the customs of the country? *Answer—He took a woman according to the custom of the country. You may call it marriage if you please. It was the only kind of marriage that could be there,—that is, take a woman when you please and leave her when you please.*

Question,—What do you mean by a legal marriage? *Answer.*—I mean by a priest or minister. There were no priests or ministers in the North-West country where Mr. Connolly resided, when he took this Indian woman. *He could not be married in any other way than he was, except that he might have married before witnesses.* I cannot say when ministers or clergymen came to the Red River. I do not know anything about it.

Question.—How long did Mr. Connolly live with his indian wife? *Answer.*—*He took her when he first went up to Rat River, about* 1803, *and kept her always until he went down to Montreal.* He had a good many children by her. He lived with her over twenty years. I never heard that he lived with any other woman, although he might have. The marriage of William Connolly to Julia Woolrich *was not over pleasing to the Indian woman. She might have scolded about it. She did scold a good deal about it, and she felt annoyed, and said he would regret it.* The Cree women were true to their fancy through fear.

Question.—Were the Cree women, married as this Indian woman was to Mr. Connolly, generally true to their husbands? *Answer*—They were so when they were fond of them, and when the were not fond of them they were not.

Question.—What year did you have conversations with Mr. Connolly's Indian wife, about his marriage to Julia Woolrich?—*Answer*—About the time they were married, I do not recollect the year.

I never saw Mr. Connolly visit the Indian woman at Pion's; he might have done so, but I do not know.

Question.—When you refer to its being common to change women in the Indian country, was not this practice confined to the "voyageurs" and understrappers of the Company?—*Answer*—Yes, generally so.

Question.—How did a chief clerk, factor, partner, or bourgeois, take an Indian wife in the North West country? —*Answer*—He took her by the consent of her parents and relations. There was no other ceremony than the giving of a few presents. The man then lived with her as long as he or she liked.

Question.—When did you travel with Mr. Connolly or see him in the interior? —*Answer*—I cannot say what years, but I saw him at various times, and travelled with him for weeks in canoes. There could not be any legal marriage by pries

or clergyman in those days in the interior, because there was no priest or clergyman there. I cannot say positively that Mr. McIntosh remarried his Indian wife, as I don't know anything at all about it. I do not know whether John McGilvray brought his Indian wife to Canada or not. I don't know that John McGilvary married a Scotch woman; I only heard so, heard that he married Miss McDonald, a daughter of Miles McDonald in Upper Canada. I do not know whether Allan McDonald remarried his Indian wife after he came to Canada with her, or not, but I think he did. The case of Hughes is the only one amongst gentlemen, I remember, who lived with his Indian wife in Canada without remarrying her according to the form practised in Canada.

Question.—Were you a partner in the North West and Hudson's Bay Companies?—*Answer*—I had shares in both Companies. I was a partner in the North West Co., and also a sharcholder in the Hudson's Bay Co.

Question.—When Mr. Connolly's Indian wife admitted to you that she was not married to Mr. Connolly, did she not mean according to the custom of Canada, that is to say by a priest or clergyman?—*Answer*—Yes, I believe so, there was neither priest nor clergyman there. That question she could not answer, because she did not know anything about it. In a legal sense she did not understand what marriage meant, she expected that Mr. Connolly *might have kept her as they do in the Indian country.* She had always been living with him up to that time as far as I know.

Question.—Mention how long John George McTavish lived with one of the girls referred to and where?—*Answer*—He took Yacko Tinneys, she was a half breed in the Rocky Mountains Spokane House, and lived with her about nine months. After which he took a daughter of McKenzie, on the Columbia River somewhere, he remained with her about the same time. I saw him afterwards in Montreal with a Scotch woman I heard he was married to. Sir George Simpson found women provided for him by pimps at the posts as he went along, he would keep them for some time and then give them to some clerk and promote him. The late William Connolly must have had by his Indian woman, six or more children. *Mr. Connolly never had but one Indian wife to my knowledge.* A common man could not take a woman without the permission of the Company.

Question.—Did you ever hear the Indian woman called Mrs. Connolly?—*Answer*—Yes, I heard her called so by all the engaged men of the Company, they did so out of politeness. Any clerk having a woman the men called her Madame. *I never heard of any of the men keeping two women at a time, it was not customary. A man could only have one wife at a time.* The husband was obliged to clothe her, and as to living, she was obliged to live on the fare of the country, fish or flesh. I never heard that the Indian woman lived with any body else but Wm. Connolly, and do not think that she did."

As before stated, the Court has considered it right to give the whole of this man's deposition, in the first place, because his testimony is very peculiar, and because he is the principal witness for the Defendant, in regard to the state of society in the North-West. There are some incoherences and many contradictions in his evidence. In one place he says Susanne did not seem to feel the re-

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pudiation and second marriage, and afterwards, he says, she scolded very much and was annoyed about it. The accounnt given of the morals of the traders clearly proves that great licence and disorder prevail in those countries. The Court will not and cannot belitve the picture here given to be true. But if it were intended to show how little law or morality is to be found in the Hudson's Bay country, how impossible it was for men to consider themselves under the moral restraints of marriage, in a country where debauchery and lawlessness were so prevalent, there can be no doubt that object has been successfully attained; but perhaps it is to be regretted that some portions of this evidence should have been introduced into the record.

It is worthy of remark, however, that Mr. Connolly did not belong to the class of persons more particularly referred to here. He was free from the vices and the special licentiousness of those who surrounded him; and it was creditable to him and his Indian wife that in a country, such as that described by the witness Larocque, their conjugal relations were marked by fidelity and devotion to the duties which that relation imposes.

Upon the strength of all this evidence for the plaintiff, and in the absence of contrary testimony for the defendant, it was strenuously contended by Mr. Stephens that the Court had proof of the Indian custom, and what that custom was; that we had cohabitation and repute during twenty-eight years, and the birth and bringing up of a numerous family; that this repute and cohabitation, and the paternal care and education of the children, were known and conspicuous not only in the North West Country, but also in Lower Canada. That there was, moreover, Connolly's express declaration that he had married this woman according to the native and Indian custom or usage, and his deliberate statement that she was his lawful wife, and that, as such, he respected her too much to take another woman. The learned Counsel than proceeded to show, with great cogency of argument and the citation of numerous authorities, that all this testimony combined was full and conclusive proof of the marriage of the plaintiff's parents; that it was sufficient, even under the common law of England, and that it was legal, complete, and unanswerable, in this case.

The defendant, however, has recorded her objections to all this evidence adduced by the plaintiff, and it was contended at the argument, that this attempt to prove a marriage by oral testimony was contrary to law, and directly against the provisions of our statute, (Chapter 20, Con. Statutes of Lower Canada.)

This Act does not apply to marriages solemnized without and beyond the limits of this Province. It could have no application whatever to such marriages, and there is no rule of evidence better known, longer recognized and more frequently enforced than this; "That where they are no registers kept, no "public records of marriages in existence, a marriage may be proved by parole "testimony; by witnesses who were present, or by the declarations of the "parents." It is also held that were registers have been lost or destroyed by fire, war, or other causes, parole testimony of marriage will be admitted. Lord Stowell and the best text writers have repeatedly declared the law to be as stated by the plaintiff's Counsel, and as a matter of fact and constant and universal practice, such, undeniably is the law. It is too elementary to be disputed—too

well known to require the citation of authorities to support it, though some will be mentioned hereafter, in order that even upon this point there may be no doubt of misapprehension.

But admitting its legality, the main difficulty consists in this: does all this testimony amount to proof of a marriage which this Court is bound to recognize as valid? This brings me to the consideration of the law which defines what marriage is, and what testimony will constitute proof of its existence. It will be borne in mind that at *Rivière aux Rats*, in 1803, as has been already insisted on there were no priests, no ministers, no magistrates, no registers: that the decrees of the Council of Trent had not been promulgated there; that neither the ordinances nor the declarations of the French kings, nor the English marriage acts were in force in that distant and barbarous region; that if, besides and in addition to the Indian usage or custom, any European law obtained there, that law probably was the common law of England, but that this is too doubtful to be adduced in argument; that there has been adduced and placed of record in this cause, indisputable evidence that Mr. and Mrs. Connolly cohabited as husband and wife during the period of twenty-eight years; that the plaintiff was born of that union, and that William Connolly, by repeated and solemn declarations stated and admitted, that the Indian woman was his lawful wife. To this may be added the fact, also proved and of record, that this woman declared to several witnesses, that she had been married to Connolly according to the law and custom of her nation.

Before the citation of authority in support of plaintiff's pretension, it may be proper to refer to the testimony of two Reverend Gentlemen, Mr. Turcotte and Mr. Aubert, Priests of the Roman Catholic Church, witnesses for the plaintiff, and the Rev. Mr. Boucher, also a Priest of the same Church, examined on behalf of the defendant. It is unnecessary to say that the Court could not in a matter of this kind be governed by their opinions, yet their evidence is a part of the record, and it is not without importance.

Mr. Aubert says, in cross-examination:

Quand je dis qu'on savait que la dite Susanne avait été marié au dit William Connolly, je le sais d'abord par l'opinion publique, et parce qu'elle—même me l'a dit et que'elle me l'a dit en me racontant le fait.

Question.—Quelle sorte de mariage est-ce?—*Réponse*—Celui qui était en usage alors pour tout le monde.

Question:—Est-ce un mariage ou reconnu par l'église on par les lois civiles en aucun cas que vous pouvez rapporter?—*Réponse*—Pour la légitimité du mariage on le considère comme valide, dès qu'on se conforme aux usages admis dans le pays où l'on se marie. Je n'ai pas eu occasion d'examiner cette question sous le rapport civil.

Question—Savez-vous que bien souvent les chefs ont plusieurs femmes?—*Réponse*—Pour les chefs natifs nés Sauvages, c'est vrai' mais pour les blancs, je n'ai jamais connu de bourgeois de la compagnie en avoir plus qu'une.

Question.—En cas qu'un chef natif se transportât dans un pays civilisé, et ayant quatre ou cinq femmes Sauvages prises suivant l'usage du pays sauvage, est ce que tout ces femmes seront légitimes, soit aux yeux de l'église on de la loi?

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—*Réponse*—La première seul sera légitime, et toutes les autres ne seront pas considérées comme les femmes légitimes.

Question,—Par quelle loi ou règle écrite ou comment autrement établie, sera faite une telle distinction entre les femme d'un chef Sauvage, pour légitimer l'une d'entr'elles, et rejeter les autres ?—*Réponse*—Selon les lois ecclésiastiques elles se trouvent dans le droit *canon* : par les lois civiles je n'en sais rien.

Question.—Pouvez-vous citer une loi ou le texte de loi dans le droit *canon* à l'appui de ce que vous dites ?—*Réponse*—C'est dans le traité *du mariage*. Si j'avais su que vous me demandassiez le chapitre, j'aurais emporté le livre.

Question.—Savez-vous si le mariage, selon la coutume sauvage, porte des conséquences différentes, et met la femme dans une position trés-différente, du cas d'un mariage dans un pays civilisé ?—*Réponse*—Ça ne dit rien ; ça dépend des usages, des pays, quant au traitement de femmes et aux droits.

Question.—Selon votre opinion, je demande si par les lois sauvages la dernière femme aura une préférence sur les autres. Est-ce que la règle sera renversée par le transport du domicile dans un pays civilisé ?—*Réponse*—Si les Sauvages restent infidèles, l'église n'a pas à s'ocuper de leur conduite ; mais s'il veut rentrer dans l'église, l'église l'oblige à reprendre la première femme, parce qu'elle la considère comme la seule légitime, à moins qu'elle ne veuille pas se faire chrétienne.

Question—Au cas qu'un homme et une femme se marient selon la coutume sauvage, s'ils veulent devenir chrétiens, est-ce qu'ils n'ont pas d'autres devoirs à faire ; ou est-ce qu'ils doivent se faire remarier par un curé ?—*Réponse*—Non, parce qu'ils sont déjà mariés.

Question.—Dans l'église catholique, n'est-ce pas que le mariage est un sacrement, et ce que c'est un devoir de recevoir la bénédiction nuptiale ?—*Réponse*—Oui, le mariage est considéré comme un sacrement, mais la présence de curé comme témoin nécessaire est requis pour valider les mariages là où le décret du concile de Trente a été publié, *mais où il n'a pas été publié, les parties peuvent contracter mariage validement sans la présence du curé d'après les lois de l'église. Le seul fait que les époux se prennent dans l'intention de se marier est assez, sans l'imposition d'aucune cérémonie.*

The Rev. Mr. Turcotte, after having spoken of the marriage of Mr. Connolly and Susanne, says in cross-examination :—

" D'après mon opinion, ce mariage était valable selon les règles de l'église " Catholique Romaine, c'est-à-dire qu'en principe, c'est le *consentment mutuel* " *qui fait le mariage.* Si les parties sont des catholiques romains, l'église re- " connaitra une telle union, *si le Concile de Trent n'était publié là.*"

The Rev. Mr. Boucher, a witness for the defence, was the confessor of the late William Connolly,—he had baptized one of his children by Julia Woolrich. He was an intimate friend of the second family. He had been for eight years a missionary at the Red River, and knew the customs of that part of the country well, Speaking of polygamy among the natives, he knew of no case of a European having two women at a time. Concubinage is the prevailing vice in the North West; thinks Mr. Connolly was not married to Susanne, and when asked if he was not aware of the existence of such a marriage according to the custom of the country, he answers :—

"Je ne connais pas de coutume autorisant le dit mariage, ne pouvant auto-
"riser comme coutume ce qui est une action défenduc de Dieu et de l'Eglise. Je
"regarde comme crime une liaison semblable."

He says that such a connection as that between Connolly and Susanne was concubinage—not marriage. This gentleman also states that the plaintiff, and all Connolly's children by the Indian woman, passed for illegitimate. According to what is stated by these witnesses though in some degree conflicting, I am inclined to think that if this marriage took place according to the usages of the natives, it would be regarded as valid by the Roman Catholic Church. I have referred to their testimony to show the opinion of Churchmen on this point. It will be remarked, however, that Mr. Boucher does not reason much upon the matter, but expresses simply his private opinion, and takes, not a legal, but a moral or religious view of this kind of marriage.

Among the authorities cited by Mr. Stephens, one of the plaintiff's Counsel, are the following:

"Le mariage, c'est l'union ou la societé légitime de l'homme et de la femme
"qui s'unissent pour perpétuer leur espéce."—Toullier, Vol. 1, No. 489.

"Le loi ne considère le marriage que comme un contrat civil."—Toullier, No. 494, Vol. 1.

"By the law of nature, by the canon law, previous to the Council of Trent,
"and by the law of England as it stood before the passage of the first marriage
"act.—(A.D. 1753.)and by the law of Scotland and France, nothing need be
"added to this simple consent to constitute a perfect marriage."—Bishop on marriage, Vol. 1, page 219. Section 218; and see cases cited in notes.

"In most of the tribes, perhaps all, the understanding is that the husband
"may dissolve the contract at pleasure. It is plain that among the savage
"tribes on this continent, marriage is merely a natural contract, and that neither
"law, custom, or religion, has affixed to it any conditions or limitations or forms.
"other than what nature has itself prescribed"—Bishop on marriage. Vol, 1,
"No. 223.

"In a state of nature," says Lord Stowell, "the contract of present marriage
"alone, without form or ceremony superadded, constitutes of itself complete marriage."—*Vide* Lindo vs. Belisario, 1 Hagg. Con. 216, 230; 4 Eng. Ec. 367, 374,
"Bishop, Vol. 1, No. 19.

"If practically a man and woman recognize each other as in substance hus-
"band and wife, though they attempt to restrict the operation of the law upon
"their relation, the law should hold them—public policy requires this, the peace
"of the community requires it, the good order of society demands it—to be
"married persons, unless some statute has rendered the observance of some form of marriage necessary."—Bishop, Vol. 1, No. 227.

"Whenever marriage is governed by no statute, consent constitutes marriage,
"and that consent is shown by their living together." Bishop, Vol. 1, Nos. 229
"and 230.

"But whenever the matter is not governed by any doctrine there to be men-
"tioned, no particular form for expressing the consent is necessary, nothing more
"is needed than that in language which is mutually understood, or in any mode

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"declaratory of intention, the parties accept of each other as husband and wife," —1 Fraser Dem, Rel, 145; Bishop; marriage,, Vol. 1, No. 229.

"Quant aux enfants nés de ces mariages putatifs, ils sont légitimes à tous "égards. Ils jouissent des mêmes droits que s'ls étaient nés d'un marriage, a- le légitime duquel il n'y aurait eu aucun obstacle"—Toullier, Vol. 1, No. 666.

"Marriage act of England does not apply to marriages abroad."—Latour vs. Teesdale, 8 Taunton, 830.

"None of the English marriage acts extend to any marriages taking place out "of England."—Blackstone, Vol, 2, page 296. Am. Ed. 1843.

"The laws which prescribe the manner in which and the persons between "whom a marriage may take place, and under what circumstances, and in what "manner it may be dissolved, constitute the status of husband and wife, and are "therefore personal laws of universal effect. It is not necessary to resort to the "origin of domicile, to ascertain what are its laws, if that were not the place in "which the marriage was contracted. The law of the place in which the mar- "riage was celebrated, must decide on its validity."—Burge Ed. 1838, Vol. 1, page 15.

"With respect to marriages contracted in a foreign country, they are con- "sidered as valid by our law, if made in such form as is deemed sufficient in the "place where contracted."—Rex. vs. Brampton, 10 East, 282; Latour vs. Teesdale, 2 Marsh, 243; Doe vs. Vardill, 5 Barn. and Cress 438; 6 Bing. N. C., 385; Darlymple, vs. Dalrymple, 2 Hagg. 52.

From these authorities, I think, it is clear that by the Canon law, by the law of France and Scotland, and even by the Common law of England, the marriage under consideration with repute and co-habitation such as is proved, should be held up to be in all respects valid.

But the defendant contends, admitting, that among the Indians, this marriage would be good, yet it must be borne in mind that Connolly was a Christian and Suzanne an infidel, and this is a sort of *empêchement*. That the custom or usage, contended for, is barbarous and pagan; it allows polygamy and divorce at will and therefore, the principle which holds that a marriage, good by the *lex loci*, is valid everywhere, does not apply—that no Christian Court of Justice can recognize and give validity to a marriage solemnized according to such a usage or custom, and consequently, upon the plaintiff's own view of international law, I am bound to adjudge and declare the pretended marriage void. This is certainly a very strange pretention, and I confess my inability, after much research, to find any authority of sufficient weight to countenance such a proposition. Let us inquire in the first place, what is the law as laid down on this point, and ascertain if the decisions or the text writers of authority, so far as I have been able to examine them, have made such a distinction.

By what law is validity of a marriage to be decided? "As to the constitu- "tion of the marriage, as it is merely a personal consensual contract it must be valid everywhere, if celebrated according to the *lex loci*"—No. 100; Story; Conflict of Laws pages 203-205; No. 80 Story Conflict of Laws, Ed. 57 pages 110-218

Validity of marriage depends upon the *lex loci* of place of solemnization."

—Latour *vs.* Teesdale, 8 Taunton, 830, Lacon *vs.* Higgins, 3 Starkie, 178 and 183.

"The general principle certainly is, that between persons *sui juris*, marriage "is to be decided by the law of the place where it is celebrated. If valid there, "it is valid everywhere."—Story Conflict of Laws, Ed. 57 page 218, sec. 118; Id, pages 220-223. Dalrymple *vs.* Dalrymple, 2 Hagg. Con. R., 54. Lacon *vs.* Higgins, 3 Starkie 183. Kent *vs.* Burgess, 11 Sim. 361. Merlin Rep. Vo. Marriage, sec. 1, page 343. Pardessus, vol. 5, page 6, tit. 7, cap. 2, art. 1481 to 1495. Pothier, Mariage, No. 263; Catherwood *vs*, Caslon, 13 M. & W. 26. Connolly *vs.* Connolly, 7 Moore 438; Broom's Legal Maxims, Ed. of 1858, page 461; Boullenois Observ. 46, p. 458. &c., &c., &c.

"With respect to marriages contracted in a foreign country, they are considered "as valid by our law, if made in such form as is deemed sufficient in the place "where contracted."—Rex *vs.* Brampton, 10 East, 282. Latour *vs.* Teesdale, 2 Marsh 243. Doe *vs.* Vardill, 5 Barn. & Cress. 438.

"Ainsi les enfants qu'une femme sauvage aurait eus d'un sauvage dans un "pays où il n'y aurait point de lois établies seraient regardés comme légitimés, "même parmi nous,quand même, le père et la mère n'auraient suivi d'autres lois "que celles qu'ils se seraient imposées; de même, ceux de deux époux, Anglais "on Chinois, qui auraient accompli les lois de l'empire de Chine ou du Royaume "de l'Angleterre."—Merlin, Marriage, sec. 2, § 1.

Lord Stowell, in deciding on the validity of a marriage celebrated in Scotland says," that the only principle applicable to such a case by the law of England, "is that the validity of the marriage rights must be tried by reference to the "law of the country where, if they exist at all, they had their origin. Having "furnished this principle, the law of England withdraws altogether and leaves "the legal question to the exclusive judgment of the law of Scotland."—Dalyrm- "ple *vs.* Dalrymple, 2 Hagg. Cons. Reports. 59.

It is, therefore," adds Lord Stowell," to be advised, that the safest course is "always to be married according to the law of the country, for then no question "can be stirred, but if this cannot be done on account of legal or religious diffi- "culties, the law of England does not say its subjects shall not marry abroad." "—Ruden *vs.* Smith. 2 Hagg. Cons. Reps., 371. And again the case Grim- "shire *vs.* Grimshire.

The same high authority insists with great force upon the observance of this "stringent and universal rule of the *jus gentium*. He says: "Why may not this "Court then take notice of foreign laws, there being nothing illegal in doing it? "From the doctrine laid down in our books—the practice of nations—and the "mischief and confusion that would arise to the subjects of every country from "a contrary doctrine, I may infer that it is the consent of all nations that it is "the *jus gentium*, that the solemnities of the different nations with respect to "marriages should be observed, and that contracts of this kind are to be deter- "mined by the laws of the country where they are made. If that principle is "not to govern such cases, what is to be the rule where one party is domiciled and "the other not? The *jus gentium* is the law of every country. and is obligatory "on the subjects of every country. Every country takes notice of it; and this

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"Court, observing that law in determining upon this case, cannot be said to de-"termine *English* rights by the laws of *France* but by the law of *England*, of "which the *jus gentium* is part. All nations allow marriage contracts, they are "*"juris gentium."* and the subjects of all nations are equally concerned in them "and from the infinite mischief and confusion that must necessarily arise to the "subjects of all nations, with respect to legitimacy, successions, and other rights "of the respective laws of different countries were only to be observed, as to mar-"riages contracted by the subjects of those countries abroad; all nations have "consented, or must be presumed to consent, for the common benefit and ad-"vantage, that such marriages should be good or not, according to the laws of "the country where they are made. It is of equal consequence to all that one "rule in these cases should be observed by all nations—that is, the law where "the contract is made. By observing this law, no inconvenience can arise; but "infinite mischief will ensue if it is not."

I do not find in any of these authorities the distinction here contended for; and when the law does not distinguish, I will not.

And here it may be proper that I should refer more particularly than I have heretofore done, to one noticeable incident in these Indian marriages, and that is polygamy. It was contended that this imparts to this connection, in an especial manner, its infidel character, and renders it unworthy of recognition as a legal marriage by this Court, excluding it from the operation of the general rules so clearly enumerated and laid down in authorities which I have just cited. But it is obvious, and must be conceded at once, that this is an incidental, not an essential element, in the law or custom of marriage known among those aboriginal tribes. It is an abuse, but not a condition of, or an essential ingredient in these barbarian obligations of matrimony. If proved at all in this case, it is manifestly established *as the exception, not the rule;* and in regard to marriages between Christians and the natives, *it is not proved to be the custom.* It may have occurred in the case of some profligate men possessed of great power and authority in the Indian country, but as a general rule it was not known or practised even among the natives. Mr. Connolly was not among those who sanctioned or connived at such an abuse of those sacred obligations which bound him so long and with so much fidility to his Indian wife. The fact is, I have, strictly speaking, nothing to do with polygamy in this case. It does not in any way come up for my consideration, except in so far as it is an infidel and unchristian abuse of a foreign law, occurring in isolated cases, and upon which I am not bound to adjudicate. It is no part of my duty to recognize or sanction in the slightest degree, or in any way whatever, that part of the Indian usage so carefully and so religiously eschewed by Mr. Connolly. And here I may remark that although polygamy was allowed among the Jews, as a general rule they were content with one wife. Diodorus also informs us the Egyptians were not restricted to any number of wives, but that every one married as many as he chose, with the exception of the priesthood, who were by law confined to one consort. It does not, however, appear that they generally took advantage of this privilege; and Herodotus affirms that throughout Egypt, it was customary to marry only one wife. It is easy to reconcile these statements, by supposing that Diodorus speaks of a law

which permitted polgyamy, and Herodotus of the usual custom of the people and if the Egytians were allowed to take more than one wife, we may conclude, from the numerous scenes illustrative of their domestic life, that it was an event of rare occurence.

Polgamy is permitted to the Moslem, but it is neither reputable to to have more than one wife, nor to divorce her without very cogent reasons; and though no objection can be made when there is no family, it is required, even in such a case, that her wishes, and those of her parents, should be consulted; and many marriage contracts stipulate that the wife shall have no partner in the harem.

No doubt this is law which Christianity expressly condemns, yet the Court has not the least hesitation in saying, that its existence among the Crees did not render Mr. Connolly's marriage with the Indian a nullity.

Further, Mr. *Cross*, the learned Counsel for the defendant, with great force and plausibility, has argued that there are other radical defects in this alleged marriage which, in his opinion, precludes the Court from regarding this union as legal matrimony. It was contended by him that no formal contract of marriage verbal or written, has been proved; that a custom which dispenses with this as a basis of marriage, which requires no witnesses, the intervention of no civil or religious authority, which is accompanied by no solemn or suitable ceremonies, exacts the observance of no religious rites whatever, and is a mere question of consent alone, is no marriage between a christian and an infidel. It must be conceded that all this goes to the very heart of this case: and these arguments have received the most anxious consideration of the Court.

In deciding this point, I think I may take it for granted, and it will be admitted at once, that the difference of religion or of race, the fact of one party being a Christian and the other pagan cannot materially, if at all, affect the question. These parties were under the circumstances *sui juris*, and they could, even according to the defendant's view of the case, have been legally married by proper authority. I am not aware of any English law which prevents a British subject from marrying an infidel, or which would render his marriage with a pagan illegal. If this be a marriage at all, it is quiet true that it was a marriage without the intervention of any civil authority and without any religious or ecclesiastical sanction; it was matrimony according to Indian customs and not in conformity to any Christian law. The Court has to deal with it as a matter of consent, an agreement to be husband and wife, followed by *concubitus* and long cohabitation, and general repute, and here I think I cannot do better than cite the words of the great Lord Stowell, giving judgmens in the Dalrymple case,—(2 Haggard's Consistory reports. Vol. 2, page 62.)—He says:

"Marriage being a contract, is of course *consensual* (as is much insisted on, I "observe, by some of the learned advocates) for it is of the essence of all contracts "to be constituted by the consent of parties. *Consensus non concubitus facit* "*matrimonium*, the maxim of the Roman civil law, is, in truth, the maxim of "all law upon the subject; for the *concubitus* may take place, for the mere grati- "fication of present appetite, without a view to anything further, but a mar- "ringe must be something more; it must be an agreement of the parties looking "to the *consortium vitæ*: an agreement indeed of parties capable of the *concubi-*

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"*tus*, for though the *concubitus* itself will not constitute marriage, yet it is so far "one of the essential duties for which the parties stipulate, that the incapacity "of either party to satisfy that duty nullifies the contract. Marriage, in its "origin, is a contract of natural law; it may exist between two individuals of "different sexes, although no third person existed in the world, as happened in "the case of the common ancestors of mankind: It is the parent, not the child "of civil society, '*Principium urbis et quasi seminarium Reipublice.*' In "civil society it becomes a civil contract, regulated and prescribed by law, and "endowed with civil consequences. In most civilized countries, acting under "a sense of the force of sacred obligations, it has all the sanctions of religion "super-added; It then becomes a religious, as well as a natural, and civil con- "tract; for it is a great mistake to suppose that, because it is the one, therefore "it may not likewise be the other. Heaven itself is made a party to the con- "tract, and the consent of the individuals pledged to each other, is ratified and "consecrated by a vow to God. It was natural enough that such a contract "should under the religious system which prevailed in *Europe*, fall under eccle- "siastical notice and cognizance, with respect both to its theological and its legal "constitution; though it is not unworthy of remark that, amidst manifold "ritual provisions, made by the Divine Lawgiver of the Jews, for various offices "and transactions of life, there is no ceremony prescribed for the celebration of "marriage. In the Christian church, marriage was elevated in a later age to "the dignity of a sacrament, in consequence of its divine institution, and of "some expressions of high and mysterious import respecting it contained in the "sacred writings. The law of the Church, the canon law (a system which, in "spite of its absurd pretensions to a higher origin, is in many of its provisions "deeply enough founded in the wisdom of man,) although, in conformity to the "prevailing theological opinion, it reverenced marriage as a sacrament, still so far "respected its natural and civil origin, as to consider that where the natural "and civil contract was formed, it had the full essence of matrimony without the "intervention of the priest; it had even in that state the character of a sacra- "ment; for it is a misapprehension to suppose, that this intervention was re- "quired as a matter of necessity, even for that purpose, before the Council of "*Trent*. It appears from the histories of that council, as well as from many other "authorities, that this was the state of the earlier law, till that council passed its "decree, for the formation of marriage; The consent of two parties expressed in "words of present mutual acceptance, constituted an actual and legal marriage."

In the preceding remarks Lord Stowell is describing a marriage extremely similar to the one proved in this case, less the twenty-eight years cohabitation. After all, what is there so immoral or revolting in this Indian usage? Jacob espoused the daughters of Laban, two sisters, very much in the same way; he bought them, he worked for them: and several instances of similar marriages are recorded in Holy writ. There does not seem to have been ceremony in those *cases*—not much if anything recorded about verbal or written contracts, and such like technical superfluity of terms. The Egytians too, as far as we can ascertain anything about their marriage rites, and the Greeks bought their wives and made presents on obtaining the consent of the parents and that of

their daughter. According to the custom of the first ages of the Republic the Roman husband bought his bride of her parents; they partook of a salt-cake of *far* or rice, and after this *confarreation* both parties were seated on the same care of sheepskin, and the ceremony was completed. After the success of the Punic wars, and in later times, amid the increasing opulence and the growing corruption of society and manners, Roman marriages, owing to the intrigues and ambition of the woman, became conspicuous for pomp and ceremony; but even then consent and *concubitus* were the main, the essential ingredients of the contract. This primitive state of things is pretty much what we find among the barbarians of North America, and very nearly, if not exactly, what is proved in the present case; nor can I perceive that much, or any more, was required in earlier times, and in cases like the present either by the canon law or by the common law of England, France or Scotland. For all these reasons, I am clearly of opinion that this case comes under the operation of the general rule of the *lex loci contractus* above referred to, and that the marriage is valid without any formal contract is sufficiently proved but to the evidence of Necon.

I have as before stated, made diligent and extensive researches into the law on this subject, in order to ascertain whether these arguments so much insisted on by the defendant, could be sustained by any book of competent authority, or in any judicial decision, and I am bound to say I can find none—nor do I believe that any exists. There is besides, one answer to all this, and a very plain one. 1st, The supreme authority of the empire, in not abolishing or altering the Indian law, and allowing it to exist for one hundred years, impliedly sanctioned it, and 2nd, The sovereign power in these matters, by proclamation, has tacitly acknowledged these laws and usages of the Indians to be in force, and so long as they are in force as a law in any part of the British empire or elsewhere, this Court must acknowledge and enforce them.

This Indian custom or usage is, as regards the jurisdiction of this Court, a foreign law of marriage; but it obtains within the territories and possessions of the Crown of England, and until it is altered, I cannot disregard it. It is competent—it has been competent during the last hundred years, for the parliament of Great Britain to abrogate those Indian laws, and to substitute others for them. It has not thought proper to do so, and I shall not. This pretention is, therefore, as before stated, utterly unfounded.

Again it is urged by the defendant, that there is no legal proof that Connolly was ever married to this Indian woman. Now apart from his own express declarations to the contrary, and his long acknowledgment of her as his wife, we have twenty-eight years of cohabitation and repute, and I come now to consider what effect in law this fact has upon the case before us, and I find, first, the following decisions of our Courts:

Superior Court, Montreal, No. 286. Tranchemontagne *vs.* Monteferrand & ux, and Charles Faris, Opposant. (Present; Judges Smith, Vanfelson and Mondelet.) Lands were seized as belonging to defendant, Monteferrand's wife, one Lousie Faris, daughter of Hugh Faris and Mainville, by an Indian marriage, previous to the year 1810. Hugh Faris was a Canadian, and his wife, Mainville, a half-breed or "Metis" Indian. They were married according to the custom of the

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country, and in this cause, no proof of any ceremony was made, but simply cohabitation and reputation, Charles Faris, nephew of Hugh, opposed the seizure and sale, claiming the property as the rightful heir of Hugh Faris.

Plaintiffs contested the opposition on the ground that the female defendant was daughter of Hugh Faris and Josephte Mainville, and legitimate, and that the marriage was void.

So held by Court—Contestation maintained, and opposition dismissed, 27th October. 1854.

At Montreal. (In Appeal) [No. 14] Court of Queen's Bench, (*March* 1867) Morgan & al., Appellants, and Gauvreau, Respondent. Present: Hon. Judges Aylwin, Drummond, Badgley, and Mondelet. No attention paid to certificates filed. Held that declarations of party, verbal and written (in a lease) of marriage, will be binding, and give to Court the right to presume a marriage and to condemn respondent as the husband.

At Montreal. (In Appeal) [No. 10] Court of Queen's Bench, Hannah Fisher, (Plaintiff,) Appellant, and Angelique Gareau, (Defd't) Respondent, Present: Hon. Judges Duval (Chief Justice), Meredith, Badgley, and Mondelet. Demand by Appellant as widow of Samuel Liscom, of Argenteuil, and to him married 16th January, 1846. without contract. A daughter born and respondent appointed the tutrix to one Samuel Bower or Liscom, legatee universal of Samuel Liscom under his will—demand is for share in community—Plea: An anterior marriage by Samuel Liscom to Pursis Burr—Proof of defendant.

1. That Church Registers were kept at Greenwich, Mass., U. S. 2. That no entry of Marrriage could be there found. 3. Cohabitation and Reputation of Liscum and Pursis Burr as man and wife.

Held sufficient evidence.

Action dismissed by Superior Court (Smith, J.), 28th June, 1862.

Judgment unanimously confirmed in appeal, 9th March, 1864.

Mr. Stephens, the plaintiff's Counsel, has also submitted the following authorities:—

"Where marriage proved to have been solemnized abroad, but doubtful whether strictly according to rites of Church of England, and not according to "custom of country where it took place, held sufficient with evidence of cohabitation Catherwood *vs.* Caslon, 1 C. & M. 431; Woodgate *vs.* Potts, 2 C. "& P. 467.

"Reputation is good evidence of marriage, though the party adducing it, "seeks to recover as heir at law, and his parents are still living."—Fleming *vs.* "Fleming, 4 Bing. 466.

"Cohabitation as man and wife furnishes presumptive evidence of a preceding "marriage."—Holmes *vs.* Holmes. 6 L. R. 470 Evans *vs.* Magoon; Exchequer Reports, 2 Crompton & Jervis 451, Danty, preuve, pages 100–112 &c., &c., &c.

"Ainsi deux personnes qui ont toujours vécu publiquement comme mari et "femme, et qui ont passé pour tels, sans contradiction, ont la possession d'état et "mari et de femme."—Toullier, Vol, 1, No 597.

"C'est donc le nom et la dignite du mariage, la cohabitation possible et pré-"sumée, la présomption toujours favorable à l'innocence et à l'état des enfants

"qui forme le premier principe adopté par les lois en matière de filiation comme "l'un des fondements de la societé civile. L'enfant conçu pendent le mariage "a pour père le mari—.Toullier. Vol. 2, No. 790.

"Les faits principaux sont, que l'individu a toujours porté le nom de son "père, que le père l'a traité comme son enfant, et pourvu en cette qualité a "son éducation, à son entretien a son établissement," Toullier, Vol. 1, No. 869; see Letter of William Connolly to John Leeves, fyled and proved, dated Lac la Pluie, August 7th, 1818, from which I make the following extract:

"The account you give of John is highly satisfactory. I am quite proud of "the little fellow, and sincerely pray God that he may not defeat the hopes I entertain of him, what obligations do I not owe you, my dear Reeves, and your worthy aunt, for your care and attention to my child, &c., &c., &c."

"La force de la possession est telle qu'elle peut tenir lieu de l'acte de nais- "sance."—Toullier, vol. 2, Nos. 871-2.

"Le Code a tranché le doute en décidant qu'à défaut de titre et de possession "constante, ou si l'enfant a été inscrit soit sous de faux noms, soit comme né "de père ét mère inconnus, la dreuve de filiation peut se faire par témoins."—Toullier, vol. 2, No. 888.

"When there is absence of *Regitres de Mariage*, the civil status of a person "can be proved by the declarations of parents and by witnesses."—Motz vs. Morcau, 5 Lower Canada Reports, page 433.

Il est nécessaire de suppléer aux registres de l'était civil, lorsqu'il n'en existe "point, soit parcequ'il n'en a pas été tenu, soit parcequ'ils sont perdus."—Toullier, Personnes, vol. 1., No. 345, Danty, Preuve, pages 100, 103 et 112.

"Quant aux enfants nés de mariages putatifs, ils sont légitimes à tous égards." —Toullior, vol. 1, No. 666,

"Where it is necessary to prove the fact of a marriage, the entry in the "Parish Register is not the only evidence; but it may be proved by persons "who were present and witnessed the ceremony, or by general reputation."—Saunders *Vbo.*, Secondary Evidence, page 835.

Baron Parke said: "I thiuk there is a great deal of evidence to go to the jury. There is evidence of four years cohabitation "of these persons as hus- "band and wife, and such cohabitation is evidence of marriage,"—Bishop, on Marriage and Divorce, p. 227, Carrington & Payne, p. 460; Woodgate *vs.* Potts.

"But when two persons agree to have that commerce for the procreation and "bringing up of children, and for such lasting cohabitation, that in a state of "nature would be a marriage, and in the absence of all civil and religious insti- "tutions, might safely be presumed to be, as it is popularly called, a marriage in "the sight of God." Lindo *vs.* Belisario.—1. Hagg Cons. Rep. 316. "But "wherever the matter is not governed by any doctrine there to be mentioned, "no particular form for expressing the consent is necessary. Nothing more is "needed than that in language which is mutually underseood, or in any mode "declaratory of intention the parties accept of each other as husband and "wife."—Bishop. Vol. 1, No. 229; Hicks *vs.* Cochran.—4 Edw., ch. 107.

"Oral evidence of marriage is admissible when there are no registers."—

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Toullier, Vol. 1 Nos. 345, 884; do. 2, No. 888; Code Civil Canada, No. 232; Danty, Preuve, p, 103, Ed. of 1727.

"As to testimony being allowed where the *acte de Baptême* is false."— Lahaye, Code. Annoté, Art. 323, and the authorities cited there, page 94 and page 95 (left column.)

"Good faith of one conjoint legitimises children."—Favard de Langlade; Rep. de la Nou. Légis; Verbo Mariage, p. 487, Ed. 1823; Toullier Vol. 1, Nos 653, 660, 661, 662 and 663.

The Court will now refer to some authorities touching proof of the legitimacy of plaintiff.—See Code Civil, Canada, Art. 232.

"When the child is inscribed under false names or as *inconns*, la preuve de "filiation peut se faire par témoins."—Toullier, Vol. 2 No. 888.

"S'il existe des enfants issus de deux individus qui ont vécu publiquement "comme mari et femme, et qui *sont tous deux décédés*, la légitimité des enfants "ne peut être contestéé sous prétexte du défaut de représentation de l'acte de "célébration de mariage, lorsque cette légitimité est prouvée par une possession "d'état."—Toullier, Vol. 1, No. 238.

"La possession d'état a trois caractères: *nomen, tractatus, fama.*"—Toullier. Vol. 2, 869.

"La force de la possession est qu'elle peut tenir lieu de l'acte de naissance."—Toullier, Vol. 2, Nos. 869, 871, 872.

"When it is proved that the child is born of a female who was married at the "time of its birth, the law takes him under its protection, and says: *Pater est "quem nuptiæ demonstrant.*"—Rutledge and Carruthers, Fac, Coll. 19th May 1812, Burge, Vol. 1, page 59. Many of these authorities bear directly upon the present case and sufficiently sustain the views which the Court has already enunciated.

It has been said that the plaintiff's *status*, being that of illegitimacy, those authorities do not apply; If this be true he was considered so only after Connolly repudiated his mother and married another woman. In the North-West and at St. Eustache, he was regarded as legitimate. I shall refer to this more particularly hereafter.

The Defendant has pleaded and argued that the plaintiff and his mother Susanne continuously acquiesced in this marriage of Wm. Connolly with Miss Woolrich. Letters have been produced. Some of these letters are addressed to the late Mr. Connolly, and several to Miss Woolrich, and are from the children and grand-children of Susanne; they are replete with expressions of gratitude, and the warmest affection to their father and the defendant; and there can be no doubt but this amiable and accomplished lady treated both Susanne and her children, with marks of friendly regard; the children even with affection; but as a matter of fact, so far as regards Susanne and the plaintiff John Connolly, there are no letters; there is nothing whatever to show express or implied acquiescence on the part of either of them,—nothing to establish express or implied acknowledgment or recognition of Miss Woolrich as the wife of Mr. Connolly, or of the marriage relied upon by the defendant; inaction, silence, are indifference not acquiescence; but even if they did not constitute such

acquiescence, it would amount to nothing in the present case. The marriage of Mr. Connolly with Miss Woolrich was good, or it was bad under the law of the land. If, as a matter of fact, Mr. Connolly was married to the Indian woman, his subsequent marriage to the defendant was null and void, and no acquiescence or sanction by his first wife could make it good. If Susanne was not his wife, his marriage with Miss Woolrich was valid, irrespective of any acquiescence by Susanne and her children. Lord Stowell thus speaks of that kind of acquiescence in Dalrymple *vs.* Dalrymple, 2 Hagg., p. 129.

"It is said that, by the law of Scotland, if the wife of the first private mar-
"riage chooses to lie by, and to suffer another woman to be trepanned into a
"marriage with her husband, she may be barred *personali exceptione* from assert-
"ing her own marriage. Certainly no such principle ever found its way into the
"law of *England;* no connivance would affect the validity of her own marriage;
"even an active concurrence on her part, in seducing an innocent woman into a
"fraudulent marriage with her own husband, though it might possibly subject
"her to punishment for a criminal conspiracy, would have no such effect. But
"it is proper that I should attend to the rule of the law of Scotland upon this
"subject. There is no proof, I think, upon the exhibition of Scotch law, which
"has been furnished to the Court, that such a principle was ever admitted author-
"itatively; for though in the gross case of *Campbell* versus *Cochrane*, in the year
"1747, the court of Session did hold this doctrine, yet it was afterwards retract-
"ed and abandoned, on the part of the second wife, before the House of Lords,
"which, most assuredly, it would not have been, if any hope had been enter-
"tained of upholding it as the genuine law of *Scotland*, because the second wife
"could never have been advised to consent to the admission of evidence, which
"very nearly overthrew the rights of her own marriage. Under the correct ap-
"plication of the principles of that law, I conceive the doctrine of a *medium*
"*impedimentum* to be no other than this, that on the *factum* of a marriage, ques-
"tioned upon the ground of the want of a serious purpose, and mutual under-
"standing between the parties, or indeed on any other ground, it is a most impor-
"tant circumstance, in opposition to the real existence of such serious purpose
"or understanding, or of the existence of a marriage, that the wife did not assert
"her rights, when called upon to do so, but suffered them to be transferred to
"another woman, without any reclamation on her part."

If any authority were required upon this point, this seems to me to be very conclusive; it most decisively disposes of the Defendant's argument about acquiescence in this case. It will be remarked that Lord Stowell is speaking of a private or clandestine marriage, the one then under consideration in the Dalrymple case; but there was nothing secret or clandestine in the marriage of Mr. Connolly with the Cree woman. Their relation as husband and wife was as public as such relations could be. Miss Woolrich was Connolly's cousin. When she was married, this lady was no longer young. She was thirty-six years of age. The Indian wife had been living with Mr. Connolly at St. Eustache, and afterwards she and several of the children resided with Connolly's sister, Miss Woolrich's cousin, in Montreal. It is a fair inference, and one which I regard as inevitable, from the evidence adduced, that Miss Woolrich well knew

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of the existence of the Indian woman, and of her intimate relations with her cousin, Mr. Connolly; that she was aware that there was a numerous family, issue of that connection, I have no doubt. While stating this to be the opinion of the Court, I feel it my duty to express the belief that Miss Woolrich was unaware of the existence of a lawful marriage between her cousin and the Indian woman. I am entirely satisfied of this; and I think it is beyond all doubt that Miss Woolrich was in perfect good faith when she married Connolly; so also was the Cree maiden, at the age of fifteen, when Connolly took her as his wife: both were in good faith, and, so far, they were very much in the same position. It is in regard to Miss Woolrich's ignorance of this marriage, and her good faith, the Defendant's Counsel urge, that it required very little to show acaquiesence; silence, inaction would be sufficient. Now, so far as the plaintiff was concerned, he had no notice to give to Miss Woolrich; he had no approval or disapproval to offer. And as to the Indian wife, what had she to say or to do? She did not mislead or deceive Miss Woolrich; that was all Connolly's work. This argument is extremely weak, and cannot be entertained for a moment by the Court. But as some stress has been laid upon this question of acquiescence, I would refer again to this point— the alleged continual acquiescence in this second marriage on the part of the plaintiff and his mother. It is proved that when Susanne heard that Connolly had deserted her and married another woman, she smiled; what she meant to express or to convey, by that smile, does not appear. The smile of a woman may express a variety of emotions: it would not, perhaps, be considered a very reliable indication of feeling in an Indian woman, or in any other; but it may fairly be presumed that Mrs. Connolly (Susanne) did not mean to express approval or satisfaction; for she added "that "Miss Woolrich would have only her leavings, and that Connolly would repent "the step he had taken." And Larocque says "she felt all this very much." Except stating on some occasions that she had been married according to the custom of her tribe, the evidence does not show that she ever alluded to the circumstance afterwards. She may have done so, however; but the testimony does not show it. This silence may, in the case of the Indian woman, be considered as resignation, apathy, pride, or despair at ever being able to vindicate her position as the lawful wife of Connolly; but such conduct could not be regarded as acquiescence on her part in Connolly's second marriage, or in her own fate as his discarded concubine. But it was further urged that from 1844 till her death, in 1862, the Indian wife was supported by Connolly till his death in 1849, and afterwards by Mrs. Julia Connolly in a convent at Red River Settlement; that is true; and this fact, and many others proved, reflect great credit upon the second Mrs. Connolly. But the inaction of this old woman—her accepting support from Connolly and his second wife, in her old age, so many years after she had been discarded—cannot for a moment be viewed as an acquiescence, on her part, in the second marriage; and even so, it would not, as before remarked, make the first bad or the second good. It is not a question of *status* which is now under consideration, but whether there was or was not a marriage between Connolly and the Indian woman? All outside that simple enquiry has nothing whatever to do with this branch of the case as presented to me. Neither the good faith of

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Miss Woolrich, nor the passive conduct or apathy of the Indian, can avail in the defence of this cause. The position, therefore, of the defendant, must be declared untenable.

Then it was said, and much insisted on, that one of the incidents of this Cree marriage was, that it might be dissolved at pleasure; and I am free to admit that, as between the natives, it seems to be a practice with these barbarians to repudiate their wives without much ceremony, and that practice appears to be sanctioned by their usages.

How far this is to be regarded as a part of their law of marriage, or merely an abuse of it, tolerated among savages, it is difficult for me to determine. It was argued by Mr. Perkins, in his remarkable reply and summing up of the plaintiff's pretensions in this case, that admitting the argument of the defendant to the fullest extent, and that marriage among the Indians, or even when between a squaw and a Christian, a European, or American, is dissolvable at the will of the husband or of either party—such a concession can have no effect upon this case. If this Cree marriage was dissolvable at pleasure, Mr. Connolly could perhaps have repudiated his Indian wife, had he done so while residing among the Crees, or where such a barbarous usage prevailed. He might have done so then if he could do so at all—but when he came to Canada, that right ceased. At all events, he could not dissolve the marriage of his own free will; he could not repudiate her in Canada, in virtue and in pursuance of this Indian usage. A man goes to a country, where divorce is allowed, and marries, he returns to his own country, where divorce is not allowed. The Courts of the latter country will not enforce the law of divorce existing in his matrimonial domicile. Much less could Mr. Connolly repudiate his wife by merely wishing to do so and then marry again. The Indian woman was his wife here, and would remain so, until the marriage was dissolved by means known to the law. It was not intended by the defendant that the first Mrs. Connolly could have repudiated her husband and married again; had such an argument been offered it would have been at once overruled. This pretension of the defendant is, therefore, without foundation.

It was also urged by the defendant (and upon this argument considerable emphasis was laid) that, Miss Woolrich having enjoyed the *status* of the lawful wife of William Connolly during a period of upwards of thirty years, she had a prescriptive right to be regarded as such. Now it will be borne in mind that Connolly had previously cohabited with the Cree woman during twenty-eight years as his lawful wife. He then repudiated her, and married Miss Woolrich with whom he cohabited from 1832 till his death in 1849, a period of seventeen years. Susanne died in 1862; Miss Woolrich in 1865. Could Connolly, under the circumstances of this case, prescribe against his first marriage? During the lifetime of the Indian woman could Miss Woolrich obtain, by prescription, what perhaps she never had in point of law under the circumstances of this case, the legal *status* of the lawful wife of William Connolly? These questions must be at once answered in the negative. Such a prescription, as that contended for by the defendant, must arise and exist under circumstances wholly different from those proved in this cause. The Court has no hesitation in saying that this argument cannot be successfully maintained.

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It is further contended by the defendant, that the only *status* of Susanne was that of concubine to William Connolly, and that of the plaintiff was illegitimacy.

With respect to the Cree woman, this is not the fact. Connolly says he married her according to the usages of her tribe or nation. She passed for his lawful wife during twenty-eight years in the North West country, and he introduced her into civilization and among his Christian acquaintances and friends in Lower Canada, as his wife. If she had been his concubine only, it is strange, it is indeed not credible, that he should have lived with her for twenty-eight years—had a numerous family—brought her to Lower Canada—presented her as his wife even to the priest, who baptized two of his children, and have taken her to his sisters in Montreal. This is not to be accepted as the relation existing between Connolly and this Indian woman. The circumstances of the case as proved, rebut every such presumption. The evidence shows conclusively that her *status* was that of a lawful wife, and not that of a harlot, till Connolly repudiated her. If there were any presumption to be invoked, it is on her behalf. The *status* of the Indian was not that of his concubine. I am not here to give expressions to loose social views of relationships such as these among which the defendant seeks to class Connolly's marriage to the Indian. Upon facts proved in this case, I must presume this connection to have been legal and regular; it was so reputed till 1801; and I am called upon to administer the law, and not to enforce popular views on these subjects. It may be customary for the Christian trader to take as his wife one of these children of the forest, acting in perfect good faith and in conformity with the law and usages of her native country, and after years of toil, fidelity, and devotion, having always treated her as his lawful wife, this trading adventurer, tired of the connection, may repudiate her, insisting that she has only been his concubine, and their offspring bastards. This is one way of doing things? but the sooner this is checked the better; and the sooner these men understand that such outrages upon law and religion will not be sanctioned by our Courts the more probability there is that such irregular practices will be discontinued.

Then as to the *status* of the plaintiff: there is no doubt that since the repudiation of his mother by his father and his father's second marriage, he has been regarded as illegitimate; and particularly so by the friends of the late William Connolly and those of the defendant. I think it is quite true that he has been so regarded generally, and so far as this general opinion could create a *status*, it has been that of illegitimacy; and, no doubt, under circumstances which it is easy to suppose, such a fact would be of importance. The certificate of baptism of the plaintiff, in the case, does not establish its illegitimacy. It is somewhat peculiar. Dated the 2nd April, 1813, it is in these words:

"Nous, Curé de Québec, avons baptisé Jean, né dans le Haut Canada, âgé "de huit ans, et dont les *parents légitimes* nous sont inconnus.

"Louise Aylwin et Louis Delmarre
"'Godmother.' 'Godfather.'

"William Connolly, } Witnesses."
"Henry Connolly, }

The father, it is strange to say, was one of the witnesses to this ceremony. It is fair to presume that the priest was informed by the father that the boy was legitimate; but the names of the parents were not given; and to make the mystery still more complete, it was falsely stated that he was born in Upper Canada.

The priest did not know where he was born—did not know who his legitimate parents were. But Mr. Connolly did, and both have been disclosed to this court; and this very certificate establishes, so far as a certificate can establish anything conclusively, that the plaintiff was not illegitimate. This argument therefore, and the objection that this action should have been brought to establish the plaintiff's legitimacy, or, at least, that such a prayer should have been in the conclusions, are in the opinion of the court, wholly unfounded.

The technical objection taken that all the children, issue of the marriage of Connolly and the Cree woman, should have joined in this action is clearly untenable. They may have perfectly good reasons for not bringing such an action, and besides they may not choose to do so; but it cannot for a moment be seriously contended that the plaintiff alone has not the right to recover his share of the community in the possession of the defendant, if such community exist.

This case might be disposed of upon a well known principal of law and of morality, and it is this, that where a doubt exists as to the legality of a marriage, Courts of justice are bound to decide in favor of the alleged marriage. All law, all morality, require and sanction this view, even of a doubtful case. In this instance, however, no such doubts exist.

Very little remains for the Court to remark in regard to this branch of the case, but to declare that according to the view which I felt bound to take of the law and the facts, there was a valid marriage existing between the late Mr. Connolly and the Indian woman. The proof of this marriage results from his own repeated and solemn declarations, to the effect that he had married her according to the custom and usages of her nation;—from the fact conclusively proved of twenty-eight years of repute—public acknowledgment and co-habitation as husband and wife—from the circumstances that he gave her his name—bestowed that name upon his children, offspring of that marriage—and from his care and education of these children. It is beyond all question, all controversy, that in the North West among the Crees, among the other Indian tribes or nations, among the Europeans at all stations, posts and settlements of the Hudson's Bay, this union, contracted under such circumstances, persisted in for such a long period of years, characterized by inviolable fidelity and devotion on both sides, and made more sacred by the birth and education of a numerous family, would have been regarded as a valid marriage in the North West, was legal there; and can this Court, after he brought his wife and family to Canada, after having recognized her here as such, presented her as such to the priest who baptized his children, and to the persons he and she associated with, declare the marriage illegal, null and void? Can I pronounce this connection, formed and continued under such circumstances, concubinage, and brand his offspring as bastard, because Mr. Connolly exercised his Indian privilege of repudiating her and marrying another woman, and waited to exercise that right till he came to Canada, where happily for society no such privilege exists? I think not. There would be no law, no justice, no sense, no

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morality in such a judgment. The Court itself could have testified to the high and accomplished character; to the cultivated intellect and feminine virtues of the amiable lady whose name and position figure so conspicuously in this unhappy case. She passed among many as the lawful and honored wife of William Connolly. She was so reputed. She was respected and beloved by those who knew her best; but behind and beyond all this, there have arisen other claims and other interests. The obscure and stigmatized offspring of William Connolly and his Indian wife has come forward, after many years, to vindicate his mother's memory and honor, and his own rights, as their lawful child. The law is with him. I am called upon to administer it, and I am forced to the conclusion that the marriage with the Cree woman was valid; that I am bound to recognize it as such, and to so adjudge; and I am bound, however painful it may be, to declare that the second marriage was and is an absolute nullity.

But there is still another question of very great importance to be decided, and that is, whether, admitting the legality of the first marriage, a community of property resulted from that marriage? Were Connolly and his Indian wife *Communs en bien* as claimed by plaintiffs' Counsel, and as understood by the law of Lower Canada? The answer to this question involves a point of law and one of fact. The honorable Mr. Justice Aylwin, a witness for the defence, and whose evidence has already been referred to, has by his testimony disposed of this branch of the case as decisively as he did that of his uncle's marriage with the Indian woman. He says: "At the time the plaintiff came to Quebec, in 1813, my "uncle lived with his sister, Mrs. Delmar, and at the same time the late Mr. "Connolly came, Julia Woolrich came also from Montreal, where she was living, "and spent the winter with her. At the time it was understood among all the "family, (that is, by my father, my mother, my aunt Delmar, my uncle, and "Mrs. Connolly, then Julia Woolrich,) it was understood that there would be a "marriage whenever my uncle could return to Canada, and get rid of the country. "Again, my uncle always said that his intercourse with the Indian woman was "to cease when he left the Indian country. He also said he was obliged to do "as the natives did when he lived in the North West. He said also that they "were brutes, and that he *always intended* to return to Canada, to marry my "aunt, and live happily here in a civilized country." Further, this witness, who knew all about his uncle's affairs and intentions, says:—"The late William "Connolly was a native of Lower Canada. I know that he went to the North "West country with the intention of making his fortune there, and returning "to Canada to reside permanently."

According to this evidence, Mr. Connolly and Julia Woolrich were under an engagement of marriage during a period of nineteen years, and all this time, one most interesting to some people, he was living with an Indian woman whom he introduced everywhere as his wife, and by whom he had a numerous family.

But that is not the question here though worthy of note in many respects: this reference is not made with the view to mark with reprobation the conduct of Mr. Connolly; far from it. The Court has no hesitation in saying, that the evidence of Mr. Justice Aylwin, in regard to the facts just adverted to, requires no corroboration. His high position, his eminent name and abilities, place his statements with reference to these particulars beyond the reach of cavil or doubt.

The late William Connolly was born at Lachine, in Lower Canada, about the year 1736, he being seventeen years old when he was married. He was by religion a Roman Catholic, and had passed his first years in Lower Canada. He entered the service of the North West Company in 1801, in 1802 was stationed at *Rivière aux Rats* in the Athabaska country. He went there to buy furs and skins from the Indians, with no more design of settlement or residence there than such as was necessary to carry on his trade. It can be easily supposed that he did not, for a single moment at any time, entertain the idea of making his permanent abode or residence in that country, or that he ever lost his intention of returning to Canada as soon as he could. But Mr. Justice Aylwin's evidence leaves no doubt upon these points. The absence of all intention to fix his domicile in that country, the *animus manendi* and the *animus revertendi* are as obvious as such things can be, from the circumstances of Connolly's position; perhaps no evidence could render the presumption more palpable, but, if such be required, Mr. Connolly himself, in conversations with Mr. Justice Aylwin, has placed this matter entirely beyond question.

It is an admitted principle, that the domicile of birth is presumed to continue till the contrary is proved, that domicile is changed only—

"Quando quis re et facto animum manendi declarat" and that "domicilium "non procedit, si ille haberet animum revertendi." These are admitted principles; and two things, therefore, must concur to constitute a domicile; first, residence; and secondly, the intention of making it the home of the party. There must be the *fact* and the *intent;* for as Pothier has truly observed a person cannot establish a domicile in a place except it be *animo et facto.* Voet emphatically says: *Illud certum est, neque solo animo atque destinatione patris familias, aut contestatione sola, sine re et facto, domicilium constituit; neque solâ domus comparatione nec aliquâ regione; neque solâ habitatione, sine proposito illic perpetuo morandi.* So D'Argentré says: *Quamobrem si figendi ejus animum non habent, sed usus, necessitatis aut negotiationis causa alicubi sint, protinus â negotio dicessuri, domicilium nullo temporis spatio constituent; cum neque animus sine facto, neque factum sine animo ad id sufficiat.*

"Domicile is acquired, par le concours de la volonté et du fait, *animo* et "*facto*—that is by actual residence in the place with the intention that the "place thus chosen should be his principal and permanent residence, the seat of "his fortune, his family, and his pursuits in life. A new domicile cannot be ac- "quired by intention alone; but having been once acquired, it may be retained "by intention, without actual residence. Neither can it be acquired, by residence "alone, however long, without that intention."

Pothier-Introd. Générale aux Cont., p.4.

D'Argentré, Contume, Art. 449.

Toullier, liv. 1, Tit. III, No. 371.

Civil Code, Art. 103.

And again:

"There must be an intention to reside permanently."

It would be easy to adduce pages of authority which would go to corroborate the doctrine here laid down, but the Court deems it unnecessary to do so. The

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principle is well known and every where acknowledged that the intention to remain permanently must be combined with the fact of residence. In some cases this intention may be presumed, but in this instance there is no room for presumption; and if any presumption whatever could be invoked, it would be against the supposition that Connolly had abandoned his domicile of birth, with the intention of forming a new one in the North West territory. But we have positive evidence to show that he never had such intention, but entirely the contrary; he intended to return so soon as he could get rid of the country, and live happily in a civilized country. This, no doubt, was his intention, was always his intention, which he finally carried out; for he lived in Lower Canada eighteen years after his return and marriage to Miss Woolrich, and then died here. He had made his fortune, the object he had in view in going to the North West, and then returned. The *animus revertendi* is clearly and conclusively established in this case. But then it may be said, and has been urged in argument, that a residence of thirty years confers upon a man a domicile, particularly where he has been married and brought up his family, and where also he has carried on and transacted his chief business in the locality. It will be remembered that lapse of time does not alter the case, when there is a constant, a persistent, intention to return, and no intention to remain, and it is beyond all question, as a matter of fact, that where the matrimonial domicile of the wife is different from her husband, it does not cause him to lose his domicile of birth. No argument, no authority, is required to prove such to be true as propositions of law. But conceding, for the sake of taking a full and complete view of this matter, that Mr. Connolly without any intention of remaining, but determined always to return to Canada, did acquire a new domicile in the North West territory, the next duty of the Court will be to determine at what precise point in that vast and wild region Mr. Connolly had his domicile. Was it at Rat River, or Fort Chippewayan, at Great Slave Lake, Lesser Slave Lake, the Rocky Mountains, Vancouver's Island, or the Mackenzie River? Was it at Rainy Lake, the Lake of the Woods, Fort Cumberland, York Factory, or Norway House? Was it at Isle à la Crosse, Rat River or Fort William? He seems to have visited and to have resided with his family at all or nearly all these places, and it is in evidence that he frequently came to Canada, and more particularly, he was present at the baptism of plaintiff in 1813, and was at Montreal in 1814. Now in regard to these trading posts, it must be borne in mind that they were situated widely apart, in some cases, more than a thousand miles distant, over almost impassible regions of wilderness. He was a fur trader, and in the prosecution of his business, he went to and fro from trading post to trading post, up and down great rivers, over mountains, across prairies and lakes, and through forests where the European had no settled home, where neither the hand of man nor the arts of civilization had subdued the wilderness or reclaimed the barbarian. The success of his trade itself depended upon barbarism, upon the cunning and active co-operation of the native savages, and the successful entrapping and slaughtering of the beasts of the forests. He was a dweller around the Indian hunting grounds, and a dealer in furs and skins. There were then no houses except within the forts, no villages, no colonies, no plantations, no civilized settlements, no political or municipal limits, circumscrip-

tions, or institutions, in most of these places; there were no Courts of law, and scarcely any law, except the will of the trader, and the native customs and usages of the Indians. And there was good reason for the absence of all these signs of progress and colonization, because, as before stated, the pecuniary success of both the Hudson's Bay and the North West Companies depended upon retaining those vast regions in a state of barbarism, and they had the power to exclude all other traders and settlers, and consequently to prevent the introduction of every element of European civilization.

Can the Court, under these circumstances, determine where Mr. Connolly's domicile was, in the North West? It seems to me to be impossible. But I might, I think, go further, and say that under the circumstances to which I have just adverted, and situated as Mr. Connolly was, he could acquire no legal domicile at Rat River; and in any case, I am clearly of opinion that whatever kind of domicile he may have acquired—for example, we may assume that his matrimonial domicile was there—yet, as a matter of fact, he did not lose his original domicile, his domicile of birth; and in support of this view of the law, it may be proper to refer to some additional authorities on this point, cited by Mr. Stephens.

"It ought always to be remembered that the question, whether the *status* has "been constituted by means of a legal marriage, is perfectly distinct from the "consideration of the rights, powers and capacities which the *status* confers.

"The enquiry whether the *status* has been constituted, is answered by the "law of the country in which the marriage was contracted.

"If by marriage, which, according to that law, is valid, the *status* is consti- "tuted, the connection of the parties with the law of that country ceases, un- "less that place be the domicile of the husband; and then its law governs, not "because the marriage was celebrated there, but because it is the country of the "husband's domicile. The parties, if they do not, by any express agreement on "their marriage, stipulate as to their future rights and capacities, are presumed "to submit to them as they have been defined by some municipal law; and the "law which, it is presumed, they contemplate, is not that of a country in which "they have no intention to reside, and to which, therefore, their *status* cannot "be subject, but that of the country in which, as it is the place of their domi- "cile, their rights and capacities are to be exercised.

"Jurists, therefore, concur in selecting the law of the domicile of the husband "and wife, as that which determines the personal powers and capacities incident "to their *status*, and not the law of the place in which the marriage was cele- "brated." Burge, Col. and For. Laws, vol. I., page 245; Pothier, Community, Nos. 5, 14.

"Whatever contrariety of opinion may exist respecting the effect of a change "of domicile on rights of property acquired under the law of the matrimonial "domicile, there is a general concurrence among jurists in holding that, although "the law which confers those rights, powers and capacities is strictly a personal "law, yet its influence exists so long only as the parties remain subject to it by "retaining their matrimonial domicile. When they quit that domicile, and "establish another, their *status* is governed by the law of the latter, and their

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"capacities and powers are those which that law confers." Burge, Col. and For. Law, vol. I., page 253. Merlin, Tome 1, sec. 10, pages 532 and 533. Pothier, Community, No. 89. Pothier, Coutume D'Orleans, Intro., No. 15.

"A, born at Amsterdam, and the Dutch Consul at Smyrna, married B, at "Smyrna, and they entered into an ante-nuptial contract relative to their "respective property. The wife afterwards died, leaving two children, and "without having made any disposition of her half of the joined property, as she "was entitled by the settlement to have done. Shortly after her death, one of "the children died at Smyrna. It became a question whether the law of "Smyrna or of Amsterdam regulated the title to the wife's share; in other "words, whether the husband had acquired a domicile at Smyrna or retained his "domicile at Amsterdam? It was decided in favor of the domicile of the birth "at Amsterdam. And even were a man to remain ten or more years in a place, "he cannot be said to have had there his fixed domicile, so long as it was con-"sidered as a temporary residence." Burge 1, p. 49.

"Where the domicile of the husband and that of the wife are not the same, "the law of the husband's domicile is to prevail, unless he means to establish "himself in that of his wife." Pothier on Community, Nos. 14, 15 and 16; Burge, page 40.

"When the law of domicile and that of the *situs* are in conflict with each "other, if the question is respecting the state and condition of the person, the "law of the place where they are situate is to be followed." Merlin, Rép. Status, Autorisation Maritale, sec. 10. Story on Conflict of Laws, No. 53.

"Le lieu de la naissance de chaque homme est présumé son domicile d'affec "tion, par une conséquence de cet amour que l'habitude et le commerce intime avec "nos parens, nos premiers instituteurs, nos amis, nous inspire pour notre patrie "Mais cette présomption de droit cède à la preuve contraire. Celui qui aban-"donne son domicile d'origine, en acquiert un autre par le fait, c'est-à-dire, par "l'habitation réunie à l'intention de fixer son domicile dans un lieu: car le domi-"cile, disent les lois, est plus d'intention que de fait."

Analyse raisonnée du droit Français. (*Verbo*, domicile, Donlcet.)

"Il y a présomption légale pour la conservation de la nationalité originaire "ou du domicile d'origine, jusqu'à la preuve du changement. De là il suit que "lorsqu'un individu a deux domiciles dans divers territoires, on doit de préfé-"rence avoir égard au lieu de sa naissance. Du reste, c'est un principe non "contesté que l'absence momentanée ne suffit pas pour former preuve du change-"ment de nationalité ou de domicile." Felix, Droit International, vol. I., page 56.

"Domicile is acquired by operation of law, as the necessary consequence of "some act; of this description is the domicile which a woman acquires on her "marriage, because she then passes to that of her husband." Burge, vol. I., page 33.

"It is difficult to lay down any rule which does not admit of some qualifica-"tion. A resort to, and residence in a foreign country, for the purpose of "carrying on trade there, may, from the frequency with which the person visits "and returns from thence, exclude the presumption of an intention to establish "a permanent residence there.

"He may have left his wife and children in the place of his former domicile, "or all his arrangements may be made exclusively with reference to, and as "connected with, the prosecution of his commercial pursuit; he may have "remitted all his money to the place of his former domicile.

"These or any other circumstances, from which it might be inferred that his "residence was only temporary, and that he contemplated a return to his former "domicile, exclude the inference that he had taken up a new and abandoned his "former domicile." Burge vol. I., page 42.

And now let us see what is to be considered the matrimonial domicile:

"Where the domicile of the husband and that of the wife are not the same, "the law of the husband's domicile is to prevail, unless he means to establish "himself in that of his wife." Story on Conflict of Laws, Nos. 191, 192, 193, 194 and 196. "Law of actual domicile governs at death." Id., Nos. 157, 158, 159, 171, 172, 174, 175, 176, 177 and 178.

"A wife is entitled to one-half of the community, though she never came into "the state." Coles Widow, and Executors, 7 Louisiana Repts., new series, page 42.

These authorities seem to the Court to have a very important bearing upon the law of the present case, in regard to the point now under consideration, and there are none on the opposite side, within my reach, which controvert seriously the doctrines here laid down. From what has been said, and under the peculiar circumstances of this case, it is in my opinion beyond doubt as a matter of law, that Connolly, during his absence in the North West Country, though that absence was prolonged through many years, did not lose his domicile of birth, that he never acquired one at *Rivière-aux-Rats*. I think, moreover, that even his matrimonial domicile, such as it was, did not change or supersede the one of origin. In that case, whatever may have been the law which prevailed at *Rivière-aux-Rats*, a community of property existed between him and his Indian wife from 1803, the date of their marriage. The Court is further of opinion that, supposing the domicile of birth to have been suspended, if I may so express it, during Connolly's absence in the North West Territory, yet it would revive upon his return to Lower Canada. In that view of the law, he always having had the intention of leaving the country and returning to Lower Canada, and that intention having been fulfilled by his return, long residence and death, at Montreal, community existed from the date of his marriage with his Indian wife. Upon both points, therefore, the marriage and the distribution of the property acquired during its existence, according to the pretensions of the plaintiff, the Court is in his favor. Judgment must be entered for plaintiff and against the defendants.

In conclusion, it becomes the duty of the Court, to thank the Counsel on both sides for the able assistance given by their argument of this important case.

The decree of the Court was in the following terms:

"The Court having heard the parties by their respective Counsel upon the merits of this cause, examined the proceedings, proof of record and documents fyled by the parties in this cause, and having maturely deliberated—Considering that the plaintiff hath proved by legal and sufficient evidence the material,

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averments of his declaration, and particularly that his father, the late William Connolly, and his, (the plaintiff's) mother, whose name before her marriage was *Susanne Pas-de-nom*, a female of the Cree tribe or nation of North American Indians, were married in the year one thousand eight hundred and three, at *Rivière-aux-Rats*, in the North West Territory; seeing that at that time there were no ministers, priests, or magistrates residing at *Rivière-aux-Rats* aforesaid, and further, that the marriage between the said late William Connolly and *Susanne Pas-de-nom*, was contracted and entered into according to the then existing customs and usages of the aforesaid tribe or nation of Cree Indians, which usages and customs have been proved in this cause;—Considering that this marriage between the plaintiff's parents was followed by twenty-eight years of continuous cohabitation as husband and wife, by and between the said late William Connolly and his aforesaid wife, and that they were always known, acknowledged, and reputed to be married persons during the whole period of the cohabitation aforesaid;—Seeing that the said late William Connolly repeatedly acknowledged and admitted that the said *Susanne Pas-de-nom* was his lawful wife; and further, that he had married her according to the laws and customs of the Cree Indians; and seeing it is proved that the said wife of the late William Connolly did likewise in her lifetime declare that she had been married to her said husband according to the customs and usages of the Cree nation;—Considering that the plaintiff is the offspring of the said late William Connolly and his said wife Susanne, begotten and born during the existence of the said marriage between his parents as aforesaid; and that as such he is one of the heirs at law of his said father and mother; and considering that from the date of the aforesaid marriage until the death of the late William Connolly, there existed between him and his said wife a community of property, according to the laws and usages of Lower Canada, and that plaintiff as heir at law of his mother is entitled to the one-sixth part or portion of the one-half of said community of property; seeing that the defendant hath failed to establish by legal proof the essential allegations of her defence, doth dismiss the pleas of the defendant and doth declare the plaintiff the true proprietor and owner of one-sixth part or portion of one-half, to wit—one-twelfth of the whole of the property composing and belonging to the community existing as aforesaid between the said William Connolly and his late wife, and enumerated in his will, as follows, to wit:—"Sundry shares of bank stocks and other stocks, the sum of five thousand nine "hundred and fifty pounds, one eighty-fifth share in the profits of the Hudson "Bay Company for outfits in the years eighteen hundred and forty-five, eighteen "hundred and forty-six, eighteen hundred and forty-seven, eighteen hundred "and forty-eight, and eighteen hundred and forty nine; a farm in the Quebec "suburbs of the city of Montreal, containing fifty-three arpents of land, with a "house and messuages thereon erected; a lot of land in Papineau Square, in "the said city of Montreal; twelve hundred acres of land in Hemmingford, in "the District of Beauharnois, with a grist and saw mill thereon erected, two "hundred acres of land in the township of Shefford, in the District of Bedford; "six houses in Kingston, in Upper Canada; twenty-five hundred acres of land "in several parts of Upper Canada; household furniture, plate and plated-ware;

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" horses and carriages;" and the Court doth condemn the defendants *par reprise d'instance* in their said names and capacities to abandon and give up the said one-twelfth part of said property, and to restore it to the said plaintiff, and it is further ordered that the said defendants *par reprise d'instance* do make and render to the said plaintiff, within three months from the date of the service upon them of the present judgment, an account of the *fruits et revenus* derived from the said property during the unlawful enjoyment thereof by the said defendant, Julia Woolrich, otherwise called Mrs. William Connolly, and by themselves, the present defendants, *par reprise d'instance*, and the Court doth condemn the defendants, *par reprise d'instance* to pay the costs of this action, *distraits*, in favor of Messrs. Perkins and Stephens, the Attorneys for the said plaintiffs. The Court reserving to the said plaintiff to take such other proceedings as he may legally have and exercise in order to execute and carry out the present judgment.

Judgment for Plaintiff.

Perkins & Stephens, for Plaintiffs.
Cross (Q.C.) & Lunn, for Defendants.
(F.W.T.)

MONTREAL, 10 JUIN 1867.

Coram MONK, J.

Dans l'affaire *S. Larivière*, Failli, et *John Whyte*, Syndic Officiel, et *Anthony McEvila*, Créancier contestant le bordereau de dividende, et *Edmond Angers*, Appelant.

JUGE:—1o. Qu'un créancier chirographaire peut avoir un intérêt à contester la collocation de créanciers hypothécaires, sans mettre en question la validité de l'hypothèque.

2o. Lorsque des hypothèques affectent plusieurs immeubles dont les deniers sont à distribuer en même temps, et d'autres affectent seulement quelques-uns de ces immeubles, les hypothèques générales doivent se diviser proportionnellement sur le produit des immeubles affectés on la balance qui en reste à distribuer, et alors la masse des créanciers, et non pas les créanciers hypothécaires non payés, doit profiter de la balance du prix de vente d'un des immeubles qui se trouve dégagé par suite de cette division de l'hypothèque générale.

3o. Que le défaut de publication d'un bordereau de dividende, suivant l'acte concernant la faillite de 1864, le rend complètement nul; il reste dans l'état de projet, et le syndic peut le mettre de côté.

4o. Que la décision du syndic sur une contestation d'un bordereau de dividende, est finale à moins qu'appel ne soit interjeté dans les trois jours, par une signification à la partie elle même.

La requête en appel exposait les faits suivants:

Un bordereau de dividende avait été préparé par le syndic le 20 juin 1866, par lequel Angers, l'appelant était colloqué pour $449.20cts., montant d'une obligation hypothécaire que lui avait consentie le failli. A McEvila, simple créancier chirographaire, produisit le 10 juillet suivant, une contestation à ce bordereau, alléguant qu'il était irrégulier, informe et nul, et concluant à ce qu'il fut déclaré tel, mis de côté et un autre préparé; il n'avait aucune preuve au dossier établissant que le requérant avait eu avis de cette contestation, et le requérant alléguait qu'il n'avait pu répondre à cette contestation, ni être entendu sur icelle.

Ex parte COTE

Saskatchewan Court of Appeal, Woods, Maguire and Hall, JJ.A.
November 2, 1971.

Evidence — Witnesses — Competence — Compellability — Whether Indian couple living together without formal marriage ceremony husband and wife in law — Whether woman competent and compellable witness for prosecution — Canada Evidence Act, R.S.C. 1952, s. 4.

The status of a wife as neither competent nor compellable to testify against her husband depends on the existence of a relationship which would constitute a valid marriage at common law. The common law of England required that the *verba de praesenti* be pronounced in the presence and with the intervention of an episcopally ordained priest in order to constitute a valid marriage. Accordingly, even where two Indians live together as husband and wife upon the mutual consent of each set of parents, with the intention of living with each other forever and with no intention of going through any other form of marriage, if neither the common law requirement for a valid marriage, nor the provisions of the *Marriage Act*, R.S.S. 1965, c. 338, are satisfied, the woman does not have the status of wife and can be compelled to testify against the man in a prosecution against him.

[*R. v. Millis* (1843), 10 Cl. & Fin. 534, 8 E.R. 844; *Merker v. Merker*, [1962] 3 W.L.R. 1389, folld; *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130; *Doe d. Breakey v. Breakey* (1846), 2 U.C.Q.B. 349; *Blanchett v. Hansell et al.*, [1944] 1 D.L.R. 21, [1943] 3 W.W.R. 275, 52 Man. R. at p. 2; affd [1944] 1 D.L.R. 799, [1] W.W.R. 432, 52 Man. R. 1, distd; *Coffin v. The Queen* (1955), 21 C.R. 333; *Reference re R. v. Coffin*, 114 C.C.C. 1, [1956] S.C.R. 191, 23 C.R. 1, refd to]

APPEAL from a judgment of MacDonald, J., 3 C.C.C. (2d) 383, 19 D.L.R. (3d) 486, [1971] 4 W.W.R. 308, quashing a conviction for contempt of Court and ordering the release of the respondent from custody.

S. Kujawa, Q.C., for the Crown, appellant.
M. C. Shumiatcher, Q.C., for accused, respondent.

The judgment of the Court was delivered by

MAGUIRE, J.A.:—The respondent was convicted by a Judge of the Magistrates' Court for contempt of Court, following her refusal to testify on the trial for a criminal offence of one Wilfred Severight. This refusal was based on the contention that she was the wife of the said Severight, and, therefore, under s. 4 [am. 1953-54, c. 51, s. 749] of the *Canada Evidence Act*, R.S.C. 1952, c. 307 [now R.S.C. 1970, c. E-10], not a competent or compellable witness for the prosecution. She was sentenced to seven days' imprisonment.

An application for a writ of *habeas corpus ad subjiciendum* was launched and came before MacDonald, J., in Chambers.

The learned Chambers Judge, in a written judgment, 3 C.C.C. (2d) 383, 19 D.L.R. (3d) 486, [1971] 4 W.W.R. 308, held that the respondent was the wife of said Severight, and, accordingly, not a competent or compellable witness for the prosecution. He quashed the conviction and directed that Barbara Anne Cote be released from custody.

The Crown has appealed, submitting there was error in law in finding and holding that Barbara Ann Cote was the wife of said Severight.

The relevant facts are:

(1) Both Cote and Severight maintain they are Christians.

(2) There was no religious nor civil marriage ceremony as provided for in the *Marriage Act*, R.S.S. 1965, c. 338.

(3) In 1967, the said two persons decided to live together as husband and wife. Each obtained the consent of her or his respective parents and thereafter lived together as man and wife and have issue, two children.

(4) Cote said she and Severight agreed to live with each other forever and had no intention of going through any other form of marriage.

(5) Evidence was given by an ordained minister of the Anglican Church, who works with Indian people of the reserve in which these two persons reside, that approximately 50% of the couples residing on this reserve and living as man and wife, had not been married in accordance with the provisions of the *Marriage Act*, and that these marriages (if the relationship may be so called), were generally accepted on the reserve.

(6) There was no evidence as to any Indian custom of marriage, and thus marriage, according to the custom, is not a factor. I will not consider the validity of such a marriage.

The decision appealed from, in effect, is one holding that a relationship where the two parties, without impediment, have agreed to enter into a permanent matrimonial relationship to the exclusion of all others, is a valid marriage in this jurisdiction; and thus Cote, being the wife of the accused person, was not a compellable witness on his trial for the offence charged.

The learned Chambers Judge referred to the decision of Rinfret, J., of the Quebec Court of Queen's Bench (Appeal Side), in *Coffin v. The Queen* (1955), 21 C.R. 333 at p. 369, wherein Rinfret, J., quotes from 38 C.J., paras. 89-90, p. 1316. Corpus Juris states:

"To constitute a marriage valid at common law, *that is, in the absence of a statute otherwise specifically providing*, it is not necessary that it should be solemnized in any particular form or with any particular rite or ceremony. All that is required is that there should be an actual and mutual agreement to enter into a matrimonial relation, permanent and exclusive of all others, between parties capable in law of making such a contract, consummated by their cohabitation as man and wife or other mutual assumption openly of marital duties and obligations."

"In accordance with the rule obtaining in respect of marriages generally, the consent of the parties is essential to the constitution of the common law marriage. The absence of such consent renders the relations of the parties meretricious.

"Mutuality. The consent of the parties to the common law marriage must be mutual".

The Court proceeded to hold that there was no evidence that Marion Petrie Coffin and Coffin had agreed to enter into a permanent arrangement to the exclusion of all others, and thus she was not Coffin's wife.

On Coffin's appeal to the Supreme Court of Canada, the contention that this woman was his wife and thus not a compellable witness was abandoned: see *Reference re R. v. Coffin*, 114 C.C.C. 1 at pp. 12 and 52, [1956] S.C.R. 191, 23 C.R. 1.

The judgment of Rinfret, J., is, however, open to the construction that had there been evidence of a permanent arrangement to the exclusion of all others, that he might have held that a valid marriage at common law had been established.

At the risk of being unduly lengthy, I think I should briefly review the several cases given by Corpus Juris in support of the statement quoted, "in Canada informal marriages are valid", and I preface my review of these cases by stating that they fail to establish this broad statement.

Johnston et al. v. Hazen (1914), 43 N.B.R. 154, merely holds that a marriage, common law in form, performed in the State of New York, and valid in that state, was valid in New Brunswick.

Robb v. Robb et al. (1891), 20 O.R. 591, raised the question of the legitimacy of a daughter of one Robb, then deceased. There was evidence that Robb had entered into a marriage in British Columbia with an Indian woman, in accordance with the custom of her tribe. This, however, was not the basis of the decision. Said Robb, following the death of his alleged wife, returned to Ontario and there was evidence of his declarations that he was legally married in British Columbia in the same way as if the ceremony had been performed in Ontario. No

evidence of a ceremony was adduced. There were further declarations of the legitimacy of his daughter and the fact that he had always treated and cared for her as his legitimate daughter. The Court held that his declarations of validity of marriage and legitimacy of his daughter, his cohabitation with his wife, and general recognition of the marriage in British Columbia, was evidence of a valid marriage. This does not decide that an informal marriage is valid.

Lawless v. Chamberlain et al. (1889), 18 O.R. 296. This was an action for a declaration of nullity of marriage on the ground of coercion. It has no reference to an informal or common law marriage.

Doe d. Breakey v. Breakey (1846), 2 U.C.Q.B. 349, raised the question of the validity of a marriage performed by a Presbyterian clergyman in Ireland. It does not support the statement quoted above.

The last decision quoted, namely, *Connolly v. Woolrich and Johnson et al.* (1867), 11 U.C. Jur. 197, is not available to me, but it appears to be a decision of a Court of first instance considering the validity of a marriage between a non-Indian and an Indian woman performed according to Indian custom.

I have found no Canadian decision recognizing as valid a common law marriage as defined in 38 Corpus Juris above. Care must, of course, be used to distinguish such a "common law marriage", if in fact valid, from what is today generally referred to as common law relationship, which latter can never be regarded as a marriage.

Counsel for the respondent endeavoured to restrict his argument to this type of "marriage" between Indians living on a reserve. I point out again that this is not a marriage according to custom, and in my opinion, consideration of the issue cannot be so limited. If a common law marriage is valid in this jurisdiction or in Canada, it must apply to all persons. He further argued that the Courts should approach the problem on the high principle of favouring the finding of valid marriage. I agree with this principle, when properly applied, and if doubt exists, resolving the doubt in favour of validity of marriage. *Robb v. Robb et al., supra*, is an excellent example.

It has been argued that the statement in *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 that [at p. 133] "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others", supports the validity of a common law marriage. That statement by the Judge Ordinary had no relation to a common law marriage, but was

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made in consideration of the jurisdiction of English Courts in respect to a marriage between Mormons contracted in Utah, when polygamy was lawful. This and many other similar decisions are in the field of conflict of laws, and not domestic or local law.

Then the question is, is the "marriage" as constituted here a valid marriage in accordance with the common law of England as it became a part of the law of this jurisdiction?

In *R. v. Millis* (1843), 10 Cl. & Fin. 534, 8 E.R. 844, an equally divided House of Lords, on appeal from the Irish Court, established that the common law of England required that the *verba de praesenti* must be pronounced in the presence and with the intervention of an episcopally ordained priest in order to constitute a valid marriage. This decision or result, as stated in *Merker v. Merker*, [1962] 3 W.L.R. 1389, is binding law, although historically incorrect. I add, to avoid any misunderstanding, that since the passage of the various marriage Acts in England, the specific provisions of the relevant Act must have been followed and taken to establish a valid marriage when celebrated in that country.

I should here probably make further reference to *Doe d. Breakey v. Breakey*, referred to above relative to the quotation from Corpus Juris. The facts here were somewhat similar to those in *R. v. Millis, supra*, in that the marriage ceremony performed in Ireland was before a Presbyterian clergyman, not an episcopally ordained priest. This carefully reasoned judgment, holding the marriage in question to be valid, does not, in any sense, disagree with *R. v. Millis*, in determining what was the common law of England.

Blanchett v. Hansell et al., [1944] 1 D.L.R. 21, [1943] 3 W.W.R. 275, 52 Man. R. at p. 2 [affd [1944] 1 D.L.R. 799, [1944] 1 W.W.R. 432, 52 Man. R. 1], does refer to a common law wife. Reference is made to three texts, including that from Corpus Juris. The question of the requirements for, and validity of, a "common law marriage" was in no sense fully before, nor considered by, the Court. It cannot be taken as an authority on this point.

Counsel further argued that the *Marriage Act*, does not expressly prohibit the solemnization of a marriage in the manner here performed. It is admitted that here there was no marriage in accordance with the provisions of the *Marriage Act*, and the relationship established does not meet the requirements as determined in *R. v. Millis, supra*, to establish a valid marriage. This precludes the necessity of any review of this Act.

The appeal is allowed, and the order of the learned Chambers Judge set aside. The respondent is not the wife of said Severight within the meaning of the word "wife" as found in s. 4 of the *Canada Evidence Act*.

Appeal allowed.

REGINA v. McAUSLANE and 8 others

Ontario Court of Appeal, Gale, C.J.O., Schroeder and Arnup, JJ.A. October 7, 1971.

Indictment — Sufficiency — Allegation of conspiracy to commit indictable offence of distributing obscene written matter — Crown failing to name material alleged to be obscene — Whether sufficient circumstances to give accused reasonable information with respect to act or omission to be proved against him — Whether sufficient identification of transaction — Cr. Code, 1953-54, s. 492(3), s. 150(1)(a), (8).

Appeal — Question of law alone — Trial Judge quashing indictment for failure to reasonably identify transaction referred to — Judgment founded on procedural defects — Whether tantamount to verdict of acquittal — Whether right of appeal — Cr. Code, 1953-54, s. 492(3), s. 584(1)(a).

The accused were charged in an indictment alleging that in the years 1969 and 1970, at the Municipality of Metropolitan Toronto and elsewhere in the Province of Ontario, they conspired together and with one another and with other named persons or agencies and with divers other persons engaged in the distribution or sale of books and with unknown persons, to commit an indictable offence, to wit, the offence of distributing obscene written matter and pictures contrary to the *Criminal Code*, 1953-54 (Can.), c. 51 (now R.S.C. 1970, c. C-34). A motion brought by counsel for the defence to quash the indictment was successful. An appeal was brought by the Crown and it was quashed on the grounds that the trial Judge's decision was not based on a question of law alone which could give rise to an appeal by the Crown pursuant to s. 584(1)(*a*) (now s. 605(1)(*a*)) of the *Criminal Code*. The indictment was quashed by the trial Judge for failure to comply with the provisions of s. 492(3) (now s. 510) which was a procedural defect only, namely, that the Crown failed to name the material alleged to be obscene, which, in the circumstances of the case failed to identify the transaction referred to. The judgment of the trial Judge was accordingly not tantamount to a verdict of acquittal and therefore the Crown had no right of appeal.

[*R. v. Sheets*, [1971] S.C.R. 614, 1 C.C.C. (2d) 508, 16 D.L.R. (3d) 221, 15 C.R.N.S. 232, [1971] 1 W.W.R. 672, distd]

Indictment — Preferring — No preliminary hearing — No recital in consent that consent granted with knowledge that preliminary not held — Whether necessary — Whether notice need be given to accused prior to obtaining consent — Cr. Code, 1953-54, s. 487(4).

I therefore think that the appeal should be allowed, the order of Mr. Justice Macleod set aside, and the motion in the Court below dismissed with costs; the respondents to pay the costs of this appeal. Judgment. McGuire, J.

Appeal allowed with costs.

THE QUEEN v. NAN-E-QUIS-A-KA.

Crown case reserved—N. W. T. Act—Indian marriage—Evidence of—Wife's evidence—Applicability of English law.

The North-West Territories Act, R. S. C. c. 50, s. 11,† provides that, with some limitations, the laws of England, as the same existed on the 15th July, 1870, should be in force in the Territories in so far as the same are applicable to the Territories.

Held, that the laws of England relating to the forms and ceremonies of marriage are not applicable to the Territories—certainly *quoad* the Indian population and probably in any case.

On the trial of a prisoner, an Indian, on a criminal charge, the evidence of two Indian women M. and K. was tendered for the defence. M. stated "that she was the wife of the prisoner; that he had two wives, and that K. was his other wife; that she M., was his first wife; that she and the prisoner got married Indian fashion; that he promised to keep her all her life and she promised to stay with him, and that was the way the Indians got married; that he married the other woman last winter; that he and the other woman lived with each other and that he took her for a wife, that was all about it.

The trial Judge, WETMORE, J., rejected the evidence of M. and admitted that of K.

Held, affirming the decision of WETMORE, J., that the evidence quoted was sufficient evidence of a legally binding marriage between M. and the prisoner for the purpose of excluding the evidence of M. as being neither a competent‡ nor a compellable witness against the prisoner on a criminal charge.

† Quoted in full in the judgment. This provision was consolidated from 49 Vic. (1886) c. 25, s. 3, which is in exactly the same terms, except that the words "subject to the provisions of this Act," and "are not hereafter repealed" are substituted for "subject to the provisions of the next proceeding section" and "may not hereafter be repealed" respectively. Section 2 of 49 Vic. c. 25, above referred to appears as sub-section 1 of section 112 of R. S. C. c. 50 with the insertion of the words "subject to the provisions of this Act." See also Ord. No. 26 of 1884 quoted p. XVII., *supra*, and Prefatory note. Ed.

‡ See now The Canada Evidence Act, 1893, 56 Vic. c. 31, s. 4.

Statement.

[*Court in banc, December 7th, 1889.*

This was a Crown case reserved.

The prisoner, an Indian, was tried before WETMORE, J., on a charge of committing an assault upon one Vivian Maleterre and thereby occasioning actual bodily harm. The prisoner tendered the evidence of two Indian women, Maggie and Keewasens, both of whom he called his wives and both of whom were in fact called and sworn. The evidence of Maggie was confined to the question of the relationship between the prisoner and the two women. On this evidence—quoted in the head-note—the learned judge rejected the evidence of Maggie further than as above mentioned and admitted that of Keewasens. The prisoner was convicted and sentenced. The learned judge reserved for the opinion of the Court in banc the question whether or not he was right in rejecting the evidence of Maggie and respited the execution of the sentence of the Court meanwhile.

The question was argued on the 3rd December, 1889.

W. White appeared for the Crown; the prisoner was not represented.

[*December 7th, 1889.*]

The judgment of the Court (RICHARDSON, MACLEOD, ROULEAU, WETMORE and MCGUIRE, JJ.) was delivered by

WETMORE, J.—The question raised by this case is of considerable importance in regard to the administration of the criminal law as it affects the aboriginal inhabitants of these Territories.

The evidence of the witness Maggie was, as appears by the case, tendered by the prisoner as that of his wife, and she stated on examination that she was his first wife. It appeared therefore that by mutual consent the relation of husband and wife existed between these parties. The woman further stated that she and the prisoner got married Indian fashion; he promised to keep her all her life, and she promised to stay with him, and that that was the way Indians got married. If mere consent coupled with Indian custom is sufficient to establish a legal and binding marriage

quoad the Indians in this Territory, it has been established by the facts I have recited. The first question which arises is: Would such a marriage if contracted before the laws of England were introduced into this Territory be recognized as a legal marriage? I am of opinion that it would. In the case of *Connolly* v. *Woolrich*,[1] Mr. Justice Monk in a very able and exhaustive judgment deals with the subject of a marriage according to Indian custom of a Christian white man with an Indian woman. The marriage in question in that case was contracted in the year 1803 in Athabasca which country for the purposes of the case Mr. Justice Monk assumed to be included within the Territories embraced by the charter of the Hudson's Bay Company. He says at page 214: "The charter did introduce the English law, but did not at the same time make it applicable generally or indiscriminately; it did not abrogate the Indian laws and usages. The Crown has not done so. Their laws of marriage existed and did exist." I adopt this view of the law in so far as the marriage customs and laws of the Indians are concerned as among themselves without, however recognizing as valid any law or custom authorizing polygamy. I will quote some extracts from Mr. Justice Monk's judgment at page 243 where he makes some citations from Bishop on Marriage and other authorities.

Judgment.
Wetmore, J.

"It is plain that among the savage tribes on this continent marriage is merely a natural contract and that neither law, custom nor religion has affixed to it any conditions or limitations or forms other than what nature has itself prescribed." Bishop on Marriage, Vol. 1, s. 223.

"In a state of nature," says Lord Stowell, "the contract of present marriage alone, without form or ceremony superadded, constitutes of itself complete marriage." *Vide Lindo* v. *Belisario*.[2] Bishop Vol. 1, s. 19.

"If practically a man and woman recognize each other as in substance husband and wife, though they attempt to restrict the operation of the law upon their relation, the law

[1] (1867) 11 Lower Can. Jur. 197; 3 U. C. L. J. 14; 1 Lower Can. L. J. 253. [2] 1 Hagg. Cons. Rep. 216, 220; 4 Eng. Ec. 367, 374. [*Vide*] Ruling Cases, Vol. XVII., *tit.* Marriage, pp. 10 *et seq.*

Judgment. Wetmore, J.

should hold them—public policy requires this, the peace of the community requires it, the good order of society demands it—to be married persons, unless some statute has rendered the observance of some form of marriage necessary." Bishop Vol. 1, s. 227.

"Wherever marriage is governed by no statute consent constitutes marriage and that consent is shewn by their living together." Bishop Vol. 1, ss. 229 and 230.

"But whenever the matter is not governed by any doctrine then to be mentioned, no particular form for expressing the consent is necessary, nothing more is needed than that, in language which is mutually understood, or in any mode declaratory of intention, the parties accept of each other as husband and wife." Fraser Dom. Rel. 145. Bishop Vol. 1, s. 225.

The case of *Connolly* v. *Woolrich* [1] was decided in 1867 and Monk, J., held the marriage of the white man with the Indian woman so contracted according to Indian custom to be a good valid and legal marriage, although the husband and wife had removed to Lower Canada and the husband had afterwards there married a white woman according to the rites of the Roman Catholic Church. This case was carried to the Court of Appeal in Lower Canada and the judgment was affirmed. In my opinion that judgment was generally a sound exposition of the law, in so far as it affected the marriage there under consideration, in view of the circumstances under which it was contracted and the citations made in the judgment which I quoted. If a marriage between a white Christian man and an Indian woman, contracted under the circumstances under which the marriage considered in that case was contracted was a valid marriage, then *a fortiori* a marriage contracted in these Territories by Indians by mutual consent and according to Indian custom before the 15th July, 1870, provided that neither of the parties had a husband or wife, as the case might be, living would be a valid marriage. But it is provided by the North-West Territories Act, section 11 thar "subject to the provisions of this Act the laws of England relating to civil and criminal

matters, as the same existed on the 15th day of July in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories *in so far as the same are applicable to the Territories* and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada or by any Ordinance of the Lieutenant-Governor in Council."

Judgment. Wetmore, J.

In the first place are the laws of England respecting the solemnization of marriage applicable to these Territories *quoad* the Indian population? I have great doubts if these laws are applicable to the Territories in any respect. According to these laws marriages can be solemnized only at certain times and in certain places or buildings. These times would be in many cases most inconvenient here and the buildings, if they exist at all, are often so remote from the contracting parties that they could not be reached without the greatest inconvenience. I am satisfied however that these laws are not applicable to the Territories *quoad* the Indians. The Indians are for the most part unchristianized; they yet adhere to their own peculiar marriage custom and usages. It would be monstrous to hold that the law of England respecting the solemnization of marriage is applicable to them. I know of no Act of the Parliament of the United Kingdom or of Canada, except as hereinafter stated, which affects in any way these customs or usages. The Ordinance respecting Marriage, chapter 29 Revised Ordinances (1888) does not in my opinion affect the question. The conclusion I have arrived at is that a marriage between Indians by mutual consent and according to Indian custom since 15th July, 1870, is a valid marriage, providing that neither of the parties had a husband or wife, as the case might be, living at the time; at any rate so as to render either one, as a general rule, incompetent and not compellable to give evidence against the other on trial charged with an indictable offence.

The Indian Act, R. S. C. c. 43, and the amending Act 50-51 Vic. (1887) c. 33 recognize the relation of husband

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and wife among the Indians. Section 9 of the Indian Act refers to "any illegitimate child." Section 12 mentions "Any Indian woman who marries an Indian" and "her husband." Section 13 mentions "the widow of an Indian." Section 20 refers to the property of a deceased Indian in certain cases devolving on his "widow;" and the "widow" of an Indian is repeatedly mentioned in this section. Section 88 referring to an Indian uses the expression "a married man, his wife and minor unmarried children." References of a like description will be found in sections 90 and 93 sub. secs. 2, 3 and 4, and section 9 of the amending Act of 1887. In view of what the intention of Parliament was in passing these acts, whom they were intended to embrace and the general purview, I cannot conceive that these references were intended only to Indians married according to Christian rites. No doubt there are many such Indians, especially in the East, but I think these expressions were intended to apply to all Indians, Pagans and Christians alike. If so they amount to a statutory recognition of these marriages according to Indian custom in the Territories. I think therefore that the evidence of Maggie was properly rejected and that the judgment given on the trial of the prisoner should be affirmed. The reason of the doctrine which holds that, as a general rule, a wife is not competent or compellable to testify for or against her husband or a husband for or against his wife, when either is charged with an indictable offence, is obvious; and I do not desire to be construed as holding more than is necessary for the purpose of this case, and that is, that, such a binding and legal marriage has been established as to make this rule of law as to evidence applicable.

The order of the Court is that the judgment given on the trial be affirmed and that execution thereof be made and that a certicate as provided by R. S. C. c. 174, s. 262,§ be prepared and forwarded to the Clerk of the Court for the Judicial District of Eastern Assiniboia.

Conviction affirmed.

§ See Crim. Code, s. 746, s.-s. 3.

[COMMON PLEAS DIVISION.]

ROBB V. ROBB ET AL.

Husband and wife—Indian marriage—Evidence of lawful marriage—Declarations of deceased husband as to—Legitimacy of children.

In proof of the celebration of a marriage evidence was given that the husband who had gone from this province to British Columbia, had gone through the ceremony of marriage according to the Indian custom with an Indian woman, he paying $20 to her father; and that after the marriage they cohabited and lived together as man and wife, and were recognized by the Indians as such up to the time of the wife's death, prior to 1879, the giving of presents and cohabitation being regarded by the tribe as constituting a marriage. The issue of the union were two children, a daughter and another child who died. About 1879, the husband returned to this province bringing the daughter with him. Evidence was also given of declarations made by the husband on his return that he had been legally married in the same manner as he would have been had the marriage taken place here, and that the daughter was his legitimate child; and that he had brought her up as such:—

Held, that, apart from the Indian marriage, there was evidence from which a legal marriage according to the recognized form amongst Christians could be presumed, and that the daughter was therefore his legitimate child and "legal heir."

Statement.

THIS was an action tried before ROBERTSON, J., at Kingston, at the Autumn Chancery Sittings of 1890.

Kirkpatrick, Q. C., for plaintiff.
Walkem, Q. C., for defendant William Robb.
McDonnell, Q. C., for the infant.
J. B. Walkem, for defendant Bajus.

The facts are stated in the judgment.

February 2, 1891. ROBERTSON, J.:—

The plaintiff is the widow of the late John Robb, of Kingston, and a devisee and executrix under his last will and testament. The defendant Bajus is an executor. The defendant Sarah Jane Robb is an infant of about the age of nineteen years, and claims to be the lawful daughter, and "legal heir" of William George Robb, now deceased,

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Robertson, J.

who was a devisee under the said will, and a son of the testator. The defendant Rogers is the administrator of the estate of the said William George Robb.

The question to be disposed of arises under the will of John Robb, and involves the question of the legitimacy of the infant defendant.

Both real and personal estate is devised and bequeathed under the will to the son William George Robb, subject to the following:

5. "I also will and bequeath, that if my said son Wm. Geo. Robb, should die unmarried, leaving no legal heir before the death of my wife, she shall by this my last will, have full power to dispose of all my real estate wherever it may be in Canada, or elsewhere, and divide the proceeds equally between her relatives and mine, giving to my relatives the half to one or more to those she may think in her opinion most deserving of it. Provided that if my son should marry and have an heir, all my real estate, but what is mentioned in section second of this will, I leave to my son and his heirs, and all moneys on accounts due to me at my death, securing to my wife the amount mentioned in this my last will, for her support during her life."

The will bears date 24th June, 1872. The testator died before 1st July, 1886. The son, William George Robb, also died on or about the 4th November, 1888, intestate, leaving him surviving, the infant defendant, who claims to be his legitimate child, which, however, the plaintiff and the other defendants deny. The facts, as regards the legitimacy or illegitimacy of the infant, are as follows:

Some time previous to the year 1869 the deceased, William George Robb, left Ontario and went to British Columbia, and there, in 1869 or thereabouts, was married to an Indian woman named "Supul-Catle," daughter of "Wah-Kus," the chief of the Comox tribe of Indians, whose wife (the mother of "Supul-Catle") was "Klach-Woshum-Keach," and the only wife "Wah-Kus" had at that time. Robb was married to "Supul-Catle" according to the Indian custom, and paid the father, "Wah-Kus," $20 in half-dollar pieces. There was a feast given by "Wah-Kus" in honour of his daughter's marriage with a white man. The giving of presents to her father and the relations of the woman, and the acceptance thereof by him,

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and the cohabitation by the man and woman is, according to the Indian custom, a marriage. Robb lived for some time in the house of "Wah-Kus" before the Indians would agree to the marriage. Robb and "Supul-Catle," from the time of this marriage, cohabited and lived together as man and wife, and were so regarded until the death of "Supul-Catle," which took place some time previous to 1879. In the meantime two children had been born to Robb by "Supul-Catle," one of whom died, and the survivor is the infant defendant.

In or about the year 1879, Robb returned to Ontario, bringing the infant defendant with him, who he declared, was his legitimate child, and he took her to the house of the plaintiff, who was his, Robb's, stepmother. The child remained there for some time, and was afterwards placed in the care of a Mrs. Rappe, a first cousin of Robb, to whom he paid $9 per month for her board, etc. She remained with Mrs. Rappe eight or nine years, and after that was kept by Robb's brother, the defendant William Robb. Robb always spoke of the child as his legitimate daughter, and said that he had been legally married to her mother; and he also said that he was married in British Columbia in the same way that he would have been married, had the ceremony taken place in Ontario. But confirmatory evidence of this was not given, nor was there any evidence to shew whether it would have been possible at the time for the ceremony to have been performed by a priest or clergyman in that part of the country. The evidence also shewed that polygamy was an acknowledged right amongst the Comox tribe, although the chief of the tribe, "Wah-Kus," had not availed himself of this right.

At the time of this union, that is, of the alleged marriage, between Robb and "Supul-Catle," British Columbia was a British colony, independent of and forming no part of the Dominion of Canada, and had a legislature of its own, and all the functions of self-government to the same extent as other British colonies where responsible government exists. The Comox tribe of Indians, as I

Judgment. understand it, were and are a nomadic band, which fre-
Robertson, J. quents British Columbia; and there is no evidence before me to show whether they are Christian or Pagan; but I think I can fairly assume from what has appeared, that they are the latter.

It is contended that a case has been made out in favour of the infant defendant: that, under the circumstances detailed in the evidence, she must be presumed to be the legitimate child of William George Robb: that there is ample evidence of repute to show that the parents of the infant defendant were legally married: that, apart from the ceremony, which is proven to have taken place, the presumption is in favour of legitimacy; and that Robb's repeated declarations, after his return to Ontario, and after the death of "Supul-Catle," that he had been legally married to her, must inure to the benefit of the infant defendant.

It is also contended that his treatment of her for nine years before his death, and during the whole of the time that he lived, from the date of his return with the child from British Columbia, shows conclusively, at all events, that, so far as he could, he made it manifest that she was his lawfully begotten child.

I confess I am much impressed with these contentions; and, in the absence of anything to the contrary, it appears to me that Robb himself considered that this child had the legal status of, and was his legitimate daughter. It is clear he considered that he was bound, either morally or legally, or by the ties of paternal affection, to provide for and nourish her, to the best of his ability; otherwise, it is not conceivable that he would have brought her while a mere infant, some three or four years of age, from her mother's people, to this province, among a strange people.

But it remains to be seen whether all that is of itself sufficient to constitute her, in the eye of the law, a "legal heir," so as to qualify her to take and hold the property devised to her late father under the will of the testator, under the provision above set forth.

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Robertson, J.

The claims of the infant were very ably sustained before me by Mr. George McDonnell, Q.C.; and he argued very forcibly, that the case was on all fours with the very celebrated case of *Connolly* v. *Woolrich*, 11 L. C. Jurist. 197; and, although that case is not binding, it is entitled to the very greatest respect. Like the most of the cases, where new questions arise, it is very elaborately discussed, and the able and learned Judge (Mr. Justice Monk) who delivered the judgment of the Court, has entered at length into a series of the circumstances of the case, and also of the law by which it was to be determined. The facts were not, I think, quite the same as those in this action, although they are to a certain extent very similar. There it was however *Held, inter alia*: "That a marriage contracted where there are no priests, no magistrates, no civil or religious authority, and no registers, may be proved by oral evidence, and that the admissions of the parties, combined with long cohabitation and repute, will be the best evidence. That such marriage, though not accompanied by any religious or civil ceremony, is valid. * * That an Indian marriage between a Christian and a woman of that nation or tribe is valid, notwithstanding the assumed existence of polygamy and divorce at will, which are no obstacles to the recognition by our courts of a marriage contracted according to the usages and customs of the country. That a Christian marrying a native according to their usages, cannot exercise in Lower Canada the right of divorce or repudiation at will; though:—*Semble*, He might have done so among the Crees. That an Indian marriage according to the usage of the Cree country, followed by cohabitation and repute, and the bringing up of a numerous family, will be recognized as a valid marriage by our courts, and that such a marriage is valid."

After considering with great care all the facts and circumstances detailed in this very interesting case, I find great difficulty in coming to the conclusion, that under the circumstances detailed in the evidence before me, in regard

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to the ceremony performed according to the usages and customs of the Comox tribe of Indians, in regard to the marriage, alleged to have taken place between William George Robb and "Supul-Catle;" that such ceremony constituted a valid and legal marriage.

It will be observed that the state of things existing at the time of the two marriages in the two countries—viz., Athabaska and British Columbia, were entirely different. In Athabaska there were no priests, magistrates or other civil officers, who could perform the ceremony—if a ceremony in presence of such a functionary, was and is necessary. The distance from civilization was so great, that had Connolly, whose moral character seems from the report to have been without reproach, desired, whether from feeling or interested motives to take the Indian maiden Susanna to his home, he had one of three courses to pursue; that was to marry her according to the custom of her tribe; to travel with her between 3,000 or 4,000 miles in canoes, and on foot, to get married by a priest or magistrate; or make her his concubine; whereas the country occupied by the Comox tribe, was a part of British Columbia, at that time under the jurisdiction of a government and parliament of its own; and although the evidence is not clear on the point, I think it sufficiently appears that there were priests and magistrates within a reasonable distance, and that a ceremony recognized by law could have been performed at a place not very far distant from where the ceremony in question did take place; and as there is evidence *primâ facie* sufficient to warrant me in concluding that a marriage according to the law of Christianity did take place, I prefer, basing my judgment on other evidence than that of the Indian usage and custom, without, however, deciding or embarrassing the case by deciding that what did take place according to that usage and custom, does not constitute a valid and legal marriage under the circumstances detailed in the evidence before me.

In order then to a consideration of the cases on the other grounds, I find as follows: 1. That Robb re-

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peatedly declared that he had been married to "Supul-Catle," the mother of his child, the infant defendant. 2. That they had been married in the same way, as they would have been, had the ceremony taken place in Ontario. 3. That the infant defendant was his daughter. 4. That he brought her up as his legitimate daughter. 5. That after the death of "Supul-Catle," and after the death of another child he removed from the country of the Comox Indians, in British Columbia, to Ontario, bringing with him the surviving child, the infant defendant, who he introduced to his own relations, at Kingston, as his legitimate daughter, with whom she remained until after his death in 1888, during all of which time he supported and maintained her, in every respect as one would support and maintain a legitimate child. 6. That during the lifetime of "Supul-Catle," from the time she was taken by Robb to be his wife, she was recognized by all their friends and acquaintances in British Columbia as his wife; and that this was uniform and positive.

I also find that polygamy existed among the Comox tribe, but as I do not base my judgment on the fact of the ceremony which took place between the parties, according to the custom and usages of that tribe, I do not think it necessary to consider in relation thereto the cases relied upon by the plaintiff and the other defendants, viz., *Re Bethell*, 38 Ch. D. 220, and *Hyde* v. *Hyde*, L. R. 1 P. & M. 130 in relation thereto, although I may say that I think upon a close examination of these cases it will be found that they are distinguishable, even on the ground of polygamy, etc.

I think this case can be disposed of on the well-known principle of law and morality, which is, that when a doubt exists as to the legality of a marriage, courts of justice are bound to decide in favour of the alleged marriage. All law, all morality require and sanction this view even of a doubtful case.

In Hubback on Succession,—(a work highly commended by Lord Selborne, C., in *Lyell* v. *Kennedy*, 14 App. Cas.,

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at p. 449),—I find, at p. 243, "Reputation of marriage may be proved by the testimony of living witnesses speaking to the existence of that reputation; by the declarations of the parties or their relatives, if deceased; and by the conduct of the parties themselves, and of third persons towards them, or by other facts or circumstances indicative of belief and understanding on the subject. The declaration of the contracting parties and their relatives are, however, also admissible on the independent ground of being hearsay evidence of a matter of pedigree within the rule which admits such evidence of such matters."

And again, at p. 244, "The declarations of the parties themselves, if deceased, that they were, or were not married, provided they were made *ante litem motam*, are admissible evidence of the fact declared. Mr. Justice Buller says that they are not to be given in evidence directly, but may be assigned by the witness as a reason for his belief, the one way or the other. But though, undoubtedly, they may have formed the basis of a reputation deposed to by the witness, they are also evidence on the footing of simple hearsay declarations in a matter of pedigree, and have been admitted in that character. Per Pratt, C. J.: *Haywood* v. *Firmin*, cited as in Peake's N. P. Cas. 233*n*; *Beard* v. *Travers*, 1 Ves. Sen. 313. Per Lord Kenyon in *Reed* v. *Passer*, 1 Peake N. P. Cas. 232.

In the *Berkeley Peerage Case*, Lord Berkeley's declaration that he was not married before the admitted marriage was received in evidence. But these assertions may be controverted, for it might have been made to preserve reputation, to promote the interests of their children, or in ignorance of the invalidity of the fact of marriage, as to which see *Kennell* v. *Abbott*, 4 Ves. 302; and *Giles* v. *Giles*, 1 Keen 685.

In this case there was no controversion. The plaintiff and other defendants relied wholly upon the assertion that the only marriage which took place was that according to the usage and customs of the Comox tribe. I cannot give way to this contention. From all that appears it is quite

possible that a marriage according to the recognized form among Christians may have taken place between these parties; and the declaration of Robb that he was legally married to the infant's mother, and that he was married in British Columbia in the same manner as they would have been had the ceremony taken place in Ontario, must be received, I think, as evidence of the fact when taken into account with cohabitation, and the birth of children, and the bringing up of these children, and the treatment of their mother as his wife, and her recognition by their friends and acquaintances as such, that such marriage did take place.

Judgment. Robertson, J.

The infant defendant it must be noted is placed at a great disadvantage. In the first place every one of her father's relations, as well as the relations of the testator's widow, who is the stepmother of the infant's father, are interested against her by reason of the provisos in the testator's will, that the lands and personalty in question, in case she is illegitimate, go to them in such manner as the widow may think proper; consequently it is useless to look to them, and they were not called, nor did they offer to bear testimony even on their own behalf, either for or against the infant; in fact they are directly interested in its being declared that she is illegitimate.

Then there is this view of the case, viz.: Supposing for argument's sake that there was no marriage ceremony, other than that according to the usages and custom of the Comox tribe, was that ceremony, quaint as it may seem to a Christian, not a good and valid marriage, under the authority of *Dalrymple* v. *Dalrymple*, 2 Hagg 54, and other cases since then, and *Campbell* v. *Campbell*, 1 Sc. Ap. 182? There is no doubt, Robb, in the presence of witnesses, took "Supul-Catle" to be his wife, and so expressed himself; and there is no doubt "Supul-Catle" consented to be his wife, and they afterwards consummated what then took place by cohabitation and living ever after during the life time of "Supul-Catle," together as man and wife.

Judgment.

Robertson, J.

In *Campbell* v. *Campbell*, above referred to, it was held that a connection commencing in adultery, which however was not pretended in this case, may on ceasing to be adulterous, become matrimonial by consent, and may be evidenced by habit and repute, the parties being at liberty to intermarry; and further that the alteration in the character of the connection from adultery to matrimony need not be indicated by any public act, or by any observable change in the outward demonstration.

And the Lord Chancellor there held, that proof of the legitimacy of the offspring is proof of the legitimacy of the marriage. And according to Lord Mansfield, C. J., in the *Berkeley Peerage Case*, 4 Camp. 401, at p. 416, "If the father is proven to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate."

In Eversley on Domestic Relations a short sketch of the origin and growth of the laws of England, respecting marriage is given, and *inter alia* that learned author says: "The tendency in England, as far as legislation has hitherto progressed, has been to regard marriage less as a religious obligation and more as a civil contract; for matrimony with all its requirements was formerly looked upon as a spiritual act within the province of the courts Christian; but the spirit in which modern legislation affecting it has been conceived, clearly evinces that its temporal and civil motive is to be held paramount and the basis of present and future change:" p. 16. Again, "as time went on the Church clothed their contract more and more with the character of a religious ceremony, and treated it less and less as a civil contract affecting the state in which the parties lived. But the *consensus* of the parties was the vital and essential portion of the contract, and those who had no impediment barring their union, might by agreeing to take each other as man and wife, contract a good and effectual marriage. * * The effect of the *consenus* of the parties being the important

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and essential element in forming this vinculum, and the ceremonies attending the formation but incidents, was that frequent marriages were made in which the consent of the parties was expressed, but not by any outward manifestation of religious rites :" p. 17.

Lord Howell, in his celebrated judgment in *Dalrymple* v. *Dalrymple*, before referred to, in discussing, what are termed "irregular marriages," and which are known by the name of *Sponsalia per verba de præsenti*, and *sponsalia per verba de futuro cum copula*, in the first of which such words were used, as "I take you to be my wife." "I marry you." "You and I are man and wife." In the second, "I will marry you," or, "I will take you to be my wife"— said: "Different rules relative to their respective effects in point of legal consequence, applied to these three cases—of regular marriages—irregular marriages—and of mere promises or engagements. In the regular marriage everything was presumed to be complete and consummated both in substance and in ceremony. In the irregular marriage everything was presumed to be complete and consummated in substance but not in ceremony; and the ceremony was enjoined to be undergone as matter of order.

In the *promise* or *sponsalia de futuro*, nothing was presumed to be complete or consummate, either in substance or ceremony. Mutual consent would release the parties from their engagement; and one party, without the consent of the other, might contract a valid marriage, regularly or irregularly with another person; but if the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection." p. 65.

This was the state of the canon law before the Council of Trent, which compelled that council to introduce the necessity of marriages among Roman Catholics being cele-

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Robertson, J.

brated in the presence of the parish priest, after due proclamation of the banns, or the obtaining of an episcopal license. But the marriages not celebrated in the presence of the church, etc., were only deemed irregular, were discountenanced, and were visited with punishments, and ecclesiastical censure, etc. Morally speaking, however, they were good, as far as they went, in the eyes both of church and state, and the issue were legitimate—In a word, as said by Willes, J., in *Beamish* v. *Beamish*, 9 H. L. Cas., at p. 306: "The general law of Western Europe, before the Council of Trent, seems clear. The fact of marriage, viz., the mutual consent of competent persons to take one another for man and wife during their joint lives, was alone considered necessary to constitute true and lawful matrimony." And this is the law of Scotland at the present time.

If I understand the case *Re Bethell*, 38 Ch. D. 220, correctly, it appears to me that the marriage there would have been held good and valid, had it not been for the fact that polygamy existed in the Baralong tribe into which Bethell married; and it was on this ground, that he, as a Baralong, had the right to take more than one woman to be his wife, that his marriage with "Teepoo," according to the usage and custom of that tribe, was declared invalid according to the law of England, because it was not formed on the same basis as marriages throughout Christendom, and was not, in its essence, "the voluntary union for life of one man and one woman to the exclusion of all others."

Then again, in that country polygamy was legal. In British Columbia, at the time of the marriage between Robb and "Supul-Catle," it was illegal; but as before stated, I do not base my judgment on that ceremony at all, for the reasons already given, and had *Re Bethell* been free from the evil of polygamy, I think it would have been declared that the union between Bethell and Teepoo would have been a valid marriage, as it was formed—in so far as the mutual consent of the parties was concerned, followed by cohabitation and the birth of a child—on the same basis as marriages throughout Christendom are formed.

On the whole, I am of opinion that it must be declared that the infant defendant Sarah Jane Robb is the lawful daughter and the only "legal heir" of the said William George Robb, and as such is entitled to take under the will of her grandfather, John Robb, set out in the statement of claim; and I declare accordingly. The costs of all parties to be paid out of the estate, as between solicitor and client. Judgment. Robertson, J.

[QUEEN'S BENCH DIVISION.]

DANCEY V. GRAND TRUNK RAILWAY COMPANY ET AL.

Railways and railway companies—Contract—Passenger ticket—"Viâ direct line"—Authority of ticket agent—Meaningless condition.

When a railway company intrust an agent with the sale of their tickets, they clothe him with the apparent authority to explain to the purchasers of such tickets the purport or effect of any condition or provision thereon, which would be unintelligible without such explanation, and also their rights under such tickets, having regard to such provision or condition.

And where such an agent sold a ticket "viâ direct line" between two places, and there were three different routes between the places operated by the company, none of them being direct, and one of which was shorter than the others, and the agent in selling the ticket gave the purchaser to understand that he might travel under the ticket by any one of the three lines, and in doing so by one of the longer routes, he was forcibly ejected from the train for declining to pay an extra fare:—

Held, that the provision "viâ direct line" was unintelligible without explanation and that the company were bound by the representation of their agent in relation thereto:—

Held, also, that the words "viâ direct line" were inapplicable to the contract and must be struck out in construing it.

THIS was an action brought against the railway company and a conductor and brakesmen, to recover damages for the unlawful and forcible ejection of the plaintiff from a train of the defendants the railway company, and was tried at the Autumn Sittings, 1890, of this Court at Goderich, before MACMAHON, J., and a jury, who found a verdict in favour of the plaintiff for $1,000. Statement.

It appeared that the plaintiff purchased from an agent of the defendant company authorized by them to sell pas-

RE SHERAN.

Marriage—Marriage per verba de presenti—Condition of Territories in 1878—Presumption of marriage—Evidence.

In the year 1878 a white man and an Indian woman, domiciled in the North-West Territories, entered into a contract of marriage *per verba de presenti* in the Territories without a ceremony of any kind, and cohabited as man and wife until the former's decease.

Held, in view of the legal provisions for the organization of the Territories and the actual condition, with reference to the facilities for the solemnization of marriage, at least in the portions of the Territories in the vicinity of the contracting parties' place of residence, that there was not a legally valid marriage.

In bigamy cases, strict proof of marriage is required; a different rule prevails in legitimacy cases, where strict proof of the marriage of the parents is not required, but may be presumed from cohabitation and repute; but where the evidence shows the actual terms upon which the parents were cohabiting and the facts relied upon as constituting the marriage, no such presumption can arise.

[SCOTT, J., *October 28th, 1899.*

Statement.

One Nicholas Sheran was domiciled in the North-West Territories from 1874 to 1882 when he died. In 1878 he began to cohabit with one Mary Brown, a full blooded Indian of the Piegan tribe, and it was verbally agreed between them that they should live together as husband and wife as long as both lived, he agreeing "never to get another woman" while she lived, and she agreeing "to have no other husband during his life." This agreement was carried out and the two lived together as husband and wife until his death. No marriage ceremony was ever performed. Of this union two children were born, Charles and William Sheran, who, after the death of their father, intestate, claimed to be entitled as next of kin of the deceased, to share in his estate.

This was an application by Joseph McFarlane, the administrator *de bonis non* of Nicholas Sheran, to have the next of kin of the deceased ascertained and the rights of all claimants decided.

The facts are more fully set forth in the judgment.

Argument

J. R. Costigan, Q.C., for the children of the deceased by Mary Brown. A binding marriage according to the law of England is simply a voluntary union of one man and one woman for life, to the exclusion of all others: *Hyde* v. *Hyde and Woodmansee*,[1] *In re Bethell, Bethell* v. *Hilyard*,[2] Bishop on Marriage, vol. I., pp. 225-30, *Regina* v. *Nanequisaka*.[3] There is a presumption in favour of a *de facto* marriage: Taylor on Evidence, sec. 172. *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie or Sambonade*,[4] *Lyle* v. *Ellwood*,[5] *Morris* v. *Davies*.[6] The sister of the deceased must show that the alleged marriage took place before the passing of the Marriage Ordinance of 1878. The facts support a valid marriage: *Connoly* v. *Woolrych*,[7] and article in 8 Can. Law Times, p. 132.

C. E. D. Wood, for Ellen Sheran, sister of the deceased. The presumption of marriage does not arise unless the party upholding it shows that the parties cohabited as man and wife before passing of Ordinance of 1878. He cited *Robb* v. *Robb*,[8] *Smith* v. *Young*,[9] Ency. Law of Eng., vol. 5, p. 436, *Warrenden* v. *Warrenden*.[10]

Costigan, Q.C., in reply.

[*October 26th, 1899.*]

SCOTT, J.—On the 14th of May, 1899, Joseph McFarland, administrator *de bonis non* of the deceased, obtained an originating summons for the following purposes:—

1. That the claimants Ellen Sheran and Charles Sheran appear and state the nature and particulars of their respective claims to the said estate, and either maintain or relinquish the same.

[1]35 L. J. Mat. 57; L. R. 1 P. 130; 12 Jur. N. S. 414; 14 L. T. 188; 14 W. R. 517. [2]57 L. J. Ch. 487; 38 Ch. D. 220; 58 L. T. 674; 36 W. R. 503. [3]1 Ter. L. R. 211; 1 N. W. T. R. pt. 2. 21. [4]50 L. J. P. C. 28; 6 Ap. Ca. 364; 44 L. T. 895. [5]44 L. J. Ch. 164; L. R. 19 Eq. 98; 23 W. R. 157. [6]5 Cl. & F. 163; 1 Jur. 911. [7]11 Lower Can. Jur. 197; 3 Can. L. J. 14; 1 Lower Can. L. J. 253; 1 Rev. Leg. 253. [8]20 O. R. 591. [9]34 Lower Can. Jur. 381. [10]2 Cl. & F. 531; 9 Bligh. 89.

2. That it may be ascertained and determined which one or more of said claimants is or are the next of kin of said deceased. Judgment. Scott, J.

3. That the accounts of said administrator may be passed and allowed, and that he may be discharged from his office.

4. That the moneys and other undistributed portion of the estate be paid into Court, or otherwise disposed of as the Judge may direct.

5. That in the meantime no action be brought against said administrator.

6. That for the purposes aforesaid it may be ordered that such issues be directed, accounts and proceedings had and taken, such directions given, and such further or other order made, as the nature of the case may require, or as to the said Judge may seem meet.

On the hearing of the application before me, the applicant and the claimant Ellen Sheran, were represented by counsel and Mr. Costigan, Q.C., who, by order of 28th June, 1897, was appointed guardian *ad litem* to the claimants Charles Sheran and William Sheran, who are infants under the age of 21 years, appeared for them. He also appeared for Mary Brown, the mother of the infant children, who claimed to be the widow of the deceased.

The deceased died in 1882, leaving him surviving one brother and two sisters of whom the claimant Ellen Sheran is one. The brother and the other sister have since died without issue, and Ellen Sheran now claims to be next of kin of the said deceased, and as such entitled to his estate.

The claimants Charles and William Sheran are the issue of the deceased by Mary Brown. They claim that they are his lawful issue, and that they are therefore entitled to his estate. It does not appear that Mary Brown makes any claim to any portion of the estate. The only question argued before me, and apparently the only one to be determined, is whether the deceased was lawfully married to Mary Brown. The only evidence adduced before me which

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bears upon the question of the marriage was the depositions of the applicant and of Mary Brown, the Reverend Louis Lebret and Robert R. Wilson which, by consent of the parties, had been previously taken under oath by the Clerk of the Court.

It was admitted upon the hearing of the application that the domicil of the deceased from 1874 down to the time of his death was in the North-West Territories, and that the South Piegan Indians are a branch of the Blackfeet nation, and that their customs, so far as material to the question involved herein, are the same as those of the Blood tribe.

It was agreed by counsel and by the guardian of the infant claimants that the question of the validity of the marriage should, in so far as the right of the issue of the marriage to inherit the estate is concerned, be determined upon the above evidence and admissions.

The evidence of Mary Brown, so far as it is material to the question involved, is as follows: "I first met Nicholas Sheran at the old town of Macleod. I was then living with my sister, who was the wife of D. R. Brown. Nicholas Sheran was then working at the mine at Coal Banks near Lethbridge. When he was courting me he promised that, if I would go to live with him, we should live together while we both lived; that he would never get another woman while I lived. I never had any other husband than Nicholas Sheran. When we went to live together it was agreed between us, that I was to have no other husband during his life, and that he was to have no other wife during my life. I lived with him in this way during four years until his death by drowning. When the eldest child of this union was christened Sheran told me that we would get married in the white man's way. Sheran belonged to the Roman Catholic Church. The eldest child was baptized in the house we were then living in at the mines. The child was first baptized by a Protestant minister who was travelling towards the Cypress Hills and passed our residence. My husband asked him to baptize the child. There was no Catholic

priest ever came in our house while we lived together. I never saw a Catholic priest during the four years we lived together. The second son was born three months after Nicholas Sheran's death. Nicholas Sheran was the father of these two boys. I had no other children by him. He was my first husband. I had no connection with any other man during the four years he and I lived together. I am a full blooded Indian of the South Piegan tribe."

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Joseph McFarland, the applicant, says as follows:—

"I know the Indian woman who lived with Nicholas Sheran at the time and previous to his death. She was a Piegan woman. It was, I think, in the winter of 1878-9 that she went to live with him. He had never been married before this. I do not personally know how she went to live with him. I only know that she did do so. She lived with him continually from the time she first went to live with him until the time of his death. It was generally known that during all this time they were cohabiting as man and wife. One child was born to them before Nicholas Sheran's death and one about six months after his death. During the time she lived with Nicholas Sheran the woman above referred to was generally addressed as "Mary," I never knew her called "Mrs. Sheran." Nicholas Sheran told me on several occasions that he intended to marry her whenever a clergyman came along. His sister, my wife, used to remonstrate with him for living with this woman in the way he was doing. He was a Roman Catholic. There was no resident Catholic clergyman in the neighborhood during the time they lived together. Catholics had no means of marrying at that time unless a priest happened to come along. When I was married I met a travelling priest at Macleod and drove him down to the coal banks for the purpose of marrying my wife to me. I was married on the 4th July, 1878. It was the following winter that we knew that the woman and Nicholas were living together at Coal Bank. She was not with him in July, 1878. I went down to the coal banks in the fall and she was there then. This would be about October, 1878.

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The first child was born, I think, in 1880. The nearest Catholic mission at that time would be the Blackfoot reservation some 90 or 100 miles from here (Macleod).

Reverend Father Scollen lived in Macleod in the fall of 1882. Father Lacombe at that time lived, I think, at Edmonton. The police headquarters were then at Macleod. Colonel Macleod was the Police Commissioner in 1878. His headquarters were at the old town. He was a Stipendiary Magistrate at that time, the coal banks were 28 or 30 miles from Macleod. Colonel Macleod used at that time to go to the coal banks. Nicholas Sheran was frequently in Macleod from the coal banks between 1878 and 1882. During this time there was a Methodist clergyman residing at Macleod. My wife urged upon her brother that he should not live with the woman without being properly married to her. He could, by making an effort, have obtained the services of a clergyman of the Roman Catholic church to marry him, but he was indifferent. He could, during that time, have obtained a Protestant clergyman in Macleod to marry him. At the time above referred to, Rev. Father Scollen resided at Macleod, I do not think he was officiating as a clergyman. I do not know whether or not he was under suspension

The evidence of Rev. Father Lebret relates solely to the rules of the Roman Catholic church with respect to marriages of Catholics by other than Roman Catholic clergymen. He states that the rule of the church is that no Catholic shall present himself for marriage before a clergyman of any other denomination; that if a Catholic is married by a clergyman of any other denomination he grievously infringes the rules of his church; that he would be infringing this rule if no Catholic priest were on hand to perform the ceremony and that there are no circumstances under which a Catholic man and woman would be justified in going before a Protestant clergyman for the purpose of marriage.

The evidence of Robert R. Wilson relates solely to the manners and customs of the Blood Indians with respect to

marriage. This evidence is not material, because there is no evidence tending to show that there had been a marriage according to Indian rites and customs, and it was conceded by Mr. Costigan upon the argument that such a marriage had not been shown.

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It was, however, contended by Mr. Costigan that the evidence shows that there was a voluntary union between deceased and Mary Brown for life, to the exclusion of all others, and that according to the law of England such a union constituted a binding marriage. Upon referring to the cases cited by Mr. Costigan in support of his contention, of *Hyde* v. *Hyde and Woodmansee*,[1] *In re Bethell, Bethell* v. *Hilyard*,[2] and *Regina* v. *Nanequisaka*,[3] I find that they merely hold that such a union is essential to a valid marriage. In none of them was it held or necessary to hold that such a union was all that was necessary to render a marriage valid.

Regina v. *Millis*,[11] appears to be the leading case upon the point. It was there held that at common law, a contract of marriage *per verba de presenti*, though a contract indissoluble between the parties themselves, did not constitute a complete marriage unless made in the presence and with the intervention of a minister in holy orders. Lord Chief Justice Tindal in his judgment in that case says: "There is found no authority to contravene the general position that at all times, by the common law of England, it was essential to the constitution of a full and complete marriage that there must be some religious ceremony; that both modes of obligation should exist together, the civil and the religious: that besides the civil contract, that is, the contract *per verba de presenti* which has always remained the same, there has at all time been a religious ceremony also which has not always remained the same but has varied from time to time." This case was carried to the House of Lords. The members of that tribunal were equally divided in opinion, the result being that the judgment of Lord

[11] 10 Cl. & F. 534; 8 Jur. 717.

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Chief Justice Tindal, from which I have quoted, was upheld. It was afterwards followed by the House of Lords in *Beamish* v. *Beamish*.[12] *Regina* v. *Millis*[11] was a bigamy case in which class of cases, strict proof of marriage is required. A different rule prevails in legitimacy cases, where strict proof of the marriage of the parents is not required, but may be presumed from co-habitation and repute. But in this case where the evidence shows the actual terms upon which the parents were co-habiting, and the facts which are relied upon by the infant claimants as constituting a marriage *de facto*, no such presumption can arise. It can only arise where such evidence is wanting.

There are, however, exceptions to the rule laid down in *Regina* v. *Millis*.[11]

In Dicey's Conflict of Laws, it is stated at p. 625, that a marriage celebrated in the mode or according to the rules and ceremony held requisite by the law of the country where the marriage takes place, is valid so far as formal requisites are concerned; also at pp. 627-34 that a marriage celebrated in accordance with the requirement of the English common law where the use of local form is impossible, such impossibility arising from the country being one where no local form of marriage, recognized by civilized states exists, or where a marriage takes place in a land occupied by savages; also at p. 754, that a marriage made in a strictly barbarous country between British subjects or between a British subject and a citizen of a civilized country and, as it would seem, even between a British subject and a native of such uncivilized country, will be held valid as regards form, if made in accordance with the requirements of the common law of England; and that it is extremely probable that with regard to such a marriage the common law might now be interpreted as allowing the celebration of a marriage *per verba de presenti* without the presence of a minister in orders; and that a local form also,

[12] 9 H. L. Ca. 274; 11 I. C. L. R. 511; 8 Jur. N. S. 770; 5 L. T. 97.

if such there be, would seem to be sufficient at any rate where one of the parties is a native.

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From this it would appear that it is only in cases where the marriage *per verba de presenti* takes place in a strictly barbarous country, where a marriage according to the English common law, or perhaps according to local rules and customs cannot be effected, that it would be sufficient.

Now, in my opinion, the Territories cannot be considered a strictly barbarous country in 1878, when the alleged marriage took place. It was then far removed from barbarism. In 1873, an Act was passed respecting the Administration of Justice and the establishment of a police force in the Territories (35 Vic. c. 25), under which, shortly after its passing, stipendiary magistrates were appointed and a mounted police force was established, the commissioner and superintendents of which were *ex officio* Justices of the Peace. The evidence shows that in 1878 the headquarters of the police force and residence of the commissioner were at Macleod, which was distant only 28 or 30 miles from the residence of the deceased.

Again, under the North-West Territories Act of 1875, a form of government was established consisting of a Lieutenant-Governor and Council with certain legislative powers, and provision was made for the administration of civil and criminal justice. There is a further fact which I may now mention, viz., that on the 2nd of August, 1878, Ordinance No. 9 of 1878, cited as "an Ordinance respecting marriages," was passed by the Lieutenant-Governor-in-Council. Under its provisions, ministers and clergymen of every religious denomination, duly ordained and appointed and resident in the Territories as also Justices of the Peace were authorized to solemnize marriages. The latter were authorized to act only in cases in which the license of the Lieutenant-Governor was obtained and provisions were made for the issue of such licenses and the appointment of issuers thereof. Ministers and clergymen were authorized to act, not only in cases where such license had been

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authorized, but also in cases where banns had been published in the manner prescribed by the Ordinance.

The Ordinance also authorized the latter to celebrate marriages without the production of a license or publication of banns in cases where the parties were remote from any issuer of licenses and where there was found to be any reasonable inconvenience or objection to the publication of banns. The evidence does not disclose whether the Ordinance was in force at the time of the alleged marriage of deceased with Mary Brown, the only evidence upon the point being that it took place sometime between the 4th of July, 1878, and about the month of October of the same year.

This much may be said, however, that the infant defendants have not shown either that the Ordinance was not in force at the time or that the circumstances were such that the marriage could not have reasonably been performed under its provisions.

The circumstances of this case differ materially from those in *Conolly* v. *Woolwich*.[7] There Conolly, whose domicile was in Lower Canada, came to the Territories as a servant of the North-West Company. When here he took as his wife an Indian girl. The marriage took place according to the local Indian rites and customs, the only form of marriage, except a marriage *per verba de presenti*, which was possible at the time, as there were then no priests or clergymen in the Territories. It was held to be a valid marriage. That case, therefore, supports the principle which I have quoted from Mr. Dicey's work.

In *Robb* v. *Robb*,[8] the husband who had gone from Ontario to British Columbia was there married according to Indian rites and customs to an Indian woman. They cohabited as man and wife for many years and were recognized by the Indians as such. He afterwards retuned to Ontario taking his daughter with him. It was shown in evidence that the husband had declared that he was legally

married in the same manner as he would have been had the marriage taken place in Ontario, and that his daughter was his legitimate child. It was held that apart from the legal marriage, there was evidence from which a marriage according to the recognized form among Christians could be presumed.

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The onus is on the infant claimants to show that deceased was lawfully married to their mother, Mary Brown. The evidence shows that the only marriage between them was a marriage *per verba de presenti*. I now hold that in the state of the Territories at the time it took place, such a marriage did not constitute a valid marriage and, therefore, that the infant defendants are not entitled to share in the estate of the deceased nor is Mary Brown entitled to any interest therein.

Marcella Macfarland and Raphael Sheran sister and brother of deceased are shown to have died after his decease. It is shown that they died without issue but it is not shown whether or not they died intestate.

Their shares in the estate became vested before their decease and may have been disposed of by will. It is only in the absence of any such disposition that Ellen Sheran should be declared to be solely entitled to the estate. I therefore cannot upon the evidence before me make any declaration as to the interest to which she is entitled. I see no reason, however, why the administrator should not settle the question of her interest if he is satisfied as to the intestacy of the deceased brother and sister.

Nor do I see any reason why he should not proceed to fully administer the estate, now that the claim of the infant claimants is disposed of. That appears to have been the only difficulty in his way. In this view it would be premature to now make an order to pass and allow his accounts or to discharge him from office.

Both he and the claimant, Ellen Sheran, will have their costs out of the estate. Under Mr. Justice Rouleau's

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order of 7th October, 1897, the guardian of the infant claimants will also have his costs out of the estate.

In the event of the assets being insufficient to pay these costs the administrator *de bonis non* will be entitled to payment of his costs in full before payment of any costs to the others.

REPORTER:

Chas. A. Stuart, Advocate, Calgary.

SHARPLES v. POWELL.

Practice—Place of entering suit—District of Deputy Clerk.

In a small debt action where the cause of action arises within the district of a Deputy Clerk, and the defendant resides within the said district, the writ must be issued out of the office of the Deputy Clerk of the district, and a writ issued by the Clerk of the District from his own office will be set aside as irregular.

[ROULEAU, J., *December 15th, 1899.*

In this action the defendant resided within the district of the deputy clerk of the Court at Edmonton, and the cause of action against him arose within the said district. The plaintiff resided within the district of the clerk of the Court at Calgary. The writ was issued from the office of the clerk at Calgary. The defendant applied by summons to set aside the writ of summons and statement of claim as irregular, on the ground (amongst others) that the writ should have been issued from the office of the deputy clerk of the Court at Edmonton.

James Muir, Q.C., for the defendant.

R. B. Bennett, for the plaintiff.

Province of British Columbia.

SUPREME COURT.

McColl, J.] STEELE *v.* PIONEER TRADING CORPORATION. [June 16.

Practice—Judgment debtor—Corporation—Examination of officer of—Nulla bona.

Application to examine A. J. Mangold, as an officer of the defendant company under Rule 486. The defendant company was formed in England for the purpose of exploring for and acquiring mining properties in British North America, and Mangold held an unlimited power of attorney from the company to act for it within any part of such territory. An execution against defendant's goods had been issued, and no return had been made.

Held, that a judgment debtor is examinable under Rule 486, notwithstanding that a fi. fa. in the sheriff's hands has not yet been returned nulla bona. Rule 486 is in aid of execution and differs from the Ontario enactment under consideration in *Ontario Bank* v. *Trowern*, 26 C.L.J. 190, which is in aid of attachment of debts. Order for examination made.

J. H. Senkler, for plaintiff. *J. A. Russell*, contra.

Bole, Local Judge.] SMITH *v.* YOUNG. [July 20.

Indian marriage—Validity of.

The plaintiff sued as mother and next to kin of J. W. S., deceased, for the purpose of being declared entitled to receive money in court to the credit of her son's estate, all his debts having been discharged by the defendant and his predecessor in office as official administrator of Nanaimo District. The plaintiff, an Indian of the Cowichan tribe, married John Schmidt, father of J. W. S., in 1868, according to the custom of the Cowichan tribe; they lived together far many years, and had one child, the said J. W. S., who was born in 1870. The father died in 1890, and by his will left all his property to his said son, who died unmarried and intestate in 1892. The estate was administered by the official administrator, and there is now a sum of money standing to the credit thereof. At the time of the Indian marriage both parties were at all events nominally Christians, and had abundance of facilities for being married in accordance with the laws of the then colony of British Columbia.

Held, that the Indian marriage was invalid. Judgment for defendant; costs of all parties to be paid out of the estate.

Sastry Velaider Aronegary v. *Sembecutty Vaigalie*, 6 App. Cas. 364 distinguished.

R. L. Reid, for plaintiff. *R. McBride*, for defendant.

Walkem, J.] GILL *v.* ELLIS. [August 8.

Practice—Vacation—Trial pending—Rule 736 (d).

The trial of this action was set down for 29th July, in Victoria, and on that day there being no judge available to take the trial, it was by consent adjourned into vacation by WALKEM, J. The case came up for hearing on 8th August, and counsel for defendant objected to the trial proceeding during the vacation. August and September are the vacation months in B.C.

Held, that the trial was not "*pending*" within the meaning of the vacation Rule 736 (d), and it would have to be adjourned until after vacation.

L. P. Duff, for plaintiff. *A. P. Luxton*, for defendant.

McPHILLIPS, J.A.: I would dismiss the appeal for the reasons given by the Chief Justice.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Aikman & Shaw.*
Solicitor for respondents: *C. J. Prior.*

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REX v. WILLIAMS.

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1921
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REX v. WILLIAMS

Criminal law—Trial for murder—Evidence—Witness—Wife of accused—Married by Indian custom—Admissibility.

On a trial for murder a woman was called as a witness by the Crown who had married the accused according to Indian custom about 20 years previously and had had several children by him. The accused had been married by Indian custom to two other women who were still living but they had redeemed themselves, *i.e.*, purchased their release from marriage by Indian custom, before his marriage to the witness. The witness gave evidence to the effect that a short time before this trial she had redeemed herself according to Indian custom and left her husband.

Held, that her evidence was not admissible.

TRIAL of the prisoner at the Vancouver Fall Assizes, on the 20th of October, 1921, by GREGORY, J. The prisoner was indicted and placed on trial, charged with the murder of one Ernest Jack, who was alleged to have been murdered by the accused on the 2nd of September, 1914. The skull and some bones, alleged to be those of the deceased, were recovered by the police in 1921, and following an investigation the accused was committed for trial. On the second trial (the jury having disagreed on the first) the Crown proceeded to call as a witness, one Jennie Williams, and upon counsel for the defence objecting on the ground that Jennie Williams was the wife of the accused, a separate issue was ordered, to determine the question as to whether or not she was the wife of the accused.

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The evidence shewed that Jennie Williams and the accused were married according to Indian custom, about 20 years previously, at Kingcome Inlet, British Columbia. She bore him several children, one being now married, with children also, the children and grand-children all being recognized at Alert Bay as the Williams family. At the time of the marriage to Jennie Williams, the accused had previously married two other Indian women, according to Indian custom (who were still living), but, according to the evidence, had both redeemed themselves at the time he married Jennie Williams. In the spring of the year 1921, Jennie Williams went to see Mr. Halliday, the Indian agent, to complain of a beating given her by the accused and asked Mr. Halliday if she could leave the accused. Mr. Halliday advised her that she could. She then left the accused and her evidence is to the effect that she had first redeemed herself according to Indian custom. Mr. Halliday gave evidence to the effect that the Indians in his district, being the Alert Bay district, were mostly married according to Indian custom and very few according to Provincial laws. According to Indian custom an Indian woman was treated as a chattel and upon payment of a certain amount of money or goods or chattels by the bridegroom, was handed over by her father or guardian, or whoever had control over her, to the bridegroom. The Indian woman then became his wife, but she could, nevertheless, redeem herself. She redeemed herself by paying back to the husband a stipulated amount, usually two or three times the amount he gave for her, and upon this being paid she was free to leave him and the marriage, according to this Indian custom, was then dissolved. Mr. Halliday further gave evidence to the effect that the department of Indian affairs was obliged to recognize these marriages and did recognize them, but that five years ago instructions were sent out that the Indians must in future be married according to the marriage laws of the Province, and no marriage by Indian custom entered into since that time has been recognized by the department. Further evidence was given by Mrs. Cook, an Indian, the interpreter, who was born and raised at Alert Bay, in which she corroborated Mr. Halliday's evidence as to the

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Indian custom and Indian marriages according to them. She also said the accused's marriage to Jennie Williams took place about 20 years ago and they were recognized by the Indians as man and wife, the said Jennie Williams still going by the name of Jennie Williams.

Maitland (*Remnant*, with him), for accused: The evidence cannot be admitted: see *Regina* v. *Nan-E-Quis-A-Ka* (1889), 1 N.W.T., No. 2, p. 21; 1 Terr. L.R. 211. With the exception of the previous wives it is identical with this case. According to the Indian custom in practice here, the marriage is dissolved by redemption. She was, therefore, the wife of the accused, according to the Indian custom in this Province, until she redeemed herself. The fact that she is not his wife now does not alter the position as to their relationship at the time.

Argument

Tobin, contra: The *Nan-E-Quis-A-Ka* case does not support the defence, as it holds that if previous wives are living there is no protection as against the present wife. There is a marriage law in British Columbia and was at the time of this marriage, therefore they are not husband and wife, the ceremony being covered by a Provincial statute: see *Bethell* v. *Hillyard* (1888), 38 Ch. D. 220. This case is governed by the *Baralong* case. In any event she is now in the position of a divorced wife.

GREGORY, J.: I do not think the evidence is admissible, but I think the Crown should ask for a case stated. The matter is one of great importance and should be authoritatively settled. I cannot, in the middle of an assize, and in the middle of the case, give the question the consideration which it should have.

Judgment

BRITISH COLUMBIA COURT OF APPEAL

Farris C.J.B.C., Taggart, Seaton, McIntyre and Carrothers JJ.A.

Re Birth Registration No. 67-09-022272

Infants — Whether non-Indians may adopt Indian child — The Adoption Act, R.S.B.C. 1960, c.4 — The Indian Act, R.S.C. 1970, c. I-6 — The Canadian Bill of Rights, R.S.C. 1970, App. III.

Appeal from the judgment of Tyrwhitt-Drake L.J.S.C., [1974] 1 W.W.R. 19, dismissing an application by a non-Indian married couple to adopt an Indian child on the ground that The Adoption Act was not applicable to Indians within the Province.

Held, the appeal should be allowed and an adoption order made. The Adoption Act was an Act of general application and applied to Indians except to the extent that it was inconsistent with the Indian Act; nor was The Adoption Act subject to the Canadian Bill of Rights.

[Note up with 13 C.E.D. (West. 2nd) *Infants*, s. 43.]

B. R. D. Smith and *D. Campbell*, for appellants.

D. R. Wilson, for respondents.

G. Carrothers, for Attorney General of Canada.

1st March 1974. The judgment of the Court was delivered by

FARRIS C.J.B.C.:—This is an appeal from a judgment of Tyrwhitt-Drake L.J.S.C. [[1974] 1 W.W.R. 19] in which he denied a petition by non-Indian parents to adopt an Indian child on the ground that The Adoption Act, R.S.B.C. 1960, c. 4, is not applicable to and in respect of Indians within the province. It is my opinion that The Adoption Act does apply to Indians subject to the provisions of the Indian Act, R.S.C. 1970, c. I-6, and that the appeal must be allowed.

On 9th February 1972 the appellants (husband and wife) filed a petition of adoption under the provisions of The Adoption Act. The child sought to be adopted was born on 17th August 1967 and is the son of natural parents who are registered members of an Indian band. The child also is a registered member of an Indian band. It is common ground that he is a person to whom the Indian Act applies.

The petitioners for adoption are non-Indians. The child has been in their care for over five years and has resided with them continuously since 1968 except for a short period in 1970 when the child was with his natural parents.

The natural parents oppose the petition although they do not propose to take the child back into their own home. It is their intention to have him brought up by the natural

mother's sister and brother-in-law who previously expressed willingness to adopt him. That adoption would be in accordance with Indian custom and not pursuant to The Adoption Act.

On the facts the Chambers Judge held that he would have no hesitation in making the order of adoption prayed for if it was within his power so to do. He considered, however, that the effect of the Indian Act is to clothe those to whom it applies with a certain status from which various rights arise. The effect of an adoption under The Adoption Act in his view is to obliterate this status. He held that a provincial law of general application cannot operate so as to be inconsistent with the Indian Act. He held, therefore, that to the extent that the operation of The Adoption Act will affect the status of the child and so extinguish his peculiar rights as an Indian it is inconsistent with the Indian Act and consequently he had no power to make the order of adoption.

With deference I do not agree. The Parliament of Canada has exclusive legislative authority in respect of Indians and lands reserved for Indians: The British North America Act. 1867, s. 91(24). Pursuant to that power it has enacted the Indian Act which confers on Indians (as defined in the Act) a certain status and certain rights. In general, the status of being an Indian, registered either as a member of a band on a band list or as a member of no band on the general list, entitles the person with that status to share in property and to govern certain of his or her personal affairs in the manner provided for in the Indian Act.

In 1951, what is now s. 88 of the Indian Act was enacted. It defines the extent to which laws of general application of a province are applicable to Indians. It reads:

"88. 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."

Thus, the extent to which laws of general application in force in a province are applicable in respect of Indians is limited. Laws of general application apply to Indians but they will not operate in a way that is inconsistent with the provi-

sions of the Indian Act or in respect of matters for which the Indian Act has made provision.

The Adoption Act is an Act of general application. Under it an adult person or an adult husband and adult wife may apply to the Supreme Court of British Columbia to adopt a child. The Act prescribes certain procedures to be followed including investigations by the Superintendent of Child Welfare. If the court is satisfied of the ability of the petitioners to bring up, maintain and educate the child properly and of the propriety of the adoption, having regard to the welfare of the child and the interest of the child's parents, the court may make an order for adoption. The effect of adoptions is dealt with by s. 10 [am. 1973, c. 2, s. 3; 1963 (2nd Sess.), c. 95, s. 1]:

"10. (1) For all purposes an adopted child becomes upon adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock.

"(2) For all purposes an adopted child ceases upon adoption to be the child of his existing parents (whether his natural parents or his adopting parents under a previous adoption), and the existing parents of the adopted child cease to be his parents.

"(3) The relationship to one another of all persons (whether the adopted person, the adopting parents, the natural parents, or any other persons) shall be determined in accordance with subsections (1) and (2).

"(4) Subsections (2) and (3) do not apply, for the purposes of the laws relating to incest and to the prohibited degrees of marriage, to remove any persons from a relationship in consanguinity which, but for this section, would have existed between them."

In my opinion the Legislature of British Columbia has not purported to legislate in respect of the matters coming within the purview of the Indian Act. The words "for all purposes" in s. 10(1) and (2) must be taken to refer to all purposes within the legislative competence of the provincial Legislature. If there was any doubt as to the Legislature's intention in this regard it was removed by the passage of The Adoption Act Amendment Act, 1973 (2nd Sess.) (B.C.), c. 95, which adds subs. (4a) to s. 10 and reads as follows:

"(4a) The status, rights, privileges, disabilities, and limitations of an adopted Indian person acquired as an Indian under the *Indian Act* (Canada) or under any other Act or law are not affected by this section."

Assuming that there was an inconsistency between the operation of the Indian Act and the operation of The Adoption Act, the error in the Court below was in holding that The Adoption Act could not apply *at all* to Indians. This approach involves a misinterpretation of s. 88. The Adoption Act applies to the extent that it is not inconsistent with the Indian Act. Where there is an inconsistency, the Indian Act prevails.

It was argued before us that this analysis involves a breach of the Canadian Bill of Rights, R.S.C. 1970, App. III. Reliance is placed on the statement of Laskin J., as he then was, in his dissenting judgment in *Cardinal v. A.G. Alta.*, [1973] 6 W.W.R. 205 at 228, 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553 (Can.):

"The section (s.88) deals only with Indians, not with reserves, and is, in any event, a referential incorporation of provincial legislation which takes effect under the section as federal legislation."

Accordingly, it is argued that The Adoption Act becomes in relation to Indians federal legislation and is therefore subject to the Canadian Bill of Rights and in particular s. 1(*b*) thereof which reads as follows:

"1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race . . . the following human rights and fundamental freedoms, namely . . .

"(*b*) the right of the individual to equality before the law and the protection of the law".

It is urged that the discrimination by reason of race is brought about by the application of The Adoption Act in two ways:

"Firstly, it operates so as to deprive the Petitioners of that equality of treatment given to all other petitioners for adoption, namely, the right to have the ancestry of the child and its ties with its natural family obliterated completely and to have conferred upon them full and unqualified parenthood. Secondly, it deprives the child of the complete and total position as a child of the adopting parents as though born to them in lawful wedlock that is afforded to all adopted children not of the Indian race."

In my opinion, s. 88 does not have the effect of converting provincial legislation to federal legislation whenever it applies to Indians. Section 88 simply defines the obligation of obedience that Indians owe to provincial legislation. Parliament

is neither delegating legislative power to the province nor adopting provincial legislation as its own by declaring in s. 88 what was true before s. 88 existed, namely, that Indians are not only citizens of Canada but also are citizens of the province in which they reside and are in general to be governed by provincial laws. In defining the limits of the obligation of Indians to obey provincial laws, Parliament could not intend that those laws should lose their character as provincial legislation. Accordingly, The Adoption Act is not subject to the Canadian Bill of Rights as that Act only applies to the laws of Canada.

Even if it is held that there is a referential incorporation of provincial legislation (viz., The Adoption Act) which takes effect as federal legislation the contention that there is discrimination and inequality before the law cannot prevail in the light of the acknowledgment by counsel for the respondents that the Indian Act is valid legislation and does not contravene the Canadian Bill of Rights.

The adoption of an Indian child has different consequences, not because of The Adoption Act, but because of the Indian Act. The Indian Act provides the manner by which Indian status is conferred upon and removed from persons of the Indian race. Its provisions prevail over s. 10 of The Adoption Act. They operate to preserve the status of Indians with concomitant rights. The anomalies thus created are the result of the application of admittedly valid federal legislation.

Accordingly, it is my opinion that The Adoption Act applies to Indians, subject to the provisions of the Indian Act.

I would allow the appeal and make the order of adoption. The order of adoption will not deprive the child of his status or his rights under the Indian Act.

looking a bad precedent. The law would indeed degenerate into a thing of contempt if it came to pass that Justices of the Peace, most of whom are not learned in the law, were permitted to assume the role of irresponsible autocrats."

I would allow the appeal, set aside the conviction and direct a new trial.

NORTHWEST TERRITORIES COURT OF APPEAL

Cairns, Johnson and Kane JJ.A.

Re Deborah E4-789
Kitchooalik and Enooyak v. Tucktoo et ux.

Eskimos — Adoption of children by native custom — Validity of.

Appeal from the judgment of Morrow J., [1972] 3 W.W.R. 194, upholding an adoption by Eskimo custom. Appeal dismissed.

Held that the judgment of the trial Judge must be upheld; adoption by custom among Eskimos was of great antiquity and nothing in the adoption legislation of the Northwest Territories could be construed as prohibiting its continued use; in many cases, including the case at bar, compliance with the requirements of the Ordinances was impossible due to geographical and other circumstances; custom adoption was a necessary incident in the lives of Eskimos living in remote areas and to prohibit it would be to deprive the Eskimos of valuable means of safeguarding the survival of children whose parents were unable to provide for them, or who had died: *Re Katie's Adoption Petition* (1961), 38 W.W.R. 100, 32 D.L.R. (2d) 686 (N.W.T.); *Re Beaulieu's Petition* (1969), 67 W.W.R. 669, 3 D.L.R. (3d) 479 (N.W.T.) applied.

[Note up with 10 C.E.D. (2nd ed.) *Eskimos*, s. 2.]

J. D. Carter, for appellants.

D. Brand, for respondents.

25th May 1972. The judgment of the Court was delivered by

JOHNSON J.A.:—This is an appeal from the order of Morrow J. by which he declared that Deborah E4-789 was by custom adopted by the respondents, [1972] 3 W.W.R. 194.

This appeal raises an interesting and important point of law that has been before the Territorial Court on several occasions but now comes before this Court for the first time.

The question is, to what extent should the Court recognize the Eskimo custom of adoption where those procedures do not conform to those laid down by Ordinances of the Northwest Territories?

The facts are not in dispute and have been summarized by the learned trial Judge [p. 196]:

"The record shows that Deborah, carrying disc No. E4-789, was born at Spence Bay on 13th April 1958. Her two parents, Gideon Kitchooalik (the father) and Rebecca Enooyak (the mother) are both Canadian Eskimos, then of Spence Bay, now of Gjoa Haven, a settlement some 88 miles distant from Spence Bay. The parents were married at Pond Inlet in the Northwest Territories. Gideon Kitchooalik was traditionally a trapper living off the land, but some six years ago was ordained an Anglican missionary. In this capacity he makes his home at Gjoa Haven but makes regular trips to Spence Bay to take services there.

"The events giving rise to the present case begin about 1959. At this time Gideon and Rebecca were living in a snow house or igloo in Spence Bay. They had four daughters at this time, the youngest being Deborah, one year old. Two of the remaining children were under school age and unable to look after themselves. At this point in time, Rebecca took sick and had to be evacuated to the hospital in Edmonton. She was there two years and eight months.

"It was impossible for Gideon to look after the trapline and at the same time the three small children. They were left with different friends, from time to time, but finally after about six to seven months the Tucktoo family came to Spence Bay for a holiday. As they were related indirectly, Gideon arranged for them to adopt Deborah. The Tucktoos were unable to have children of their own, although by the date of this hearing had acquired two more small children by custom adoption.

"Rebecca described the situation in the following way:

" 'I had four girls to take care of and at that time my husband was still hunting with the dog team and he was not earning money, you know, he had to earn money to take care of the girls and had to hunt at the same time. The Tucktoos did not have any children of their own. It was a very good chance for her to have a good home and be taken care of properly.'

"The mother is quite frank in her testimony and makes it clear that 'there was no way around it — if he did not do any hunting they can starve'. The position she takes is that she continually exhorted her husband by letter to not adopt out the child as she wanted to keep her. Rebecca was asked by counsel if it was 'true as far as you are concerned that when

Gideon, while you were away, gave your daughter away for adoption, that is pretty much the only thing he was able to do?' Her answer was 'Yes'."

There was evidence that placing a child with foster parents was not satisfactory. This was because the foster parents did not feel the same responsibility toward a foster child that they did toward their own.

The female plaintiff recovered and rejoined her husband in the north. Although she saw Deborah, she took no steps to recover her until recently. Of the events leading up to these proceedings the learned Judge said [p. 199]:

"The actual repossession of Deborah took place following a visit between the Tucktoos and the natural parents. The facts are not too clear, but it seems that Deborah was originally to visit with her natural parents but then, as a result of a dispute between Rebecca and Mooselah, the child has been retained by the natural parents."

After hearing evidence from the parties as well as expert evidence as to the Eskimo custom of adoption, the learned Judge held the adoption of Deborah by the respondents to be valid, notwithstanding the failure to comply with Ordinances of the Northwest Territories dealing with the subject.

The practice of adoption has been common among primitive peoples of this continent. In the Handbook of American Indians (North of Mexico), under the heading of "Adoption", is the following:

"An almost universal political and social institution which originally dealt with persons but later with families, clans or gentes, bands and tribes. It had its origin far back in the history of primitive society".

To a race which inhabits the barren and frigid wastes surrounding the Arctic seas adoption is imperative if the young who cannot be properly looked after are to survive. As would be expected, such a practice has, according to the evidence, existed among the Eskimos for a long time. In adoptions, the father as "the boss" of the family, had power to place his child for adoption; his wife's consent was not required. This is recognized by the appellant husband. The learned trial Judge quotes the following from his evidence [p. 197]:

"A. At the time when I gave the kid away, it was my kid, and the man is the boss and at the time I figured I had all the say when I gave the kid away, and I find now that I should not have done that.

"Q. Yes, but you did not answer the question. A. I would never have given Debbie (Deborah) away for adoption but my wife was in hospital and the kid was sick and I didn't know what to do with it so I gave it away."

In 1961, in the case of *Re Katie's Adoption Petition* (1961), 38 W.W.R. 100, 32 D.L.R. (2d) 686 (N.W.T.), Sissons J. held that adoptions according to the custom of the Eskimos were valid, and his judgment was followed by Morrow J. in *Re Beaulieu's Petition* (1969), 67 W.W.R. 669, 3 D.L.R. (3d) 479 (N.W.T.), where he held that adoption according to the custom of the Indians should be treated in the same manner.

Considering the almost universality of adoption practice extending back into antiquity, it is strange that it was not recognized by the common law, and it was not until 1926 that the first adoption legislation was enacted in England. No law of adoption became a part of the law of the Territories when the laws of England, as existing on 15th July 1870, were introduced into the Territories by the North-West Territories Act, 1870 (Can.), c. 4. The first Adoption Ordinance was in 1940 [An Ordinance Respecting the Adoption of Infants, assented to 15th October 1940]. This followed upon the discovery of gold and uranium and the opening-up of mines to extract these minerals. Section 2 of that Ordinance reads:

"2. Any unmarried person of the full age of twenty-one years or a husband and wife jointly may by petition to a stipendiary magistrate apply for leave to adopt an infant or infants not in the relationship of brother or sister or uncle or aunt by the whole or the half blood to the petitioner or petitioners."

Section 4 reads in part:

"4. Save as in this section otherwise provided no order for adoption shall be made without the written consent of . . .

"(*c*) the parents of the infant or survivor of them; or the parent, guardian or person having the lawful custody of the infant; or the mother only where the infant is illegitimate".

In 1948 this Ordinance was repealed and replaced by another (1948, c. 35). It is admitted that this adoption took place prior to Christmas 1959, so it would be this Ordinance that existed at the time of this adoption. Section 4 [am. 1953 (1st sess.), c. 1, s. 1] reads in part:

"4. (1) A husband and wife each of whom is over the age of twenty-five years may apply jointly to a Judge for leave to adopt an unmarried minor as their child.

"(2) A widow or widower over the age of twenty-five years may apply to a Judge for leave to adopt an unmarried minor as her or his child if such unmarried minor was living in the home of the applicant preceding the date of death of the husband or wife of the applicant, as the case may be, but if the unmarried minor was not living in the home of the applicant prior to the death of the husband or wife of the applicant, then the applicant may only apply for leave to adopt an unmarried minor of the same sex as the applicant and who has attained the age of at least eight years and has been maintained for at least two years in the applicant's home as a member thereof.

"(3) A single person over the age of twenty-five years may apply to a Judge for leave to adopt an unmarried minor as his or her child if the unmarried minor is of the same sex as the applicant and has attained the age of at least eight years and has been maintained for at least two years in the applicant's home as a member thereof".

One of the requirements of an application under this Ordinance is set out in s. 5(2):

"(2) A health certificate from a duly qualified medical practitioner stating that he has examined the physical and mental condition of the applicant and is of opinion that the applicant is not a mental defective and is not suffering from mental illness nor from a communicable disease shall accompany the application."

The question is, did this legislation prohibit the continuation of the practice of adoption in accordance with Eskimo custom? It will be seen that in both the 1940 and 1948 Ordinances the word "may" is used when describing who may make petitions for adoption. This word is usually interpreted as permissive and s. 5(3) of The Interpretation Ordinance, R.O.N.W.T. 1956, c. 52, provides that "may" is to be given a "permissive and empowering" meaning. These Ordinances, while providing a relatively simple method, do require an appearance before a judge.

By the time *Katie's* case, supra, was decided, new and more detailed provisions has been enacted (The Child Welfare Ordinance, 1961 (2nd sess.) (N.W.T.), c. 3) and Pt. IV (ss. 82 to 108) dealt with adoptions. Sissons J. in *Katie's* case commented upon various of its provisions, and said that Eskimos, living in the remote areas of the Eastern Arctic, as these parties do, would find it difficult, if not impossible, to comply with them. I shall refer only to two of these. At p. 104 of his judgment he says:

"Sec. 97 of the *Child Welfare Ordinance* reads:

" '97. (1) Unless the adoption order provides that the adopted child retain his surname, the adopted child shall assume the surname of the adopting parent.

"(2) In making an adoption order, the judge may, in his discretion, change the christian or given name or names as the adopting parent desires, and thereafter the adopted child is entitled to and is to be known by the name or names so given.'

"This section does not recognize that ordinarily Eskimos do not have a surname. There are only given names and these usually have a particular and personal significance. The child retains his name on adoption, as a woman retains her name on marriage.

"Sec. 105:

" '105. (1) Every person who places a child with another person on the understanding that the other person will adopt the child shall, within thirty days after the day on which the chid has been so placed, notify the Superintendent of the placement.

" '(2) Every person who fails to comply with subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $100.00.' . . .

"Kilipaluk and Nabveyak did not notify the superintendent of the placement and adoption within 30 days after the day on which the child was so placed.

"This is generally an impractical provision so far as Eskimos are concerned. At most points there is no regular mail service and mail goes in or comes out by chance, perhaps once or twice a year. The ordinary Eskimo cannot read or write. The superintendent is far away. There is usually locally no one in authority, or perhaps within 500 miles, who could be notified, even if such notification would be sufficient."

I have quoted s. 5(2) of the 1948 Ordinance requiring the applicant to produce a certificate of a duly qualified medical practitioner as to his physical and mental health. That provision alone would prevent these people who have no ready access to a doctor from taking advantage of the Ordinance. In the remote areas of the Arctic where most Eskimos live, there is no ready access to a stipendiary magistrate (or after 1955 to the Territorial Judge) who alone can make an adoption under the Ordinance. It must be borne in mind that adop-

tions in these areas are often of some urgency. In the present case the child had developed sores and was not getting enough milk. Compliance with the provisions of these Ordinances in the context of the circumstances under which these Eskimos live is almost impossible. I am of the view that it was never intended that these provisions would exclude the well-established custom of Eskimo adoption. To interpret it otherwise would be to deprive many of these people of a custom that is so valuable to the safety and survival of children where death of a parent is a common hazard of their existence. It would also invalidate a large number of custom adoptions that have been confirmed by the courts throughout the years.

There is no doubt that adoptions in Eskimo societies are a necessity of life, if certain children are to be safeguarded. In time, as Eskimos are brought more closely into the Canadian community, the necessity to retain custom adoptions will disappear. Until that happens, the Eskimo custom of adoption should be preserved.

It is said that the Court of these Territories cannot recognize or give effect to custom adoptions by the Eskimo. While the Indian Act, R.S.C. 1970, c. I-6, recognizes such adoptions by Indians there is no corresponding legislation for Eskimos. From this, it is argued that Parliament did not intend to extend recognition of this practice to these people. Custom has always been recognized by the common law and while at an earlier date proof of the existence of a custom from time immemorial was required, Tindal C.J. in *Bastard v. Smith* (1838), 2 Mood. & R. 129 at 136, 174 E.R. 238, points out that such evidence is no longer possible or necessary and that the evidence extending "as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom" is all that is now required. Such proof was offered and accepted in this case.

The Canadian Bill of Rights, 1960 (Can.), c. 44, was pleaded. It was said in the appellants' factum:

"The Appellants would not have been ordered to give up their daughter if they had not been Eskimos. They were therefore denied equality before the law by reason of their race, national origin or colour."

Without considering whether this is "discrimination by reason of race" the point can be decided on a narrower ground. As I have said, this adoption took place in the summer of 1959. The Bill of Rights was enacted in 1960. That Act, in my opinion, cannot be applied where the effect of doing so

would be to alter the status of a person which had been acquired before the Bill of Rights became law.

The order declaring Deborah to have been adopted in December 1959 in accordance with the Eskimo custom should not be disturbed, and the appeal is dismissed with costs.

BRITISH COLUMBIA SUPREME COURT

Andrews J.

Lanson Homes Ltd. v. Block Bros. Contractors Ltd.

Contracts — Option to purchase parcels of land — Option agreement containing several alternatives, some unenforceable — Severability — Intention of parties.

Plaintiff and defendant entered into an agreement for the sale of certain lots, using for the purpose a standard form of interim agreement commonly used by real estate agents. They deleted the words "Interim Agreement" and substituted therefor the words "Option to Purchase". The following clause appeared in the body of the document: "This offer to purchase constitutes an option on the above lots. Individual lots may be purchased by an agreement whereby the balance would be by way of first charge to the vendor selling price to be $5700 per lot downpayment one dollar. This purchase agreement to be continued to the term of option period and will apply only to homes on these lots being under construction. Homes to be listed exclusively with Block Bros. Realty Ltd. If all lots are not built on by Mar. 31/71, Lanson Homes Ltd. have the right to either purchase remaining lots for $5700.00 each cash or at a rate of interest not to exceed 16% per annum from Mar. 31/71. Option expires Mar. 31, 1971." Plaintiff tried without success to get in touch with defendant before the end of March 1971 and then, on 7th April, caused his solicitor to prepare a deed for defendant's signature by which he agreed to buy the lots and pay the consideration therefor. Defendant refused to complete.

Held that the document in question, unsatisfactory though it was in many respects, expressed the intention of the parties to agree on a number of alternatives, some of which were clearly unenforceable. However the alternative contained in the closing lines of the clause, supra, was enforceable and it was severable from the remainder of the clause; plaintiff had exercised the option contained in the final sentence within a reasonable time, and was entitled to a decree of specific performance: *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 66 W.W.R. 477, 1 D.L.R. (3d) 513 (B.C. C.A.); *Lougheed v. Thompson et al.* (1929), 36 O.W.N. 84 (C.A.); *Hillas & Co. Ltd. v. Arcos Ltd.* (1932), 147 L.T. 503 applied.

[Note up with 5 C.E.D. (2nd ed.) *Contracts*, ss. 2, 3, 40.]

D. W. Carmichael, for plaintiff.

C. C. Barnett, for defendant.

29th May 1972. ANDREWS J.:—The plaintiff in this action sues for specific performance of an agreement entered into

"The ultimate test as to when a payment is *intra vires* a company is when what is done is done *bona fides*, within the ordinary scope of the company's business and reasonably incidental to the carrying on of the company's business for the company's benefit and advantage . . .

"The arrangement between the appellant and its employees to pay bonuses according to their shareholdings was, in my view *bona fide*, within the scope of the appellant's business and incidental to the carrying on of that business for the appellant's advantage. I should think that it is for the appellant, through its directors, to decide that such an arrangement was in the interests of the appellant subject only to the limitation that it is reasonable in the management of the appellant's affairs."

I have already held that the payment to Mr. Biggs was one that it was not unreasonable for the company to have made. The argument that it was ultra vires necessarily fails.

The appeal is therefore allowed.

NORTHWEST TERRITORIES TERRITORIAL COURT

Morrow J.

Re Deborah E4-789
Tucktoo et ux. v. Kitchooalik and Enooyak

Eskimos — Adoption of children by native custom — Validity of.

In the light of the history of legislation in the Northwest Territories dealing with adoption and child welfare, the validity of custom adoptions among the Eskimo people remains unimpaired. The Child Welfare Ordinance, 1961 (2nd sess.) (N.W.T.), c. 3, s. 83, as re-enacted by 1969 (3rd sess.) (N.W.T.), c. 1, impliedly recognizes the continuing validity of the native custom: *Re Katie's Adoption Petition* (1961), 38 W.W.R. 100, 32 D.L.R. (2d) 686 (N.W.T.) approved.

[Note up with 10 C.E.D. (2nd ed.) *Eskimos*, s. 2.]

D. Brand, for applicants.

D. Carter, for respondents.

23rd February 1972. MORROW J.:—During a routine court circuit in 1970 I was engaged in hearing custom adoption applications at the settlement of Spence Bay, located at the base of Boothia Peninsula. On these hearings the practice is to have both the natural parents and the adopting parents appear before the Court. Both sets of parents are questioned,

and if it appears clear to me that an adoption in accordance with Eskimo custom has taken place, I then grant a declaratory order confirming same. These proceedings are purely voluntary but over the years the native people have requested the Court to provide the service, as the possession of the formal order or document seems to reassure the people and is of assistance in helping them with mothers' allowances and other problems with government departments.

This practice has grown up as a result of a judgment of the late Sissons J. of this Court, viz. *Re Katie's Adoption Petition* (1961), 38 W.W.R. 100, 32 D.L.R. (2d) 686. In 1969 I extended the practice to apply to custom adoptions in Indian communities: *Re Beaulieu's Petition* (1969), 67 W.W.R. 669, 3 D.L.R. (3d) 479.

On this occasion in Spence Bay the present applicants came before me in the normal manner, the date was 21st January, and requested an order. On inquiring into the matter, however, I found that the natural parents, who now lived at Gjoa Haven, were not before the Court and had repossessed the child. The application was adjourned until a full-scale hearing could be arranged.

As this was the first occasion to come to my notice where a custom adoption had been in effect reversed, and I have myself held 248 custom adoption hearings, I arranged for the appointment of lawyers to argue the case and to marshal the evidence.

A not unusual experience in this Territory where litigants live so far apart, it has taken this long to arrange for the taking of evidence and for the hearing of arguments. The natural parents were heard finally at Spence Bay, Cambridge Bay, and at one stage some of the testimony was even taken in the air over King William Island en route to Spence Bay, on 9th August 1971. An expert witness on Eskimo customs, E. Lyall, was heard at Yellowknife on 10th August, and finally the adopting parents were heard at Resolute Bay, their new home, on 3rd February 1972. The case was then adjourned to Yellowknife for argument which took place on 8th February.

As a result of the submissions put forward by counsel I am forced to observe that one of the most important and, I believe, most cherished customs, namely, that of custom adoptions, has been placed in direct conflict with the "white" or "southern" culture. What started out, therefore, as a relatively simple case has now reached a point in time where perhaps

the last vestige of native culture, heretofore recognized by our Court, is in danger of being lost to these people, of going down the same path as their hunting and other rights.

The record shows that Deborah, carrying disc No. E4-789, was born at Spence Bay on 13th April 1958. Her two parents, Gideon Kitchooalik (the father) and Rebecca Enooyak (the mother) are both Canadian Eskimos, then of Spence Bay, now of Gjoa Haven, a settlement some 88 miles distant from Spence Bay. The parents were married at Pond Inlet in the Northwest Territories. Gideon Kitchooalik was traditionally a trapper living off the land, but some six years ago was ordained an Anglican missionary. In this capacity he makes his home at Gjoa Haven but makes regular trips to Spence Bay to take services there.

The events giving rise to the present case begin about 1959. At this time Gideon and Rebecca were living in a snow house or igloo in Spence Bay. They had four daughters at this time, the youngest being Deborah, one year old. Two of the remaining children were under school age and unable to look after themselves. At this point in time, Rebecca took sick and had to be evacuated to the hospital in Edmonton. She was there two years and eight months.

It was impossible for Gideon to look after the trapline and at the same time the three small children. They were left with different friends, from time to time, but finally after about six to seven months the Tucktoo family came to Spence Bay for a holiday. As they were related indirectly, Gideon arranged for them to adopt Deborah. The Tucktoos were unable to have children of their own, although by the date of this hearing had acquired two more small children by custom adoption.

Rebecca described the situation in the following way:

"I had four girls to take care of and at that time my husband was still hunting with the dog team and he was not earning money, you know, he had to earn money to take care of the girls and had to hunt at the same time. The Tucktoos did not have any children of their own. It was a very good chance for her to have a good home and be taken care of properly."

The mother is quite frank in her testimony and makes it clear that "there was no way around it — if he did not do any hunting they can starve". The position she takes is that she continually exhorted her husband by letter not to adopt out

the child as she wanted to keep her. Rebecca was asked by counsel if it was "true as far as you are concerned that when Gideon, while you were away, gave your daughter away for adoption, that is pretty much the only thing he was able to do?" Her answer was "Yes". It is also admitted that it was on an adoption basis.

Again on cross-examination:

"Q. But apart from the fact that you did not consent or express your consent was the situation bad enough to be a ground acceptable to Eskimo culture for there to be an adoption? A. Yes."

Some of the testimony of Gideon Kitchooalik is equally interesting:

"A. At the time when I gave the kid away, it was my kid, and the man is the boss and at the time I figured I had all the say when I gave the kid away, and I find now that I should not have done that.

"Q. Yes, but you did not answer the question. A. I would never have given Debbie (Deborah) away for adoption but my wife was in hospital and the kid was sick and I didn't know what to do with it so I gave it away."

He testifies that in Eskimo custom he was the boss of the family and it was "I who adopted the kid out, without any say from my wife, so it is a custom".

In giving his evidence John Tucktoo agreed that Deborah was given to the Tucktoos in the "Eskimo way of adopting".

Ernest Lyall, who is married to an Eskimo, and has spent 40-odd years in the Arctic, the last 22 of them at Spence Bay, gave the Court much help in describing the way of adopting children in the Eskimo culture.

He described how, in the days before mothers' allowances and welfare, it was not uncommon for unwanted children to be destroyed by the mother immediately at birth and before she had developed any affection for the child. Preference was for boys. An Eskimo mother would often, upon becoming pregnant, make arrangements in advance for adopting the child when born if it was, for example, a daughter, and she already had a daughter. The donee would generally be a woman who had no children or at least no child. This custom or method of handling surplus children was obviously born of necessity, the need of the primitive community to survive,

with hunger ever present. The preference in the old days for boys was of course to provide a hunter for the family.

The coming of the white man with the police and courts of course discouraged the custom of destroying the unwanted or surplus child, so the custom of giving them out in adoption has probably increased and become more important than ever before. This is particularly so now that the payment of mothers' allowances has to some extent removed the financial burden.

It seems clear from this evidence and in fact from the evidence given by all the parties, that there is a very well-defined custom governing adoptions among the Eskimo people. Rebecca said there is supposed to be a reason in each case. In her case the reason is clear. Looking back over the more than 200 cases that I have heard to date there is no doubt in my mind but that these reasons are always there and are all based on good sense: the mother had to go to hospital and could not look after the child; this is the third or fourth child in a row and my wife cannot look after it; this is a twin and my wife cannot look after two of the same age; we have lots and the grandmother is lonely and wants this one to look after. Perhaps the saddest case that has come before me to date is one at Eskimo Point, where the mother said that she was giving her child away because "all of her children died and she wanted this one to live". I have gone outside the actual testimony in the present case and referred to my own experience as a judge to emphasize the degree of importance that custom adoptions occupy in their culture. In my observation, which goes back some 12 years, I would say that this is the most outstanding characteristic of their culture and appears to outrank marriage and hunting rights. In my opinion the white culture could learn a lot from these customs — the Eskimos have what we are trying to legislate.

Referring back to Lyall's evidence, he is emphatic that once the father has decided to give the child away, "what he said went, and this has nothing at all to do with the mother. This was the old custom". By "old custom" he is referring to the situation before the white man's laws came. According to this witness the present proceedings are unique in that heretofore it was unknown for parents to try to take children back after there has been an adoption by custom.

The evidence taken in the proceedings further shows that no attempt was made earlier by Rebecca to take Deborah back because she was so young and it would upset the child; also that they understood she did not love them any more.

The actual repossession of Deborah took place following a visit between the Tucktoos and the natural parents. The facts are not too clear, but it seems that Deborah was originally to visit with her natural parents but then, as a result of a dispute between Rebecca and Mooselah, the child has been retained by the natural parents.

I met Deborah privately and she indicated that she would be satisfied to live with either set of parents. She is now 14 years old and in Grade VII at school.

I am satisfied on the facts that Deborah was given to John and Mooselah Tucktoo for adoption in accordance with Eskimo custom. I am satisfied further that it was a valid adoption in accordance with the custom, although the natural mother, Rebecca, had asked that the father not give her out for adoption. If it were not for the issues in law raised by counsel representing the natural parents, I would feel it necessary to make the usual declaratory order recognizing the adoption as such: in other words it is an adoption within the meaning of *Re Katie's Adoption Petition* (1961), 38 W.W.R. 100, 32 D.L.R. (2d) 686.

It now becomes necessary to examine the legal objections put forward.

The arguments put forward on behalf of the natural parents fall under three main headings: 1. that the judgment of the late Sissons J. in *Re Katie*, supra, is wrong; 2. that even if *Re Katie* was correctly decided it is no longer applicable; 3. that in any event the existing legislation relating to adoptions has pre-empted the field and therefore custom adoptions cannot be recognized.

A review of the legislation becomes necessary before discussing the above arguments.

The Northwest Territories Act, R.S.C. 1970, c. N-22, by s. 18(1) and (2) provides:

"(1) Subject to this Act, the laws of England relating to civil and criminal matters, as such laws existed on the 15th day of July 1870, are in force in the Territories, in so far as they are applicable to the Territories and in so far as they have not been or are not hereafter repealed, altered, varied, modified or affected in respect of the Territories by any Act of the Parliament of the United Kingdom or of the Parliament of Canada or by any ordinance.

"(2) All laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories."

It will be seen from subs. (2) above that the Government of Canada by 1960, c. 20, s. 2, made all laws of general application applicable to the Eskimos.

Language similar to s. 18(1) above has been found in the various Northwest Territories Acts dating back to the time when Canada first acquired Rupert's Land in 1868. The chain of legislation is outlined in the reported decision of *Royal Bank of Canada v. Scott and Commissioner of Northwest Territories*, [1971] 4 W.W.R. 491 at 493 et seq., 20 D.L.R. (3d) 728. It will be seen, however, that as far back as 1869, during the transition period, the Temporary Government of Rupert's Land Act, 1869 (Can.), c. 3, was by s. 5 careful to preserve all existing laws:

"5. All the Laws in force in Rupert's Land and the North-Western Territory, at the time of their admission into the Union, shall so far as they are consistent with 'The British North America Act, 1867,' — with the terms and conditions of such admission approved of by the Queen under the 146th section thereof, — and with this Act, — remain in force until altered by the Parliament of Canada, or by the Lieutenant Governor under the authority of this Act."

An examination of what the law of England might have been as of 15th July 1870 is of no assistance, as there was no recognition of adoption by the law of England in the sense of the transfer of parental rights and duties to another person until 1926, when the Adoption of Children Act, 1926 (Imp.), c. 29 was passed: *Humphrys v. Polak*, [1901] 2 K.B. 385; 17 Hals. (1st), para. 260; 21 Hals. (3d), paras. 484, 485.

The earliest Ordinance that I have been able to find is An Ordinance Respecting the Adoption of Infants, assented to 15th October 1940. Section 2 of this Ordinance provides:

"2. Any unmarried person of the full age of twenty-one years or a husband and wife jointly may by petition to a stipendiary magistrate apply for leave to adopt an infant or infants not in the relationship of brother or sister or uncle or aunt by the whole or the half blood to the petitioner or petitioners."

The above Ordinance was repealed by a new Ordinance assented to 23rd December 1948, being c. 35. Two sections only appear to be of possible interest to the present problem:

"APPLICATION

"3. This Ordinance does not apply in respect of an application for adoption pending when this Ordinance comes into force.

"ADOPTION

"4. (1) A husband and wife each of whom is over the age of twenty-five years may apply jointly to a stipendiary magistrate for leave to adopt an unmarried minor as their child . . .

"(4) A stipendiary magistrate may, where by reason of blood relationship or other special circumstances, he considers it to be in the best interests of the unmarried minor sought to be adopted, permit an application for adoption to be made in any case not otherwise provided for in this Ordinance."

This Ordinance was replaced by The Adoption Ordinance, R.O.N.W.T. 1956, c. 1, where s. 3(1) and (4) is essentially the same as s. 4(1) and (4) above.

By The Child Welfare Ordinance, 1961 (2nd sess.) (N.W.T.), c. 3, The Adoption Ordinance was repealed and adoptions were then provided for in this new Ordinance.

Section 83 of The Child Welfare Ordinance begins: "An application for the adoption of a child may be made by". Section 103, referred to in *Re Katie's Adoption Petition* (1961), 38 W.W.R. 100, 32 D.L.R. (2d) 686, states:

"103. (1) Every adoption heretofore made according to the laws of the Territories, and every adoption made according to the laws of

"(*a*) any province of Canada;

"(*b*) any country or part thereof forming part of the British Commonwealth of Nations;

"(*c*) any state of the United States of America; or

"(*d*) any other country or part thereof approved by order of the Commissioner,

"has for all purposes in the Territories the same effect as an adoption made in accordance with this Part.

"(2) The Commissioner may by order approve any country or part thereof for the purpose of subsection (1)."

All of the above was repealed by an amending Ordinance passed in 1969. Two sections only of the amendments need be quoted. These are:

"83. Where it is the opinion of a judge hearing a petition for the adoption of a child that it is in the best interests of the child not to require compliance with any provision of this Part that is required before an adoption order may be made, the judge may waive the provision and make an order of adoption of the child."

"97. An adoption effected according to the law of province or of any other country, or part thereof, before or after the commencement of this section, has the same effect in the Territories as an adoption under this Ordinance."

Section 84 of the new legislation is essentially the same as old s. 83 [1961 (2nd sess.) (N.W.T.), c. 3], repeating the words "an application to adopt . . . may be made".

1. *That the judgment of the late Sissons J. in Re Katie is wrong*

This judgment is reported in 38 W.W.R. 100, 32 D.L.R. (2d) 686. It is concerned with an application for adoption dated 3rd August 1961 and relates to a custom adoption, the petitioners both being Eskimo. As the present custom adoption took place in 1959 the legal validity of *Re Katie* is quite pertinent. Sissons J. was concerned with the new Child Welfare Ordinance, 1961 (2nd sess.) (N.W.T.), c. 3, in this case.

In attacking the judgment, counsel for the respondents argues that the Indian Act, R.S.C. 1952, c. 149, s. 48(16) [reen. 1956, c. 40, s. 13] has no application. The learned Justice at p. 101 of the report states that custom adoptions were recognized by this section. I accepted the same proposition in *Re Beaulieu's Petition* (1969), 67 W.W.R. 669, 3 D.L.R. (3d) 479, when custom adoptions among Indians were recognized. The Supreme Court of Canada in *Reference re Term "Indians", in s. 91(24) of B.N.A. Act*, [1939] S.C.R. 104, [1939] 2 D.L.R. 417 (sub nom. *Re Eskimos*), has held that "Indians" includes Eskimos in the sense used in s. 91(24) of the B.N.A. Act, 1867. This is of little help here, however, as s. 4(1) of the Indian Act specifically excludes Eskimos.

Counsel also argues that the Northwest Territories Act, R.S.C. 1952, c. 331, s. 17(2) (now s. 18(2)), even if applicable to the situation as it stood at the date of *Re Katie*, namely, 1961, can have no application now because of the effect of s. 1(*b*) of the Canadian Bill of Rights, 1960 (Can.), c. 44.

He argues that this section gives a person "equality before the law" and that if this is the law of Canada now, then a non-consenting mother would be discriminated against if the customs recognized by the *Katie* case were allowed to stand. It may well be that if the adoption Ordinances had the same effect that customs give, then this argument could be accepted. I am unable, however, to read "law" and "law of Canada" as used in the Bill of Rights and as discussed in such cases as *Regina v. Drybones*, [1970] S.C.R. 282, 71 W.W.R. 161, 10 C.R.N.S. 334, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473, and *Re Lavell et al.*, [1971] F.C. 341, [1972] 1 O.R. 396n, 14 Cr. L.Q. 236, 22 D.L.R. (3d) 188, to include customs or what one could describe as non-legislated law.

In conclusion under this heading of argument I do not agree with the contention of counsel but re-affirm *Re Katie*.

2. *That if Re Katie was correctly decided it is no longer applicable*

Under this heading I understand the submission to be that if the Ordinance which governed adoptions at the time of *Re Katie* permitted the court to recognize custom adoptions, then, in any event, the Council by the enactment of an amendment by 1972 (1st sess.), c. 1, which in effect declared one aspect of the law of custom, by inference disallowed custom adoptions. The amending Ordinance added a new subs. (4) to s. 85 of the 1969 Ordinance which purports to give a grandparent preference in adoption proceedings. If, as argued, this was an enlargement to include one aspect of custom adoptions, normally adoptions by grandparents, there is nothing in the wording of the amendment which in any way takes away from custom adoptions if they were recognized before. It may well be that the amendment was unnecessary, but that of itself does not affect the status of custom adoptions, in my opinion.

3. *That in any event the existing legislation relating to adoptions has pre-empted the field and therefore custom adoptions cannot be recognized*

The argument here is that by enacting the adoption Ordinances, the Territorial Council has abolished or extinguished the custom adoptions.

Each Ordinance purporting to deal with adoption, beginning with s. 2 of the 1940 legislation, down to the present 1969 legislation, s. 84, uses similar expressions, viz., "any unmarried person . . . may petition . . . for leave to adopt" (1940,

s. 2); "may apply jointly . . . to adopt" (1948, s. 4(1)); and finally "an application to adopt . . . may be made" (1969, s. 84).

Nowhere am I able to find any language which purports to disallow any other form of adoption. As there was no "adoption" law in England as of 1870 it can be assumed that the legislators in 1940 and subsequently knew that there was no statute law requiring repeal. But it is undisputed that during this whole period a section of the community, more than one-third of the total population if reference is made to Eskimos only, more than two-thirds if Indians are included, were following the time-honoured practice of custom adoptions.

Section 5(3) of The Interpretation Ordinance, R.O.N.W.T. 1956, c. 52, provides that "the expression 'may'" is to be read as "permissive and empowering".

In construing similar language contained in The Interpretation Ordinance, C.O.N.W.T. 1898, c. 1, the Judicial Committee, in discussing legislation concerned with costs and the phrase "may summon", held that the effect of The Interpretation Ordinance was to make the language "permissive" rather than "obligatory": *McHugh v. Union Bank of Canada*, [1913] A.C. 299, 3 W.W.R. 1052, 23 W.L.R. 409, 10 D.L.R. 562.

A review of the authorities makes it clear that "customs which go with the land" and "customs which fix and order the discents of inheritances" can only be altered by Parliament: *Anon., Case LXX* (1559), Jenk. 220, 145 E.R. 151. The discussions relating to the overriding or repeal of customs by legislation contained in the following references are of interest here: Maxwell on Statutes, 11th ed., pp. 172 et seq.; Craies on Statute Law, 6th ed., pp. 338 et seq.; *Salters' Co. v. Jay* (1842), 3 Q.B. 109, 114 E.R. 448; *London (City) Corpn. v. Gatford* (1675), 2 Mod. Rep. 39, 86 E.R. 928; 11 Hals. (3d) 180, paras. 334, 335. It is of interest also that "in the case of a conquered or ceded colony the original systems of law remain until they are changed": Holdsworth's History of English Law, vol. XI, p. 240.

As I read the adoption Ordinances referred to above and which represent the only legislation in effect during the history of the Northwest Territories, I cannot find any of the language contained therein that is repugnant to or could either directly or by implication be taken as being intended to override or repeal the native customs in respect of adoption. In fact I am forced to the conclusion that the legislation, and this may be deliberate, is at most permissive. I am encouraged

in this conclusion by the language of s. 83 already quoted from the 1969 amendment, which language is in my view almost a blanket invitation by the legislators to the judge to ignore any of the existing requirements if it was felt to be in the interests of the child. I cannot help but think that this was perhaps deliberate to leave the door open for custom adoptions in the Northwest Territories.

I am pleased that I have been able to reach the result which I have, so that the problem of stare decisis which *Re Katie* would have presented, had I been inclined to reach a contrary decision, has not emerged. I think I should state here, however, that had I felt the law was otherwise, I would still have felt that I should follow *Re Katie* because of the public interest. It is well recognized that, "Where a series of decisions of inferior Courts have put a construction on an Act . . . and have thus made a law which men follow in their daily dealings . . . that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding": *Bourne v. Keane*, [1919] A.C. 815 at 858.

No one could sit, as I have, in these remote communities, and observe the obvious relief each set of foster parents and parents seem to portray as the court affirms the custom adoption, and thereby gives them the "piece of paper" modern society seems to place so much store in, without being convinced that the validity of these custom adoptions should be maintained.

I realize that, in reaching the conclusion that I have, the natural mother will suffer disappointment. I regret this but see no alternative.

In the result there will be judgment as follows:

(1) An order declaring that Deborah E4-789 was by custom adopted by John Tucktoo and Mooselah Tucktoo on or about 1st December 1959.

(2) An order directing that she be returned to the above foster parents as quickly as can be conveniently arranged.

(3) Application can be made to the Court if there be any difficulty arranging the return.

(4) There will be no costs under the circumstances.

paid into court that remains after deducting the amount of the liens and the costs of the lienholders in respect thereto.

I find, therefore, that the lienholders are entitled to be paid out of court the following amounts, established by their affidavits, together with costs to be fixed by me if counsel are unable to agree: Schering Contractors Ltd., $1,263; Kuzyk Plumbing & Heating Ltd., $479.75; W. T. Pillage Oil Transport Ltd., $810; Edson Welding Co. Ltd., $165; Air Drilling Service International Ltd., $568.95.

The board is entitled to the balance of the fund in court.

NORTHWEST TERRITORIES

TERRITORIAL COURT — MORROW, J.

Re Indian Custom Adoptions
Re Beaulieu's Petition

Indians — Adoption by Custom — Legal Effectiveness of.

Adoptions by Indian custom, as in cases of adoption by Eskimo custom, are as effective as if made under Pt. IV of the *Child Welfare Ordinance*, NWTO, 1961, 2nd sess., ch. 3: *Re Katie's Adoption Petition* (1961) 38 WWR 100, at 101-2, 1962 Can Abr 819 (N.W.T.) followed.

[Note up with 13 CED (2nd ed.) *Indians*, sec. 16.]

No counsel appeared.

February 3, 1969.

MORROW, J. — In a written judgment dated October 16, 1961, Sissons, J. of this court made a full analysis of the legal situation with respect to custom adoptions, having particular reference to Canada's Eskimos: *Re Katie's Adoption Petition* (1961) 38 WWR 100. No appeal was taken from the practical and sensible conclusion reached, and it should be observed that from 1961 on, this court has consistently recognized Eskimo custom adoptions and has never refused to grant formal orders confirming them. It is of considerable interest as well that in April, 1968, F. J. Neville, of Ottawa, then holding the position of superintendent of child welfare, charged with the responsibility for administering adoptions under the *Child Welfare Ordinance,* NWTO, 1961, 2nd sess., ch. 3, attended along with this court and assisted in processing a good many such custom adoptions in the East Arctic. This co-operative

attitude by the superintendent has gone a long way in facilitating the processing of native adoptions which would for the most part be otherwise denied and remain unresolved if the strict letter of the law so provided for in the *Child Welfare Ordinance* was required to be followed.

Sissons, J. in *Re Katie's Adoption Petition, supra,* was concerned with Eskimo custom adoptions, but his observations and remarks were obviously intended to apply to Indian adoptions as well. The court's attention has been drawn to the situation that, in the more remote parts of the Western Arctic, there have been many adoptions carried out by Indians, but not processed under the *Child Welfare Ordinance,* and not likely to be, because of the problem of handling the same through Ottawa.

To ensure no prejudice to the adopted child or to his foster parents "because it is well to have something of court record establishing the adoption and proving it for purposes of family allowances, school registration, succession," and so on (to quote from p. 102 of the above judgment) a hearing on the matter was scheduled at Fort Rae on February 3, 1969.

On this occasion statements were taken before me from Jimmy Bruneau, chief of the Dogrib Indians located at Rae, Alex Charlo and Harry Koyina, both members of the same band council, from Louis Beaulieu, a councillor from the band at Lac la Morte, from Vital Thomas, an Indian of some standing in the community, and from Father Leo Mukwa, the parish priest at Rae. There was general consensus that for as far back as could be remembered the system of adoption by custom among their people had been practised and was respected in much the same way as with the Eskimos. As part of the inquiry, the full facts surrounding the custom adoption of the infant Denis Marie by Louis Beaulieu and his wife, Elise Beaulieu, were gone into.

I am satisfied from what I heard at Rae that the Indians, certainly in this area, have from time immemorial practised and recognized custom adoption and that "these people should not be forced to abandon it and it should be recognized by the court." (Sissons, J., *supra,* at p. 102.)

I accept the reasoning of Sissons, J. in *Re Katie's Adoption Petition, supra,* wherein, at p. 101, he states: "Adoptions in accordance with native custom have not been abrogated."

The custom adoption is further recognized by the language of sec. 48 (16) (substituted 1956, ch. 40) of the *Indian Act,* RSC, 1952, ch. 149, which states:

"48. (16) In this section 'child' includes a legally adopted child and a child adopted in accordance with Indian custom."

Accordingly I am satisfied that adoptions by Indian custom are as effective as if made under Pt. IV of the *Child Welfare Ordinance* and a declaratory order to that effect shall go.

BRITISH COLUMBIA

SUPREME COURT — WILSON, C.J.S.C.

Willson v. Willson

Divorce and Other Matrimonial Causes — Costs Not Claimed in Prayer for Relief — Practice.

The practice with regard to costs in divorce proceedings under the *Divorce Act*, 1967-68, ch. 24, is the same as it was before the coming into force of that Act; costs ought not to be awarded unless claimed in the prayer for relief: *Robilard v. Robilard* [1942] 3 WWR 497, 58 BCR 293, 4 Abr Con (2nd) 476 followed. If, however, the court still has a discretion in the matter of costs it should not exercise it without notice to the person against whom costs are claimed.

[Note up with 9 CED (2nd ed.) *Divorce and Other Matrimonial Causes*, secs. 100, 123; *Power on Divorce*, 2nd ed., pp. 584 *et seq.*]

F. H. Phippen, for petitioner.

No one *contra*.

February 17, 1969.

WILSON, C.J.S.C. — In this suit under the *Divorce Act*, 1967-68, ch. 24, by a wife against her husband for a divorce on the grounds of his adultery the petitioning wife did not, in her prayer for relief, ask for costs.

It has been held by Farris, C.J.S.C. in *Robilard v. Robilard* [1942] 3 WWR 497, 58 BCR 293, a case tried under the *Divorce and Matrimonial Causes Act*, RSBC, 1936, ch. 76, that costs should not be ordered unless claimed in the prayer for relief or, alternatively, if this is wrong, and the court still has discretion to award costs although not claimed, then the discretion should only be exercised after notice to the person against whom costs are claimed.

By our D.R. 30 costs are, as they were under the old Act, in the discretion of the court.

R. 6, regarding parties, says:

R
C V I C

NORTHWEST TERRITORIES

TERRITORIAL COURT SISSONS, J.

Re Katie's Adoption Petition

Infants — Adoption — Child Welfare Ordinance — Adoptions by Eskimo Adoption Custom as Adoptions "According to the Laws of the Territories" within S. 103 and of Same Effect as If Made under Ordinance.

Eskimos — Adoption Customs — Preservation of by Indian Act, S. 48 (16) — Non-Abrogation of by Northwest Territories Act, S. 17 — Effect of Canadian Bill of Rights — Unsuitability of Child Welfare Ordinance, Pt. IV.

The adoption provisions of pt. IV of the *Child Welfare Ordinance*, NWTO, 1961, 2nd sess., ch. 3, are unrealistic having regard to conditions in the Northwest Territories. Secs. 83, 84 (2), 90, 91, 93 (2), (3), 97, 103, 105, criticized.

Adoption in accordance with custom is recognized by the *Indian Act*, RSC, 1952, ch. 149, sec. 48 (16) (substituted 1956, ch. 40, sec. 13), and adoptions in accordance with Eskimo custom in particular have not been abrogated by 1960, ch. 20, amending the *Northwest Territories Act*, RSC, 1952, ch. 331, by adding subsec. (2) to sec. 17. The *Canadian Bill of Rights*, 1960, ch. 44, prevents such abrogation of Eskimo rights, freedoms, laws and customs.

Adoptions "made according to the laws of the Territories" within the meaning of sec. 103 of the *Child Welfare Ordinance, supra*, include adoptions in accordance with Indian or Eskimo custom and such adoptions have "for all purposes in the Territories the same effect as an adoption made in accordance with this Part" (i.e., pt. IV of said Ordinance).

[Note up with 10 CED (2nd ed.) *Eskimos*, secs. 1, 2; 2 CED (CS) *Infants*, secs. 98-101, 102; 3 CED (CS) *Words and Phrases* (1946-1960 Supps.).]

October 16, 1961.

SISSONS, J. — This is the petition of Noah E7-877 of Frobisher Bay, in the Northwest Territories, janitor, and of Keeatchuk, E7-878, his wife, for the adoption of Katie E7-1807.

The petition is headed "In the matter of the adoption ordinance," is dated August 3, 1961, and was presented to the court at Frobisher Bay on August 5, 1961, by Harold Zukerman and Norman Zukerman, welfare officers with the Department of Northern Affairs and National Resources. The following material was filed with the application: Affidavits in support of the petition, family history and report; marriage particulars; consent of Kilipaluk E3-659, the father of Katie E7-1807; health certificates as to the petitioners.

The petition presents some difficulties.

The *Adoption Ordinance,* NWTO, 1956, ch. 1, was repealed by the *Child Welfare Ordinance,* NWTO, 1961, 2nd sess., ch. 3. Pt. IV of this *Child Welfare Ordinance* contains provisions for adoption.

The *Child Welfare Ordinance* was assented to July 20, 1961. It was not available at the time of the preparation and presentation of the petition herein, and the petition is not in conformity with the provisions of pt. IV of the *Child Welfare Ordinance.*

The adoption provisions contained in pt. IV are unrealistic having regard to conditions in the Northwest Territories.

The peoples of the Northwest Territories are classed as Eskimos, Whites and Indians. The Eskimos outnumber the Whites, and the Whites outnumber the Indians.

There are many more Eskimo and Indian adoptions than there are White adoptions.

In the Northwest Territories there are adoptions in accordance with the Adoption Ordinance, adoptions in accordance with Indian custom and adcptions in accordance with Eskimo custom.

Adoptions in accordance with custom is recognized by the *Indian Act,* RSC, 1952, ch. 149:

> "48 (16). In this section 'child' includes a legally adopted child and a child adopted in accordance with Indian custom."

Adoptions in accordance with native custom have not been abrogated. In particular, adoptions in accordance with Eskimo custom have not been abrogated by ch. 20 of the Statutes of Canada 1960, amending the *Northwest Territories Act,* RSC, 1952, ch. 331, by adding the following to sec. 17:

> "(2) All laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories."

The *Canadian Bill of Rights,* 1960, ch. 44, prevents Eskimo rights, freedoms, laws and customs being abrogated in this way.

The Eskimos, and particularly those in outlying settlements and distant camps, are clinging to their culture and way of life which they have found to be good. These people are in process of cultural change and have a right to retain whatever they like of their culture until they are prepared of their own free will to accept a new culture. In particular, although there

may be some strange features in Eskimo adoption custom which the experts cannot understand or appreciate, it is good and has stood the test of many centuries and these people should not be forced to abandon it and it should be recognized by the court.

Where there have been adoptions in accordance with Indian or Eskimo custom, the parties sometimes apply for an adoption order. These applications have been made under the *Adoption Ordinance.*

There are some hundreds of adoptions in accordance with Eskimo custom going back many years in which there has been no application to the court and in which applications are pending.

These applications to the court are made because the white man says there should be an adoption order, and because it is well to have something of court record establishing the adoption and proving it for purposes of family allowances, school registration, succession, and to avoid dispute or question.

The *Child Welfare Ordinance* provides:

> "83. An application for the adoption of a child may be made by
>
> "(*a*) a husband and wife jointly.
>
> "8_. * * * (2) Where an application for the adoption of a child is made by a husband and wife jointly, the application shall be accompanied by a certificate of their marriage.
>
> "93. * * * (2) Except where a joint application is made under section 83 by two spouses, no order shall be made for the adoption of a child by more than one person."

The welfare officer has filed with this application the following certificate:

> "Marriage Particulars
>
> "Noah E7-877 and Keeatchuk E7-878
>
> "This couple have been married by Eskimo custom for many years. This is a stable and recognized marriage in this community."

The application is not accompanied by a certificate of their marriage.

The department of northern affairs has argued in another matter now before this court that there is no such thing as a

marriage by Eskimo custom and that what purports to be such is only an "Eskimo custom of concubinage."

If this argument is correct Noah E7-877 and Keeatchuk E7-878 are not husband and wife and I cannot entertain their application for the adoption of Katie E7-1807.

It is not necessary that I deal with this point at this time.

Sec. 90 requires that "an affidavit of execution in form D shall be attached to every consent given under this Part * * * ."

There is a consent here, but no affidavit of execution.

Sec. 91 reads as follows:

> "91. Where a child in respect of whom an application for adoption is being made is under the age of eighteen years, the application shall be accompanied by a certificate signed by the Superintendent acknowledging that he has been notified of the application.
>
> "93 * * * (3) No order for the adoption of a child under eighteen years of age shall be made unless the Superintendent certifies in writing that
>
> "(*a*) the child has resided with the applicant within the Territories for more than one year, and that, during this period, the conduct of the applicant and the conditions under which the child has lived have been such as in his opinion justify the making of an adoption order; or
>
> "(*b*) the applicant is to the knowledge of the Superintendent a proper person to have the care and custody of the child and that for the reasons set out in the certificate it is in the best interests of the child that the period of residence be dispensed with, or that a period of residence of the child with the applicant outside the Territories be counted."

There is no such certificate in writing from the superintendent filed with the application.

The superintendent resides in Ottawa, beyond the jurisdiction of the court, and would not be certifying from personal knowledge. He will require an army of welfare workers in the field to acquire the necessary information.

The provision is inconsistent with, and an infringement on, the duties and powers of the court, and could be used to prevent or delay the adoption.

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There is in this case a report in writing from the welfare officer who presented the application and has first-hand knowledge of the facts, and who is northern experienced and sensible, as to the residence of the child with the applicants, the conduct of the applicants and the conditions under which the child has lived.

Sec. 97 of the *Child Welfare Ordinance* reads:

> "97. (1) Unless the adoption order provides that the adopted child retain his surname, the adopted child shall assume the surname of the adopting parent.
>
> "(2) In making an adoption order, the judge may, in his discretion, change the christian or given name or names as the adopting parent desires, and thereafter the adopted child is entitled to and is to be known by the name or names so given."

This section does not recognize that ordinarily Eskimos do not have a surname. There are only given names and these usually have a particular and personal significance. The child retains his name on adoption, as a woman retains her name on marriage.

Sec. 105:

> "105. (1) Every person who places a child with another person on the understanding that the other person will adopt the child shall, within thirty days after the day on which the child has been so placed, notify the Superintendent of the placement.
>
> "(2) Every person who fails to comply with subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $100.00."

Kilipaluk E3-659 and Nabveyak E3-660, his wife, the natural parents of Katie E7-1807, placed the girl with Noah and Keeatchuk on the understanding that they thereby adopted her. Kilipaluk and Nabveyak did not and do not want the child, and Noah and Keeatchuk did and do want her.

Kilipaluk and Nabveyak did not notify the superintendent of the placement and adoption within 30 days after the day on which the child was so placed.

This is generally an impractical provision so far as Eskimos are concerned. At most points there is no regular mail service and mail goes in or comes out by chance, perhaps once or twice a year. The ordinary Eskimo cannot read or write. The

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superintendent is far away. There is usually locally no one in authority, or perhaps within 500 miles, who could be notified, even if such notification would be sufficient.

It is a shocking provision which makes it a crime for an Eskimo to follow his ancient custom in the traditional way.

Sec. 103:

> "103. (1) Every adoption heretofore made according to the laws of the Territories, and every adoption made according to the laws of
>
> "(*a*) any province of Canada;
>
> "(*b*) any country or part thereof forming part of the British Commonwealth of Nations;
>
> "(*c*) any state of the United States of America; or
>
> "(*d*) any other country or part thereof approved by order of the Commissioner,
>
> "has for all purposes in the Territories the same effect as an adoption made in accordance with this Part.
>
> "(2) The Commissioner may by order approve any country or part thereof for the purpose of subsection (1)."

I think adoptions "made according to the laws of the Territories" include adoptions in accordance with Indian or Eskimo custom.

The adoption of Katie E7-1807 by Noah E7-877 and Keeatchuk E7-878 took place at birth, on or about August 10, 1960.

This adoption "has for all purposes in the Territories the same effect as an adoption made in accordance with this Part," i.e. pt. IV of the *Child Welfare Ordinance*.

I am making an order declaring that Katie E7-1807 was adopted by Noah E7-877, of Frobisher Bay, in the Northwest Territories, and Keeatchuk E7-878, on August 10, 1960, and that this adoption is as effective as if made under pt. IV of the *Child Welfare Ordinance* and that the said child is and has been from August 10, 1960, the adopted child of the said petitioners and retains the name of Katie E7-1807.

SUPREME COURT OF CANADA

Laskin C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

Natural Parents v. Superintendent of Child Welfare and Petitioners for Adoption (Attorney General of Canada, Attorney General of Alberta, Attorney General of British Columbia, Attorney General of Ontario and Attorney General of Saskatchewan, Intervenors)

Indians — Whether non-Indians may adopt Indian child — Effect of s. 88 of the Indian Act, R.S.C. 1970, c. I-6, on The Adoption Act, R.S.B.C. 1960, c. 4.

Appeal from the judgment of the British Columbia Court of Appeal, [1974] 3 W.W.R. 363, 14 R.F.L. 396, 44 D.L.R. (3d) 718, which allowed an appeal from Tyrwhitt-Drake L.J.S.C., [1974] 1 W.W.R. 19, 13 R.F.L. 244, who dismissed an application by a non-Indian married couple to adopt an Indian child on the basis that the operation of The Adoption Act would affect the status of the child and extinguish the peculiar rights which were his as an Indian.

Held, the appeal was dismissed and the adoption allowed.

Per LASKIN C.J.C.: The Adoption Act must be referentially incorporated into the Indian Act and if any portions of it in its treatment of Indians are inconsistent with the Indian Act such portions cannot be given effect to. There is no inconsistency between s. 10(2) of The Adoption Act and s. 11(1)(*d*) of the Indian Act as the adopted Indian child remains entitled to be registered as an Indian under the Indian Act.

Per RITCHIE J.: It was not the intent of Parliament in passing s. 88 of the Indian Act that if a provincial law of general application affected Indians, as most general laws would, it should be incorporated into the Indian Act and become part of the federal legislation. A provincial law of general application is binding on all citizens of the province including Indians provided it does not affect a right granted to an Indian under the Indian Act. An adopted Indian child retains his right to be registered as an Indian and his status as an Indian is not affected.

[Note up with 13 C.E.D. (West. 2nd) *Indians*, s. 1.]

J. J. Gow and *D. R. Wilson*, for appellants.

B. R. D. Smith, for respondents.

N. D. Mullins, Q.C., and *G. C. Carruthers*, for Attorney General of Canada.

K. Lysyk, Q.C., for Attorney General of Saskatchewan.

M. Manning, for Attorney General of Ontario.

W. Henkel, Q.C., for Attorney General of Alberta.

7th October 1975. LASKIN C.J.C. (JUDSON, SPENCE and DICKSON JJ. concurring):—The question in this appeal concerns the validity of an adoption order made in respect of a

male Indian child in favour of a non-Indian couple who had provided a foster home for the child. The child's natural parents, who were registered members of a band under the Indian Act, R.S.C. 1970, c. I-6, he too being entitled to registration thereunder, objected to the adoption, but it was held at first instance that their consent should be dispensed with. No objection is taken to the regularity of the adoption proceedings, but a constitutional question was raised in respect of The Adoption Act, R.S.B.C. 1960, c. 4, and, more particularly, in respect of that Act as amended by the addition thereto of s. 10(4*a*) by 1973 (2nd Sess.), c. 95, s. 1. Connected to this question is the effect of s. 88 of the Indian Act.

The Judge at first instance, although satisfied on the merits that an adoption order should be made without the consent of the natural parents, held that there was an inconsistency between The Adoption Act and the Indian Act which precluded such an order [[1974] 1 W.W.R. 19, 13 R.F.L. 244]. In his opinion, the Indian Act clothed those within its terms with a certain status from which alone certain rights arose, and that status would be obliterated by the operation of The Adoption Act. The British Columbia Court of Appeal was unanimously of the opinion that Indian status survived despite adoption [[1974] 3 W.W.R. 363, 14 R.F.L. 396, 44 D.L.R. (3d) 718]. It held that The Adoption Act, as a provincial statute of general application, applied to the adoption of Indian children, and was blunted only to the extent of inconsistency with the Indian Act. The addition of s. 10(4*a*) to The Adoption Act, between the date of the judgment at first instance and the hearing of the appeal, reinforced the view that there was no impingement on matters within the Indian Act. The Indian Act would prevail if there was an inconsistency but that was no reason to hold that The Adoption Act could not apply at all to Indians.

The British Columbia Court of Appeal also reached and rejected an issue as to the application of the Canadian Bill of Rights, R.S.C. 1970, App. III, by holding: (1) that s. 88 of the Indian Act did not referentially incorporate The Adoption Act so as to make it federal legislation for the purposes of the Canadian Bill of Rights, and (2) that even if there was referential incorporation, there was no violation of the Canadian Bill of Rights, either by way of discrimination on account of race or by way of inequality before the law, especially in the light of the concession by counsel for the natural parents that the Indian Act was valid federal legislation that did not in its relevant terms contravene the Canadian Bill of Rights.

In the result, the British Columbia Court of Appeal concluded that The Adoption Act applied to Indians, subject to the provisions of the Indian Act, and that an order of adoption should be made.

The legislative provisions particularly germane to the disposition of this appeal are s. 10 [am. 1973, c. 2, s. 3; 1973 (2nd Sess.), c. 95, s. 1] of The Adoption Act, and s. 88 of the Indian Act, and they read as follows:

The Adoption Act, s. 10:

"10. (1) For all purposes an adopted child becomes upon adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock.

"(2) For all purposes an adopted child ceases upon adoption to be the child of his existing parents (whether his natural parents or his adopting parents under a previous adoption), and the existing parents of the adopted child cease to be his parents.

"(3) The relationship to one another of all persons (whether the adopted person, the adopting parents, the natural parents, or any other persons) shall be determined in accordance with subsections (1) and (2).

"(4) Subsections (2) and (3) do not apply, for the purposes of the laws relating to incest and to the prohibited degrees of marriage, to remove any persons from a relationship in consanguinity which, but for this section, would have existed between them.

"(4*a*) The status, rights, privileges, disabilities and limitations of an adopted Indian person acquired as an Indian under the *Indian Act* (Canada) or under any other Act or law are not affected by this section.

"(5) This section is to be read subject to the provisions of any Act which distinguishes in any way between persons related by adoption and persons not so related.

"(6) This section does not apply to the will of a testator dying before or to any other instrument made before the seventeenth day of April, 1920.

"(7) This section applies to adoptions made by the Court or by the Provincial Secretary under legislation heretofore in force.

"(8) For the purpose of this section, 'child' includes a person of any age, whether married or unmarried."

The Indian Act, s. 88:

"88. 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 bylaw 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 refer also to s. 2(1) of the Indian Act in which "child" is defined to include "a legally adopted Indian child" (in the French version "un enfant indien légalement adopté") and s. 48(16) defining "child", for the purpose of that section (being a section respecting distribution of property on an intestacy), to include "a legally adopted child and a child adopted in accordance with Indian custom". These provisions show that adoption is within the scope of the Act, albeit that the general definition in s. 2 is confined to adoption of an Indian child and, in my view, in any context involving parental relationship it would be limited to an Indian child of Indian parents.

The submissions of the appellants against the validity of the adoption order are based on a series of related propositions which I may summarize as follows. The Indian Act, which was enacted in its present form in 1951 by 1951 (Can.), c. 29, and which introduced at that time the Indian register and as well s. 88, makes the original family tie the essence of Indian status and keeps the child in that status (at least until enfranchisement as provided in s. 109). Since adoption under The Adoption Act by non-Indian persons would obliterate the family ties and hence destroy the status, the Act cannot of its own force apply to status Indians and, indeed, would be an encroachment on federal legislative power in relation to Indians under s. 91(24) of the B.N.A. Act, 1867. If the provincial Adoption Act applies at all, it can only apply through referential incorporation under s. 88 of the Indian Act, but it cannot be squared with s. 88 because of irreconcilable inconsistency. However, if it does so apply and can operate consistently to some degree, this can only be if it is restricted to the adoption of a status Indian child by status Indians. Appellants went on to contend that if there was no such limitation to the force of The Adoption Act, it would run foul

of the Canadian Bill of Rights because there would be discrimination on account of race and inequality before the law.

The respondents, whose counsel also appeared for the Attorney General of British Columbia, were supported in this appeal by the Attorney General of Canada and the Attorneys General of Saskatchewan, Ontario and Alberta. The main thrust of their submissions was to assert that The Adoption Act applied ex proprio vigore to the adoption of Indian children and hence no question arose under the Canadian Bill of Rights. An alternative submission, made particularly by the respondents' counsel, was that even if The Adoption Act applied through referential incorporation, there was nothing inconsistent in giving force to that Act and still recognizing the survival of the Indian status of the adopted child under the Indian Act.

This Court did not call upon the respondents or the intervenors to make submissions on the Canadian Bill of Rights, being of the opinion that, on the assumption that The Adoption Act, by referential incorporation, is federal legislation, there was nothing in it to bring any of the prescriptions of the Canadian Bill of Rights into play. I would in this connection adopt the remarks of the British Columbia Court of Appeal on this issue.

I do not, however, agree with the British Columbia Court of Appeal that there was no referential incorporation in this case. Whether there was or was not depends not only on the meaning and scope of the phrase "all laws of general application from time to time in force in any province" in s. 88 of the Indian Act, but, as well and preliminarily, on the relation between so-called provincial laws of general application and federal legislative powers in relation to matters that, absent federal legislation, are alleged to be governed by those provincial laws in some of their aspects. In this connection I draw attention to the judgment of this Court in *Regina v. George*, 47 C.R. 382, [1966] S.C.R. 267, 3 C.C.C. 137, 55 D.L.R. (2d) 386, in which Martland J. pointed out at pp. 280-81 that the now s. 88 (it was then s. 87) in speaking of "laws of general application from time to time in force in any province" referred to "those rules of law in a province which are provincial in scope", including laws of England adopted as part of provincial law.

There was no challenge in this Court to the general and long-established proposition found in *Union Colliery Co. Ltd.*

v. Bryden, [1899] A.C. 580 at 588, 1 M.M.C. 337, C.R. [12] A.C. 175, that:

"The abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867".

It cannot be said therefore that because a provincial statute is general in its operation, in the sense that its terms are not expressly restricted to matters within provincial competence, it may embrace matters within exclusive federal competence. Thus, to take an example, it has been held by this Court that general mechanics' lien legislation of a province could not be enforced against the property of an interprovincial pipeline: *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481. Again, provincial minimum wage legislation was held inapplicable to the employees of an interprovincial communications enterprise: see *Minimum Wage Commn. v. Bell Telephone Co. of Can. Ltd.*, [1966] S.C.R. 767, 59 D.L.R. (2d) 145, and, similarly, inapplicable to employees of a local contract postmaster: see *Re Sask. Minimum Wage Act*, [1948] S.C.R. 248, 91 C.C.C. 366, [1948] 3 D.L.R. 801. This is because to construe the provincial legislation to embrace such activities would have it encroaching on an exclusive federal legislative area. On the other hand, provincial hours of work legislation was held applicable to employees of a hotel owned and operated by a railway company but not as an integral part of its transportation system: see *Reference re Application of Hours of Work Act (B.C.) to Employees of the C.P.R. in Empress Hotel, Victoria*, [1950] 1 W.W.R. 220, [1950] A.C. 122, 64 C.R.T.C. 266, [1950] 1 D.L.R. 721 (sub nom. *C.P.R. v. A.G. B.C.*).

Ex facie, and apart from the amendment of 1973 introducing s. 10(4a), The Adoption Act did not purport to extend to areas of exclusive federal competence, e.g., Indians. It could only embrace them if the operation of the Act did not deal with what was integral to that head of federal legislative power, there being no express federal legislation respecting adoption of Indians. It appears to me to be unquestionable that for the provincial Adoption Act to apply to the adoption of Indian children of registered Indians, who could be compelled thereunder to surrender them to adopting non-Indian parents, would be to touch "Indianness", to strike at a relationship integral to a matter outside of provincial competence. This is entirely apart from the question whether, if referen-

tially incorporated, The Adoption Act could have any force in the face of various provisions of the Indian Act, securing certain benefits for Indians.

Counsel for the respondents cited a number of cases holding Indians to be subject to provincial legislation. Among them was *Rex v. Hill* (1907), 15 O.L.R. 406 (C.A.), and *Rex v. Martin* (1917), 41 O.L.R. 79, 29 C.C.C. 189, 39 D.L.R. 635 (C.A.). These, and other like cases, are simply illustrative of the amenability of Indians off their reservations to provincial regulatory legislation, legislation which, like traffic legislation, does not touch their "Indianness". Such provincial legislation is of a different class than adoption legislation which would, if applicable as provincial legislation simpliciter, constitute a serious intrusion into the Indian family relationship. It is difficult to conceive what would be left of exclusive federal power in relation to Indians if such provincial legislation was held to apply to Indians. Certainly, if it was applicable because of its so-called general application, it would be equally applicable by expressly embracing Indians. Exclusive federal authority would then be limited to a registration system and to regulation of life on a reserve.

The fallacy in the position of the respondents in this case and, indeed, in that of all the intervenors, including the Attorney General of Canada; is in the attribution of some special force or special effect to a provincial law by calling it a "provincial law of general application", as if this phrase was self-fulfilling if not also self-revealing. Nothing, however, accretes to provincial legislative power by the generalization of the language of provincial legislation if it does not constitutionally belong there.

This is, no doubt, overly obvious, but it is compelled by the nature of the submissions made in this case by the respondents and the intervenors. If the phrase "provincial laws of general application" has any source, it is in the "federal company" cases, involving the relationship of general companies legislation of a province to federally incorporated companies. Thus, in *John Deere Plow Co. v. Wharton*, 7 W.W.R. 706, [1915] A.C. 330 at 342-43, 29 W.L.R. 917, 18 D.L.R. 353 (Can.), Lord Haldane commented as follows:

"It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by s. 92."

The history of this matter is well-known because from the very beginning of its concern with the B.N.A. Act, 1867, the

Privy Council drew a distinction between authority to incorporate companies and to prescribe their powers and their corporate structure and the internal relationship of shareholders and directors and authority to regulate the activities or enterprises in which the companies are engaged. It was in this connection that Lord Haldane made the observation above-quoted. Yet in the very case in which he made it, the Privy Council concluded that it was not open to a province under its general companies legislation to require a licence of a federally incorporated company as a condition of carrying on business qua company because this would in effect prevent it from exercising the powers with which it was endowed by federal authority. *A.G. Man. v. A.G. Can.*, [1929] 1 W.W.R. 136, [1929] A.C. 260, [1929] 1 D.L.R. 369 (Can.), and *Lymburn v. Mayland*, [1932] 1 W.W.R. 578, [1932] A.C. 318, 57 C.C.C. 311, [1932] 2 D.L.R. 6 (Can.), are two contrasting cases in which the principle of *John Deere Plow*, seen in later cases like *Great West Saddlery Co. v. The King*, [1921] 1 W.W.R. 1034, [1921] 2 A.C. 91, 58 D.L.R. 1 (Can.), was applied to provincial legislation which was alleged to put federally incorporated companies at the mercy of the province in respect of the sale of their shares. The particular results in those two cases are of no direct relevance here, but simply illustrate the care that must be taken in the analysis of the issues and of the provincial legislation before subjecting federally incorporated companies to general provincial companies legislation. I cannot believe that any less care should be taken in analysis before subjecting Indians, coming as they do within a specific head of exclusive federal jurisdiction, to general provincial legislation, unless the inclusion of Indians within the scope of the provincial legislation touches them as ordinary persons and in a way that does not intrude on their Indian character or their Indian identity and relationship.

I would add that to give a primary effect to so-called "provincial laws of general application", in the face of s. 88 of the Indian Act, is to fall into the same trap that was noted by Judson J. in *A.G. Can. v. Nykorak*, 37 W.W.R. 660, [1962] S.C.R. 331, 33 D.L.R. (2d) 373. The fact is that we are concerned here with a federal enactment which would be robbed of any meaning if the respondents' and intervenors' submissions went as far as they appeared to carry them. When s. 88 refers to "all laws of general application from time to time in force in any province" it cannot be assumed to have legislated a nullity but, rather, to have in mind provincial legisla-

tion which, per se, would not apply to Indians under the Indian Act unless given force by federal reference.

I am fully aware of the contention that it is enough to give force to the several opening provisions of s. 88, which, respectively, make the "provincial" reference subject to the terms of any treaty and any other federal Act and subject also to inconsistency with the Indian Act and orders, rules, regulations or bylaws thereunder. That contention would have it that s. 88 is otherwise declaratory. On this view, however, it is wholly declaratory save perhaps in its reference to "the terms of any treaty", a strange reason, in my view, to explain all the other provisions of s. 88. I think too that the concluding words of s. 88, "except to the extent that such laws make provision for any matter for which provision is made by or under this Act" indicate clearly that Parliament is indeed effecting incorporation by reference. To hold otherwise would be to reject the proposition quoted earlier from the *Union Colliery Co.* case and to treat the distribution of legislative powers as being a distribution of concurrent powers.

In the view I take, I find it immaterial that the provincial Legislature introduced s. 10(4a) into The Adoption Act. It may properly be considered as an abjuring provision, but there is the point, which was raised during the hearing, that if the province does indeed claim that its Act applies to interfere in Indian family relationships, s. 10(4a) may be constitutionally suspect. I do not find it necessary to pursue this point.

Treating The Adoption Act as referentially incorporated, the central question in this case becomes one of the extent to which that Act is inconsistent with the Indian Act. Certainly, there would be no problem of consistency or inconsistency if, as the appellants urge, the incorporation was limited to adoption of Indian children by Indians. Whether it should be so limited depends on the effect of adoption under the incorporated Act upon the position of an Indian child under the Indian Act. For this purpose, I am not concerned with the actual administration of the incorporated legislation, that is with whether a case for adoption of the particular child by the particular applicants is made out and whether the case is one where the consent of the natural parents should be dispensed with. Assumptions to these ends must be made to focus on the issue of consistency.

In view of the effect of s. 10 of The Adoption Act (as an incorporated provision in the Indian Act) upon parentage, is it open to say that notwithstanding adoption by non-Indians

the Indian child still has entitlement to be or to continue to be registered as an Indian under s. 11 of the Indian Act? This, in my view, is the key provision going to consistency or inconsistency, since "Indian" is defined in the Indian Act as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian". Section 11. so far as relevant, reads as follows:

"11. (1) Subject to section 12, a person is entitled to be registered if that person

"(*a*) on the 26th day of May 1874 was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands,* being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

"(*b*) is a member of a band

"(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or

"(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

"(*c*) is a male person who is a direct descendant in the male line of a male person described in paragraph (*a*) or (*b*);

"(*d*) is the legitimate child of

"(i) a male person described in paragraph (*a*) or (*b*), or

"(ii) a person described in paragraph (*c*)".

I may say here that s. 12 of the Indian Act, mentioned in the opening words of s. 11 above, does not have any bearing here.

It has not been contested that the Indian child in this case comes within s. 11(1)(*d*) unless the effect of an adoption order would be to remove him from that classification. Section 10(2) of The Adoption Act, previously quoted, speaks of a cessation, upon adoption, of the relationship of the child to his natural parents and of the natural parents to the child

"for all purposes". These quoted words do not destroy entitlement to registration under s. 11(1)(*d*) of the Indian Act. They would equally be involved if the adoption of the Indian child was by Indian adopting parents, and yet counsel for the appellants did not urge that there was complete inconsistency in that situation. There may, indeed, be some situations under the Indian Act with which an adoption order and the effect given to it may not be squared. That, however, should not exclude adoption per se through the incorporating effect of s. 88, since adoption legislation is ruled out only to the extent that it is inconsistent.

I do not find that on the key issue of registrability there is inconsistency between The Adoption Act and the Indian Act. I would be loathe to give such a wide construction (and it is construction only with which we are here concerned) to the incorporated s. 10(2) of The Adoption Act as to create incompatibility with the continuing effect of s. 11(1)(*d*) of the Indian Act. This would result in excluding Indian children from possible adoption (save perhaps by Indian custom as mentioned in s. 48(16)) outside of the Indian community, a result to which I would not come unless clearly compelled to do so by unambiguous legislation.

For these reasons, differing somewhat from those of the British Columbia Court of Appeal, I would dismiss the appeal. This is not a case for costs in any court.

MARTLAND J.:—This case is concerned with a petition by the respondent petitioners for the adoption of an Indian child, now over seven years of age. The petitioners are not Indians. The petition was made pursuant to the provisions of The Adoption Act, R.S.B.C. 1960, c. 4. Section 8 [am. 1961, c. 1, s. 3; 1964, c. 1, s. 4; 1968, c. 4, s. 4; 1970, c. 1, s. 3] of the Act contains the following provisions:

"8. (1) Subject to the provisions of subsection (6), no adoption order may be made without the written consent to adoption of

"(*a*) the child, if over the age of twelve years;

"(*b*) the parents or surviving parent of the child, provided that, if the child is illegitimate at the time the mother's consent was signed and has not previously been adopted, only the mother's consent is required, and, notwithstanding anything contained in the Legitimacy Act, no further consent shall be required by reason of the legitimation of the child; . . .

"(6) The Court may dispense with any consent required by subsection (1) if satisfied that the person whose consent is to be dispensed with has abandoned or deserted the child or cannot be found or is incapable of giving such consent, or, being a person liable to contribute to the support of the child, either has persistently neglected or refused to contribute to such support or is a person whose consent ought, in the opinion of the Court and in all the circumstances of the case, to be dispensed with, and the Court may act on the written report of the circumstances by the Superintendent, without further evidence."

The facts are summarized in the reasons of the trial Judge when dealing with the application of the petitioners to dispense with the consent of the natural parents of the child to the adoption:

"The child in question is of native origin, the son of registered members of a band. He is thus a person to whom the Indian Act, R.S.C. 1970, c. I-6, applies. At the age of seven weeks or so he was admitted to hospital in a condition near death as a result of injury and neglect. He came under the care of the female petitioner, a registered nurse on the staff of the hospital, and it is a fair inference from the evidence that she was instrumental in preserving his life. In due course the baby was discharged from hospital (having been apprehended under The Protection of Children Act, R.S.B.C. 1960, c. 303) to the care of the petitioners on an official foster home basis, and thereafter (save for a short period which he spent with his natural parents at the age of three, which resulted in another episode requiring a stay in hospital) has been brought up by them. There is no doubt at all, in my view of the evidence, that he is now a member of their family in every way but blood relationship, and that it would be a cruel and damaging thing to remove him from that family. His status at the moment is that of a ward of the Superintendent of Child Welfare.

"The natural parents have had difficult lives. They do not propose to take the boy into their own immediate family — in which they show some wisdom, for on the evidence I cannot possibly hold them to be fit and proper parents — but instead propose that he be raised by an aunt. This lady and her husband testified that they were willing and anxious to undertake the duty. They have impressive credentials as foster parents, and in my opinion, showed themselves to be admirable and suitable people in every way. It is true that in the past, having taken certain preliminary steps, they did

not pursue the matter of formal adoption. Only now do they come forward and state their position. While delay of this sort might be regarded as a lack of due diligence on the part of the wealthy and the well advised, I do not regard it in that light in the circumstances of this case.

"I am much indebted to certain prominent native people who attended the hearing at my request as friends of the Court, to inform me as to tribal custom in the matter of adoption and family relationships generally. Mrs. Audrey Sampson, Mr. Phillip Paul, for many years Chief of the Tsartlip Band and now holding a responsible office in the education field, and Chief John Albany of the Songhees Band advised me, and were of great assistance. I am of the view that native custom, speaking very generally (for there are slight differences between those of one people and another), recognizes a form of adoption: the rearing of children was and is not the exclusive responsibility of the parents, though they have primary rights and duties. Grandparents, uncles and aunts share this responsibility to a great extent. In native society, originally matrilineal, it is usual nowadays for grandmothers and aunts to take in and rear children when their parents, for one reason or another, cannot themselves do so. Many instances of this custom were given: see also James Sewid, Guests Never Leave Hungry, 1969. I think it is general, and much in use today. It brings about something very close to our notion of adoption: a notion which is common to all legal systems, West Coast native custom as well as our Roman derived law.

"Those who gave evidence, as well as the Court's own advisers, were all of the opinion that there was potential danger to a native child being brought up in a white family, particularly when he reached the later stages of adolescence. I can readily appreciate this view: it is based on perfectly sound ideas of the effects of heredity and is not a matter merely emotional or racial. Instances abound where such persons have in the past experienced difficulty in establishing racial identity in their maturity.

"However, there is another view. One must not forget the effects of environment upon personality; and I have on this point the evidence of Dr. Rasmussen, the family doctor of the petitioners, who has attended the child all his life, is well acquainted with his immediate family, and who struck me as not only a learned, but a sensible physician. Dr. Rasmussen, while not discounting heredity, made a strong case for an intelligently imposed environment being largely determinative of the direction of personality growth — and I am in no doubt

at all as to the capabilities and intentions of the petitioners in this regard. They are as likely as any people to succeed in equipping this child with the strong character of which he will stand in need in the future.

"This is a case, then, where the claims of native custom and The Adoption Act of the province come into conflict, or where heredity and environment clash as concepts. This conflict can only be resolved in the light of the best interests of the child himself. He must be considered as an individual, not a part of a race or culture. His own people are ready and willing to bring him up — in effect, to adopt him. His foster parents have provided, and now provide, the only home he has ever known. To my thinking, the foster parents have established their right (or taken up the right abandoned by the natural parents) to *custody* at this time.

"On balance then, I believe it is best for this child that he be left where he is. The future will not be so difficult for him as it may have been for those of an earlier generation. The order I must make is that the consent of the natural parents to his adoption by the petitioners be dispensed with; and on the facts, I would be prepared to make an order for adoption."

Counsel for the natural parents raised a question of law as to whether The Adoption Act could apply to a child who is an Indian within the purview of the Indian Act. This issue was subsequently argued and the trial Judge concluded that to the extent that the operation of The Adoption Act would affect the status of the child as an Indian, and so extinguish his rights as an "Indian", it is inconsistent with the Indian Act. The petition for adoption was dismissed, although, otherwise, the trial Judge expressed the view that he would have had no hesitation in making the order prayed for.

This decision was reversed on appeal by the unanimous judgment of the Court of Appeal for British Columbia [[1974] 3 W.W.R. 363, 14 R.F.L. 396, 44 D.L.R. (3d) 718]. The following passage appears in the reasons for judgment of the Court [p. 365]:

"In my opinion the Legislature of British Columbia has not purported to legislate in respect of the matters coming within the purview of the Indian Act. The words 'for all purposes' in s. 10(1) and (2) must be taken to refer to all purposes within the legislative competence of the provincial Legislature. If there was any doubt as to the Legislature's intention in this regard it was removed by the passage of The Adoption Act

Amendment Act, 1973 (2nd Sess.) (B.C.), c. 95, which adds subs. (4a) to s. 10 and reads as follows:

"'(4a) The status, rights, privileges, disabilities, and limitations of an adopted Indian person acquired as an Indian under the *Indian Act* (Canada) or under any other Act or law are not affected by this section.'"

Section 10 [am. 1973, c. 2, s. 3; 1973 (2nd Sess.), c. 95, s. 1] of The Adoption Act, to which reference is here made, contains the following provisions:

"10. (1) For all purposes an adopted child becomes upon adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock.

"(2) For all purposes an adopted child ceases upon adoption to be the child of his existing parents (whether his natural parents or his adopting parents under a previous adoption), and the existing parents of the adopted child cease to be his parents.

"(3) The relationship to one another of all persons (whether the adopted person, the adopting parents, the natural parents, or any other persons) shall be determined in accordance with subsections (1) and (2).

"(4) Subsections (2) and (3) do not apply, for the purposes of the laws relating to incest and to the prohibited degrees of marriage, to remove any persons from a relationship in consanguinity which, but for this section, would have existed between them.

"(4a) The status, rights, privileges, disabilities, and limitations of an adopted Indian person acquired as an Indian under the *Indian Act* (Canada) or under any other Act or law are not affected by this section."

The Court of Appeal, in its reasons, dealt with the impact of s. 88 of the Indian Act. It has been argued by counsel for the natural parents that if the effect of s. 88 was to incorporate The Adoption Act into the Indian Act, as federal law, it would contravene the provisions of the Bill of Rights, 1960 (Can.), c. 44.

Section 88 provides as follows:

"88. 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."

The Court of Appeal held that s. 88 did not convert The Adoption Act into federal legislation for the following reasons [pp. 366-67]:

"In my opinion, s. 88 does not have the effect of converting provincial legislation to federal legislation whenever it applies to Indians. Section 88 simply defines the obligation of obedience that Indians owe to provincial legislation. Parliament is neither delegating legislative power to the province nor adopting provincial legislation as its own by declaring in s. 88 what was true before s. 88 existed, namely, that Indians are not only citizens of Canada but also are citizens of the province in which they reside and are in general to be governed by provincal laws. In defining the limits of the obligation of Indians to obey provincial laws, Parliament could not intend that those laws should lose their character as provincial legislation. Accordingly, The Adoption Act is not subject to the Canadian Bill of Rights as that Act only applies to the laws of Canada."

The natural parents appealed to this Court. On the appeal the constitutional validity of the statute which amended The Adoption Act by adding subs. (4a) to s. 10 (previously cited) was questioned on the ground that it was legislation dealing specifically with Indians.

The first question which requires consideration is as to whether the adoption which is under consideration here could properly be authorized by provincial legislation. There is no question as to the power of a provincial legislature to legislate concerning the subject matter of adoption. There is also no question that The Adoption Act is a statute of general application applying to all residents of British Columbia. It did not purport to affect Indians, qua Indians, in a manner different from its effect on all other persons in the province. The only reference in the Act to Indians, as such, appears in s. 10(4a), enacted in 1973, which sought to provide that s. 10 of the Act should not affect the status of an adopted Indian person acquired as an Indian under the Indian Act. It is also clear that the Indian Act contains no procedure of its own for the adoption of Indian children.

The only references to adoption in that Act are:

"2. (1) In this Act . . .

" 'child includes a legally adopted Indian child".

"DISTRIBUTION OF PROPERTY ON INTESTACY

"48. (16) In this section 'child' includes a legally adopted child and a child adopted in accordance with Indian custom."

No other provision is made in this Act with regard to the legal effect or consequences of adoption.

It is contended, however, that, notwithstanding the absence of federal legislation on the subject, to the extent that The Adoption Act might purport to govern the adoption of Indian children it would constitute an encroachment upon the exclusive federal jurisdiction, under s. 91(24) of the B.N.A. Act, 1867, to legislate on the subject of "Indians, and Lands reserved for the Indians."

Subsection (24) of s. 91 is unlike the other subsections of that section (other than subs. (25)) in that it confers legislative jurisdiction on the Parliament of Canada in relation to a specified group of people. The ambit of that authority is uncertain, in that it has not been positively defined by the courts. Within certain limits this includes the power to define Indian status, and this power has been exercised by Parliament by the enactment of the Indian Act. In my opinion it does not mean that Parliament alone can enact legislation which may affect Indians. It does not mean that Indians are totally exempted from the application of provincal laws. A number of cases dealing with the application of provincial laws to Indians were mentioned in the judgment of this Court in *Cardinal v. A.G. Alta.*, [1973] 6 W.W.R. 205, [1974] S.C.R. 695, 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553. The extent to which provincial legislation could apply to Indians was stated to be that the legislation must be within the authority of s. 92 of the B.N.A. Act and that the legislation must not be enacted in relation to Indians. Such legislation, generally applicable throughout the province, could affect Indians.

In the present case we have provincial social legislation, applicable throughout British Columbia, dealing with the subject of the adoption of children. Is the scope of s. 91(24) such that it makes it impossible for an Indian child to be adopted under the provisions of The Adoption Act? In support of the proposition that subs. (24) has that effect it is argued that The Adoption Act can compel Indian parents to surrender their child to non-Indian parents. But, under the provisions of The Adoption Act, no Indian child could be adopted by

anyone without the parents' consent unless the child had been made a permanent ward of the Superintendent of Child Welfare, or of a children's aid society, or unless consent of the parents is dispensed with because the child has been abandoned or deserted, or because of failure to contribute to the child's support, or because the parent is a person whose consent, in the opinion of the court, in all the circumstances of the case, ought to be dispensed with.

These exceptions to the general rule requiring the consent of a child's natural parents to an adoption are all cases in which the child is in need of protection.

The Protection of Children Act makes provision for the committal of children in need of protection to the custody of the Superintendent of Child Welfare or to a children's aid society, and for the placement of such children in a foster home. The Indian child in the present case was a ward of the Superintendent of Child Welfare and had been placed in the custody of the petitioners on an official foster home basis.

Both The Protection of Children Act and The Adoption Act are designed for the protection, custody and care of children in the Province of British Columbia. In my opinion the power given to Parliament, under s. 91(24), to legislate on the subject matter of "Indians, and Lands reserved for the Indians" does not make such legislation inapplicable to Indian children, in the absence of federal legislation dealing with the matter, merely because the designated authorities under those statutes might consider it appropriate, in certain circumstances, in the child's interest, to entrust custody of such child to a foster home, or to parents by adoption, who were not themselves Indians. I do not interpret s. 91(24) as manifesting an intention to maintain a segregation of Indians from the rest of the community in matters of this kind and, accordingly, it is my view that the application of The Adoption Act to Indian children will only be prevented if Parliament, in the exercise of its powers under that subsection, has legislated in a manner which would preclude its application.

There have been cases in which it has been held that some provincial legislation of general application would not be applicable to a corporation or institution subject to exclusive federal control. In *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481, it was held that a federally incorporated company which was incorporated for the purpose of transporting oil by means of interprovincial and international pipelines, and thus was a work

or undertaking within the exclusive jurisdiction of Parliament, was not subject to a mechanic's lien registered under provincial legislation, because such legislation would permit the sale of the undertaking piecemeal and thus nullify the purpose for which it was incorporated.

The case of *Minimum Wage Commn. v. Bell Telephone Co. of Can.*, [1966] S.C.R. 767, 59 D.L.R. (2d) 145, held that a company which had been declared to be a work for the general advantage of Canada was not subject to having its employer-employee relationships affected by a provincial minimum wage statute. Similarly, in *Re Sask. Minimum Wage Act*, [1948] S.C.R. 248, 91 C.C.C. 366, [1948] 3 D.L.R. 801, it was decided that provincial minimum wage requirements would be inapplicable to an employee who was a part of the postal service.

McKay v. The Queen, [1965] S.C.R. 798, 53 D.L.R. (2d) 532, held that a municipal zoning regulation governing the erection of signs on residential properties could not preclude the erection of a sign to support a candidate in a federal election.

Each of these cases was concerned with a particular statute which had the effect of restricting an enterprise or activity within exclusive federal jurisdiction. The Adoption Act is not legislation of this kind. It does not restrict the rights of Indians. It makes it possible for Indian children to have the same right to become adopted as that of all other children in the province. If the contention of the appellants were to prevail it would mean that the parents of an Indian child who desired that the child be adopted by non-Indian adoptive parents would not be able to accomplish that end under the provisions of the provincial legislation, despite their consent.

I do not find any conflict between the provisions of The Adoption Act and the Indian Act. I agree with the view expressed in the Court of Appeal that the words "for all purposes" in subss. (1) and (2) of s. 10 of The Adoption Act must be taken to refer to all purposes within the competence of the British Columbia Legislature. Section 10, even prior to the enactment of subs. (4a), did not purport to deprive the child of any status or rights which he possessed under the Indian Act at the time of his adoption, and it is clear that no provincial legislation could deprive him of such rights.

With respect to the constitutional validity of subs. (4a) of s. 10 of The Adoption Act, it is my view that the purpose of this amendment to s. 10 was merely to make it clear that

the Legislature did not intend that The Adoption Act should be construed as encroaching upon a legislative area which was beyond its competence. If it purported to have any effect beyond that it would be ultra vires of the Legislature as being legislation in relation to Indians. I do not propose to deal with the matter further, because the views which I have so far expressed are not in any way based upon subs. (4a).

I now propose to consider the impact of s. 88 of The Indian Act upon the circumstances of this case. I do not regard s. 88 as intending to incorporate, as part of federal legislation in respect of Indians, all provincial laws of general application. To adopt this view would be to say that, in respect of one class of persons, i.e., Indians, only federal law should apply to them, and subject to federal enforcement. It would mean that Parliament, by enacting s. 88, had caused valid provincal legislation, properly applicable to Indians, to cease to have effect as provincial legislation, by incorporating it as federal legislation into the Indian Act. The wording of s. 88 does not purport to incorporate the laws of each province into the Indian Act so as to make them a matter of federal legislation. The section is a statement of the extent to which provincial laws apply to Indians. I agree with the view expressed by the Court of Appeal with respect to the meaning of this section, which is cited earlier in these reasons.

For the foregoing reasons, I would dispose of this appeal in the manner proposed by the Chief Justice.

BEETZ J.:—I have had the considerable advantage of reading the opinions of the Chief Justice, of Martland J. and of Ritchie J. They relate the facts and quote the relevant provisions of the Indian Act, R.S.C. 1970, c. I-6, and of The Adoption Act, R.S.B.C. 1960, c. 4, as amended by the addition thereto of s. 10(4a) in 1973 (2nd Sess.), c. 95, s. 1.

In my view, the only question directly raised by this case is whether an Indian child can be legally adopted by non-Indian parents.

The Indian Act, in s. 2(1), explicitly contemplates legal adoption although it does not otherwise provide for it. Provincial laws must therefore apply; there are no others. None of the provisions of the Indian Act forbids the adoption of an Indian child by non-Indian parents. The Adoption Act does not distinguish either, assuming that it could, which is most unlikely. I cannot be persuaded that laws general in their terms ought to be interpreted so as not to extend all their advantages to a child because he is an Indian.

While its formal order is silent on this point, the Court of Appeal of British Columbia concludes its reasons for judgment by saying that [[1974] 3 W.W.R. 363 at 367, 14 R.F.L. 396, 44 D.L.R. (3d) 718]: "The order of adoption will not deprive the child of his status or his rights under the Indian Act". Inherent in this conclusion is the proposition that the adoption order could not have been granted had the child lost his Indian status as a consequence of the adoption sought by the petitioners which is the only reason why the trial Judge held that he had no jurisdiction to grant the petition [[1974] 1 W.W.R. 19, 13 R.F.L. 244].

I do not agree with that proposition.

Even if one assumes that the child would lose his Indian status as a consequence of the adoption order, I fail to see in what respect this would conflict with the Indian Act. There could be no conflict either by way of outright repugnancy or by way of occupation of the field since the Indian Act, silent as it is on the conditions, formalities and effects of legal adoption, does not even purport to occupy the field.

One field that the Indian Act does occupy is the definition of Indians. It directs how Indian status is acquired, held and lost. It makes Indian status dependant upon various factors among which is the relationship of filiation. But filiation can be affected by provincial adoption laws. The question then arises whether the concept of filiation under the Indian Act is co-extensive with that of provincial law or, in other words, whether the Indian Act is to be construed, for the purpose of defining Indian status, as importing the concept of provincial law. The question remains the same, I believe, irrespective of words such as "for all purposes" which are found in subss. (1) and (2) of s. 10 of The Adoption Act. Should the answer to that question be in the affirmative, Indian status might conceivably be affected in the result. But such a result, if it be the case, would turn on the true construction of the terms used in the Indian Act to prescribe who qualifies as an Indian in the light of the whole Act. It would flow from these terms and not from provincial law except insofar as, in the very definition of Indian status, they may be part of federal law. It would be a case of reference to provincal law, which can sometimes be made by the use of a single expression in a statute. Such a case would differ, I think, from the broader question whether, for purposes other than the definition of Indian status, the latter purpose being provided for in the Indian Act, provincial laws of general application apply to Indians of their own force or by referential incorporation

under s. 88 of the Indian Act. The incorporation in this case, if any, is a particular, not a general one and it finds its source in the provisions of the Indian Act which relate to Indian status. Problems of a similar nature would arise should Indians wish to adopt a non-Indian child or should a child who is the member of an Indian band be adopted by Indians of another band.

I do not find it necessary to express an opinion on the purview of s. 88 of the Indian Act.

One finds nothing startling in the possible impact of provincial law upon Indian status if one keeps in mind that, in certain cases, the Indian Act makes the acquisition or loss of Indian status dependant upon marriage (as in *Re Lavell and A.G. Can.*, 11 R.F.L. 333, 23 C.R.N.S. 197, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481), and that provincial laws relating to the solemnization of marriages may affect the validity of the contract: *Re Marriage Legislation in Can.*, [1912] A.C. 880, C.R. [1912] A.C. 126, 7 D.L.R. 629 (Can.). Failure to observe provincial laws might, under the provisions of the Indian Act relating to status, entail far-reaching effects upon the status of persons who are parties to an Indian marriage and upon the status of their issue if such provisions are construed as attaching status to a marriage which is valid according to provincal law. This is the situation apart from s. 88 of the Indian Act, as it was the situation before the enactment of this section in 1951 [1951 (Can.), c. 29, s. 87].

The view which I take of this case makes it unnecessary for me to pronounce upon the effects, if any, of the adoption order on the status of the child. However, there are additional reasons of a jurisdictional and procedural nature why I find it preferable to exercise restraint on this point. It would not normally be competent for provincial courts to decide whether or not a person is an Indian. The Indian Act provides a forum and a procedure for this purpose in ss. 5 to 10 which relate to registration: the inclusion of the name of a person on a band list or on the general list, or its deletion from such list may be the subject of a protest made to the Registrar by interested parties such as the electors of the band; the decision of the Registrar upon such protest is subject to review by a county or district court judge acting as persona designata; the latter's decision can in its turn be reviewed by the Federal Court of Appeal under s. 28 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.). This again is illustrated by the proceedings in the *Lavell* case. Our own jurisdiction is limited to giving the judgment that could and

should have been rendered by the court whose decision is appealed against: s. 47 of the Supreme Court Act, R.S.C. 1970, c. S-19.

I accept on the other hand that, before granting an adoption order in a case similar to the present one, the trial judge may and indeed should, in the exercise of his discretion although not as a matter of adjudication, take into consideration, among various circumstances to be weighed by him, the child's possible forfeiture of his Indian status. This consideration does not arise in this case where the child's life and health have twice been put in jeopardy while he was away from his foster parents, the petitioners, whose family and home have been his only family and home for several years.

Finally, in order to reach my conclusions and to answer the question of law which has been specifically stated by the Chief Justice, I must say that s. 10(4a) of The Adoption Act is, in my opinion, clearly ultra vires. This may be paradoxical since subs. (4a) appears to have been dictated by the intent not to invade federal jurisdiction. But what was said is what matters, not what was meant. Whether "the status, rights, privileges, disabilities, and limitations of an adopted Indian person acquired as an Indian under the *Indian Act*" are affected or not affected by adoption is, as a matter of legislative policy, exclusively for Parliament to decide or, as a question of interpretation in a proper case, for the courts to rule upon. How Indian status is affected, by adoption or otherwise, is a matter coming within the class of subjects mentioned in s. 91(24) of the B.N.A. Act, 1967.

I would dispose of the appeal as is proposed by the Chief Justice.

PIGEON J. (DE GRANDPRE J. concurring):—I agree with Beetz J. and also with the views expressed by Martland J. on the meaning and effect of s. 88 of the Indian Act, R.S.C. 1970, c. I-6.

RITCHIE J.:—I have had the advantage of reading the reasons for judgment prepared for delivery by the Chief Justice and while I agree with him that the appeal should be dismissed, my reasons for doing so are so materially different from his that I think it desirable to express my own views.

The question of law to which this appeal relates and which has been outlined in the reasons for judgment of the Chief Justice is, essentially, whether The Adoption Act, R.S.B.C. 1960, c. 4, as amended, applies of its own force to Indians

within the meaning of the Indian Act, R.S.C. 1970, c. I-6, who are resident in the Province of British Columbia.

A constitutional issue related to this general question and arising directly from a recent amendment to The Adoption Act was formulated in the order of the Chief Justice dated 4th July 1974, notice of which was served on the Attorney General of Canada and the Atorneys General of the provinces pursuant to that order. The question so stated reads as follows:

"Whether A) *The Act to Amend the Adoption Act*, S.B.C. 1973, (2nd) chapter 95, which purported to take effect on the 7th day of November, 1973 is *ultra vires* the Legislative Assembly of the Province of British Columbia being legislation specifically dealing with Indians."

By the amendment to which reference is made in this question, the Legislature of British Columbia enacted subs. (4a) of s. 10 of The Adoption Act which reads as follows:

"(4a) The status, rights, privileges, disabilities, and limitations of an adopted Indian person acquired as an Indian under the *Indian Act* (Canada) or under any other Act or law are not affected by this section."

As will hereafter appear, I am satisfied that The Adoption Act is not a statute enacted in relation to Indians "under the *Indian Act*" and that its provisions, including those of s. 10, do not affect the "status, rights, privileges, disabilities, and limitations . . . acquired as an Indian under the *Indian Act*". The Adoption Act only applies to Indians by reason of their character as citizens of the Province of British Columbia and I can find no conflict between that statute and the Indian Act.

It follows from this that in my opinion the newly-added subsection made no change in the law. If I thought otherwise, however, I would feel constrained to hold that subs. (4a) constitutes an attempt by the province to invade the field of legislative authority over "Indians and Lands reserved for Indians" which is assigned to the exclusive legislative authority of Parliament by s. 91(24) of the B.N.A. Act, 1867, and is accordingly beyond the powers of the province, but as I find that subs. (4a) has no such effect and makes no change in the law, I find it to be ineffective rather than ultra vires.

The question so raised is however, in my view, far from the heart of the matter and the determination of this appeal must turn on the meaning to be atributed to the language employed by Parliament in enacting s. 88 of the Indian Act

and particularly whether that section has the effect of incorporating provincial legislation as a part of the Indian Act and thereby converting it into legislation passed by the Parliament of Canada. Section 88 of the Indian Act reads as follows:

"88. 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.*" (The italics are mine.)

The reasons for judgment delivered by the Chief Justice of British Columbia on behalf of the Court of Appeal of that province contain the following pertinent comments on this section [[1974] 3 W.W.R. 363 at 364-65, 14 R.F.L. 396, 44 D.L.R. (3d) 718]:

"In 1951, what is now s. 88 of the Indian Act was enacted. It defines the extent to which laws of general application of a province are applicable to Indians . . .

"Thus, the extent to which laws of general application in force in a province are applicable in respect of Indians is limited. Laws of general application apply to Indians but they will not operate in a way that is inconsistent with the provisions of the Indian Act or in respect of matters for which the Indian Act has made provision."

And the Chief Justice later observes [pp. 366-67]:

"In my opinion, s. 88 does not have the effect of converting provincial legislation to federal legislation whenever it applies to Indians. Section 88 simply defines the obligation of obedience that Indians owe to provincial legislation. Parliament is neither delegating legislative power to the province nor adopting provincial legislation as its own by declaring in s. 88 what was true before s. 88 existed, namely, that Indians are not only citizens of Canada but also are citizens of the province in which they reside and are in general to be governed by provincal laws. In defining the limits of the obligation of Indians to obey provincal laws, Parliament could not intend that those laws should lose their character as provincial legislation. Accordingly, The Adoption Act is not subject to the Canadian Bill of Rights [R.S.C. 1970, App. III] as that Act only applies to the laws of Canada."

This view is directly opposed to that expressed by the present Chief Justice in the reasons for judgment which he delivered on behalf of the minority in this Court in *A.G. Alta. v. Cardinal*, [1973] 6 W.W.R. 205 at 228, [1974] S.C.R. 695, 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553, where he said of the effect of s. 88 on the provisions of The Wildlife Act, R.S.A. 1970, c. 391, when read in light of the terms of an agreement entered into between the province and the federal government which was confirmed by the B.N.A. Act, 1930, and by s. 12 whereof Canada agreed that the laws respecting game in the Province of Alberta applied to Indians within the boundaries of that province:

"The section (88) deals only with Indians, not with reserves, and *is, in any event, a referential incorporation of provincial legislation* which takes effect under the section as federal legislation. I do not read s. 88 as creating any exception to the operation of federal legislation by making way for otherwise competent provincial legislation, as is the case under the Lord's Day Act, R.S.C. 1970, c. L-13. If The Wildlife Act of Alberta is such an enactment as is envisaged by s. 88, an Indian who violated its terms would be guilty of an offence under federal law and not of an offence under provincial law." (The italics are mine.)

The majority of this Court did not subscribe to these views and found it unnecessary in the circumstances of that case to determine the meaning and effect of s. 88, but the present Chief Justice does not appear to have altered the view which he then expressed as his reasons for judgment in the present case are clearly predicated on the assumption that s. 88 constitutes referential incorporation of provincial legislation which takes effect under the section as federal legislation.

In my opinion, before embarking on an analysis of the language used in s. 88, it is profitable to consider the construction to be placed on provincial legislation which is not directed towards or passed in relation to Indians but which may have an incidental effect on them as citizens of the province in which they reside. In this regard, Martland J., in delivering the opinion of the majority of this Court in *A.G. Alta. v. Cardinal,* commented on the provisions of s. 12 of the agreement hereinbefore referred to whereby it was provided that the laws respecting game in force in the province applied to Indians within its boundaries, and went on to say [pp. 210-11]:

"As indicated earlier, the appellant starts from the proposition that, prior to the making of the Agreement [Schedule

to The Alberta Natural Resources Act, 1930 (Alta.), c. 21], Indian reserves were enclaves which were withdrawn from the application of provincial legislation, save by way of reference by virtue of federal legislation. On this premise it is contended that s. 12 [of the Agreement] should not be construed so as to make provincial game legislation applicable within Indian reserves.

"I am not prepared to accept this initial premise. Section 91(24) of the B.N.A. Act, gave exclusive legislative authority to the Canadian Parliament in respect of Indians and over lands reserved for the Indians. Section 92 gave to each province, in such province, exclusive legislative power over the subjects therein defined. It is well established, as illustrated in *Union Colliery Co. of B.C. Ltd. v. Bryden*, [1899] A.C. 580, 1 M.M.C. 337, C.R. [12] A.C. 175 (Can.), that a province cannot legislate in relation to a subject matter exclusively assigned to the Federal Parliament by s. 91. But it is also well established that provincial legislation enacted under a heading of s. 92 does not necessarily become invalid because it affects something which is subject to federal legislation. A vivid illustration of this is to be found in the Privy Council decision a few years after the *Union Colliery* case in *Cunningham v. Tomey Homma*, [1903] A.C. 151, which sustained provincial legislation, pursuant to s. 92(1), which prohibited Japanese, whether naturalized or not, from voting in provincial elections in British Columbia.

"A provincal legislature could not enact legislation in relation to Indians, or in relation to Indian reserves, but this is far from saying that the effect of s. 91(24) of the B.N.A. Act was to create enclaves within a province within the boundaries of which provincial legislation could have no application. In my opinion, the test as to the application of provincial legislation within a reserve is the same as with respect to its application within the province, and that is that it must be within the authority of s. 92 and must not be in relation to a subject matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian reserves, but if provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the province, including Indian reserves, even though Indians or Indian reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a

province within which the power of a province to enact legislation, otherwise within its powers, is to be excluded."

I agree with the views so expressed and, as I have indicated, I am of opinion that The Adoption Act of British Columbia was not passed "in relation to Indians" but rather that it is a statute applying to all the citizens of the province and only having application to Indians as such citizens.

In my view, when the Parliament of Canada passed the Indian Act it was concerned with the preservation of the special status of Indians and with their rights to Indian lands, but it was made plain by s. 88 that Indians were to be governed by the laws of their province of residence except to the extent that such laws are inconsistent with the Indian Act or relate to any matter for which provision is made under that Act.

The question here is whether s. 10 [am. 1973, c. 2, s. 3; 1973 (2nd Sess.), c. 95, s. 1] of The Adoption Act is legislation in relation to Indians so as to affect Indian status or Indian land rights. This section has been fully reproduced in the reasons for judgment of the Chief Justice, but I think it desirable for an understanding of my reasons to reproduce the first three subsections:

"10. (1) For all purposes an adopted child becomes upon adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock.

"(2) For all purposes an adopted child ceases upon adoption to be the child of his existing parents (whether his natural parents or his adopting parents under a previous adoption) and the existing parents of the adopted child cease to be his parents.

"(3) The relationship to one another of all persons (whether the adopted person, the adopting parents, the natural parents, or any other persons) shall be determined in accordance with subsections (1) and (2)."

In determining whether this section affects the status, rights, privileges, disabilities or limitations of an Indian it appears to me desirable to consider the meaning of Indian under the Indian Act. The word is defined in s. 2(1) as follows: "'Indian' means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian". The persons so entitled are described in s. 11(1), the relevant portions of which are reproduced in the reasons for

judgment of the Chief Justice. Section 11(1)(*a*) provides that a person is entitled to be registered as an Indian if that person was considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, under the provisions of 1868 (Can.), c. 42.

I think it relevant to quote s. 11(*b*), (*c*) and (*d*) which provide that a person is entitled to be registered as an Indian if that person:

"(*b*) is a member of a band

"(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or

"(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

"(*c*) is a male person who is a direct descendant in the male line of a male person described in paragraph (*a*) or (*b*);

"(*d*) is the legitimate child of

"(i) a male person described in paragraph (*a*) or (*b*), or

"(ii) a person described in paragraph (*c*)".

It is not contested that the child adopted in this case comes within s. 11(1)(*d*) unless the effect of the adoption order would be to remove him from that classification. It was contended that the provisions of s. 10(2) of The Adoption Act which I have quoted, affected the status of the adopted child so as to deprive him of his right to registration under the Indian Act.

Section 10(2) provides that an adopted child ceases upon adoption to be the child of his existing (natural) parents and the existing parents of the adopted child cease to be his parents, but I do not think that this section can be said to destroy the child's quality as the legitimate child of a person entitled to be registered as an Indian. The fact that the child acquires new parents does not make him an illegitimate child and it is his legitimacy which entitles him to registration in conjunction with the fact that he was born of a male person entitled to registration.

It is worthy of note also that under the provisions of s. 2 (1) of the Indian Act "child" is defined as follows: "'child' includes a legally adopted Indian child". This provision serves

as an indication of the fact that the Parliament of Canada recognized that Indian status was unaffected by provincial Adoption Acts because there being no federal legislation concerning adoption, the phrase "a legally adopted Indian child" must refer to adoption under the law of the province, and I take the view that the definition must be taken in its ordinary and natural meaning and that there is no reason to confine it to cases of the adoption of Indian children by Indian parents.

In light of the above, I am of opinion that s. 88 of the Indian Act should be construed as meaning that the provincial laws of general application therein referred to apply of their own force to the Indians resident in the various provinces. Accordingly, in my view, The Adoption Act here in question applies to the Indians resident in the Province of British Columbia just as it does to the other residents of that province.

For all these reasons I would dismiss this appeal.

I agree with the Chief Justice that this is not a case for costs in any court.

MANITOBA QUEEN'S BENCH

Solomon J.

McLachlan v. McLachlan et al.

Executors and administrators — Beneficiaries honestly believing estate fully administered — Entering into agreement for sale of land and discovering error and need for administrator — Whether administrator bound by earlier agreement.

C. M. died intestate in 1969; her estate consisted of real property registered in her name and $5,000; J. M. as husband was entitled to $10,000 and one-third of the balance of C. M.'s estate; J. M. as administrator transmitted title to the real property into his name as administrator of the estate of C. M.; three children were entitled to share in the balance of C. M.'s estate after payment to J. M.; J. M. died in 1973 and left surviving a wife E. M. and the three children; E. M. was executrix of the estate of J. M. J. M. tried to sell the real property but never received the price he wanted. After J. M.'s death an offer was made to E. M. to purchase the property; she discussed the matter with two of the children before she accepted the offer and the other child after acceptance and all agreed the price was satisfactory. When the condition of the title was discovered, in the name of J. M. as administrator of C. M.'s estate, a son applied for and was appointed administrator de bonis non of the estate of C. M., his mother. The son did not consider he was bound by the earlier acceptance of E. M. and sought the direction of the Court.

The Court held that proof of non-compliance with the condition that all government regulations be complied with was a complete defence, and that the question as to whether the loss was occasioned as a natural consequence of such non-compliance was immaterial.

A later Supreme Court of Canada decision, *Survey Aircraft Ltd. v. Stevenson*, supra, held that a clause excluding liability if the aircraft was operated in violation of the conditions set forth to be complied with in its certificate of airworthiness was effective to bar a claim where the aircraft was operated in violation of two conditions, namely, the performance of aerobatics and the carrying of a passenger.

A later Supreme Court of Canada decision, *Orion Insur. Co. v. Crone*, [1967] S.C.R. 157, [1967] I.L.R. 1-179, 60 D.L.R. (2d) 630, distinguished *Survey* on its facts, holding that the actions by the pilot in the *Survey* case did operate so as to result in the aircraft being used for a purpose not authorized by the licence and hence bringing the exclusion clause into play, whereas the actions by the insured on the *Orion* facts did not constitute a breach of condition sufficient to result in the aircraft being used for an unauthorized purpose. Both the *Orion* and *Survey* cases are perhaps distinguishable on their facts, since non-compliance in each case involved some sort of additional risk, whereas here we are dealing with a situation where no additional risk was occasioned by the non-compliance.

However, even given this to be a valid distinction, I am, nevertheless, still bound by the *Obalski* case, supra, and I must therefore conclude that the insured has no claim for loss due to his non-compliance with the conditions of the policy. In the result the action must stand dismissed against the defendant Insurance Company of North America. At the outset of this action the plaintiff wholly discontinued the action against the other defendant.

MANITOBA QUEEN'S BENCH

Dewar C.J.Q.B.

Nelson and Nelson v. Children's Aid Society of Eastern Manitoba

Indians — Whether children subject to provisions of The Child Welfare Act, R.S.M. 1970, c. C80 — Custody and adoption.

The Child Welfare Act applies to children who are Indians, and orders made thereunder for permanent custody or for adoption do not terminate or destroy such children's status as Indians.

[Note up with 13 C.E.D. (West. 2nd) *Indians*, ss. 1, 16.]

P. V. Walsh, for applicants.

V. W. Libitka, for respondent.

B. J. Meronek, for Department of Justice.

M. S. Samphir, for Attorney General of Manitoba.

28th June 1974. DEWAR C.J.Q.B.:—Gordon Nelson and Christine Nelson apply under s. 15(3) of The Child Welfare Act, R.S.M. 1970, c. C80, for an order that the custody of their infant children Bruce Douglas Nelson, born 11th October 1961, Edward Gordon Nelson, born 5th October 1962, Eleanor Nelson, born 31st January 1965, Alberta Louise Nelson, born 20th December 1966, and Nancy May Nelson, born 4th June 1968, be returned to them.

The children were apprehended by the Children's Aid Society of Eastern Manitoba at Emerson, Manitoba, on 20th February 1970, at which time a Family Court order was made committing the children to the care and custody of the society for a period of three months.

By subsequent orders this temporary custody was extended to 20th August 1970, then to 20th November 1970. No further order was made after that time and the children were returned to their parents on 11th December 1970, apprehended again by the society on 22nd April 1971, and by court order they were again placed in the care and custody of the society until 22nd October 1971. This order, too, was extended initially to 22nd February 1972, then to 22nd June 1972, by which latter date the society had applied for an order for permanent custody pursuant to the provisions of The Child Welfare Act. That application was heard before Bowman Prov. J. in the St. Boniface Family Court on 17th November 1972 and resulted in orders committing each of the children permanently to the care and custody of the society. The applicant parents were notified of the hearing on 17th November 1972. The female applicant attended.

On 23rd February 1973 the society placed the child Alberta Louise Nelson for adoption within the Province of Manitoba and on 20th June 1973 placed the child Nancy May Nelson for adoption in the United States of America. These placements also were made pursuant to the provisions of The Child Welfare Act and save for the issue as to the application of that Act to Indians raised in these proceedings the placements are not questioned. I am not asked to consider the legality of a placement for adoption outside Canada. The other three children, namely, Bruce Douglas Nelson, Edward

Gordon Nelson and Eleanor Nelson, are presently in foster homes and available for adoption.

At the present time the parents reside in the City of Winnipeg. The mother has been working intermittently, the father is unemployed. On 15th November 1972, two days prior to the hearing before Bowman Prov. J., each of the parents made a declaration stating:

"THAT I am unable to resume responsibility and care of my children and it is my wish that they remain in the permanent care and custody of the Children's Aid Society of Eastern Manitoba.

"THAT I understand fully the context and meaning of the permanent committment of my children to the guardianship of the Children's Aid Society of Eastern Manitoba."

On the merits, having regard to the material before me and the failure of the applicants to indicate a plan for the care and welfare of their children, I would not interfere with the orders of permanent custody made on 17th November 1972.

The real grounds of this application are set forth in the amended originating notice and are as follows:

"a) that The Child Welfare Act of Manitoba insofar as it purports to affect the rights or interests of Indians is *ultra vires* and null and void;

"b) in applying the said Child Welfare Act to Indians the presiding Judge exceeded his (sic) jurisdiction and was without jurisdiction."

These grounds were modified in argument on behalf of the applicants to define the issue more appropriately as one wherein the applicants contend the provisions of The Child Welfare Act relating to permanent custody orders and adoption can have no application to Indians because they are inconsistent with the Indian Act, R.S.C. 1970, c. I-6, and Regulations, etc., made thereunder or are in conflict with provisions of the Indian Act.

It is common ground that the applicants and the children involved are Indians. It is also common ground that The Child Welfare Act is a statute of general application within this province. It does not differentiate between children, or in its application to children, on grounds of ethnic or racial origin. I have not been referred to any provision of the

Indian Act specifically in conflict with any provision of The Child Welfare Act. The case is argued on a more general basis, namely, that the provisions for permanent custody or adoption contained in The Child Welfare Act when applied to children who are Indians can have (not necessarily do have) the effect of depriving them of the status it is said is conferred by the Indian Act.

Section 88 of the Indian Act provides:

"88. 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."

There can be no question that these children are subject to this provision. It makes applicable to Indians all laws of general application within a province except where those laws are inconsistent with the Indian Act or make provision in matters already dealt with under the Indian Act. A part of the material before me includes copies of certain treaties executed in 1871 and 1875 between the Crown and certain groups of Indians including the Rousseau band. These treaties contain nothing that appears to affect the present issue.

A similar question was dealt with recently in the British Columbia Court of Appeal in an action between the Superintendent of Child Welfare and the petitioners for adoption, as appellants, and the natural parents of an Indian child who had been adopted by non-Indian parents. The reasons for judgment, dated 1st March 1974, do not appear to have been reported [see *Re Birth Registration No. 67-09-022272*, [1974] 3 W.W.R. 363, 14 R.F.L. 396, 44 D.L.R. (3d) 718].

The statute considered by the Court of Appeal in that case was The Adoption Act, R.S.B.C. 1960, c. 4, a statute of general application within the Province of British Columbia providing for the adoption of children. The Court of Appeal reversed the judgment of the lower Court which denied a petition by non-Indian parents to adopt an Indian child on the ground that The Adoption Act of British Columbia was not applicable to and in respect of Indians within that province [[1974] 1 W.W.R. 19, 13 R.F.L. 244].

In my view The Child Welfare Act applies in the case of these children. The fact that an Indian child may be the subject of an order for permanent custody or the fact that an Indian child may be adopted by non-Indian parents does not, in my view, terminate or destroy any rights that child as an Indian may have under the Indian Act nor terminate or destroy the child's status as an Indian. Further, The Child Welfare Act does not purport to do so. Accordingly, it seems clear that despite a custody order made under The Child Welfare Act or an adoption effected under the provisions of that Act an Indian child continues to enjoy whatever rights or status are accorded by the Indian Act.

Part of the applicants' complaint is that adoption by non-Indian parents removes an Indian child from the Indian cultural atmosphere and environment. If that is the case, these children have been abandoned for some considerable time by their parents and a complaint of this nature now is difficult to understand. In my view the Indian Act does not attempt to compel persons who are Indians to live within any particular cultural environment as a condition of retaining the status of Indian within the meaning of the Act.

The application is dismissed. Costs may be spoken to.

ALBERTA SUPREME COURT

[APPELLATE DIVISION]

Allen, Sinclair and Prowse JJ.A.

Mathieson v. Mathieson

Contempt of court — Disobedience of restraining order — Procedure.

Appellant was in breach of an order restraining him from visiting his ex-wife's home or molesting or interfering with her in any way; he had committed three previous breaches for which he had been brought before the Court and punished, by way of reprimands and imprisonment. He was sentenced on the final breach to imprisonment for one year.

Held, the appeal should be allowed and the sentence of imprisonment set aside; in the proceedings which led to the sentence of imprisonment the appellant was not represented by counsel and it appeared that he was not afforded an opportunity to explain how and why the breach occurred; moreover, the proceedings were summary in nature whereas the contempt in question was not criminal and was not committed in the face of the Court, and the authorities were to the effect that in such a case summary process should rarely if ever be resorted to: *Rex v. Almon* (1765), Wilm. 243, 97 E.R. 94; *Re Campbell and Cowper*, [1934] 3 W.W.R.

RE WAH-SHEE

Northwest Territories Supreme Court, Morrow, J. April 4, 1975.

Infants — Adoption — Custom adoption — Whether custom adoption to be permitted where wife of Indian petitioner a caucasian.

Indians — Adoption — Custom adoption — Whether custom adoption permissible where wife of Indian petitioner a caucasian.

The practice and legality of Indian custom adoption has long been recognized by the Court. This form of adoption is not to be denied to petitioners simply because one of them is a caucasian woman. Where the woman has married an Indian and has expressed in clear language the intent to become a full member of the Indian band, and has been accepted not only by the chief and Council of the band, but by the whole band, and where she is entitled to be registered as the wife of a person entitled to be registered as a member of the band pursuant to s. 6 of the *Indian Act*, R.S.C. 1970, c. I-6, she and her husband are entitled to adopt an Indian child by native custom adoption.

[*Re Adoption of Katie E7-1807* (1961), 32 D.L.R. (2d) 686, 38 W.W.R. 100; *Re Tucktoo et al. and Kitchooalik et al.* (1972), 27 D.L.R. (3d) 225, [1972] 3 W.W.R. 194; affd 28 D.L.R. (3d) 483, [1972] 5 W.W.R. 203; *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479, 67 W.W.R. 669, refd to]

APPLICATION for a declaratory order confirming a custom adoption.

Earl D. Johnson, for Government of Northwest Territories.

MORROW, J.:—The two petitioners herein purported to adopt Corrine Cordell Washie, a child of Treaty Indian parents, on June 30, 1974, by Indian custom adoption. While it has been the long-standing practice of this Court to grant declaratory orders confirming custom adoptions on summary application, the facts in the present case were felt to require a more formal hearing. Accordingly both petitioners appeared before me today and testified as to their background and as to the circumstances of the adoption. Mr. Earl Johnson, solicitor for the Social Development Department of the Territorial Government was invited to appear as well and his assistance was very helpful.

James Jason Wah-shee is a Treaty Indian whose parents were both Treaty Indians. He is presently president of the Indian Brotherhood and just recently was elected to the Territorial Council by acclamation. Mr. Wah-shee described how custom adoptions are an integral part of the culture of his people, who constitute the Dogrib Indian Band located in and about Fort Rae, in the Northwest Territories. He agreed with and confirmed the testimony of his wife which will be examined in greater detail. One of Mr. Wah-shee's own

brothers came into the family group by custom adoption.

Caroline Diane Wah-shee is of the caucasian race and was married to James Jason Wah-shee at Fort Rae on August 9, 1969. Before she and her husband were married they both approached his parents and sought and obtained their blessing to the marriage. As she says, her intention to become a full member of the Indian Band was expressed in clear language at that time and has never wavered. The young couple then circulated among the groom's relatives and friends seeking acceptance as is and as has always been the custom and finally the marriage was accepted by Chief Bruneau and his Band Council. They were welcomed by the Chief and his Council and they all shook hands.

Father Amoreaux performed the marriage ceremony in the Dogrib language except for a few words from Mrs. Wah-shee in English. Following the marriage all participants took part in a dance which is apparently part of the custom and tradition among the Dogrib people.

Following the marriage, application was made to have Caroline Diane Wah-shee's name entered on the band list pursuant to s. 6 of the *Indian Act*, R.S.C. 1970, c. I-6. This application was accepted and the applicant was given a card No. 619 certifying that she "is an Indian within the meaning of the Indian Act". Mrs. Wah-shee has since been in receipt of treaty money and subject to the limitations as well as the benefits under that statute.

Following the marriage the petitioners have adopted one child of the Indian race which adoption was effected under the provisions of the *Child Welfare Ordinance*, 1961 (2nd Sess.) (N.W.T.), c. 3.

Mrs. Wah-shee who is presently employed by the Territorial Government as a community development officer has certain reservations about adoptions under the legislation, particularly in respect to native children feeling that such practices as keeping the natural mother from knowing where her child has gone, and so on, creates problems. As she says the practice tends to erode the customs and traditions of the native people. She and her husband were determined, therefore, to seek their second adoptive child by the "custom" method if the law permits.

I should observe that this petitioner outlined how, without the declaratory declaration presently sought, she and her husband were experiencing difficulty with acquiring a proper birth certificate, with mother's allowance cheques, medical benefits, and other matters where identification is required.

With this in mind, when Corrine Cordell Washie was born the petitioners in accordance with the custom of the Dogrib people arranged to adopt her at the time of birth. The child was born in the hospital at Yellowknife on June 26, 1974. The child had jaundice. The petitioner Caroline Diane Wah-shee helped care for and feed the child while it recuperated in the hospital following birth and then took delivery of the child. She and her husband have continued to care for the child as their's ever since.

The child is James Jason Wah-shee's niece. Her parents have acknowledged the custom adoption. From the point of view of the natural parents the reason for the adoption is their poverty and the fact that this child was their 10th..

Except for the female petitioner's racial origin the adoption would have gone through without special attention. The practice and legality of such adoptions has long been recognized by this Court: *Re Adoption of Katie E7-1807* (1961), 32 D.L.R. (2d) 686, 38 W.W.R. 100; *Re Tucktoo et al. and Kitchooalik et al.* (1972), 27 D.L.R. (3d) 225, [1972] 3 W.W.R. 194; affirmed 28 D.L.R. (3d) 483, [1972] 5 W.W.R. 203, and *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479, 67 W.W.R. 669.

Special reference should be made to *Re Beaulieu's Adoption Petition* as this decision relates to custom adoptions in and about the Fort Rae area and the chief and Council members who gave evidence as to the custom practised by the Dogrib Indians were the same persons who gave their approval and blessing to the marriage of the petitioners.

The petitioner Caroline Diane Wah-shee was accepted by not only the chief and Council but by the whole of the Dogrib band, she has been accepted on the Band list as shown by the card referred to above, and she was in my opinion entitled to be registered as such as the wife of a person entitled to be (and in fact registered) registered as a member of a band: s. 11(*f*). This in my opinion has had the legal effect of constituting her a full member of the Dogrib Indian Band with full status. Even without the provisions of the *Indian Act* I would have, on the evidence, found her to be a full member of the band with all that entails.

Accordingly I see no reason why she and her husband could not have by custom adopted the child Corrine. In the result there will be an order declaring, ordering and adjudging that the petitioners adopted the child in accordance with native custom on or about June 30, 1974, and that as requested the child shall retain the name of Sky Aurora Wah-shee.

Application granted.

ALBERTA FAMILY COURT

Byrne Family Ct. J.

Black Plume v. Black Plume

Custody — Indian children — Section 67 of the Indian Act, R.S.C. 1952, c. 149, not ousting the jurisdiction of Family Court under The Domestic Relations Act, R.S.A. 1955, c. 89.

25th June 1970. BYRNE Family Ct. J.:—This is an application for maintenance of children only brought by Geraldine Black Plume against Cecil Black Plume. At the first hearing, objection was taken by the respondent husband as to jurisdiction and, accordingly, adjourned to 14th April 1970 for argument on this point.

Counsel for the parties reached agreement and presented to the Court the following set of facts:

1. Geraldine Black Plume and Cecil Black Plume are both Indians within the meaning of the Indian Act, R.S.C. 1952, c. 149, and are registered members of the Blood Indian Band.

2. They were married on 1st October 1960 and there are five children born of this marriage. These five children and their ages are: Gerald, nine; Shirley, eight; Colleen, six; Calley, three; and Norman, one. The eldest three are all attending school.

3. The parties have been living apart since January 1969.

4. Cecil Black Plume deserted his wife and family without sufficient cause.

It is noted that the application is for children only and desertion would, therefore, not necessarily be an ingredient in the hearing. However, in reaching a decision, I am accepting as a fact that Cecil Black Plume did in fact desert the applicant and the children of the marriage without sufficient cause.

Counsel for the respondent takes the position that the applicant, being an Indian and married to an Indian, both within the meaning of the Indian Act, and both residing on the reserve, has her rights under s. 67 of the Indian Act.

Counsel representing the applicant argues that while the applicant does have certain rights of recovery from the respondent under s. 67, she is not thereby precluded from proceedings, as could any other resident of Alberta, by way of The Domestic Relations Act, R.S.A. 1955, c. 89. Section 87 of the Indian Act was referred to in support of this position. Finally, counsel

representing the applicant argues that if s. 67 circumscribes the applicant's rights, then that section ought to be declared inoperative as being contrary to the Bill of Rights, 1960 (Can.), c. 44.

I see nothing repugnant in the applicant having certain rights under the Indian Act, namely, those given to her by s. 67, and at the same time having the right to proceed under the relevant portion of The Domestic Relations Act for the Province of Alberta. It therefore becomes unnecessary to consider whether s. 67 ought, in these circumstances, to be declared inoperative.

Counsel for the respondent also argued that because treatment of and legislation for Indians under the B.N.A. Act, 1867, was reserved to the Parliament of Canada, no Indian ought to be proceeded against under this provincial statute, namely The Domestic Relations Act. However, it seems to me that this argument is met when one considers that The Domestic Relations Act is clearly one affecting civil rights (a provincial matter) and that the Indian Act says (s. 87) that all Indians shall come under provincial statutes of general application except to the extent that there is a conflict with the Indian Act, and I see no conflict here.

Accordingly, the objection as to jurisdiction is dismissed.

SASKATCHEWAN QUEEN'S BENCH

Disbery J.

Richardson v. Richardson and Smith

Custody — Mother living in open adulterous relationship — Mother granted custody of five-year-old daughter — Principles — The Divorce Act, 1967-68 (Can.), c. 24, s. 11(1)(c).

Divorce — Costs — Recovery of expenses of private detective — Recommended procedure.

The existence of an adulterous relationship and its effect upon the morals of the infant are proper factors to be considered in a custody action, but such always remain subsidiary considerations to the infant's welfare and happiness. An order for custody is made for the benefit of the infant involved and, such being the purpose of the order, the decision upon which the order issues is not to be determined by weighing the conduct of the wife vis-à-vis the husband and on that basis awarding custody to the wronged spouse. Accordingly, the respondent wife, in the instant case, was awarded custody of her five-year-old daughter, notwithstanding that she was living openly in an adulterous relationship with the co-respondent. The evidence indicated that the respondent was a good mother and that the adulterous relationship had no bad effects upon the child. It was further indicated that both respondents intended to regularize their relationship as soon as possible.

MANITOBA

COURT OF APPEAL

Before McPherson, C.J.M., Coyne, Dysart, Adamson and Montague, JJ.A.

Children's Aid Society of Eastern Manitoba et al (Plaintiffs) Respondents

v. **Rural Municipality of St. Clements** (Defendant) Appellant

Infants — Neglected Children — Liability for Maintenance — Illegitimate Child of Treaty Indian Mother — Child Welfare Act — Municipal Act — "Institution" — "Resident" — "Residence" — "Lives" — "Living."

In view of the lack of clarity in the provisions of *The Child Welfare Act*, RSM. 1940, ch. 32, with sec. 2 (2) of *The Municipal Act*, RSM, 1940, ch. 141, incorporated, *held* that the part of the order in question herein which imposed liability for maintenance upon the appellant municipality could not be justified; nor do said provisions justify placing the liability upon the city of Winnipeg or upon any municipality in respect of an illegitimate child of a Treaty Indian whose residence and domicile, in the ordinary acceptance of the terms, is an Indian reserve.

The illegitimate child of a Treaty Indian mother is an Indian and during infancy takes the domicile and residence of the mother.

[Note up with 2 CED (CS) *Indians*, secs. 7, 8; *Infants*, sec. 74; 3 CED (CS) *Words and Phrases* (1947-1951 Supps.).]

Appeal from part of an order by Bernier, C.C.J. Appeal allowed. No costs.

F. W. Newman, Q.C., for defendant, appellant.

A. M. Monnin, for plaintiff, respondent, Children's Aid Society.

Mrs. I. R. Hunt, for plaintiff, respondent, City of Winnipeg.

Miss M. B. McMurray, for plaintiff, respondent, Director of Public Health and Welfare.

June 6, 1952.

The judgment of the court was delivered by

COYNE, J.A. — This is an appeal from that part of an order of County Court Judge Bernier, purportedly under sec. 30 (1) of *The Child Welfare Act*, RSM, 1940, ch. 32, and amendments, whereby the appellant municipality of St. Clements was ordered to pay for the maintenance of Florence Ratte, an illegitimate child of a Treaty Indian mother also named Florence Ratte, residing, in the usual sense at least, on the Scanterbury Indian Reserve, which is geographically situate within the boundaries

designated as those of the municipality. The woman was committed to the Winnipeg General Hospital from the reserve by the authorities there for medical care, and her child was born at the hospital.

The mother went from the reserve for about three months in each of four successive summers to work at Grand Beach, a place admittedly within the appellant municipality and outside the reserve, and for somewhat briefer periods, in different years, at Winnipeg.

The subsection authorizes an order for "the payment by the municipality of which the child is resident * * * of a reasonable sum for the maintenance of the child * * * *." The rules defining "residence" and "resident" provide that an illegitimate child "shall have the residence of the mother."

There is no dispute of fact. Nor can there be any dispute that upon the ordinary meaning of the word "resident" or "residence," and in the circumstances of this case neither the mother nor the child could be held to have resided, lived or dwelt in any municipality or any "unorganized or disorganized territory" in the province, or otherwise than in the reserve. The question is whether, for the present purpose, the statute has artificially changed that meaning of resident or residence. The difficulty lies in construing the numerous statutory provisions which have a bearing, and in applying them.

By sec. 91 of *The B.N.A. Act, 1867*, item No. 24, "Indians and lands reserved for the Indians," fall to the sole jurisdiction of the Parliament of Canada. The lands in the reserve never belonged to the province. They never came within its jurisdiction. Nor did the Indians on the reserve. The reserve is not in the appellant municipality in the sense of being part of it.

As the child here in question was illegitimate, the only positive fact of its racial parentage in evidence is the race of the mother. At common law and in international law an illegitimate child follows the nationality of the mother: *Udny v. Udny* (1869) LR 1 Sc & Div 441 (H.L.), per Lord Westbury at 457. In my opinion the same rule should apply in answering that the child is an Indian. The child also, during infancy, follows the domicile and residence of the mother and the latter is responsible for its support while in her control. That the child's residence is that of the mother is also specifically provided for purposes of the Act in R. 3 (*a*) (*iv*) of the statutory Rules here-

after referred to. The child in this case is, under ordinary acceptance of the words, domiciled and resident and has its home in Scanterbury Reserve.

There is, however, nothing to prevent the legislature from taking measures to provide proper care in this province for neglected children wherever born, domiciled or resident, whether Indian or not, whether Canadians or nationals of some other country; nor from providing that cost of maintenance shall fall upon some municipality; nor from imposing liability upon a particular municipality to be determined by rules which the legislature lays down. But the intention to depart from the usual meaning of words and usual rules of interpretation must be plain, particularly where the effect of such departure is to impose a pecuniary burden or tax.

There has been much argument as to what is an "institution." The learned judge found that the Indian reserve is an "institution" within the meaning of *The Child Welfare Act,* and his judgment is based on that interpretation. The Act, by sec. 2 (*f*), provides:

> "In this Act, unless the context otherwise requires,
>
> * * *
>
> "(*f*) 'institution' means a building or part of a building, other than the private dwelling of a family, set apart for the care or custody of children, other than an industrial home."

Sec. 2 (*j*) provides: " 'resident' and 'residence' have the same meaning as in *The Municipal Act*, RSM, 1940, ch. 141," sec. 2 (2). The complicated provisions of that subsection also make reference to "institution." Part of the subsection is [amended 1940, ch. 60, sec. 1; 1948, ch. 69, sec. 1]:

> "Where by this or any other Act of the Legislature a municipal corporation * * * is made liable for any indebtedness by reason of a person being a resident of the corporation or having a residence therein, the expressions 'resident' and 'residence' so used shall, unless otherwise by that or some other Act provided, be determined according to the following rules * * *.
>
> "RULE 1: ADULTS
>
> * * *
>
> "(*d*) a person other than an employee living in any public school, college, hospital * * * seminary, monastery, convent or other like *institution* in a [municipal]

corporation * * * *or a person living in an Indian reserve within a corporation,* shall *not* thereby gain residence in the corporation * * * ." [My italics.]

The contention of the respondents is that "institution" as used in *The Municipal Act,* which does not define it, must be given the ordinary meaning, and that, they say, includes an Indian reserve. The word is a loose and flexible one. It is indefinite in meaning. Its use in Rule 1 (*d*) indicates that in *The Municipal Act* and *The Child Welfare Act* it means "public school, college, hospital * * * seminary, monastery, convent or other like institution;" that is, it must be related to use of some building. Such is in conformity with the meaning of the word as defined in *The Child Welfare Act,* sec. 2 (*f*), *supra.* R. 1 (*d*), in dealing expressly with "an Indian reserve within a corporation," after having dealt with school, college, convent, "or other like institution," thereby makes a distinction which takes the reserve out of the class of an "institution." That is emphasized by the fact already pointed out—that an Indian reserve, even within the geographical boundaries designated as those of the municipality, is not within provincial jurisdiction and therefore is not part of the corporation of the municipality. In my view the reserve is not an "institution" within the meaning of the Act.

Further, in my opinion, there is such lack of clarity in the provisions of *The Child Welfare Act,* with sec. 2 (2) of *The Municipal Act* incorporated, that the part of the order which imposes liability upon the appellant, and which is the subject of this appeal, cannot be justified; nor do the provisions justify placing the liability upon the city of Winnipeg nor upon any municipality in respect of an illegitimate child of a Treaty Indian whose residence and domicile in ordinary acceptance is the reserve, as I hold the mother's to be here.

The mother did not live one continuous year "within the province" (R. 1 [*b*]) construing the latter phrase as being exclusive of the area of any Indian reserve. Her domicile and residence until 1944 was admittedly in Scanterbury Reserve. In that year, while her domicile and residence remained the same, at the age of 16 she began coming into "the province" temporarily to work, and on cessation of such work — on the average in some three months' time—she returned on each occasion to the reserve, usually for a continuous period of some nine months. She was never in an "institution" until May 27, 1950, except for two months in a tuberculosis hospital in 1947.

In this manner, in these circumstances, she left to work on seven occasions altogether in the seven years up to the apprehension of the child.

Temporary absence from home on the reserve could not at common law or in ordinary usage be deemed a change of residence. The question is whether the statute has clearly changed that principle as applied to the circumstances of this case so as to make such temporary absence in a municipality a change of "residence" such as to impose liability on the appellant.

The statute, in defining "resident" and "residence," continually uses those words in definition and continually employs various forms of the verb "live," used in ordinary speech as synonyms for the words which are being defined. That is instanced in the following quotations from the Rules in sec. 2 (2) above:

"RULE 1: ADULTS.

"(*a*) * * * person who has * * * *lived* in a corporation * * * shall retain such *residence* until he *lives* in another corporation * * *.

* * *

"(*d*) * * * a person *living* in an Indian reserve within a corporation, shall not thereby gain *residence* in the corporation * * * continuity of *living* in a corporation * * *.

"RULE 2: MARRIED WOMEN.

"(*b*) * * * shall acquire *residence* in her own right by *living* separate and apart from her husband * * * until she returns to *live* with her *husband* * * *.

"(*c*) If a husband and wife are not *living* together * * * they shall be considered as *living* separate and apart within * * * paragraph (*b*) * * *.

"RULE 3: MINORS.

"(*a*) Every person * * * unless he has acquired a separate *residence* * * * shall have the *residence* of

* * *

"(*iii*) the parent with whom he is *living*, if the father and mother are *living* separate and apart;

* * *

"(*v*) * * * unless and until he *lives* with the guardian * * * whereupon he shall have the *residence* of his guardian * * * [or with a person adopting him] whereupon he shall take the residence of his adoptive parent * * *.

* * *

"(*c*) A person * * * may acquire a separate *residence* * * *

"(*i*) if a male, by marrying and *living* in a corporation * * * or, if a female, by marrying and *living* with her husband;

"(*ii*) by being completely self-supporting and *living* in a corporation * * *.

"(*iii*) if a person * * * has been *living* separate and apart from his father, mother * * * for more than three years and has not during that period gained a *residence* within the province in his own right * * *;

"(*iv*) any person who, having acquired a separate *residence* under this rule, subsequently returns to live with a parent * * * shall thereupon acquire the *residence* of such parent * * *.

"RULE 4: GENERAL INTERPRETATION.

"(*a*) Continuity of *living* within a corporation * * * shall not be deemed interrupted by temporary absence * * * for the purpose of casual employment, business * * *."

In the above, "living" can only mean having an established home or settled abode, notably: "Living separate and apart from her husband," "until she returns to live with her husband," "if a husband and wife are not living together," "the residence of * * * the parent with whom he is living, if the father and mother are living separate and apart," "marrying and living in a corporation," "continuity of living within a corporation * * * shall not be deemed interrupted by temporary absence * * *."

Such meaning of "living" is in accord with the dictionaries, where the ordinary meaning of "live," "reside" and "dwell" is shown as substantially the same and each is used in definition of others. See, for instance, the *Shorter Oxford Dictionary* and *Standard Dictionary*. The latter, under "abide," in distin-

guishing between a number of words of similar or somewhat similar meaning, concludes: "*Sojourn*, remain temporarily; *live, dwell, reside,* have a permanent home." There is therefore no real distinction between *live, dwell,* and *reside*, and one can be substituted for another without change of meaning. They do not mean merely "exist" or "breathe"—mere physical existence is not intended. "To live" is defined as "to have a settled residence, abide, dwell; as 'man can live in all climates'." All are variously defined as "be settled as in a home," "to live as a settled resident," "to have a fixed abode or habitation," "to remain in a permanent residence," "to establish one's self," "to settle." "Living in" does not mean "presence in" without intent of settling in.

Other provisions phrased in dubious terms do not help the interpretation put forward by the respondents.

The ordinary rule against temporary absence affecting change of residence is recognized and is applied by R. 4 (*a*) to absence from a corporation or organized or disorganized territory in the province:

> "Continuity of living within a corporation or * * * territory * * * shall not be deemed interrupted by temporary absence * * * for the purpose of casual employment, business, holidaying, or of medical or hospital attention, or for other like reason or purpose."

Further, the inaccuracy of language and indefiniteness of meaning in the subsection is illustrated in the use of "casual," which ordinarily means accidental, occurring by chance or accident, without design or previous arrangement. That cannot be the meaning intended in use of the word in the Rule, because casual employment is mentioned in the same breath as such *designed* and prearranged employment, occupation, reason or purposes as "business, holidaying, medical attention," etc., and as if all of them fall into a common category; and because if "casual" meant accidental, the Rule would then mean "continuity * * * shall not be deemed interrupted by temporary absence for the purpose of employment to be obtained only by chance or accident;" and if so, a person going away from home without an arrangement in advance for employment and thereby running the risk of not getting it, would, by later obtaining employment unarranged for previously, not acquire residence in the municipality to which he went, no matter how long he stayed; while one who went to a prearranged temporary job for a limited period would acquire residence there no matter how short

the period, provided it lasted 60 days (R. 1 [*b*]) even though the definite prearranged period would tend to send him home on its expiration, and cause the job to be in fact really a temporary one and the absence also a temporary one. "Casual," as used in the Rule, would seem to be intended for "temporary" or occasional.

R. 1 (*b*) says that, where a person has not lived continuously within any corporation or territory for one continuous year, "the residence of such person shall be in the corporation or territory in which he *lived* continuously the longest during the last year * * * if such *living* was for a period of at least sixty days' duration * * *." That Rule must be read along with R. 4 (*a*), *supra,* respecting temporary absence. The 60-day provision does not help the respondents for it may be construed as meaning that moving to a municipality with intention to reside or live there permanently shall not alone be sufficient to establish the "residence" required under the Act if, whatever the original intention, the person does not in fact remain for 60 days.

On the basis that "living" connotes dwelling or residing with intent of permanent stay, and excludes sojourn or temporary stay, and that change of residence requires going to the next place with that intent, the mother has not been living in and is not and has not been a resident of either St. Clements or Winnipeg.

As it is the definition that really determines whether or not a pecuniary burden or tax can be imposed, the provision must be construed strictly against grant of power to impose the burden; and authority to levy the tax, if it is to be invoked, must be clear.

I am not satisfied that the statute is sufficiently clear to warrant an interpretation empowering the imposition made on the appellant by the order appealed from.

The federal department committed the mother to Winnipeg General Hospital just prior to, and for the purpose of, the birth of the child there, as well as on account of her tubercular condition. The Children's Aid Society, from the best of motives, stepped in here where the federal authority should have done so; but whether the latter is legally responsible or not, is not in question in this case. The moral responsibility, however, is clearly federal.

I would allow the appeal and discharge such part of the order appealed from as imposes liability on the appellant. No costs.

COURT OF APPEAL.

22ND JUNE 1955.

RE COOKE; THE COUNTY OF BRUCE v. THE CITY OF HAMILTON.

Infants — Neglected Children — Municipal Liability for Maintenance — Residence on Indian Reserve — Reserve Deemed to be within County — The Child Welfare Act, 1954 (Ont), c. 8, s. 1(e) — The Territorial Division Act, R.S.O. 1950, c. 388, ss. 1(2), 5 — The Indian Act, R.S.C. 1952, c. 149, ss. 2(o), 18.

An appeal by the County of Bruce from an order of a juvenile court judge declaring the appellant liable for the maintenance of Deborah Rose Cooke, a neglected child.

The appeal was heard by Laidlaw, Aylesworth and Gibson JJ.A.

S. A. Shoemaker, Q.C., for the appellant.

R. B. Robinson, for the City of Hamilton, respondent.

The judgment of the Court was delivered by

Aylesworth J.A. [after stating the nature of the appeal]:— The child was born in Hamilton on 11th August 1954. The child's mother, Ethelene Cooke, was born in the Saugeen Indian Reserve and lived there all her life until 1952. Thereafter she lived for uncertain periods in Toronto, Waterdown, Burlington and eventually back again in the Saugeen reserve. The trial judge found that the mother's residence was in the Saugeen reserve "and, therefore, as the Indian Reserve geographically is within the confines of the County of Bruce, I find that the child belongs to the County of Bruce".

I agree that the determining factor in ascertaining liability for the child's maintenance is, on the facts of this case, the mother's residence, and I agree that, for the purposes of this case, the mother's residence was in the Saugeen Indian Reserve. I further agree that the appellant is liable for the child's maintenance. Pending the disposition of the case by His Honour, The Children's Protection Act, R.S.O. 1950, c. 53, was repealed and The Child Welfare Act, 1954 (Ont.), c. 8, came into force on the 1st January 1955, but counsel agree that it is immaterial which of the Acts applies. For convenience, reference need only be made to the present Act.

For the appellant it is said that the Saugeen Indian Reserve forms no part of the county: The Territorial Division Act, R.S.O. 1950, c. 388, ss. 1(2) and 5. Appellant also refers to The Indian Act, R.S.C. 1952, c. 149, ss. 2(*o*) and 18, whereby

the lands of an Indian reserve are vested in and held by Her Majesty for the use and benefit of Indians. I do not think the question in issue falls to be determined by reference to either of those enactments. For the purposes of The Child Welfare Act "municipality" is broadly defined by s. 1(*e*) thereof as meaning "county, city or separated town"; that is to say, the organizational or geographical units deemed appropriate for the purpose of child welfare charges are prescribed in the definition. Many other organizational or geographical units, such as townships, villages and police villages, are not so prescribed. In my view, the Saugeen reserve is "in the county" just as much as one of the county's townships or villages. For the purposes of the Act residence is, and remains, primarily a geographical consideration. Designation of some "county, city or separated town" as the place of residence is to be made, and consequent upon that designation being made as a finding of fact, liability for the maintenance of the neglected child depends.

Presumably in most cases involving an Indian reserve as the place of residence, the Department of Indian Affairs will reimburse the municipality held to be liable, but it is suggested that the mother of this child is not "a Treaty Indian" and that upon that ground the Department has refused to accept any of the financial burden for maintenance. That matter, however, is really not before us except incidentally, and it cannot affect our decision. Both the Department of Indian Affairs and the Director of Child Welfare were served with notice of the appeal to this Court but neither was represented before the Court.

The appeal will be dismissed and the appellant will pay the Corporation of the City of Hamilton its costs of the appeal.

Appeal dismissed with costs.

RE VANDENBERG AND GUIMOND

Manitoba Court of Appeal, Freedman, Guy and Dickson, JJ.A.
October 25, 1968.

Infants — Custody — Illegitimate child — Right of mother of illegitimate child to custody at common law — Modified by equitable rule making welfare of child paramount — Whether position changed by legislation — Child Welfare Act (Man.).

At common law the right of the mother of an illegitimate child to custody was supreme. This was later modified by the equitable rule making the welfare of the child paramount. However, before the Court's equitable jurisdiction can be called into action the Court must be satisfied that it was not merely better for the child but essential or clearly right for the child's safety or welfare in some very serious and important respect that the mother's rights be superseded.

The *Child Welfare Act*, R.S.M. 1954, c. 54, has not changed the common law–equity position. Under s. 110 of the Act the Court can only override the right of guardianship and custody given to the mother of an illegitimate child by the Act if the Court finds it "proper so to do". The Court must ask itself, "Has the mother done anything to disentitle her to guardianship?" And in answering this question the Court must apply the test for its equitable jurisdiction: "Is it essential or clearly right for the welfare of the child in some very serious and important respect that the mother's guardianship right be superseded?" Clearly a balancing of financial considerations is not a proper ground for determining whether custody is to be awarded to the natural mother or to the putative father. Nor are the prospect of convent life for the religious training of a Roman Catholic child or the influence of life on a Reservation for an Indian child considerations entitling a Court to take from a Roman Catholic mother of Indian descent the custody of an illegitimate child born to her.

[*Ex p. Knee* (1804), 1 Bos. & Pul. (N.R.) 148, 127 E.R. 416; *Re Maher* (1913), 12 D.L.R. 492, 28 O.L.R. 419; *Frost v. Belovich*, [1943] 3 W.W.R. 337; *Re Alderman, Alderman v. Gegner* (1961), 32 D.L.R. (2d) 71, 38 W.W.R. 1; *Re M., an Infant*, [1955] 2 Q.B. 479; *The Queen v. Nash, Re Carey, an Infant* (1883), 10 Q.B.D. 454; *The Queen v. Barnardo, Jones's Case*, [1891] 1 Q.B. 194; affd *sub nom. Barnardo v. McHugh*, [1891] A.C. 388; *Re Gefrasso* (1916), 30 D.L.R. 595, 36 O.L.R. 630; *Wong v. Kozeyoh*, [1942] O.W.N. 210 [affd at p. 536]; *Welsh v. Bagnall*, [1944] 4 D.L.R. 439, [1944] O.R. 526; *Martin et al. v. Duffell*, [1950] 4 D.L.R. 1, [1950] S.C.R. 737; *Maat and Maat v. Hepton and Hepton*, 7 D.L.R. (2d) 488, [1957] O.R. 64 [affd 10 D.L.R. (2d) 1, [1957] S.C.R. 606]; *Re Holowaty* (1958), 27 W.W.R. 465; *Bestwick v. Auston* (1909), 11 W.L.R. 73; *Price v. Cargin*, 4 D.L.R. (2d) 652, [1956] O.W.N. 410; affd 8 D.L.R. (2d) 2, [1957] S.C.R. 341; *Re Lewis* (1967), 61 W.W.R. 418; *Re Fynn* (1848), 2 De G. & Sm. 457, 64 E.R. 205, refd to; *The Queen v. Gyngall*, [1893] 2 Q.B. 232, apld]

Infants — Custody — Equitable principles are to be applied in custody matters by Courts of Manitoba.

[*K. v. K.* (1956), 7 D.L.R. (2d) 16, 20 W.W.R. 449, 64 Man. R. 298, overd; *Re Hallas and Children's Aid Society of Winnipeg* (1960), 26 D.L.R. (2d) 28, 33 W.W.R. 507, refd to]

APPEAL by the natural mother from an order of Hall, J., granting custody of two illegitimate children to their putative father.

M. MacKay, for respondent, appellant, Guimond.
M. Fenson, for applicant, respondent, Vandenberg.

The judgment of the Court was delivered by

DICKSON, J.A.:—We are here concerned with the custody of two infant children, Alice Alyda Guimond, seven years old, and Lisa Valerina Guimond, three years old. Their mother is the respondent Mary Nellie Evelyn Guimond, 36 years old, of Indian descent and a Roman Catholic. Their father is the applicant Henry Vandenberg, 35 years old, of Dutch descent and a member of the Dutch Reform Church. Mr. Vandenberg and Miss Guimond lived as man and wife from 1958 until January, 1968, when they separated. It would appear that Miss Guimond has never married, although she gave birth to three sons prior to her relationship with Mr. Vandenberg. Mr. Vandenberg was married in 1952, separated from his wife in 1953, and lived apart from his wife until her death in November, 1967. Custody of the two children born of the relationship between Mr. Vandenberg and Miss Guimond was granted by Hall, J., to Mr. Vandenberg. Miss Guimond appeals that decision.

Mr. Vandenberg is a zoo keeper. He is employed by the Metropolitan Corporation of Greater Winnipeg at a gross monthly salary of $444. After deductions, his take-home pay amounts to $345 per month. His monthly expenses, including mortgage payments, amount to approximately $284. He supplements his income by part-time work as a rent collector and painter for which he received $1,300 in 1967 and $800 from January to March, 1968. He lives at 504 Walker Ave., Winnipeg, in a six-room, single-family dwelling owned in equal shares by him and Miss Guimond. Miss Guimond lived at 504 Walker Ave. with Mr. Vandenberg until their separation. Now he lives there with the two young children, whose custody is in dispute, and a housekeeper whom he engaged to look after the children.

Miss Guimond is a nurses' aide. She is employed by the Holy Family Home at a gross monthly salary of $210. Her evidence is that she has been working there for four years. At present she is living in a suite at 537 Langside St., Winnipeg. The suite has two bedrooms and a kitchen.

When she left the home at 504 Walker Ave., Miss Guimond took her younger daughter with her, leaving her elder daugh-

ter because, as she explained, she did not wish her elder daughter to miss school. The younger daughter remained with her in the Langside St. suite for about a month. The landlady looked after the child during Miss Guimond's absence. Then the landlady obtained other employment. Miss Guimond got in touch with her sister, Mrs. Agnes Bird of the Fort Alexander Indian Reservation who took the child to live with the Bird family on the Reservation. A week or so later Mr. Vandenberg went to the Reservation, took the child, and brought her home with him. There was considerable argument during the hearing over whether at the time of taking the child Mr. Vandenberg stated, as alleged by Mrs. Bird, that he had a Court order to do so, or whether, as he maintains, he simply said that, if necessary, he would get a Court order. Nothing turns on this. Mr. Vandenberg gave a rather lurid description of the overcrowded and unsanitary condition of the house occupied by Mr. and Mrs. Bird and their family. However, from his description the house would appear to be typical, neither better nor worse than the house one frequently finds on an Indian Reservation.

No attempt was made to prove that Miss Guimond was not a fit mother. It would appear that prior to the separation she not only worked steadily as a nurses' aide but also carried out in a reasonably satisfactory manner her domestic and maternal duties in and about the family home. Her separation from Mr. Vandenberg was caused, in the words of Mr. Vandenberg, by "her relations". Her sons and their friends came and stayed at 504 Walker Ave. So did her father. Miss Guimond explained that her sons paid Mr. Vandenberg board money and that her father helped her around the house. However, Miss Guimond was given the choice of getting her relatives out of the house and keeping them out, or leaving herself. She chose the latter course. It might be added that Mr. Vandenberg complained "The oldest son slept in the basement with his girl friend, and my little girl looked when they had sexual relations which I didn't like". Miss Guimond said she had not seen this incident.

At the time of the trial Miss Guimond was expecting another child, of whom Mr. Vandenberg was father.

Miss Guimond did not receive from Mr. Vandenberg any maintenance payments for the younger daughter in respect of the time such daughter was with her. She said that it would cost $60 to $80 per month for food and clothing for the two girls.

If she is awarded custody of the two children Miss Guimond would propose to live with them in the Langside St. suite,

continue to work at the Holy Family Home and engage a baby-sitter to look after the children, including the child shortly to be born. For furtherance of their religious education she would propose to place her daughters in a convent.

The main ground of complaint advanced on behalf of Miss Guimond concerning the custody award made by Hall, J., was that the Judge treated the matter as if she and Mr. Vandenberg were married persons with equal rights to custody and control, not recognizing the *prima facie* right of the mother of illegitimate children to their custody. Support for that contention will be found in the transcript of evidence. The trial Judge said, p. 71:

> What I have to decide is which, if either of these two parents can best provide these children with the kind of environment that would give them a reasonable chance to grow up and have a reasonable happy life. I suppose that is pretty broad but that is the approach I would take, however, go on.

And at pp. 88 and 89:

> MR. MACKAY: It seems to me that the whole hearing has been misconstrued. We are not *ad idem* in what this application is about. This is an application by a natural father for custody of the two children. Before the hearing goes further, the issue is not whether these children are best off with either of two competing parents. The whole issue is, isn't [*sic*] Miss Guimond such an unfit mother that the State should intervene and take them away from her?
>
> THE COURT: I disagree. With great respect I am not here to have these children used as a pawn in a dispute between the mother and father. I am here to decide what is in the best interests of those children, and I can assure you I won't deal with it on any other basis. If you are unhappy about that, that is too bad.
>
> Go ahead, Mr. Fenson.

What then is the position in law of the father of an illegitimate child? It is said in 3 Hals., 3rd ed., p. 108, that:

> The father of an illegitimate child, so long as the child remains illegitimate, is not generally recognised by the law of England for civil purposes.

and at p. 109:

> Unless he has obtained an adoption order the father has no right to the custody of the child, even though he is in a better position to maintain it . . .

Ex p. Knee (1804), 1 Bos. & Pul. (N.R.) 148, 127 E.R. 416, is given as authority for this statement of the law.

In *Re Maher* (1913), 12 D.L.R. 492, 28 O.L.R. 419, Middleton, J., as he then was, said, p. 497:

> With reference to the elder of the two infants, it is further to be observed that, as it was not born in wedlock, Maher had no right whatever.

Re Maher was not followed in *Frost v. Belovich*, [1943] 3 W.W.R. 337, nor in *Re Alderman, Alderman v. Gegner* (1961), 32 D.L.R. (2d) 71, 38 W.W.R. 1. However, in *Re M., an Infant*, [1955] 2 Q.B. 479, Denning, L.J., as he then was, strongly affirmed that the father of an illegitimate child is without rights. He said, p. 488:

> In my opinion the word "parent" in an Act of Parliament does not include the father of an illegitimate child unless the context otherwise requires. This is implied in the decision in *Butler v. Gregory* (1902), 18 T.L.R. 370, with which I agree. The reason is that the law of England has from time immemorial looked upon a bastard as the child of nobody, that is to say, as the child of no known body except its mother. The father is too uncertain a figure for the law to take any cognizance of him except that it will make him pay for the child's maintenance if it can find out who he is. The law recognizes no rights in him in regard to the child: whereas the mother has several rights. She has the right to the custody of it during her lifetime until it is 14 years of age; *Humphrys v. Polak*, [1901] 2 Q.B. 385: whereas the natural father has no right to the custody of it either during her lifetime (*Rex v. Soper* (1793), 5 Term Rep. 278), or after her death (*Ex parte Guardians of St. Mary Abbotts* (1887), 51 J.P.N. 740).

In the earlier case of *The Queen v. Nash, Re Carey, an Infant* (1883), 10 Q.B.D. 454 at p. 456, Jessel, M.R., said:

> In many cases the law recognizes the right of a mother to the custody of her illegitimate child. In the case of *Ex parte Knee*, 1 B. & P.N.R. 148, before Sir James Mansfield, it was held that she had such a right unless ground was shewn for displacing it. The Court is now governed by equitable rules, and in equity regard was always had to the mother, the putative father, and the relations on the mother's side.

The Queen v. Nash was followed by *The Queen v. Barnardo, Jones's Case*, [1891] 1 Q.B. 194, the headnote to which reads in part:

> In determining who is entitled to have the custody of and control over an illegitimate child the Court will, in a proper case, give the same effect to the mother's wishes in respect of the care, maintenance, and education of the child as it gives to the wishes of the father of a legitimate child in those respects.

In an appeal taken to the House of Lords, *sub nom. Barnardo v. McHugh*, [1891] A.C. 388, Lord Herschell said, at pp. 398-9:

> It is, however, no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the Courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction. As was said by Sir George Jessel M.R., in *Reg. v. Nash*, 10 Q.B.D. 454: "In equity regard was always had to the mother, putative father, and relations on the mother's side." In that case the mother of an illegitimate child sought to have it delivered to her in order that it might be placed under the care

of her sister. The child was in the custody of the wife of a labouring man, with whom it had been placed by the mother, who was living with another man as his mistress. The Court, notwithstanding the opposition of the person in whose custody it was, ordered that the child should be delivered into the custody desired by the mother. I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shewn that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother.

The principles enunciated in *Barnardo v. McHugh* were followed in 1916, in *Re Gefrasso*, 30 D.L.R. 595, 36 O.L.R. 630, where Meredith, C.J.O., said, at p. 597:

> It is settled law that the desire of the mother of an illegitimate child as to its custody is primarily to be considered and must be given effect to, unless it would be prejudicial to the child's interests if it were delivered into the custody of the mother: *Barnardo v. McHugh*, [1891] A.C. 388.

In *Wong v. Kozeyoh*, [1942] O.W.N. 210 [affd at p. 536], Urquhart, J., concluded that the mother was not absolutely entitled to custody, adding, p. 213:

> . . . but it seems to me that the evidence should go a long way to defeat the *prima facie* right of the mother to deal with the child.

In *Welsh v. Bagnall*, [1944] 4 D.L.R. 439, [1944] O.R. 526, Hogg, J., at p. 444, said:

> There is no doubt but that the mother of an illegitimate child has a *prima facie* right to its custody.

The most authoritative affirmation of the law set forth in *The Queen v. Barnardo* will be found in *Martin et al. v. Duffell*, [1950] 4 D.L.R. 1, [1950] S.C.R. 737, where Cartwright, J., as he then was, said, at p. 7:

> It is, I think, well settled that the mother of an illegitimate child has a right to its custody, and that, apart from statute, she can lose such right only by abandoning the child or so misconducting herself that in the opinion of the Court her character is such as to make it improper that the child should remain with her. There is no suggestion in the case at bar that the respondent abandoned the child or that her conduct and character are other than excellent.

and at p. 9:

> In the present state of the law as I understand it, giving full effect to the existing legislation, the mother of an illegitimate child, who has not abandoned it, who is of good character and is able and willing to support it in satisfactory surroundings, is not to be de-

> prived of her child merely because on a nice balancing of material and social advantages the Court is of opinion that others, who wish to do so, could provide more advantageously for its upbringing and future. The wishes of the mother must, I think, be given effect unless "very serious and important" reasons require that, having regard to the child's welfare, they must be disregarded.

It was contended by counsel for Mr. Vandenberg that *Martin v. Duffell* was a case having to do with adoption and not custody and was rendered inapplicable to the case before us by reason of the particular provisions of the *Adoption Act*, R.S.O. 1937, c. 218. We cannot accede to this view. The case must be considered to be of wider application and as authority for recognition of the primary claim of the mother for custody.

Martin v. Duffell is referred to in *Maat and Maat v. Hepton and Hepton*, 7 D.L.R. (2d) 488, [1957] O.R. 64 [affd 10 D.L.R. (2d) 1, [1957] S.C.R. 606], and in *Re Holowaty* (1958), 27 W.W.R. 465.

The Queen v. Gyngall, [1893] 2 Q.B. 232 (referred to in such cases as *Re Bestwick and Auston* (1909), 11 W.L.R. 73; *Frost v. Belovich*, [1943] 3 W.W.R. 337; *Price v. Cargin*, 4 D.L.R. (2d) 652, [1956] O.W.N. 410; affd 8 D.L.R. (2d) 2, [1957] S.C.R. 341, and *Re Lewis* (1967), 61 W.W.R. 418) is cited by counsel for Mr. Vandenberg in support of the proposition that in the exercise of its equitable jurisdiction the Court will refuse to give the mother custody, if satisfied that it is essential for the welfare of the child, although the mother had not been guilty of any misconduct to disentitle her to the custody of the child. *Gyngall* was a contest not between natural mother and putative father, but between natural mother and a stranger by blood. Lord Esher, M.R., at p. 242, adopted with approval the statement of Knight Bruce, V.-C., in *Re Fynn* (1848), 2 De G. & Sm. 457, 64 E.R. 205, to the effect that before the equitable jurisdiction can be called into action the Court must be satisfied that it is not merely better for the children but "essential to their safety or to their welfare, in some very serious and important respect", that the parental rights be superseded. Lord Esher, M.R., warned that:

> . . . the Court must exercise this jurisdiction with great care, and can only act when it is shewn that either the conduct of the parent, or the description of person he is, or the position in which he is placed, is such as to render it not merely better, but — I will not say "essential," but — clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded . . .

As has been indicated, at common law the right of the mother of an illegitimate child to custody was supreme. This,

however, was modified by the equitable rule making paramount the welfare of the child. What then of statute law in Manitoba?

The statute law supports the claim of Miss Guimond. The *Child Welfare Act*, R.S.M. 1954, c. 35, specifically places the children of a so-called "common law" relationship into a different category from children of a legal marriage. Section 101A [enacted 1955, c. 6, s. 11] of the *Child Welfare Act* constitutes her, as the unmarried mother of the children, "guardian of the person" of the children "unless another person is appointed guardian of the person, or of the estate and person, . . . by a court of competent jurisdiction". According to s. 108 a guardian appointed under, or constituted by, the Act is entitled to the custody and control of the infant. Section 106(1) provides that the guardians appointed under the Act are removable by the Court of Queen's Bench "for the same cause for which trustees are removed, or for any proper cause".

If a guardian of the type referred to in s. 101A can be considered to have been *appointed*, such guardian can only be removed in the manner indicated in s. 106(1). If such guardian is considered as having been *constituted* by the Act and not appointed, the Act is silent as to the manner of her removal. Section 110, however, permits the Court of Queen's Bench, "upon application by a parent or an infant in the sole custody or control of the other parent, or any other person with or without his or her authority, or of a guardian", to "make an order for the access of the applicant to the infant". The section further provides that the Court, if it "deems it proper so to do, may make an order for the delivery of the infant into the custody and control of the applicant, there to remain for such time and under such conditions as the court orders".

Before the Court overrides the right of guardianship given to Miss Guimond and delivers custody to Mr. Vandenberg, the Court must find it "proper so to do". What test is the Court to apply? The mother is constituted sole guardian by the Act. Surely the Court must ask itself: "Has the mother done anything to disentitle her to guardianship?" If the test in *The Queen v. Gyngall, supra*, is applied, the Court must ask: "Is it 'essential' or 'clearly right' for the welfare of the children in some 'very serious and important' respect that the guardianship right be superseded?" One must then ask: "In what very serious and important respect is it 'essential' or 'clearly right' that Miss Guimond's primary right to custody be abrogated?"

The Judge appears to have proceeded on the footing that the natural mother and natural father have equal rights to the illegitimate children. While parents do have equal rights to their legitimate children, it is now too well established to be open to dispute that such is not the case for the parents of illegitimate children. Hall, J., felt that the welfare of the children would be better served by placing them in the custody of the natural father. There is no legal precedent for granting illegitimate children to the custody of their natural father merely because he can provide the children with an upbringing which might be slightly better than that which the natural mother would be likely to provide. In many cases the natural father has been awarded custody of the children but all of these which have come to our attention have involved serious neglect or abandonment by the mother or conduct detrimental to the best interests of the child. The law implies that in order for a father to gain custody of an illegitimate child, the amount or degree of neglect by the mother must be greater than that which is required in the case of a legitimate child. It is not a mere balance scale with both parties starting equal, but rather, the balance scale is tipped heavily in favour of the mother of illegitimate children. Given this situation this Court must look carefully at the evidence.

Hall, J., rested his disposition of the case upon two grounds. He said:

> It is my distinct impression that he [*i.e.*, Mr. Vandenberg] is anxious, willing and well able to provide a relatively good home and community environment for the growth and development of the children, and that in all probability he will succeed. On the other hand, leaving financial considerations aside, it is quite unlikely that the mother has the capacity or resources to meet her responsibilities.

Clearly a balancing of "financial considerations" is not a proper ground for determining whether custody is to be awarded to the natural mother or to the putative father. In *The Queen v. Gyngall, supra,* Lord Esher, M.R., stated, p. 243, that no wise man would entertain the suggestion that a "child ought to be taken away from its parent merely because its pecuniary position will be thereby bettered". Equally, a child should not be taken from its natural mother on the ground that its pecuniary position will be improved by giving custody to the putative father.

It is difficult to determine from the evidence in what respect the Judge considered Miss Guimond lacked "capacity" to meet her responsibilities. For many years she discharged her responsibilities as homemaker and mother in a manner which gave Mr. Vandenberg little, if any, cause for complaint.

What kind of woman is Miss Guimond? She has not abandoned her children nor neglected her children. It is conceded that she does not have any problem with alcohol. She is not a cruel woman. Mr. Vandenberg contends that the atmosphere of the home due to the mother's friends and family renders the home unhealthy for the children. However, at the same time Mr. Vandenberg admits the mother looked after the children "fairly well". The circumstances which necessitated sending her daughter temporarily to stay on the Fort Alexander Reservation were not such as to derogate from her right to custody.

The Judge expressed concern that Miss Guimond lacked resources to meet her responsibilities. Such concern could, it would seem, be readily overcome by an appropriate award of maintenance to Miss Guimond for the benefit of the children.

The second ground upon which the Judge rested his decision was expressed by him in these words:

> Indeed it is probable that these children will find themselves in an institutional environment of a temporary or permanent nature or under the influence of life on a Reservation.

With respect, we do not deem the prospect of convent life for the religious training of a Roman Catholic child or the influence of life on a Reservation for an Indian child to be considerations entitling a Court to take from a Roman Catholic mother of Indian descent the custody of children born to her. We find nothing in either of these circumstances detrimental to the interests of the children.

We would only add that a further consideration which should not be overlooked in support of Miss Guimond's claim to custody is the tender age of the two children concerned, seven and three years.

In the result we would allow the appeal.

In the course of the foregoing judgment several cases have been cited in which equitable principles have been applied in custody matters. Attention may be called to the observations of Montague, J.A., in *K. v. K.* (1956), 7 D.L.R. (2d) 16, 20 W.W.R. 449, 64 Man. R. 298, to the effect that since April 20, 1931, the date upon which the *King's Bench Act* was assented to, the rules of equity relating to the custody and education of children ceased to be the law of Manitoba. In the later case of *Re Hallas and Children's Aid Society of Winnipeg* (1960), 26 D.L.R. (2d) 28 at p. 35, 33 W.W.R. 507, Freedman, J.A., construed the said observations of Montague, J.A., as *obiter dicta* and expressed the view that the question was still an open one. Assuming that equitable principles do apply, the

claim of Mr. Vandenberg must, in our opinion, still fail. If equitable principles can not be applied Mr. Vandenberg's position is even less favourable. This may be an appropriate occasion to declare our view that the jurisdiction of the Courts of Manitoba in custody matters is not restricted by the exclusion of equitable principles therefrom, as Montague, J.A., suggested.

Guardianship and custody of the infant children Alice Alyda Guimond (also known as Vandenberg) and Lisa Valerina Guimond (also known as Vandenberg) shall remain with the respondent Mary Nellie Evelyn Guimond until further order of the Court. The applicant Henry Vandenberg shall have reasonable access to the said infant children, the terms of such access to be settled by the Court if the parties are unable to agree. There will be an order that the applicant pay to the respondent for the maintenance of the said two infant children the aggregate sum of $80 per month commencing November 1, 1968, until further order of the Court. The respondent will have her costs here and in the Court below.

Appeal allowed.

LAND et al. v. RYAN et al.

British Columbia Supreme Court, Gould, J. October 29, 1968.

Motor vehicles — Negligence — Motorist operating vehicle abreast of other vehicle on two-lane highway — Refusing to permit passing or dropping back — Eventually cutting other vehicle off to avoid head-on collision — Liability for resulting rear-end collision.

Damages — Personal injuries — Plaintiff paraplegic — Factors in general damages award.

Plaintiffs were passengers in second defendant's car travelling on a two-lane highway. First defendant and his passenger, who had consumed about eight glasses of beer each in a two-hour period before setting out in first defendant's car, were travelling in the same direction. First defendant passed second defendant, then was overtaken and passed by second defendant. First defendant became aware of the female plaintiff in second defendant's car and first defendant overtook second defendant again and began driving, for some seven miles, in a fashion that interfered with second defendant's driving, frequently driving abreast of second defendant's car and preventing it from either passing or dropping behind by accelerating or reducing his speed. On a blind hill first defendant was driving abreast of second defendant while his passenger waved at the female plaintiff when a car came over the crest of the hill. First defendant accelerated and cut second defendant off, second defendant's car struck first defendant's car, went out of

supported by the evidence. The defence of contributory negligence fails. The injuries sustained by the female plaintiff were, I find, caused solely by negligence of the defendants.

As a result of the fall, the female plaintiff, a right-handed lady, suffered a very severe and painful sprain of the right wrist which stretched all joints of the hand and wrist. The swelling which resulted therefrom involved the median nerve, causing numbness in three fingers. She underwent physiotherapy treatments extending over many months, and had six cortisone injections. She has suffered a permanent disability consisting of 25 per cent reduction in wrist movement and function, limitation of movement of three fingers which seriously affects her gripping power, pain at the extremities of movement of said joints, and numbness, especially in the middle finger. She has done her best to adjust by using her left hand but there are many things that she can no longer do for herself because of her weak grip and limitations of movement. I assess her general damages at the sum of $3,500. Special damages in the sum of $774.50 were agreed upon. The plaintiffs will, therefore, recover $4,274.50 from the defendants, and costs.

MANITOBA QUEEN'S BENCH

Matas J.

Canard v. Attorney General of Canada and Rees

Statutes — Interpretation — "Ordinarily resident" — The Indian Act, R.S.C. 1952, c. 149, s. 4(3), as enacted by 1956, c. 40, s. 1(2).

Following the death of plaintiff's husband, an Indian registered as such pursuant to the Indian Act, defendant R., the superintendent in charge of an Indian district embracing the reserve where deceased had a residence, was appointed administrator of his estate pursuant to s. 42, as amended by 1956, c. 40, s. 12, and s. 43 of the Indian Act. Plaintiff disputed the appointment and applied for and was granted letters of administration by the Surrogate Court. She now sought a declaratory judgment that the Act did not apply to the deceased because of the exempting provisions of s. 4(3), the relevant portion of which reads: "sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province." Since October 1967 deceased and plaintiff had lived in a house which had been built for them on the reserve. Each summer deceased had been employed for some weeks on a farm outside the reserve and for such periods he and his family lived in a bunkhouse on the farm. When his employment ceased they moved back to the house on the reserve. In 1969 deceased had moved, in the same employment, with his family, to the farm and 2 days after his arrival he died.

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*arily resident" — The Indian Act,
acted by 1956, c. 40, s. 1(2).*

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Held that plaintiff was entitled to the declaration sought; the words "ordinarily reside" were not defined in the Act but had been the subject of frequent judicial interpretation. The authorities were to the effect that a person could have more than one "ordinary residence", according to the particular facts. In the case at bar the deceased was ordinarily resident on the farm for the periods during which he worked there; for the rest of the time he was ordinarily resident on the reserve: *Mester v. Kummu*, [1957] O.W.N. 534; *Attorney General v. Coote* (1817), 4 Price 183, 146 E.R. 433; *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209, [1946] C.T.C. 51, [1946] 1 D.L.R. 689 applied.

[Note up with 20 C.E.D. (2nd ed.) *Statutes*, ss. 2, 4; 22 C.E.D. (2nd ed.) *Words and Phrases*.]

W. Rachman, for plaintiff.

H. B. Monk, Q.C., for defendants.

20th April 1972. MATAS J.:—The plaintiff is the widow of the late Alexander Canard ("the deceased" or "Canard"), an Indian late of Fort Alexander Indian Reserve No. 3 in Manitoba. The defendant William Barber Rees ("Rees") is superintendent in charge of Clandeboye Fisher River Indian District in Manitoba.

Canard was killed in a traffic accident on 6th July 1969. He died intestate. Rees was appointed as administrator of Canard's estate on 1st December 1969, pursuant to s. 42 [am. 1956, c. 40, s. 12] and s. 43 of the Indian Act, R.S.C. 1952, c. 149 (now R.S.C. 1970, c. I-6) ("the Act"). The appointment has not been revoked. On 18th March 1970 the Surrogate Court of the Eastern Judicial District of Manitoba issued letters of administration of Canard's estate to the plaintiff.

Mrs. Canard claims a declaratory judgment that:

1. The Act does not apply to the deceased because of exempting provisions under s. 4(3) [en. 1956, c. 40, s. 1(2)].

2. Alternatively, if the Act does apply, its provisions relating to administration of estates of Indians (ss. 42, 43 and 44) are ultra vires and contrary to the principles of the Canadian Bill of Rights, 1960 (Can.), c. 44; the appointment of Rees as administrator was contrary to the principles of natural justice.

The defendants have counterclaimed for a declaratory judgment declaring Rees to be the lawful administrator of Canard's estate and declaring the appointment of the plaintiff as administratix to be void; an injunction restraining Mrs. Canard from acting as administratrix; and an order impounding her letters of administration.

Notice of trial was given to the Attorney General of Manitoba, who advised counsel for the plaintiff that he did not

wish to be heard. Because of my conclusions with respect to the first point raised by the plaintiff it will not be necessary for me to deal with the constitutional issues.

Agreed statement of facts was filed. From that statement it appears that:

"7. The Fort Alexander Indian Reserve near Fort Alexander in Manitoba is and at all material times has been an Indian Reserve established as an Indian Reserve pursuant to the Indian Act, being a tract of land set aside by Her Majesty in the right of Canada for the use and benefit of the Fort Alexander Band of Indians and is hereinafter referred to as 'the Reserve.'

"8. At all material times the late Alexander Canard was registered as an Indian pursuant to the 'Indian Act' and was a member of the Fort Alexander Band of Indians, holding Band Number 888.

"9. The late Alexander Canard and Mrs. Canard, the plaintiff commenced to reside on the Reserve in the year 1964. In that year they had intermittent residence on the Reserve. Mr. Canard and the plaintiff have made their home on the Reserve since late in 1964. They resided on the Reserve from that time until the date of Mr. Canard's death. In the month of October, 1967 a house was built for Mr. and Mrs. Canard on the Reserve and they occupied it as their home until the date of Mr. Canard's death and Mrs. Canard has continued to live in the house and still resides there.

"10. In the summer of 1967 and 1968, Mr. Canard was employed for several weeks each summer as a helper on a farm at St. Andrews, Manitoba, and on those occasions the Canard family would move into the bunkhouse on the farm, complete the work to be done, and then move back to the Reserve.

"11. In the year 1969, Mr. Canard was again employed on the same farm, but had moved his family to the farm and commenced his employment only two days before his death. After his death Mrs. Canard moved back to the house on the Reserve . . . "

Section 4(3) of the Act reads:

"(3) Sections 113 to 122 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province."

f my conclusions with respect plaintiff it will not be necessary tutional issues.

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The words "ordinarily reside" are not defined in the Act. The term has been interpreted in a number of cases dealing with a variety of different situations — reciprocal enforcement of judgments, qualifications of electors, jurisdiction of the court over a debtor, revenue statutes, etc.

In *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209, [1946] C.T.C. 51, [1946] 1 D.L.R. 689, the Supreme Court of Canada considered the meaning of the words "residing or ordinarily resident in Canada" as they appeared in s. 9(1)(*a*) of the Income War Tax Act, R.S.C. 1927, c. 97, as it stood in 1940. Rand J. said at p. 224:

"The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance 'residing' is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.

"The expression 'ordinarily resident' carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act [i.e., the Income Tax Act of the United Kingdom] reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

"For the purposes of income tax legislation, it must be assumed that every person has at all times a residence",

and at p. 225:

"But in the different situations of so-called 'permanent residence', 'temporary residence', 'ordinary residence', 'principal residence' and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited. On the lower level, the expressions involving residence should be distinguished, as I think they are in ordinary speech, from the field of 'stay' or 'visit'."

In *Beament v. Minister of National Revenue*, [1952] 2 S.C.R. 486, [1952] C.T.C. 327, 52 D.T.C. 1183, [1952] 4 D.L.R. 609, the Supreme Court of Canada considered the Income War Tax Act, s. 7A(1) [en. 1946, c. 55, s. 7]. Cartwright J. said at p. 493:

"*The Income War Tax Act* does not contain a definition of the words 'resident' or 'ordinarily resident' and it is common ground that they should be given the everyday meaning ascribed to them by common usage",

and at p. 494:

"It has frequently been pointed out that the decision as to the place or places in which a person is resident must turn on the facts of the particular case",

and see Maxwell on Interpretation of Statutes, 12th ed., p. 28.

An indication of the extent of judicial comment may be gathered by examination of Words and Phrases, Permanent ed., vol. 37, pp. 299-312, where the word "reside" is dealt with, and pp. 312-453, where variations of the word such as "resided", "resident", and "residence", etc. are considered.

The New Century Dictionary and Encyclopedia, vol. 6, p. 4146, defines "ordinarily" as: "In an ordinary manner . . . Commonly; usually; in most cases", and "ordinary" as: "2. Common in practice or use; usual; frequent; habitual."

The term "reside" is defined in vol. 8, p. 5102, as: "1. To dwell permanently or for a considerable time; have a settled abode for a time, or a dwelling or home".

The New English Dictionary, vol. 7, p. 187, defines "ordinarily" as: "2. In the ordinary or usual course of events or state of things; in most cases; usually, commonly."

"Ordinary" is defined in vol. 7, p. 188, as: "3. Belonging to the regular or usual order or course; having a place in a fixed or regulated sequence; occurring in the course of regular custom or practice; regular, normal, customary, usual."

The term "reside" is defined in vol. 8, p. 517, as: "2. To dwell permanently or for a considerable time, to have one's settled or usual abode, to live *in* or *at* a particular place."

And see *Attorney General v. Coote* (1817), 4 Price 183, 146 E.R. 433, where the Court was considering the Property Tax Act, 1806 (Imp.), c. 65. Wood B. said at p. 188:

"It is no uncommon thing for a gentleman to have two permanent residences at the same time, in either of which

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n thing for a gentleman to have two at the same time, in either of which he may establish his abode at any period, and for any length of time."

And see *Mester v. Kummu*, [1957] O.W.N. 534, where Wells J. held that a person may have more than one ordinary residence.

77 Corpus Juris Secundum 294 contains the following comment:

"A residence may be acquired in a very short period of time . . . at the very moment there is a concurrence of bodily presence and the requisite intent a residence is created. Residence is a quality which endures when once acquired, and when once it is established it is presumed to continue, without intermission, until it is shown to have been changed, abandoned, or a new one gained."

In dealing with the elements of residence, the following appears at p. 295:

"Two fundamental elements are essential to create a residence, and these elements are: (1) Bodily presence in a place. (2) The intention of remaining in that place. Residence is thus made up of fact and intention, the fact of abode and the intention of remaining, and is a combination of acts and intention. Neither bodily presence alone nor intention alone will suffice to create a residence. There must be a combination and concurrence of these elements, and when they occur, and at the very moment they occur, a residence is created."

Section 11 of the Interpretation Act, R.S.C. 1970, c. I-23, reads:

"11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

In my view, the intention of Parliament, in enacting s. 4(3), was to ease in some degree the protective controls which had existed with respect to dealing with estates of Indians.

I find that Canard was ordinarily resident, with his family, on the farm at St. Andrews in Manitoba for the period during which he worked there. He was ordinarily resident on the reserve the rest of the time. When Canard died, he was not ordinarily resident on the reserve. The plaintiff is entitled to a declaration that, pursuant to s. 4(3) of the Act, ss. 42 to 44 do not govern the administration of Canard's estate and that the appointment of Rees as administrator is invalid.

Defendants' counterclaim is dismissed. Costs to the plaintiff.

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plain intention, is strictly confined to the case of a "party" within Ontario. It was never intended or contemplated that a person who is not within Ontario shall in this way be compelled to come from the ends of the earth to submit to examination. Rule 328 deals with the case "where a party to be examined is out of Ontario," and provides that the examination is then to take place in such manner and in such place as the Court in its discretion may think most convenient.

Mr. Armour contrasts the wording of the former Rule, which speaks of a party residing in Ontario and a party residing out of Ontario, and he argues that the change of phraseology cannot be regarded as indicating a change of meaning, and the party ordinarily resident in Ontario is a party "within Ontario" within the meaning of the Rules. He points out that it has been held that a person, being transient through Ontario, and who is served while on the train, or passing through the Province, can, under certain reported cases, be regarded as liable to be examined where he may be so served, and he suggests that, if Rule 337 is given its plain meaning, then these cases must be regarded as overruled. I do not think that the consequence that he suggests would follow from this decision. Under Rule 337 examination is to take place before the proper officer of the county in which the party resides, and any transient would be protected by this requirement from the evil result feared.

I have no hesitation in holding that the Rule is not applicable to the case where the party is temporarily out of Ontario. The Rule is predicated upon the physical presence of the party to be examined within the Province. The words "within Ontario" are, in the Rule itself, contrasted with "the county in which he resides."

It follows that the motion fails, and should, I think, be dismissed with costs.

FISHER v. ALBERT.

Ontario Supreme Court, Orde, J. March 8, 1921.

INDIANS (§II—8)—INDIAN LANDS—ACTION FOR DECLARATION THAT ASSIGNMENT OBTAINED BY FRAUD—DECISION OF SUPERINTENDENT-GENERAL OF INDIAN AFFAIRS—JURISDICTION OF COURT—JUDICATURE ACT, R.S.O. 1914, CH. 56, SEC. 16 (B)—QUESTION OF LAW—MOTION FOR JUDGMENT.

The Supreme Court of Ontario has jurisdiction to entertain an action which seeks merely a declaratory judgment and the power given the Court in such an action is to make "binding declarations of right."

A motion for judgment on the question of law may be dismissed.

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MOTION by defendant for judgment on a point of law raised in the pleadings, and set down (by consent) for hearing , under Rule 122.

A. G. Chisholm, for the defendant.

A. R. Douglas, for the plaintiffs.

ORDE, J.:—The defendant moves, by consent, under Rule 122, upon a point of law raised by the pleadings.

The two plaintiffs and the defendant are Indians, belonging to the Chippewa Indians of the Thames, upon the Chippewa Reserve, in the township of Caradoc, in the county of Middlesex.

The statement of claim alleges that the plaintiffs are the daughters of Mrs. Betsy Grosbeck, who died intestate on the 19th February, 1915, and that at the date of her death she was the owner of certain lands in the Chippewa Reserve, which were then leased to a tenant, whose lease expired in the month of April, 1919; that, upon the expiration of the lease, the defendant wrongfully took possession of the said lands and is now wrongfully in possession thereof, under a location ticket issued by the Department of Indian Affairs, which the plaintiffs allege was obtained fraudulently. The plaintiffs allege that the said location ticket was issued to the defendant upon the production of a certain agreement, together with certain receipts for moneys paid and an assignment of the location ticket of the deceased Betsy Grosbeck, and that the signature of the said Betsy Grosbeck to such documents, if she signed them at all, was procured by fraud and misrepresentation on the part of the defendant, and that Betsy Grosbeck never sold the said lands to the defendant, and that he has no right, title, or interest therein. And the plaintiffs claim a declaration that the location ticket of the defendant was obtained by him by fraud and misrepresentation, and such further and other relief as the Court may deem meet.

The amended statement of defence denies the allegations of the plaintiffs, alleges the defendant's lawful and peaceable possession and occupation of the lands, and further sets up that this Court has no jurisdiction, on the ground that all the parties are Indians, that the lands form part of the said Indian Reserve, and that the claim of the plaintiffs was heretofore fully investigated by the Superintendent-General of Indian Affairs, under the provisions of the Indian Act, and was disallowed, and further that the defendant is the holder of a location ticket issued to him

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under secs. 21, 22, and 23 of the said Act. By a paragraph added by amendment to meet more specifically the charge of fraud as raised by the amendment of the statement of claim, the defendant says that all the allegations of fraud and misrepresentation were fully investigated by the Superintendent-General of Indian Affairs; and that, after such investigation and an adjudication thereon, the Superintendent-General of Indian Affairs concluded that such allegations had been disproved, and adjudged the defendant to be entitled to the lands, and directed that a location ticket be issued to him, and that since the issue thereof the said Superintendent-General has left the defendant in quiet and undisturbed possession.

The question of law raised by the statement of defence was very fully and ably argued on both sides; but, after giving the arguments very careful consideration, I am of the opinion that the question which it is open to me to consider upon this motion is very limited in its scope, and that the larger questions which were discussed are such as can be properly dealt with only at the trial. The fact that this motion was set down by consent does not enlarge the power of the Court to deal with the point summarily. Consent is merely an alternative for leave to set the motion down.

The point raised by the defence is that the Supreme Court has no jurisdiction because the claim of the plaintiffs has already been adjudicated upon in favour of the defendant by the Superintendent-General of Indian Affairs, who is, by sec. 31 of the Indian Act (R.S.C. 1906, ch. 18), "the sole and final judge" as to who are the persons entitled to the property of a deceased Indian. It was stated on the argument that the Superintendent-General had adjudicated under this section, and this was not denied by counsel for the plaintiffs. I do not attempt to determine the exact scope of the Superintendent-General's power under this section, but it seems to be clearly limited to questions as to those entitled to the "estate" of a deceased Indian, and it may not extend to a determination of the rights of a person claiming as the defendant does here, not as one entitled to the estate, but under some agreement made with the deceased Indian in her lifetime.

It was stated on the argument without contradiction that the Superintendent-General of Indian Affairs had by letter intimated the desire or willingness of the Department that the question of fraud should be determined by the Courts as a preliminary to some action looking towards a recon-

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sideration of his previous adjudication upon the matter.

While there are cases in which, under the corresponding English Rule, the facts upon which the question of law raised by the pleadings is based, have been allowed to be proved by affidavit, the practice is not to be encouraged. If parties are agreed upon facts which are not set out in the pleadings they may state a case under Rule 126, but it is embarrassing upon a summary motion to be called upon to consider facts not disclosed by the pleadings. It is true that, as the facts upon which the point of law is raised are set forth broadly in the statement of defence, the plaintiffs might seek to dispose summarily of the question of law so raised, because for the purpose of the motion they can admit the truth of the defendant's allegations of fact. And upon the same principle a defendant who raises a question of law upon the allegations of fact contained in the statement of claim may move, because for the purposes of his motion he admits the facts so alleged. But here the facts upon which the defendant raises the point of law are alleged by himself, and upon those allegations the defendant asks that the Court shall determine summarily that it has no jurisdiction to entertain the action.

The anomaly of this method of bringing a question of law summarily before the Court is commented upon by Moss, C.J.O., in *Bank of Ottawa* v. *Township of Roxborough* (1909), 18 O.L.R. 511. In that case the defendant raised a question as to the jurisdiction of the Supreme Court to entertain the action. At p. 518 the learned late Chief Justice of Ontario says: "For the purpose of the argument as to want of jurisdiction, the allegations of the statement of defence ought not to be regarded." He then points out the danger of relying upon the defendant's allegations, though he says that the parties might admit all the essential points in such a way as to reduce the matter to a pure point of law.

In one sense every defence raises a question of law. A defendant, setting up certain facts in answer to the plaintiff's statement, and then pleading that upon that state of facts the plaintiff is not entitled as a matter of law to the relief claimed, might then ask the Court to determine that question of law in a summary way under Rule 122. The Rule was, of course, not intended for any such purpose. Its object was to provide either for the disposal of the whole action or some important phase of it, by dealing with some question of law upon a state of facts admitted for the pur-

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poses of the motion. Here the defendant asks the Court, upon a state of facts which he alleges, to hold that the matter is in effect res adjudicata by virtue of sec. 21 of the Indian Act, and this notwithstanding that the Superintendent-General of Indian Affairs is apparently willing under certain circumstances to reconsider his previous decision. The defendant argues that I ought not to consider that fact and should hold that the Superintendent-General is himself bound by his own decision. Perhaps he is, but does not the fact that the argument involves the consideration of these matters indicate how necessary it is that the summary power to deal with a question of law under Rule 122 should be exercised cautiously, and that if there is any doubt as to the facts or circumstances upon which the point turns, it should be left for determination at the trial? This was the conclusion of the Court of Appeal in *Bank of Ottawa* v. *Township of Roxborough*, supra.

Leaving the wider question of law raised by the defendant, as to the effect of the Superintendent-General's adjudication, there is still to be considered the objection raised by the defendant, that upon the amended statement of claim as framed the action ought to be dismissed because all that the plaintiffs seek is a declaratory judgment, and as the lands in question are part of an Indian Reserve, and as such vested in the Crown, there is no power in the Court to enforce any judgment in favour of the plaintiffs. This point comes rather under Rule 124, which empowers the Court to strike out a pleading on the ground that it discloses no reasonable cause of action, than under Rule 122.

The jurisdiction of the Supreme Court to entertain an action which seeks merely a declaratory judgment is given by sec. 16 (b) of the Ontario Judicature Act, but it is significant that the power given to the Court in such an action is to "make binding declarations of right." The defendant says that a judgment merely declaring that the defendant obtained the location ticket by fraud and misrepresentation cannot advance the position of the plaintiffs as against the defendant, and that it would not constitute a binding declaration of right, as the defendant's rights could not be in reality affected, nor would the judgment "bind" him to anything. It would be a mere finding upon a question of fact from which no legal result would flow. Even admitting that the Superintendent-General of Indian Affairs has intimated his willingness to act upon that finding, it is not suggested that he is under any obligation to do so, and if

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he is free to re-open his own investigation as a result of any judgment of this Court, he is equally free to do so without such a judgment.

Counsel for the defendant refers to *Ottawa Young Men's Christian Association* v. *City of Ottawa* (1913), 29 O.L.R. 574, at p. 581, 15 D.L.R. 718, and *Re Toronto General Trusts Corporation and McConkey* (1917), 41 O.L.R. 314. These cases are not quite in point, though they establish the principle that the Court ought not to be called upon to pronounce declaratory judgments in cases where the jurisdiction over the subject-matter is vested in some other tribunal, such as a court of revision or an arbitrator.

In reply to this contention of the defendant, counsel for the plaintiffs relies upon two cases: *Bull* v. *Frank* (1865), 12 Gr. 80, where Mowat, V.-C., held that the Court might, in a case of fraud in obtaining an assignment of the interest of a locatee of the Crown, pronounce a decree though no patent for the lands had yet been granted by the Crown; and *Pride* v. *Rodger* (1896), 27 O.R. 320, in which a Divisional Court held that, notwithstanding the fact that the Crown grant had not issued, under the jurisdiction conferred by the Judicature Act as then in force to decree the issue of letters patent from the Crown to rightful claimants. "declaratory relief may in a suitable case be given . . . if the Crown is willing to act upon the judgment of the Court" (p. 323). In view of these two cases, I should hesitate before coming to the conclusion that the action should be summarily disposed of merely because the judgment sought is declaratory only. The cases, while not quite parallel, are nearly so, and if the matter rested there I would dismiss the motion on the ground that the question whether or not a declaratory judgment should be pronounced in a case like this would be determined better after a trial when all the facts and circumstances are before the Court than upon a summary application.

But there is one aspect of the motion as affecting the plaintiffs' rights which must not be overlooked. I have dealt with the defendant's objection to the plaintiffs' claim for a declaratory judgment upon the theory suggested by the defendant that the decision of the Superintendent-General of Indian Affairs is final and conclusive under sec. 31 of the Indian Act. But, as already pointed out, his jurisdiction under sec. 31 may not extend beyond the mere determination of questions of heirship or arising under a will, and it may be held that he has no power to deal with a

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claim arising, not as a matter of distribution of the deceased's estate, but solely under an agreement inter vivos. That claim was quite independent of the succession to the estate. That it arose upon Betsy Grosbeck's death was merely an incident in her bargain with the defendant. His claim was not in fact to any part of her estate; it was that, as she had sold her interest in the land to him, it formed no part of her estate. If the plaintiffs succeed in establishing that the jurisdiction of the Superintendent-General does not go this far, then the claim for a declaratory judgment may enable the Court to make a "binding declaration of right" which can be enforced in some way against the defendant. This issue being open furnishes an additional reason for declining to hold that the action should be summarily dismissed. In my judgment, it should go down to trial in the ordinary way.

The motion will therefore be dismissed with costs to the plaintiffs in the cause.

It is expedient that the trial should not be delayed, and there has been delay already by reason of the amendments to the pleadings. The order ought to provide that the case be set down for the sittings at London on the 22nd inst., and that 5 days' notice of trial shall be sufficient.

ATTORNEY-GENERAL FOR ONTARIO v. GREAT LAKES PAPER Co. Ltd.

Ontario Supreme Court. Rose, J. March 10, 1921.

CONTRACTS (§IIIA—195)—AGREEMENT WITH CROWN RESPECTING TIMBER—LEASE OF WATER POWER—ALLEGED AGREEMENT TO TAKE POWER FROM HYDRO ELECTRIC COMMISSION—ASSIGNMENT OF RIGHTS BY GRANTEE TO COMPANY—CONTRACT TO TAKE POWER NOT ENFORCEABLE AGAINST COMPANY.

The Government cannot force a company, which is the assignee of certain rights and privileges affecting timber on Crown lands, to take power from the Hydro-Electric Commission, even if there is a valid contract between the grantee of such Crown lands and the Government; the company taking their assignment without any knowledge of any restrictive covenant.

ACTION for a declaration and an injunction, and counterclaim for a declaration and damages. The facts of the case are fully set out in the judgments following.

G. H. Kilmer, K.C., *C. S. MacInnes*, K.C., and *Christopher C. Robinson*, for the plaintiff.

I. F. Hellmuth, K.C. and *A. M. Stewart*, for the defendants.

ROSE, J.—In this action the Attorney-General, suing

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Full Court.] [Jan. 10.

STARKE *v.* REID.

Mortgage—Redemption—Right to assignment—Right to reconveyance—R.S.O. c. 102, s. 2.

The plaintiffs, being mortgagees of certain lands, afterwards acquired by transfer a second mortgage on the same property, and now sued the covenantors in the former mortgage, who demanded, upon payment of the amount, of the former mortgage, a reconveyance subject to equities of redemption existing in other parties.

Held, that the defendants were entitled to this, and that the plaintiffs could not tack the amount of the second mortgage to the first and require payment of both.

Kinnaird v. *Trollope*, 39 Ch.D. 636, followed.

Per BOYD, C.: When the mortgagor who pays under his covenant has assigned the equity of redemption, the form of conveyance should be of the legal estate to the mortgagor who pays subject to the equity of redemption of his assignee, and the mortgage should itself be handed over for securing him in the amount paid upon it.

Moss, Q.C., for the plaintiffs.

F. Hodgins and *Coatsworth* for the defendants.

Full Court.] [Jan. 10.

MOLSONS BANK *v.* HEILIC.

Principal and surety—Security held by creditors—Release of same without consent of surety—Rights of surety—Judgment.

The plaintiffs sued the defendant as endorser of a promissory note made by a customer, of which notes they held a number endorsed by various parties, and also a mortgage from the customer on certain lands to secure his general indebtedness. Before this action the plaintiffs had released and discharged certain of the lands comprised in the mortgage, without the consent of the defendant.

Held, on appeal from the judgment of ROBERTSON, J., 25 O.R. 503, that the plaintiffs were entitled to judgment against the defendant for the amount of the note, but without prejudice to the right of the latter to make the plaintffs account for their dealings with the mortgaged property held for the benefit of the endorsers when that security had answered its purpuse or the debt had been paid by the sureties, or when in any other event the application of the moneys from the security could be properly ascertained.

Crerar, Q.C., and *P. D. Crerar* for the plaintiffs.

J. W. Nesbitt, Q.C., for the defendant.

ROSE, J.] [Jan. 10.

JOHNSON *v.* JONES AND TOBICOKE.

Indians—Capacity to make a will—Female Indian—43 Vict., c. 28, ss. 16-20 (D.)—R.S.C., c. 43.

Held, that an Indian, male or female, may make a will, and may by such will dispose of any lands or goods or chattels, except as far as such rights may be interfered with by the Indian Act or other statute.

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Held, further, that in the case of the will of an Indian widow, where the property bequeathed was personal property, there being nothing in the Indian Act to restrict or interfere with her right to dispose of the same either by act *inter vivos* or by will, the will was valid and sufficient to pass the property named in it.

Quære, however, whether the last part of section 20 of the Indian Act does not leave all questions arising in reference to the distribution of the property of a deceased Indian, male or female, to the Superintendent-General, so that his decision, and not that of the court, should determine such questions.

Snider and *Thompson* for the plaintiff.

Furlong for the defendant Jones.

Washington for Tobicoke.

STREET, J.] [Jan. 12.

PATTEN *v.* LAIDLAW.

Money in court—Subsequent order for costs—Claim of set off.

By the report of the Master in a mechanics' lien action a certain sum of money was found due from the owner Laidlaw to the contractor, and the former was ordered to pay the amount into court, which she did. The contractor then appealed from the report, but without success, and he was ordered to pay the costs of the appeal to Laidlaw. Laidlaw now asked that these costs might be paid out of the moneys paid by her into court, upon the ground that otherwise she would lose them owing to the contractor's inability to pay.

Held, that the order could not be granted.

The applicant no longer owed anything. The payment into court was a discharge of her liability, and the money so paid in was no longer hers, but was in court for distribution according to the findings of the report. She therefore had no money in her hands and no right to the money in court, and must look to the contractor personally for her costs of the appeal.

O'Heir for the appellant.

Logie for the other defendants.

No one appeared from the plaintiff.

MEREDITH, C.J.] [Jan. 28.

RE COLQUHOUN.

Devolution of Estates Act, R.S.O., c. 108, s. 6—Rights of children of deceased brother or sister.

The children of a deceased brother or sister are not entitled, under section 6 of the Devolution of Estates Act, R.S.O., c. 108, to participate in the distribution of the intestate's estate.

J. M. Clark for the applicant.

A. J. Boyd for the official guardian for infants.

IN THE SUPREME COURT.

8TH MAY 1886.

Coram SIR W. RITCHIE, C. J., STRONG, HENRY, TASCHEREAU, FOURNIER, GWYNNE, JJ.

JONES AND FRASER.

LEGACY—REVOCATION OF—SALE OF OBJECT BEQUEATHED—RES JUDICATA—MARRIAGE IN NORTH WEST TERRITORY.

HELD :—1° That under the law prior to the Code, the alienation of the object bequeathed *necessitate urgente* did not carry a revocation of the legacy ;

2° That when a testator exchanged a property that he had previously bequeathed by his will, even not *ex necessitate* but *non cum animo mutandi*, the legacy was not revoked, but the property received in exchange passed to the legatee ;

3° That the judgment of the Chief Justice (SIR W. C. MEREDITH) holding that such alienation had not the effect of defeating the legacy, was final as it was not appealed from, that it was a *res judicata* and that the Superior Court had no authority to hear the question anew ;

4° That the appellant's mother having renounced the succession of her father, the appellant who claims in his capacity of her universal legatee and who has accepted his grandfather's legacy, is now debarred from the right of assailing such legacy. That the partage of 1839, assented to by the appellant's mother and ratified since by the appellant who received monies under its provisions, cannot now be repudiated, and that the appellant cannot claim more than his mother was entitled to under the said partage ;

5° (Reversing that part of the judgment of the Court of Queen's Bench.) That though, when a testator pays debts which, by his will, he had obliged certain of his legatees to pay, he is presumed to have discharged these legatees from the obligation to pay them—this point did not properly arise in this case ;

6° (By the Court of Queen's Bench.) That evidence of long cohabitation of a white man and an Indian woman in the North West Territory, the woman having never received the title of wife, will not establish a valid marriage. (1)

This was an appeal from a judgment of the Court of Queen's Bench, reversing a judgment of the Superior Court sitting at Quebec.

The facts of the case briefly stated are as follows :

About the end of the last century, the late Alexander Fraser left for the North West and the St. Maurice. He returned after a certain number of years, and invested his earnings in the pur-

(1) The Supreme Court, though not casting any doubt upon the correctness of the judgment of the Court of Queen's Bench thereupon, considered it unnecessary to enter upon the subject—as it was held that the legacy was not revoked.

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chase of several seigniories, amongst which were those of Temiscouata and Madawaska. During his stay in the North West, he lived with an Indian woman named Angelique Meadows, who bore him several children, only two of whom, Angelique and Marguerite, were living at the death of Mr. Fraser. This woman, some years after Mr. Fraser's return, came to Rivère-du-Loup, where he had settled, bringing some of her children with her who were baptized in Quebec, the certificate of baptism mentioning that they were the children of Alexander Fraser and Angelique Meadows.

Mr. Fraser provided for her wants, but did not live with her at Rivière-du Loup. He lived at home with another woman who bore him successively the following children: Elizabeth, Magdeleine, William, the respondent, Edward and Alexander.

Marguerite was the mother of the appellant.

By his solemn will and testament before Parent and colleague, notaries, bearing date the 11th February 1833, Mr. Fraser, amongst other testamentary provisions, made the following in connection with the seigniories of Temiscouata and Madawaska: He bequeathed to his daughters, Margaret (the child of the Indian woman and mother of appellant), Elizabeth and Magdeleine (children of Pauline Michaud), and to each of them:

"Two leagues in front by two leagues in depth to be taken from his seigniory of Temiscouata and from that of Madawaska, from the beginning of the Portage road..... the said Marguerite, Elizabeth and Magdeleine Fraser and the survivor or survivors of them..... to have the usufruct or enjoyment thereof during their lifetime only; and as to the ownership of the same the said testator gives and bequeathes it to the children of the said Marguerite, Elizabeth and Magdeleine Fraser, by thirds, the children to represent their mothers. The said children to hold and possess as full owners thereof, the share reverting to their respective mothers, but only after the death of the latter. And if it should happen that one or two of his said daughters should die childless, then the children of the surviving daughter or daughters shall have the full ownership, in equal portions, of the share which the daughter who has died childless would have had;

"The said testator orders that the aforesaid six leagues of the said seigniories be divided into three portions amongst the

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three daughters aforesaid, by the said testamentary executors, and when the said portions shall be so divided, they shall be drawn for by lot and each of the said daughters must remain satisfied with the portion assigned to her by lot ..... the will of the testator being that if any of them should refuse to accept the portion allotted to her, the legacy shall become void in so far as she is concerned and shall revert to the other daughter or daughters accepting."

The testator afterwards disposed of "the remainder of his seigniories of Temiscouata and Madawaska, outside of the six leagues above bequeathed" in favor of his sons, William and Edward, they to have and hold same in equal halves in usufruct and enjoy the same only during the lifetime of both or of the survivor of them, in case one of them should die childless before obtaining the age of majority;

"The testator orders that the aforesaid remainder of the said seigniories be divided between the said William and Edward Fraser in two portions as equal as possible, in the manner and under the conditions set forth in the case of the three daughters of the testator."

The following persons were appointed testamentary executors for the purpose of carrying out the wishes of the testator: Thomas Jones, husband of Marguerite Fraser, John Fraser and John Malcolm Fraser, with power to act jointly or separately.

Mr. Fraser died on the 14th of June 1837, but in the interval between the making of his will and his death, to wit: in 1835, he sold the seigniories of Temiscouata and Madawaska for the sum of £15,000, in order to meet his debts. He paid his most pressing debts, amounting to £5,400, and invested the balance £9,600. Mr. Fraser was illegitimate, and as he did not, by his will, appoint a universal legatee, his estate remained vacant as regards the sum of £9,600, unless it could be shown that in selling the seigniories of Temiscouata and Madawaska he had not intended to cancel the legacies given by him to his children. However, at his death, his estate appeared to have, at first, been considered vacant as regards the £9,600 in question, and John Malcolm Fraser was appointed curator.

Mr. John Fraser and he resigned their office of executors, and Thomas Jones remained the sole testamentary executor. It was then (on the 21st September 1838) that the interested par-

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ties decided to consult the late Mr. Van Felson, in order to ascertain what their rights were.

On the 20th September 1839, Thomas Jones (appellant's father) as testamentary executor, Marguerite his wife, Elizabeth and Magdeleine, William and Edward (the three latter represented by their tutor), proceeded in accordance with the provisions of the will and with the advice of Mr. Van Felson, to divide and apportion their legacies, basing their calculations upon the approximate area of the seigniories bequeathed. Estimating this area at 230,000 acres, they divided the sum of £9,600 into as many portions as there were acres in each lot.

Each of the daughters was allotted the sum of £984.1.7¼ as representing her share of the legacy, while the two sons were allotted £3,323.17.6¼ each.

Later on, in 1843, Mr. J. B. Pouliot was appointed curator, in the place and stead of Mr. John Malcolm Fraser.

Suit was brought by the appellant against Mr. Pouliot in order to make him render an account, and Jones, representing one third of the interest of his deceased mother Marguerite, daughter of the Indian woman, had to be brought into the case as defendant.

In his plea he alleged:

1. That the legacy of the seigniories of Temiscouata and Madawaska had been cancelled by the sale thereof made by Mr. Fraser in the interval between the date of his will and that of his death and that, consequently, the £9,600 came into his abintestate succession.

2. That his grand-mother, Angelique Meadows (the Indian woman), was married to Mr. Fraser in accordance with the customs of the Indians, that such marriage was a lawful one and that, consequently, the children of Mr. Fraser by the Indian woman were legitimate.

These pretensions were set aside by the judgment of the Hon. Chief Justice MEREDITH, on the 30th June 1881; the learned judge considering that the legacy of the seigniories of Temiscouata and Madawaska was not cancelled, virtually set aside the claims of Jones and ordered Pouliot to deposit in Court all the monies of the Fraser estate arising from the original sum of £9600, in order that they might be distributed amongst Fraser's legatees, in accordance with the provisions of the will.

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This judgment is reported in 7 Q. L. R. p. 149.

In obedience to the judgment of the 30th June 1881, Mr. Pouliot deposited, as being the balance of his account as curator, the sum of $50,015.07, besides certain securities amounting to about $38,000. Fraser moved that the prothonotary be ordered to draw up a report of distribution for the said sum of $50,015.07, which motion was granted.

The report of distribution was drawn up in accordance with the views held by respondent, and duly filed; the appellant and Magdeleine then filed their oppositions.

Following are the claims of the appellant as set forth in his opposition.

1. He repeated all the allegations of his plea, to wit: the legitimacy of the marriage of the Indian woman with Mr. Fraser and, consequently, the legitimate birth of his mother, Marguerite, whose universal legatee he is. He also set up for the first time the pretended community of property of the Indian woman. He therefore claimed as the represententative of his grand-mother who was *commune en biens*, one fourth of the £9,600 and another fourth of the property of his grand-father Mr. Fraser, £4,800 To this amount he added the interest accrued, according to his statement, on the above capital, say £6,325—which, added to the principal, makes a sum of £11,025, or $44,000, for which he asked to be collocated.

2. As a second reason, he alleged that, in the event of his claims as to legitimacy and revocation of the legacy being rejected, he stands by the provisions of the will, without, however. admitting the validity of the partition made in 1839.

He pretended that such partition (although signed by his father, Thomas Jones, the sole testamentary executor of his mother Marguerite) cannot be set up against him, Jones, one of the substitutes; that, moreover, the six leagues bequeathed to the daughters were worth more than the remainder of the seigniories bequeathed to the sons, inasmuch as, he states, they were the only portion on which improvements had been made; that in fact these six leagues represented three-fifths in value of all the seigniories.

He concluded the second part of his opposition by asking to be collocated for $17,000, being the arrears of interest due to him as follows, to wit: $8,000, the balance of interest due to

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his mother at her death, and $9,000 for his share of the interest accrued since her death.

3. He pretended that Mr. Fraser had ordered by his will that his daughters be exempted from the payment of the debts, and he therefore asked that he be allowed to share, not only in the £9,600 left at Mr, Fraser's death, bnt also in the £15,000, the amount received by Mr. Fraser for the seigniories in 1835.

Fraser contested the appellant's opposition and alleged:

1. That the alliance between the late Mr. Fraser and the Indian woman was nothing bnt concubinage, which was known to all, and was admitted to be such by Mr. Fraser, the Indian woman and her children; that Jones had himself publicly acknowledged the illegitimacy of the birth of his mother, Marguerite, and of the connection between Mr. Fraser and the Indiam woman; that the stain of illegitimacy appeared on the registers of civil status, &c., &c.

2. That the snccession of the late Mr. Fraser was opened on the 17th June 1837, and that Jones had allowed more than thirty years to elapse without claiming his pretended rights;

3. That the above mentioned judgment of Chief Justice MEREDITH, rendered on the 30th June 1881, had the authority of *res judicata* as to the two questions of legitimacy and non-revocation of the legacy;

4. That the partition in qnestion had been made in accordance with the expressed intentions of the testator and in the most equitable manner by the late Mr. Jones, father of the appellant, who was then the sole testamentary executor and who had the right to make the same under the very terms of the will; that Marguerite, the mother of the appellant, was one of the parties to the said partition and that the appellant Jones had received the balance coming to him, both in capital and in interest, under the said partition;

5. That Jones had always acknowledged the validity of the partition, had confirmed and ratified it on several occasions and had allowed more than thirty years to elapse without ever attacking it; moreover that he could not have snch partition set aside otherwise than by a direct action to that effect.

On the 7th of April 1884, Mr. Jnstice CARON rendered judgment in the Superior Court in favor of the appellant.

On the 8th of May 1885, the Court of Qneen's Bench in Appeal

reversed Mr. Justice CARON'S judgment. SIR A. A. DORION, C. J., and RAMSAY, CROSS and BABY, JJ., concurred; Mr. Justice MONK dissented on the question alone of legitimacy. Jones & Fraser.

MONK, J.—In the present cause, I differ in opinion from the majority of the Court, as to the legitimacy of the mother of the respondent Jones, Margaret Fraser. The various questions concerning the proof and validity of a marriage of the nature of the one invoked by Jones, and *possession of status*, having been discussed at length, before me, in the Superior Court and, afterwards, in the Court of Appeals, in the case of *Connolly* v. *Woolrich*, my remarks, as well as those of the other judges, being very fully reported, I shall limit myself to a few short observations.

It appears, by the extract of baptism filed in this cause, that Margaret Fraser, the respondent's mother, was born on the 10th of July, 1796, and her elder sister, Angelic, (who married one Ignace Beaulieu,) on the 24th December, 1789. As we shall see later, those children were baptized, in 1801, at Quebec, as being the children of Alexander Fraser and of Angelic Meadows, an Indian woman from the North-West territories.

We know, as a fact well established by historical evidence, that, at such a remote period as 1789, there existed no authority, religious or civil, properly organized, in those distant countries. At the time in question, the decree of the Council of Trent had not been published in the North-West territories. The respondent Jones has moreover shown, by the Rev. Mr. Poiré, an old missionary, that catholic priests and protestant ministers had penetrated there, only a certain number of years after the beginning of the present century, to wit about 1817. It is therefore clear that, if the marriage alleged by Jones to have taken place, in the North-West, between his grand-father, Alex Fraser, and his grand-mother Angelic Meadows, really existed, it cannot be proved by means of registers of civil status. The first child of that marriage, or connection, being born in 1789, neither was it possible to prove the material fact of the celebration of the marriage, by persons who had witnessed it. These two modes of evidence were also wanting in the case of *Connolly* v *Woolrich*; we have thus to examine, if Jones has made out his case by the other modes of evidence recognized by law, viz., the certificate of birth of his mother and the possession of status.

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By our law, and by the old french law, no one can claim the title of husband, or wife, and the civil effects of marriage, unless he produces a certificate of the marriage, as inscribed in the registers of civil status, saving the case where no registers were kept, or where they are lost, or destroyed; on the contrary, if the question is raised by children issue of two persons who have publicly been known, during their lifetime, as husband and wife, and who are both dead, the law is not so severe, and the children may succeed in having the legitimacy of their birth acknowledged, by producing the titles which are personal to them, namely, their baptismal certificate and proving their possession of status, as legitimate children of those two persons. If such a doctrine is adopted, as it is in civilized countries, in places where the marriage can be surrounded with all the exterior solemnities and forms prescribed by law, *a fortiori*, is it to prevail, when the alleged marriage has taken place in a country where there are no priests, no ministers of any religious denomination, no magistrates, nor any regular constituted authority. The books are filled with *arrêts*, or decisions, of the highest Courts in France, in which marriages contracted either there, or in other civilized countries, have been declared valid and binding, although no certificate of their celebration was produced.

Jones alleges that his grand-father Alex. Fraser, married the Indian woman, Angelic Meadows, while he was temporarily residing in the territories of the North-West, as an employee in the service of the Company of that name, and, according to the usages and customs of uncivilized countries, that is, by having alleged marriage accompanied with the exterior formalities, which were generally in use, on similar occasions, in the place where he took that woman. The following facts appear by the record. Alex Fraser was born in Lower Canada; after having been engaged in the fur trade, in the North-West, from about 1788 to 1801, he came back to his native country, bringing with him the Indian woman and several children whom he had of his connection with her; it is not sufficiently shown what where the peculiar customs, or usages, in force in the locality where Fraser is said to have married this woman, that is what were the solemnities, or extrinsic forms accompanying the execution of the contract; but, we know from the testimony

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of the writers who speak of the early history of the North-West, and also by the evidence produced, in the case of *Connolly* v. *Woolrich*, that in general, those customs were very simple. It has been said that polygamy existed amongst the indian tribes of the North-West, and that the marriage invoked by the respondent could not therefore be supposed to possess the character required for marriage, in all christian countries, that is unity and perpetuity. As will be seen, on reference to the above authorities, polygamy did not exist, as a rule, among the white men who, there, married Indian women, but only among the Indian tribes. A marriage which took place, there, according to the local usages, was considered as an ordinary marriage. Pierre Marois, one of the witnesses, in the *Connolly* case, states: (11 L. C. Jurist p. 228.)

I translate from his evidence, as given in french.

"A man there, in the North-West, could not take more than one woman and we regarded that union as the union of husband and wife, (in Lower Canada), and a union as sacred as it is here. I have been married there myself, according to the custom of the country, *à la façon du pays.*" Mr. Herriott, a very intelligent man, who had risen from the rank of clerk to that of chief factor, in the North-West Company, says (ibid. p. 229), speaking of the union of Connolly with the Indian woman: "*When I say married, I mean according to the custom of the country, which was by an agreement between the father of the girl and the person who was going to take the girl to wife. They live as married people, when married in that manner. I considered it as binding as if celebrated by an Arch-Bishop..... The marriage, according to the custom above described, was considered a marriage for life. I considered it so. I know of hundreds of people living and dying with the woman they took, in that way, and without any other formalities.*"

Even if English law were to prevail, in the present instance, the case of *Hyde* v. *Hyde* could not be invoked to justify the presumption that the union of Fraser and Angelic Meadows was contracted with the intent, by Fraser, to repudiate her at his own will. As Mr. Justice BADGLEY well observed, in referring to the *Hyde* case, (1 Rev. Legale, p. 332). "This was not the case of the Christian white man who married an Indian woman, while, on the other hand, Hyde and his wife were *both Mormons, and married as such, both recognizing polygamy, as part of their faith.*" Good faith

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is always presumed, even in matters where merely pecuniary interests are involved, nor is there any reason, in the present instance, to deviate from the well known maxim that, in the absence of proof to the contrary, *omnia presumuntur rite esse acta.*

The controversy in this case arises between a grand-son of Alex. Fraser and of the Indian woman, and the plaintiff, Wm. Fraser, who is a son of the same father, by a white woman, Pauline Michaud. It is a fact, beyond doubt, that this latter, Pauline Michaud, was never married to Fraser and that she never was considered by any body as his wife. The plaintiff has himself produced his own extract of baptism, in which he is baptized as the natural child of Alex. Fraser and of Pauline Michaud. Thus, one of the most serious objections which had been raised, in the case of *Connolly* v. *Woolrich*, against the Indian marriage, does not exist here; in fact, it was alleged and proved, in that case, that Connolly had married (at the church, at L'Assomption, after a *dispense de parenté* from the Catholic Bishop), his cousin, Julia Woolrich, and that they had lived and co-habited together, as man and wife, for a number of years, during the lifetime and to the knowledge of the Indian woman, Suzanne *pas de nom.*

The existence of such a marriage as the one contracted between Connolly and Woolrich, with all the religious rites prescribed by the church of their faith, in the presence of Larocque, Connolly's companion in the wilds of the North-West, and their long possession of status as husband and wife, were some of the strongest reasons which induced Mr. Justice LORANGER to dissent from his four colleagues, in the Court of Appeals. Here, there is no attempt at all by the plaintiff to set up any valid marriage against the one invoked by the respondent, and it is impossible to say that Fraser repudiated his Indian wife, as Connolly did.

To show the legitimacy of his mother, Jones has strongly insisted on her act of baptism, which reads as follows:

This 8th day of October 1801, were baptized the following children of Alexander Fraser, of Rivière-du-Loup, and of Angelic Meadows, viz, Angelic, born the 24th day of December 1789, Alexander, born on the 16th of November 1791, and Margaret (the mother of respondent), born on the 10th of July 1796. Alex. Spark, Minr., Alex. Fraser, father, Mother not present,—Malcolm Fraser, witness, John Munro, witness, Peter Fraser, witness.

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Jones claims that this certificate is complete and that, coupled with the possession of status, it demonstrates the legitimacy of his mother, though it is not mentioned that she was a legitimate child, nor that Fraser and Angelic Meadows were husband and wife. If we refer again to the Connolly case (1 Rev. Légale, p. 386), we see that the extract of baptism of the plaintiff, John Connolly, was incomplete and incorrect, and though signed by the father, it was stated therein that the legitimate parents of the child were unknown. In order to provide what was wanting in that certificate of baptism, the Court took into consideration the certificates of his sisters, Mary and Margaret, both baptized at St. Eustache, in 1831. But even in these latter certificates there is no mention that Connolly and Woolrich were husband and wife, nor any similar expressions, nor is the word legitimate made use of. We find that they are described as being the daughters of Guillaume Connolly and of Suzanne, an Indian *woman coming* from the upper countries, (Suzanne, sauvagesse descendue des pays d'en haut, 1 Rev. Lég. p. 340). Mr. Justice MACKAY, one of the judges who sat in the Court of Appeals, speaking of those certificates, remarks, ibid, p. 379: "This certificate is labelled, on page two of the Appendix printed for the Superior Court, by the appellant, *certificate of baptism illegitimate*; I think it the contrary and a *serious piece against the defendant*..... Taking with this certificate the evidence of Mr. Turcotte, I am clearly of opinion, that this, instead of baptism of an illegitimate, as entitled by appellant, *is a certificate of very legitimacy*, and the law says so." (1 Rev. Légale, p. 379, and ibid, p. 380, in princip.) "Did ever a man presenting a bastard, to be baptized, act, or *sign*, as William Connolly did, at St. Eustache? The St. Eustache certificate is in the form prescribed by our Consolidated Statutes and the Ordonnance of 1667. The term legitimate is not required to be used, under our laws, and is not invariably used. These certificates are complete."

Mr. Justice BADGLEY also expresses a very decided opinion, in the same sense (1 Rev. Légale, p. 340). "The legal effect of this *acte de baptême* (of Mary and Margaret Connolly), was to recognize the legitimacy of these daughters, which enabled them afterwards to profess, *en religion*, in religious establishments."

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The same doctrine has been sanctioned by a number of decisions, in France, specially in the following case: A man named Dufour had been baptized in the Church of St. Michel de Menil Montant, under the name of Pierre Dufour, son of Guillaume, consul of the said place, and of Judith de Négrier; it was not stated in the certificate that the father and mother were married, nor that the child was legitimate; notwithstanding these facts, it has been held, by an *arrêt* of the Parliament of Paris, 31st July 1782, that Pierre Dufour was a legitimate child.

I concur in the opinion expressed by Mr. Justice MACKAY and Mr. Justice BADGLEY, and I think the extract of baptism of Margaret Fraser *is a serious piece against the plaintiff*, contesting the opposition of Jones.

This latter relies also on the possession of status, of which Cochin, the celebrated author and jurisconsult, says, Plaid. Bourjelat, 2d Edit. Paris, 1788, p. 150: "Of all the proofs which secure the status of men, there is none more solid, none more weighty than that of public possession." The respondent has heard a great number of witnesses to prove that possession. I shall not undertake to review all their evidence, for it would carry me too far; suffice to say, that the following facts, in substance, appear on record. Alex. Fraser was a Lower-Canadian, by birth; in the early portion of his life, he engaged as a clerk, or apprentice, in the North-West Company. While in the North-West, he contracted a union, about 1788, with the Indian woman already mentioned, Angelic Meadows, and he lived with her, there, up to 1801, when he came back to Canada, bringing with him his three children Angelic, Alexander and Margaret, whom he caused to be baptized, at St. Andrews Church, at Quebec, on the 8th October 1801. The Indian woman also came to civilized country, either with Fraser, in 1801, or later; it does not appear clearly, at what time. Finally, Alex. Fraser and the Indian woman settled at Rivière-du-Loup, but he does not seem to have co-habited a long time, with her, there. On the other hand, it is a matter of fact which is unfortunately too certain, by the record, that he lived a number of years with Pauline Michaud, one of his servants, to whom he was not married, and by whom he had several children, amongst others the plaintiff, Wm. Fraser. In any case, co-ha-

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bitation in Canada. at least during a certain time, between Fraser and Angelic Meadows, is proved by Cyprien Guichard, who, when a young man, had been hired, by Fraser, to work for him.

He says that Fraser and the Indian woman were living together, etc. (*roulaient ensemble*), in the large blue house, on the hill, at Rivière du Loup; he saw them together, in this house, on different occasions. Several other witnesses testify to their having heard from others that Fraser and Angelique Meadows had co-habited together, during a certain period, (*pendant une escousse ensemble*) and that, afterwards, Fraser had built a small house for her.—In fact, he caused such a house to be erected close to his own and he used to pay frequent visits to the Indian woman. Subsequently, he went to Lake Temiscouata with two servants, Pauline Michaud and l'*Asseline*, and he resumed possession of his Domaine, at Rivière du Loup, only some time after the death of the Indian woman, in 1833. While at Lake Temiscouata, he came down occasionally to River du Loup and to the Portage, to his son-in-law's, Thos. Jones, father of the respondent, where the Indian woman lived a certain time, and, according to Benj. Michaud, these visits generally lasted 4 or 5 days. It is moreover established, by a great number of witnesses, who were well acquainted with Alex. Fraser, that he and Angelic Meadows have been publicly acknowledged and known, during their life-time, as married persons. It was, say the witnesses, public rumor, general opinion, the saying of the world, (*le dicton du monde*),—what was said, from one to another, amongst the old people, (*parmi les vieux*), that Alex. Fraser was married with the Indian woman; he generally passed for having been married to her, in the North-West, according to the custom of the country. On the contrary, it cannot be denied that, from the beginning to the end, Pauline Michaud was always reputed to be the concubine of Alex. Fraser, (*une adoptée*). According also to the evidence of respondent, the children of Fraser and of the Indian woman passed legitimate; they always bore the name of their father; the others, those of Pauline Michaud, were reputed illegitimate, (*illégitimes—des enfants trouvés.*) As the record shows, Fraser did not cause any of his children issue of his connection with the white woman to be baptized; those of Pauline Michaud who were baptized are mentionned as being his natural children; he was not present at their christening.

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Taking now a glance at the other evidence, here is, for instance, what Frs. Chassé testified :

"I have not heard the family name of that Indian woman ; she was called "Madame Fraser." The persons who called her so were all the persons amongst us. Among the people, that Indian woman was considered as a *Lady*. At Mr. McLaughlin's (married to Angelic Fraser, sister of Alexander Fraser), she was considered as Mrs. Fraser (*on la regardait comme Madame Fraser*)."

Frs. Lévêque, aged 87 years, who was also examined in french, proceeds as follows :—"I have known perfectly well the Indian woman, of whom I have spoken : that woman was considered as an ordinary woman ; she was respected—she was a respectable woman. The McLaughlins said, when Mr. Fraser was living with Pauline Michaud, that it was his own business ; we cannot help it,—(on n'y peut rien) and, in fact, they could not help it..... The McLaughlins also treated them, (the children of Fraser and of the Indian woman), with respect ; they were people of high standing, (de grandes gens). The McLaughlins treated them as relations (les considéraient comme des parents, comme on se regarde entre parents)." It is also shown that Fraser has taken great care of the Indian woman, even when he was living apart from her. He was very fond of his children Angelic, Margaret, &c., and always treated them as beloved children, caused them to be educated, &c. With the same object of showing the existence of the marriage between his grand-mother and grand-father, Jones has proved several declarations made by the Indian woman, and more numerous ones yet made by Alex. Fraser to Benj. Michaud, Geo. April, Chouinard, etc. Fraser, for instance, stated one day to Damboise, who had enquired how was his Lady, (sa Dame), pointing out Angelic Meadows and putting his hand on her shoulder : "This is my wife, Damboise." Among the other admissions made by Fraser, the following one seems to me to be important ; it is the one related by Pélagie Marquis, the widow of Michel Moreau. She says that, at the time of the birth of the first child of Alex. Fraser and of Pauline Michaud, Fraser hired her father, André Marquis, who was mail carrier, to take him to Quebec. When he had returned from Quebec, she continues, he, Mr. Fraser, sat to table, to dine. Her father asked why he had done such a thing. He answered, " André, *on manque*

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à tout âge"; a man is liable to do wrong, at any age. "That thing" was the first child of Pauline Michaud. After having said: On manque à tout âge, he added: "That will not prevent me from taking care of my wife, as usual, (comme de coutume);" he was meaning the Indian woman: there was no other.—It was asserted, at the hearing, that those declarations of Fraser, as given by the witness, were all idle talk, mere gossip. I entertain a different opinion. Credit and respect have always been attached to the word of a man who may have deviated from the right path, but who confesses his fault, and, unless we declare that the father of the appellant was a man deprived of all notion of morality and barren of all sentiment of honor and self-respect, the conversation, for instance, related by Pélagie Marquis, it seems to me, must be viewed in a different light.

As already stated, among the people, Alex. Fraser and Angelic Meadows passed for married persons: to her face, and before Fraser, the Indian woman was called Madame Fraser. It is true that several witnesses add that, out of her presence, she was some times called *la sauvagesse* or *la sauvagesse à M. Fraser.* This however, in my opinion. does not amount to much against the alleged marriage, because these terms, in the mouth of the witnesses who used them, do not mean to convey any expression of contempt, towards the Indian woman; because the same witnesses state that she was married, that she passed to be married with Alex. Fraser, that she was a respectable woman etc. Reference had been made by the appellant to the existence of a previous marriage between the Indian woman and one Letang; there is no satisfactory evidence, at any rate, to show that this marriage was still existing, when Fraser came to live with her, and if faith is to be given to the storles concerning Letang, I think we may admit that she was a widow, when Fraser married her; otherwise we would have to add crime to crime and to explain facts which the appellant declares not to be credible by other facts still less admissible; if that woman had another husband, at the time, why should Fraser have brought her to this country, especially if the union between them was, as the plaintiff contends, one which might be broken, at the pleasure of Fraser?—But, says also the plaintiff, Jones himself has admitted that his mother was not the legitimate daughter

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of Alex. Fraser and of Angelic Meadows, and that they were never married. In support of that argument, we are referred to a petition which Jones and his sister and brother appear to have addressed to His Excellency the Governor General, in April 1862. It might have been better, if such a document had not been produced, but I do not think it can affect the conclusion at which I have arrived. The petition was filed on the 12th September, that is several days after the enquête had been closed generally, without any notice to the adverse party and any opportunity for him to explain that document, or state under what circumstances it had been signed; neither is it proved that the signature of Thos. Jones, which appears at the foot of the petition, is really the signature of the respondent. But, even admitting it to have been properly filed and proved, I would still persist in my opinion At the time it appears to have been made, Alex. Fraser and Angelic Meadows were both dead, since more than 25 years; their status and that of their children had been fixed and established by death and could not be changed by mere declarations of the latter. There is a case directly at point, in the *œuvres* of Cochin; a man named Bourgelat had received money, during several successive years, from his father; in the receipts given by him, the child confessed that he was the natural son of that man, that he was not entitled in any way, to those sums, but that they were paid to him through the mere generosity of his father; the son even going as far as to declare, in a writing signed by him, that he had a perfect knowledge of his birth and status. However, the Court, acting on the principle that no person can prejudice his status by his own declarations, because our status does not belong to ourselves alone, gave judgment in favor of Bourgelat, and decided that he was legitimate. To destroy the evidence adduced by the respondent Jones, concerning the legitimacy of Margaret Fraser, and to show that Alex. Fraser and the Indian woman were not married, the plaintiff has examined only four or five witnesses. I do not think their evidence sufficiently precise nor strong enough to counterbalance the testimony given by Jones' witnesses.

As argued by the counsel for respondent, Fraser made a very carefully prepared will, in which he appoints no universal legatee, but only particular legatees; on the other hand, it

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appears, on the face of the will, that the testator had disposed of a portion only of his property; for he orders, by a special clause, that if there remained debts to be paid, at the time of his death, his executors should employ, for that purpose, the moveable and immoveable property not bequeathed by him, and specially the six thousand acres of land which he possessed, in rear of his seigniory of River du Loup, and as to which land no bequest is to be found, in his will. If we say that Fraser's children, by the Indian woman were illegitimate, as those of Pauline Michaud are admitted to be, we must suppose that he was disposed to institute the Crown as his heir, for the portion of the property not bequeathed by him. After having thus briefly reviewed the evidence, in conclusion, I am of opinion that Jones must succeed, as regards the legitimacy of his mother, Margaret Fraser, that her extract of baptism is legal and sufficient, and also that he has proved that she has always enjoyed the possession of status, as legitimate child of Alex Fraser and of Angelic Meadows. I regret to have to dissent, but I think I am bound by law, and by the judgment in the Connolly case, to declare that she is the lawful child of Alex. Fraser and of Angelic Meadows. Even if we admit there is doubt, in the present case, I believe the authority of Cochin, cited by respondent, in his factum, applies here, and, as I observed, in *Connolly* v. *Woolrich*: where a doubt exists, as to the validity of a marriage, all law, all morality require and sanction that view, even of a doubtful case. On the other points, I agree with my learned colleagues.

RAMSAY, J.—The appellant brought an action against the curator to the vacant estate of the late Alex. Fraser to render an account to appellant, a special legatee under the will of Alex. Fraser, of the sum of £9,600, being the balance of the price of sale of two seigniories, Temiscouata and Madawaska, portions of which had been bequeathed to appellant, but had been subsequently sold by the testator. The respondent, Jones, was made a party to this suit, and he specially pleaded, that he was the legitimate son of Marguerite Fraser, who was the legitimate daughter of the late Alex. Fraser and Angelique Meadows, an Indian woman to whom Fraser had been married according to the Indian custom in the North-West Territory; that the legacy to appellant was revoked by the sale of the seigniories, and that

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in right of his mother he, the respondent, was entitled to one half of the balance of the price of sale.

On these issues the parties were heard before Chief Justice MEREDITH, who dismissed the exception on the ground that under the law of Canada as it stood when Alex. Fraser's will was made, and at the time of his death,—and indeed until the alteration of the law by the Civil Code—the sale of the object bequeathed was only a presumption that the testator had changed his intention, which presumption might be, and has been, rebutted. The judgment, therefore, ordered Pouliot to account, and he deposited in Court, $50, 015.07. A project of distribution was then made, collocating Fraser. To this respondent filed an opposition, setting up the same grounds as he had raised by his defence to the action, with the further allegation that by the Indian marriage, A. Fraser being a domiciled Lower Canadian, community of property was established by law between him and Angelique Meadows, and that therefore Jones had a right, through his mother, to one-fourth, that is one-half of Angelique Meadows' share of the community.

There is also another question to which it is unnecessary for the moment to refer.

This contestation, so far as explained, was met by several counter pretensions. It was said that the whole matter had been litigated between the parties, that a judgment had been rendered against the opposant from which no appeal had been taken, and that there was *chose jugée* between them on the whole contestation. It was further contended, as before, that the bequest was not revoked, that there had been no marriage between Alex. Fraser and the Indian woman, and that if there had been such a marriage it could not give rise to community.

We have therefore to inquire, (1) whether under the circumstances, the sale of the object bequeathed, by the law of Canada prior to the Civil Code, implied the intention to revoke the legacy. (2) Whether there was a valid marriage between Alexander Fraser and Angelique Meadows. (3) Whether, admitting there was a marriage, it gave rise to community of property between them. (4) Whether all or any of these questions could be again argued by respondent against appellant.

I shall take the last of these questions first. Our law is expressed in general terms it article 1241, C. C. It would have

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avoided perplexity if the article had not been drawn with a view to originality. It differs from the article 1351, C. N., and also from Pothier's analysis, Ob. No. 888. As it appears to be the old law the legislature intended to embody, I shall take Pothier's version as the expression of that intention. We have first the principle, that to invoke successfully *res judicata* the new demand must have the same object as the former demand, of which the defendant his been absolved. The constituents of this requirement are three in number: 1. The same thing. 2. The same cause of action. 3. And the same qualities both of plaintiff and defendant. If any one of these three things is lacking, there is no *res judicata.* In the case before us do they all exist? With regard to the first question it seems to me that the decision of Chief Justice MEREDITH, from which there has been no appeal, is final, so far as it goes. It was contended that it was not a final, but an interlocutory judgment, because it was not absolutely the last judgment to be rendered in the case. This, however, is not the real distinction between final and interlocutory judgments. To avoid repeated and unnecessary appeals, judgments final by their nature are considered as interlocutory, although they are improperly so called; but no judgment on the merits, on which there has been a full hearing, is interlocutory in the sense that it can be modified by the Court later. The difference between a final judgment and an interlocutory is that the former is a sentence determining the right, whereas the latter only prepares the way for its determination; 2 Cujas, 491 D. The latter can be altered, not the former, and so it has always been held, that a judgment deferring the oath cannot be altered, while a simple ruling at enquête can be altered. Toullier X, 116, 7. I think that the judgment of the Superior Court was a sentence, and therefore that the Superior Court had no authority to hear the question anew on the opposition.

Chief Justice MEREDITH, however, did not adjudicate on the second point, because, as it stood, it was of no importance whether Alex. Fraser and Angelique Meadows were married or not. Not having adjudicated on the point, in fact the issue not being fully before the Court, I don't think it possible to hold that there is any *res judicata* as to the question of legitimacy and the effect of the Indian marriage, if it took place.

But if I had to decide upon the merits of the first point, I

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concur in the able argument of the learned Chief Justice in the Court below so fully, that I should have only one remark to add to what he has said. It seems to me that the institutes state the abstract principle of the old law precisely. It is this, the intention of the testator in disposing of the thing bequeathed is to be gathered from all the circumstances, and the digest gives as an instance, not exclusively, a sale by urgent necessity.

It does not follow that this necessity was necessarily starvation or personal discomfort and distress. In a sense Fraser was a rich man; but a large part of his property was unprofitable, and likely to remain so for years, and he was offered a great price for it which would clear him of all embarrassment, and he sold. That is to say, he sold owing to a change of circumstances, which did not in the least affect any motive he had in making his will. The will shows a careful provision for all his children, all of whom he evidently believed to be illegitimate. He was himself illegitimate, and he had no heirs but the Crown. Is it to be presumed that he intended to make the Crown the heir of this windfall? I think not, and I attach great weight to the presumption arising from his having disposed of all his property by his will, and from his knowing that what he did not bequeath would go to the Crown, that he did not intend to alter his will as regards these seigniories.

As to the condition of financial distress in which Alexander Fraser was before the sale of the seigniories, it is hardly necessary to go very minutely into the examination of the accounts, he owed, for on the 2nd April, 1862, the respondent, his brother and sister found it their interest to address a petition to the Governor-General relative to this succession of their father, and very particularly referring to the £9,600 in question, and they distinctly enunciate the fact that "le dit Alex. Fraser avait des "dettes considérables, et était même considéré comme pauvre"; and they then go on to say that, by the sale of the seigniories of Temiscouata and Madawaska for £15,000, "il put ainsi libérer "ses seigneuries de la Rivière du Loup, Villeraie, Terrebois et "LeParc d'une partie des dettes dont elles étaient grevées."

This was intended to convey to the Governor-General the idea of a sale under the pressure of urgent necessity, and it appears the representation was effectual. The Solicitor-General for Lower Canada gave an opinion in which he says: "1st, that

the sale by the said Alex. Fraser, took place under circumstances of urgent necessity, that is to say, at a moment when he was greatly involved in debt, and that as there appears no indication of the intention of the testator to revoke the bequest made of the property so sold, the legacy has not lapsed, but remains in full force and virtue, and that consequently the £9,600 cannot be claimed by the Crown." The committee concurred in this opinion and advised that the same be approved and acted on. Having thus obtained the abandonment of the claim by the Crown, on the ground that the legacy had not lapsed, the sale having been made under the pressure of urgent necessity, the repeated attempt to have the legacy declared void, on the ground that the sale of the seigniories was without necessity, and that Fraser was, at the time, a rich and an unembarrassed man, looks a little audacious. We have also Alex. Fraser's own declaration that the payment of his debts with part of the money coming from the sale was "a great relief" to him. (Letter, 3rd Sept. 1835.)

We next come to the question of the alleged marriage, which becomes of importance, as the respondent claims one-fourth as heir of his mother. I take it, this is a question principally of fact. There appears to be no serious difference of opinion between the parties as to any proposition of law, save one. Respondent does not contend that the burthen of proof is not on him; but he argued that it was not necessary to produce a register of marriage, that the absence of any such register being established, the marriage could be proved by witnesses, and that it was sufficient, to establish a marriage, to show possession of the *status*—that is, that the wife bore the name of the husband, that he treated her as his wife, educating, and bringing up the issue as his lawful offspring, and repute. It was also contended that the declarations of the man and woman are evidence of the marriage, or, at all events, of these facts.

I did not understand that these propositions were disputed, nor do I understand that the respondent contends that cohabitation alone will create the presumption that there was a marriage. The general doctrine of the civil law is clear. *Matrimonium inter virum et mulierem contractum fuisse non præsumitur et qui ergo asserit inter aliquos contractum fuisse matrimonium probare id debet. Cum autem altero de duobus modis probari soleat celebratum*

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matrimonium veris scilicet et præsumptis probationibus etc. Menochius de Præs.—Libr. 3, Pr. 1, No. 1, No. 10.

Evidently it is one thing to say there was actually a marriage, and quite another to say that a marriage will be presumed from the possession of *status*.

Respondent alleges both. He neither relies wholly on the marriage, which he alleges, and which, to say the least of it, is peculiar, nor on the possession of *status*, which possesses characteristics to some extent unusual, but he says: "There was a marriage between my grand-father and grand-mother according to the custom of the barbarous tribes amongst whom they were living; none other was possible. Therefore this marriage was sufficient, and the proof of their cohabitation having the binding effect of marriage is to be found in the possession of the *status* of wife by my grand-mother." It is this that gives rise to the sole question of law on which the parties appear to me to be disagreed. Appellant's pretension is that the very nature of the relation between Alexander Fraser and this Indian woman, far from creating a presumption of marriage, destroys such presumption and fully explains his cohabitation with her, and his whole treatment of her. If Mr. Alex. Fraser, being interrogated seriously on the matter, had answered: "I went to the wilds of the North-West a young man and unmarried, I was surrounded by savages, and I cohabited during all the years I was there with this woman; I had several children by her; I treated her well, and when I left I brought her down here with our children; I provided for them both as well, and better perhaps than I could afford, but I never was married to her," the statement would have readily been accepted as a reasonable, if not entirely a satisfactory account of the relations existing between him and Angelique Meadows. Morally speaking, it is not satisfactory. Is it one the law will adopt? is a question we shall shortly have to examine.

In the meantime, let us turn to the facts. Those sought to be established are the marriage absolutely, or the *possession d'état* from which a marriage may be presumed. It is not disputed that the characteristics which determine the *possession d'état* are name, treatment and repute. There is no evidence of the custom as respects marriage in the tribe to which Angelique Meadows belonged, or indeed any evidence of a marriage at all, except in

the alleged declarations or admissions of Fraser himself and of the Indian woman. Fraser's admissions are sought to be proved by nine witnesses. Two of them, Benjamin Michaud and George April, relate stories that Fraser told them as to his marriage; but the stories are totally dissimilar. He was evidently telling these people travellers' tales, which should, to a certain extent, justify his *liaison* with this woman. There was nothing serious in what he said. The respondent also brought up one Paul Morin to tell a story of a conversation with a *commis*, whose name is not given. This does not appear to me to be evidence; but, if the respondent relies upon it at all, it contradicts both the story of Michaud and that of April. Again, we have the statement of a grandchild of this connection, Ignace Beaulieu, who relates that his grandmother told him that she was not like Pauline, but that she was maried to Fraser. "C'est les bourgeois qui nous ont mariés," etc. The other testimony on the point is that Fraser called her his wife: *sa sauvagesse*, *la bonne femme*, *la grande-mère*, and one witness says he called her "sa dame" by way of distinction. In the absence of *possession d'état* does this establish a marriage? We might perhaps be willing to admit that there might be a binding contract by the consent of the parties, where no religious ceremony is practicable, although I very much doubt this, in any country in which the rules of the Council of Trent took effect. Of course, those rules prevail here; for no different law being pleaded, we must presume that our law exists in the North-West. Now our law is composed of the public law of England, and the municipal law of France; and the public law of England and France in these matters being almost identical, it is unimportant to inquire whether this is to be governed by public or by municipal law. If we were to presume that any other law than that of this Province existed in the North-West, we should be obliged to say it was that of England, which no more than ours recognizes a natural marriage. If however, we were to give the fullest effect to consent, as being the one thing essential to marriage, for that is really the doctrine relied on, to what must the consent extend? Certainly to something more than co-habitation. Although evidence of co-habitation may go to establish status, it is not marriage.

The marriage, which the law recognizes as binding, is a

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bond indissoluble at the will of the parties. "*Non est in conjugum potestate dissolvere matrimonium.*" Men. Ib.. No. 10, Some allusion has been made to the law of Scotland, and the well-known case of *McAdam & Walker* was referred to. That was a very striking case. McAdam formally before his servants, called into a room for the purpose of being witnesses, declared his marriage with Walker, who ratified it. He went into the next room and blew out his brains. This was held to be a valid marriage by the law of Scotland, which rejects the rules of the Council of Trent.

In the case before us it seems to me there is no evidence of any such contract. Much has been said of the local custom, but there is not a word of evidence as to what that custom was. Nor am I prepared to accept the proposition that the co-habitation of a civilized man and a savage woman, even for a long period of time, gives rise to the presumption that they had consented to be married in our sense of marriage. "*Requiritur secundo quod vir at mulier pares sint.*"

This brings us to the presumptions arising from Fraser's conduct when he left the wild north-western territory and returned to Lower Canada. Did he give Angelique Meadows his name, did he treat her as his wife, had she the reputation of being his wife? We are told by respondent's witnesses, that Fraser, the Indian woman and the halfbreed family came down together, and also that Fraser came down and that they followed. Respondent, by his factum, seems to give credit to the latter story.

We are also told by several of respondent's witnesses that, after they arrived at Rivière du Loup, Fraser and Angelique Meadows did not live in the same house, and that they never lived together there. Towards the close of respondent's *enquête*, a witness, Cyprien Guichard, is produced, who tells us "cette "dame de Monsieur Alexandre Fraser restait avec lui dans la "grande maison bleue sur la côte; je ne l'ai pas vue ailleurs "que là." And he adds: "Personne ne savait si Monsieur "Alexandre Fraser était marié." * * * Il était marié, après "le dicton du monde, il était marié, pas comme on se marie, "nous autres," etc. Giving the fullest weight to this testimony, the witness, when twelve years old, had been four or five times to Fraser's house in the early years of his stay at Rivière du Loup, and saw the Indian woman there. He never was there

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after. Now, however these facts may be, it is perfectly certain that shortly after the arrival of the Indian family at Rivière du Loup, a separate house was built for her and her family, and they always afterwards lived apart from Fraser. It is true he provided for all their material wants, he constantly sent them food, and he educated the children, but no writer pretends that treatment of that sort indicates *possession d'état*, by the woman, as wife. "*Requiritur quod vir ipse pertractet mulierem honorifice, eo scilicet modo, quo uxores pertractari, et haberi solent.*" "*Requiritur ut habitatio sit in una eadem que domo: non autem sufficeret, quod vir habitaret in solita sua domo, utputa in paterna, et mulier in domo conductitia.*" "*Requiritur ut ii ita cohabitantes, coram testibus declarent, se cohabitare tanquam conjuges.*" (Men. Ib. Nos. 74, 75, 76.)

The respondent has totally failed to prove that the Indian woman bore Fraser's name. To her face she was called "Madam Fraser," but generally "la sauvagesse" or "la sauvagesse à Mons. Fraser," was the appellation she received. Fraser himself never called her Mme. Fraser; and in no document does he give her his name. In the will in question he gives her an annuity as "Angelique Meadows." In the registry of baptism, the name given to the mother is her maiden name. It is said that this is all the law requires, and that the officiating clergyman has no right to insert anything he is not obliged to insert. It certainly would not have been a trespass had he given to the wife her husband's name, which he did not do, because it was not given to him, we must presume. This, then, is a very solemn occasion on which F. refused this woman his name.

As to repute, common report, rumour or fame, call it which you will, there is a great distinction to be made. Rumour or fame may be words spread abroad without any authority, owing its origin to malice, and its acceptance to credulity; or, it may be a common opinion made known by words and arising out of some grounded suspicion or indication. Now it appears to me that it is impossible to read the deposition of the witnesses produced by respondent without being struck with its artificial and unauthoritative character. It is based upon no indication but that Fraser and Angelique Meadows had lived together and had children, and the hearsay marriage, according to the unproved Indian custom. In other words, the witnesses begged the whole question. Here, then, are people who avowedly know

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nothing of the marriage, and who saw no conclusive signs of the existence of a marriage, seeking to impose their idle and irrelevant gossip on the court under the guise of evidence. This is the rumour which the jurisconsults call, "*falsus sermo*," "*qui certum nuntium atque auctorem non habet.*"

By the testimony produced by the respondent, opposant in the Court below, it appears to me that there is no evidence of the three characteristics of *possession d'état* now insisted upon by him. Leaving aside, for the moment, the question of prescription, let us add to what precedes the fact, that the respondent has allowed the intermediate generation almost to pass away, before he comes to claim as a novelty, in right of his mother, this *status* which, if the testimony of his witnesses means anything at all, she always enjoyed. It seems incredible that any one could believe such a pretension.

But now let us turn to the evidence adduced by the appellant. The general repute of the illegitimacy of all Fraser's children, and that he never was married at all. is attested by Henry Davidson, Telesphore Michaud and Xavier Laforest, in quite as positive a manner as any of the witnesses who have testified to the marriage, and it is supported by indications which it is not easy to explain away. We have seen Fraser never called Angelique Mme. Fraser to anybody that can be produced ; that he did not give her his name before the Presbyterian minister at Quebec in 1801. Before her death she had become a Roman Catholic, and she was buried at St. Patrice, where a regular register was kept, and no one thought of saying the deceased was the wife of Fraser. She is described as "Angelique, sauvage, native des pays du Nord-Ouest" To pretend that this was the certificate of burial of the Seignior's recognized wife is to presume on unbounded credulity.

Fraser died in 1837. The difficulty as to the will, owing to the sale of the seigniories, was perfectly known. The opinion of counsel was taken, and on his opinion a *partage* was agreed upon, without any one dreaming of contending that "Angélique Sauvage, native des pays du Nord-Ouest," was the legitimate wife of the testator.

But respondent says he is not bound by this *partage*, to which he was not a party. That may be, but that is not the question for the moment. Whether it binds the respondent or

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not. it is at all events an act of all the persons who could act, and it assumes as incontrovertible that Fraser was never married. As to the pretension that respondent never acquiesced in this, it is not exact. Over and over again, he took money under this arrangement and gave receipts. Of course this may be error. and he may be relieved from it; but that is not what he seeks. If he has acquiesced in this *partage*, he should have it set aside. He has no right to hold to the bad title and get another incompatible with it.

But did he make a mistake about the share falling to him? On the 2nd April, 1862, the respondent, his mother and sister, made the petition to the Governor-General, already mentioned, praying him to renounce, on the part of the Crown, to any pretension that the alienation of the seigniories annulled the legacies.

In that document, the petitioners thought it necessary to set up what they then, having arrived at majority, considered was their *status* and that of their grandmother, and they allege:

" Que, pendant son séjour dans le Territoire du Nord-Ouest, " il contracta *alliance, suivant les usages de ce pays, il vécut maritale-* " *ment avec une femme de ce pays*, nommée Angélique Meadows, de " laquelle il eut cinq enfants, savoir: Angélique, plus tard la " femme de Sieur Ignace Beaulieu, Alexandre, Marguerite, mère " de vos pétionnaires, John et Mary qu'il amena avec lui, ainsi " que leur mère, à la Rivière du Loup, en Canada."

" Que la dite Angélique Meadows, ayant, à son arrivée en " Canada, été instruite des vérités et de la doctrine de la religion " chrétienne et *des lois du pays*, cessa de vivre avec le dit feu " Alexandre Fraser, et se sépara de lui."

" Que le dit feu Alexandre Fraser vécut alors avec une " autre personne, de laquelle it eut plusieurs *autres enfants naturels*, " dont cinq sont encore vivants."

* * * * * * * * *

Que le dit feu Alexandre Fraser ne s'est jamais marié.

" Que lors de son décès, le dit Alexandre Fraser n'avait, soit dans ce pays, ou ailleurs, aucun héritier ou représentants légaux."

In the absence of any evidence of marriage, this is decisive. It is an unqualified admission, and it is a subject about which the respondent could not be in error.

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If conversations of fifty years ago were to be relied upon (they are the whole of respondent's evidence), it would seem that Angelique had a husband according to some custom when, it is pretended, she married Fraser.

Commentary is useless. I do not think it necessary to examine the question of prescription. The law is laid down in Art. 236, C. C. It has been contended that this article does not express the old law, and that respondent was not seeking to regain his *status*, but to take advantage of it; that this could not be prescribed, and that his title was the certificate of baptism. It seems to me that these interesting speculations can only arise on facts very different from those submitted for our consideration.

Great importance has been attached to the case of *Connolly* v. *Woolrich*. That case seems to me to be very easily distinguished from this one. The judge found, as a fact, that there was a marriage: there was cohabitation, for a considerable period of time, in Lower Canada, and there was a formal declaration by the deceased Connolly that he was married to the Indian woman, made to the priest who baptized his children. It is sufficient to say this to explain the opinion at which I have arrived, in the case before us, without any special reference to that case; and, although I have read the report of it with great care, I do not feel called upon to express either approbation, or the reverse, of the long and able opinion of the learned judge who delivered the judgment, in the Superior Court.

The remaining question is as to the distribution to the legatees, under the will. Respondent claims on the whole $60,000, and he contends further, that, in so far as he represents his mother, he is not liable for the debts of the testator; or, in other words, that his share of the sold seigniories should be represented by so much of the price of sale, and not of the balance. I have only to say that I entirely concur with the learned Chief Justice, on this point.

CROSS, J.—The case having already been stated, I shall confine myself to a few remarks on the question of the legitimacy of the children of the Indian woman.

I think *Connolly* v. *Woolrich* was a stronger case,—against the Indian marriage,—than the present, and, if allowed to be a precedent, I would have nothing to say; but, as *Connolly* v.

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Woolrich was appealed to the Privy Council and compromised by the parties, without a decision there, and independent opinions being given in this case, I think it my duty to express my views, as to who has the right, in the present instance.

I notice, in the report of the case of *Connolly* v. *Woolrich*, in the Revue Legale, that the three courts: Superior Court, Court of Review and Queen's Bench, all decided in favor of the Indian marriage. I think, from my recollection, this is incorrect, so far as the Court of Review is concerned. The case was inscribed in Review, but the inscription was withdrawn and an appeal taken, instead, to the Queen's Bench; so that no opinion was obtained of the Review Court. There was but one dissentient voice, in the Queen's Bench. To my mind that decision was unsatisfactory, and I think it is well the subject should be further ventilated, to satisfy the doubts that have been entertained. as to the soundness of that decision. Much learning was expended, in that case, which seems to me unnecessary to travel over again. If I were desirons. time and circumstances would prevent me from doing so. I have not been able to find my notes of the former case, not even the Factums used in it, but the statement of a few simple propositions, it seems to me, obviates the necessity of extended enquiry, as to the authorities bearing on the case

It is generally received, as part of the *jus gentium*, that a marriage, wherever celebrated. is good and will be admitted as valid in all countries having a civil polity, provided the convention formed, or supposed to be formed, implies *perpetuity* and *exclusiveness*, according to the notions of a christian marriage. It must not be merely cohabitation, as that would imply a power of repudiation.

Also, that it is the consent of the parties to the union, or agreement, which constitutes marriage, and the register is merely the legal proof of that fact.

Each country has its own rules, as to the proof of the contract, at the place where it is sought to be enforced. Wherever human beings are found, on the face of the globe, we may assume. as incontrovertible, that the law of nature operates, by the intercourse of the sexes, for the perpetuation of the species. In countries inhabited by savage tribes, there is generally little consistency, or uniformity, in the regulation of that intercourse,

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and it is, for the most part, very unceremonious. Civilization introduces artificial regulations affecting property rights and defines obligatory duties, for the protection of women and children. In christian countries, the relation of husband and wife is distinguished by an amplification of reciprocal, obligatory duties and consequences, as affecting property, differing widely from those to be found elsewhere and forming a striking contrast to the relations of male and female, in savage life, where perpetuity of union and exclusiveness is not a rule, at least, not a strict rule.

Marriage, as understood by Christians, is the union for life of one man with one woman, to the exclusion of all others; any intercourse without these distinctive qualities cannot amount to a Christian marriage. A Christian marriage, in a civilized country, carries with it a certain status and involves civil rights, as regards property. That status and those civil rights offer one distinction between the union of the sexes, under the contract of marriage, as practised in a civilized country, and the union of the sexes, as it occurs in the country of savages, or barbarians. In the former case, the laws of status and property are the artificial creation of civilization, to guarantee order and protect the relations of persons towards each other, in civilized life. The most of civilized countries require, as proof of marriage, certain formalities to accompany the event, This is to avoid uncertainty in, and to regulate the duties of, relationship. To carry with it these incident rights, it is necessary that the relationship should be satisfactorily established. By our law, it is necessary that it should be proved from the legal Register, or that the absence of the Register should be duly accounted for, such as might occur by its destruction, or an omission to make the entry. For a foreign marriage, the like would be required, unless it were shewn that marriage, in the sense that it is understood among christians, could be proved and was proved, according to the law of the country where it was celebrated.

It is true that consent to the complete contract forms the essence of it, and the Registers are but the evidence, although, by the local law, they are, as a general rule, the only proof admissible; but this consent, wherever given, must be of the nature and to the full extent of a christian marriage. Cohabita

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tion and intercourse will not fulfil the requirement. The agreement must be for life and exclusive. The Roman Catholic faith makes its celebration a sacrament and all christian people consider it a very solemn act. I do not mean that the parties must necessarily be christians; but they must have in view and agree to contract, in the christian sense of its obligations, which imply exclusive unity and perpetuity. Would then a marriage, or union, in a pagan or savage country, according to the custom of such country, be admitted to amount to a christian marriage, of efficacy for the enforcement of the rights and duties incident to a christian marriage, in a christian country? It seems to me it should not; could such a union be adopted, or converted into a christian marriage, by the parties transferring their domicile to a christian country and there residing with the acknowledged status of husband and wife, according to the custom of civilization? An affirmative conclusion would perhaps be reasonable, especially if one of the parties was a civilized christian who might be supposed to have contemplated marriage, in a christian sense, and, for the other, it might be presumed in favor of a marriage; but, without this satisfaction by submission to and adoption of civilized law, I think the union could not amount to a marriage, in the christian sense. This view is substantially adopted by Bishop, the American author, on Marriage and Divorce, vol 1, § 222, vol 2, § 754; and a valuable note, on the subject, will be found in Fœlix, Droit international privé, by Charles Demangeat, p 123, in a similar sense.

It is not to be wondered at that, in a country where so liberal views prevail, on the subject of marriage, as in the United States of America, and where perhaps registers are not uniformly deemed essential, that posterior cohabitation with status of husband and wife should be accepted as a proof of marriage. I am not aware that it has been accepted elsewhere, as evidence of the contract, although it seems reasonable it should be; the fact of the husband giving the pagan, or savage woman, his rank in a civilized country and a persistence in treating her as his wife by her consent, would give reasonable grounds for the inference that it was, from the first, intended the union should be permanent and exclusive.

In the present case, there is no proof of an actual celebration, or agreement; the proof offered is that Fraser passed for

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having been married, in the North West, according to the custom of the savages there. If even such proof were uniform and uncontradicted, it would not amount to proof of possession of status. It is true that some of the witnesses state that Fraser himself said that he was married to this *sauvagesse*, according to the custom of the Indian tribes. Admitting this to be accepted as proof, to the fullest extent, it could amount to no more than that the union consented to by him was such an arrangement as the savages, in a state of nature, made with each other, necessarily neither possessing the attribute of permanence, nor exclusiveness. Where I find that the case completely fails is that there is no proof of possession of status, within the limits of civilization, that is after Fraser came to reside in Lower Canada. Some called the Indian woman Madame Fraser, and some Fraser's *sauvagesse*. But she lived apart from him, in a small house of 18 to 20 feet square, and had not the rank, or position of a wife, in a civilized sense, while he lived and entertained his friends, in his extensive seigniorial manor house, and cohabited, to the knowledge of the sauvagesse and the public, with another woman. There is no proof of an actual marriage and no room to infer it from possession of status, as that did not exist, within Lower Canada. There is besides, proof that the sauvagesse admitted she had another husband, named Létang, whom she took prior to Fraser, and it is not proved he was dead, at the time she lived at Rivière-du-Loup. It is a well known fact that polygamy prevails among the pagan Indians.

We know it from tribes of these Indians still living within our provinces and territories, and this sauvagesse, Angélique Meadows, as is proved, only became converted to christianity a short time before her death. It is however argued that Fraser did not take more than one Indian wife; and that the rule, with the Bourgeois, or Factors of the North-West or Hudson's Bay Co, was only to take, or allow, one wife. If that were so, it would go to show that Fraser acknowledged his subjection, either to the law of England, by which a marriage would require to be regularly solemnized, or the law of Lower Canada, which required the same thing and which, although difficult of performance, was not impossible. For so important a purpose, he could either have made a voyage to civilization,—or imported an ordained clergyman; but it is not civilized law that is relied

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on. although it might well be held that, if there was any dominant law in the territory, it was that of the masters of the country and not of the Indian tribes; but if, as contended, it was the custom of the tribes that controlled, then it was a union that could not be recognized, in a civilized country; firstly it was a marriage, where bigamy was permitted,—see *Hyde and Hyde* v. *Woodman*, 1 Probate and Divorce cases, p. 130, and 2dly, because it was susceptible of dissolution, at the will of both, or even one of the parties.

Then, if there were any doubt as to Fraser's intention in the matter, as well as showing the status of the parties, when clergymen arrived in the North-West Territory, he could have resorted to one of them to have his marriage solemnized, and if subject to the law of Lower Canada, as contended for by respondent, he would thereby have legitimized his children by the Indian woman. Again, when he presented them for baptism, at St. Andrew's Church, Quebec, there is no doubt he would have been glad to have them christened as legitimate, had he intended to marry Angélique Meadows, and, if he had ever intended to legitimate them, or give them such a status, and the woman that of his wife, it was his duty to have a marriage celebrated, on arriving in a civilized country. The baptism of his children. in the form in which it was done, although it does not prove illegitimacy, certainly does not prove legitimacy, and. from our manners and customs, always (when it can be done) of naming the legitimate parents of the children baptized, the form adopted rather throws a shadow on their title to legitimacy, and so it is with the authorities we were referred to, in Merlin, vo. légitimité.—Although some, or, at least, one of the cases, at first sight, would seem to desire that the law should wink at immorality, yet the context, as a whole, means that the omission to state the marriage, or legitimacy, is not presumed to show illegitimacy, yet anything equivocal, in the Register, goes to cast a doubt on the legitimacy. Again, I say, where would you look for the intention and the purpose of the parties, if not in the solemn and deliberate acts, in important family matters? There was no attempt to marry, on coming into a civilized country, when Fraser baptized his children. No effort was made to have them declared legitimate. When he made his will, he showed the purpose of treating all his chil-

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dren alike and made no attempt to declare any of them legitimate. It was proved that he was himself illegitimate and he appears to have preferred having all his children in the same rank, in this respect, as himself, with regard to the Indian relations. If it was considered that it was marriage, concubinage cannot have a place in these countries.—If concubinage, then there cannot be marriage, in the sense in which that is understood, in a civilized country.

This was recognized, in the evidence given in the case of *Connolly* v. *Woolrich*, as cited by the respondent, when Noël Annance says that he never knew of a man and woman living together, in the North-West, without being married. He might have cited a little more, where he says that a woman is called the man's squaw, that, he says, is his wife. In other words. they are male and female, and that is all and she is, in fact, the husband's property.

Concubinage cannot be distinguished from marriage, in a civilized country. In Rome, where it was tolerated, it could not be distinguished.

It was the quality of stranger, or foreigner alone which condemned Berenice to the rank of concubine and not that of the wife of emperor Titus. It was the same, at an earlier time, with Cleopatra and Mark Anthony. I think the illegitimacy of the children of the Indian woman is demonstrated, and moreover it was distinctly and formally acknowledged by Jones, the party now contesting it, in his petition to the Canadian Government, in April 1862, at a time when he had the strongest motives for asserting his legitimacy. He then signed a distinct declaration stating that his grand-mother was never married. He has not shown that it was, by error, or mistake, that he did so, and the document had the sanction of his brother and sister also, and no doubt had the approval of all the family, and was made because such was the known and acknowledged status of the parties. At the time, the ablest counsel had also been consulted on the affairs of the family, on the same basis, and a partage of usufructuary rights carefully prepared and executed with the sanction of all the family interested, including the respondent's father, then acting as a sole executor to Fraser's will. On this point, I would reverse the judgment of the Superior Court.

It may be further suggested if the Indian woman had been

a lawful wife, in Lower Canada, she had cause and the utmost provocation to have taken proceedings for separation. How could she have proved her title to make such a demand? In the exercise of that privilege, which Fraser could have exercised. in the North-West, he had repudiated her and decided not to marry or legitimate his children, and although he could not vacate her quality of wife, if once legally acquired, it is not to be forgotten that rank could not be obtained without an actual marriage, or, at least, such acquiescence on his part of her status of wife, as would sustain the inference that a marriage had taken place. I find no possession of status proved. I consider this the turning point, in the case.

The judgment rendered reads as follows:

La Cour, après avoir entendu les parties, par leurs avocats respectifs, sur le mérite, examiné tant le dossier et la procédure en Cour de première instance que les griefs d'appel produits par le dit appelant et les réponses à iceux, et, sur le tout, mûrement délibéré.

Considérant que l'intimé, issu du mariage de feu Thomas Jones et de feu Marguerite Fraser, n'a pas prouvé les allégués essentiels de son opposition, et entr'autres qu'il n'a pas prouvé que feu Alexandre Fraser et Angélique Meadows, père et mère de la dite Marguerite Fraser, aient jamais contracté un mariage légitime, ni que le prétendu mariage, que l'intimé allègue avoir été contracté, dans les territoires du Nord-Ouest de l'Amérique Britannique du Nord, entre le dit Alexandre Fraser, né dans la Province de Québec, et la dite Angélique Meadows, femme sauvage des territoires du Nord-Ouest, fut un mariage ayant les conditions requises pour être reconnu valable, dans la dite Province de Québec, ou dans tout autre pays civilisé.

Et considérant que, par son testament, reçu devant Mtre Parent et son collègue, notaires, le 11 février 1833, le dit Alexandre Fraser, entr'autres legs, a fait le legs suivant, savoir:

"Quatrièmement. Donne et lègue, le dit testateur, à ses trois filles, Marguerite Fraser, femme de Thomas Jones (daughter of the Indian woman), et Elizabeth et Magdeleine Fraser, (daughters of Pauline Michaud), et à chacune d'elles, deux lieues de front sur deux de profondeur, à prendre dans sa dite seigneurie de Témiscouata et dans celle de Madawaska, à partir de l'entrée du chemin du Portage, avec ensemble les moulins à

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farine et à scie, maisons et autres bâtiments et dépendances construites sur l'étendue des dites six lieues de seigneuries ci-dessus léguées, et aussi tous les droits seigneuriaux, cens, rentes, lods et ventes et accessoires. Et enfin tous les animaux et effets mobiliers que le dit testateur délaissera, au jour de son décès, sur les premisses susdites, pour par les dites Marguerite, Elizabeth et Magdeleine Fraser, et la ou les survivantes d'elles, au cas que les prédécédées meurent sans enfants, jouir, faire et disposer des dits animaux et effets mobiliers, en autant qu'ils tomberont dans leur lot, en pleine propriété, et pour par elles, et survivante d'elles, comme susdit, et au cas susdit, jouir, faire et disposer des immeubles ci-dessus à elle légués, en usufruit et jouissance seulement, leur vie durant, en bon père de famille; et quant à la propriété, le dit testateur la donne et lègue aux enfants des dites Marguerite, Elizabeth et Magdeleine Fraser, par tiers, les enfants représentant leur mère, pour par les dits enfants jouir et disposer, en pleine propriété, de la part de leur mère, mais après son décès;—et, arrivant que l'une des susnommées, ou deux d'entr'elles décèderaient sans enfants, les enfants de la survivante, ou des suivivantes d'elles, auront la pleine propriété, par portion égale entr'eux, de la part dont aura joui celle qui sera décédée sans enfants

"Ordonne le dit testateur que les susdites six lieues des dites seigneuries soient divisées at partagées en trois lots, entre les trois susnommées, par les susdits exécuteurs testamentaires; lesquels lots étant faits seront tirés au sort et chacune des susnommées sera obligée de se contenter du lot qui lui sera échu par le sort, avec les bâtisses, soit moulins, soit maisons, ou autres bâtiments qui se trouveront situés dessus et même avec les animaux et effets mobiliers qui pourront se trouver sur chacun des dits lots, ou aucun d'eux, sans être obligées entr'elles à se rendre raison, ni s'indemniser de la plus ou moindre valeur de son lot, voulant le dit testateur que si aucune d'elles refusait d'accepter le lot à elle échu, que le legs à elle fait devienne caduc à son égard, et appartienne et soit réuni au legs de l'autre, ou des deux autres acquiesçant; car telle est l'expresse volonté du testateur."

"Cinquièmement. Donne et lègue le dit testateur aux dits William et Edouard Fraser, ses fils, le restant de ses dites seigneuries de Témiscouata et de Madawaska, à partir des six lieues léguées ci-dessus aux dites dames Fraser, avec ensemble, les

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moulins, maisons et autres bâtisses qui se trouveront y construits, lors du décès du dit testateur, et aussi les cens, rentes seigneuriales, lods et ventes et autres droits seigneuriaux y annexés, pour, par les dits William et Edouard Fraser, en jouir, et disposer, par juste moitié entr'eux, en usufruit et jouissance seulement, leur vie durant et du suivivant d'eux, au cas que le prédécédé décéderait sans enfants, en bon père de famille, le dit testateur en léguant la propriété aux enfants du dit William et Edouard Fraser, pour moitié, et aux survivants des dits enfants, au cas que les prédécédés mourussent sans enfants; mais veut le dit testateur, si les dits William et Edouard Fraser décèdent sans enfants, ou si tous leurs enfants décèdent en minorité, sans enfants, que la jouissance des dits biens appartienne aux dits Malcolm et Elliot Fraser, par juste moitié entr'eux, et la propriété à leurs enfants, moitié entre chaque famille,—les enfants représentant leur père, pour par les dits enfants en disposer de la manière expliquée au second article des autres parts."

"Ordonne le dit testateur que le susdit restant des dites seigneuries soit divisé entre les dits William et Edouard Fraser, en deux lots aussi égaux que possible, de la manière et aux mêmes conditions expliquées, relativement aux trois dames Fraser."

Et considérant que, le 22 août 1835, le dit Alexandre Fraser aurait vendu les dites seigneuries de Témiscouata et de Madawaska à Nathan Cummings, pour la somme de quinze mille louis, dont cinq mille cent quatre-vingt-onze furent employés à payer des dettes pressantes, laissant, après déduction des frais et dépenses incidentes à la vente, une somme de neuf mille six cents louis, qui a été placée sur hypothèque sur des biens fonds situés dans la province de Québec.

Et considérant que le dit Alexander Fraser est décédé, le 14 juin 1837, sans avoir altéré ou révoqué son testament.

Et considérant que, par jugement rendu en cette cause, le 30 juin 1881, la Cour Supérieure siégeant à Québec, a jugé que la vente qui a été faite, par le dit Alexander Fraser, des dites seigneuries de Temiscouata et de Madawaska, le 22 août 1835, devait être considérée comme ayant été faite à raison de nécessités urgentes et que rien n'indiquait que le dit Alexander Fraser eût l'intention, en vendant ses dites seigneuries, de révoquer le legs qu'il en avait fait par son testament, en faveur des dites

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Marguerite, Elizabeth et Magdeleine Fraser et des dits William et Edouard Fraser, mais qu'au contraire, en plaçant les deniers provenant de la dite vente, comme il l'avait fait, et par les autres circonstances apparaissant dans cette cause, il était à présumer que le dit Alexander Fraser voulait que l'appelant et les autres personnes, auxquelles il avait légué les dites seigneuries, recevraient ce qui restait du prix d'icelles et les intérêts en provenant, de la même manière et dans les mêmes proportions, qu'ils auraient recueilli les dites seigneuries, si le dit Alexander Fraser n'avait pas été dans la nécessité de les aliéner.

Et considérant que, d'après la loi en force dans la ci-devant province du Bas-Canada, lors de la confection du testament du dit feu Alexander Fraser, et lors du décès du dit feu Alexander Fraser, l'aliénation des biens légués n'entraînait pas nécessairement la revocation des legs que le propriétaire avait pu faire de ces biens, et que la Cour de première instance a bien jugé, en décidant, par son jugement du 30 juin 1881, que, vu les circonstances sous lesquelles le dit Alexander Fraser avait vendu ses dites seigneuries de Témiscouata et de Madawaska, il n'avait pas eu l'intention de révoquer, et n'avait pas révoqué, le legs qu'il avait fait des dites seigneuries, et que la somme de neuf mille six cents louis, (balance du prix qu'il en avait reçu), représentait les dites seigneuries et devait se partager, entre les légataires des dites seigneuries, de la même manière et dans les mêmes proportions que les seigneuries l'auraient été, si elles n'avaient pas été vendues par le dit Alexander Fraser.

Et considérant que, par son dit testament, le dit Alexander Fraser a ordonné que, dans le cas où il laisserait des dettes à payer, lors de son décès, ses exécuteurs testamentaires, pour être en état de les payer, seraient saisis de tous les biens meubles et immeubles dont il n'avait pas disposé par son testament et de tous les revenus et produits des biens légués à Malcolm et à Elliot Fraser, ainsi qu'aux dits William et Edouard Fraser,—les biens légués aux dites Marguerite, Elizabeth et Magdeleine Fraser devant être exempts et déchargés des dites dettes.

Et considérant que le dit Alexander Fraser, n'ayant pas eu l'intention de révoquer, par la vente qu'il a faite des dites seigneuries, le legs qu'il en avait fait, ce legs doit subsister, sur le prix de vente qui en reste, avec toutes les conditions de substitution et les charges et exemptions, quant au paiement des det-

tes, comme si les dites seigneuries n'avaient été vendues qu'après le décès du testateur, le dit Alexandre Fraser, et que le dit intimé, qui est l'un des appelés à la substitution créée par le legs que le dit feu Alexander Fraser a fait des dites seigneuries de Témiscouata et de Madawaska, n'est pas lié par le partage que la dite Marguerite Fraser, qui était grevée de substitution, a fait, le 27 septembre 1839, qui n'était que provisoire, et qu'il a le droit de demander, comme il le fait, subsidiairement, par son opposition, à être payé, sur les deniers déposés en cette cause par le curateur à la succession du dit feu Alexander Fraser, de toute sa part du prix pour lequel les dites seigneuries de Témiscouata et de Madawaska, sans déduction du montant des dettes et dépenses incidentes qui ont été payées par le dit feu Alexander Fraser, ces dettes et dépenses incidentes étant censées avoir été payées à même la part du prix de vente revenant au dit appelant et au dit Edouard Fraser, légataires du surplus des dites seigneuries.

Et, considérant que les dites seigneuries de Témiscouata et de Madawaska, ayant été vendues pour un seul prix de quinze mille louis, égal a soixante mille piastres courant, il est nécessaire, pour parvenir à la distribution des deniers déposés en cette cause, entre les parties intéressées et conformément à leurs droits respectifs, qu'une ventilation ait lieu, pour déterminer quelle était, à l'époque de la vente des dites seigneuries, le 22 août 1835, la valeur des parts indivises d'icelles, qui avaient été léguées par le dit Alexander Fraser, par son testament du 11 février 1833, aux dites Marguerite, Elizabeth et Magdeleine Fraser, consistant en deux lieues de front par deux lieues de profondeur, pour chacune d'elles, ou deux lieues par six en totalité, et quelle était la valeur du restant des dites seigneuries, légué au dit appelant et au dit Edouard Fraser, le tout eu égard au prix total de quinze mille louis, pour lequel la totalité des dites seigneuries a été vendue, et de déterminer quelle proportion de la dite somme de quinze mille louis, (égale à soixante mille piastres), représentent, dans la dite vente, les parts léguées aux dites Marguerite. Elizabeth et Magdeleine Fraser, et quelle autre partie de la dite somme représentent les parts léguées au dit appelant et au dit Edouard Fraser.

Et considérant qu'il y a erreur dans le jugement rendu dans la Cour de première instance, le 7 avril 1884.

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Cette Cour casse et annulle le dit jugement du 7 avril 1884 et, procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre, cette Cour renvoie toute cette partie de l'opposition de l'intimé par laquelle il demande à être colloqué, sur les deniers déposés en cette cause, comme représentant sa mère, Marguerite Fraser, qu'il allègue avoir été héritière légitime des dits feu Alexander Fraser et Angélique Meadows, qualité qu'il n'a pas prouvée, et maintient cette autre partie de son opposition par laquelle il demande à être colloqué, comme appelé à la substitution créée par le dit Alexander Fraser, pour moitié de la part des dites seigneuries de Témiscouata et de Madawaska léguée à la dite Marguerite Fraser, sa mère. Et, afin d'établir quelle est la proportion des deniers déposés en cette cause qui doit revenir au dit intimé, il est ordonné que, par experts à être nommés, sous l'autorité de la Cour Supérieure, ou d'un juge d'icelle, suivant la loi, toutes les parties intéressées étant présentes, ou dûment appelées, les dits experts, après serment prêté, procéderont à faire une ventilation des différentes parties des dites seigneuries de Témiscouata et de Madawaska, de manière à établir quelle est la proportion de la dite somme de quinze mille louis,—(prix auquel la totalité des dites seigneuries de Témiscouata et de Madawaska a été vendue, par acte du 22 août 1835)—représente la partie des dites seigneuries que feu Alexander Fraser, avait par son testament du 11 février 1833, léguée à ses trois filles, Marguerite, Elizabeth et Magdeleine Fraser, et quelle proportion du dit prix de vente représente la portion des dites seigneuries que le dit Alexander Fraser avait léguée, par son dit testament, au dit appelant et à Edouard Fraser, le tout eu égard à la valeur que chacune des dites parties de seigneuries avait, lors de la dite vente, et, à cette fin, les dits experts prendront connaissance du dossier, des titres, plans, documents ainsi que de la preuve faite en cette cause, entendront les parties et recevront toute autre preuve légale, écrite ou orale, qui leur sera offerte par les parties, relativement à l'étendue et valeur des dites seigneuries et des différentes parties d'icelles comprises dans les legs que le dit Alexandre Fraser en a fait et aux matières qui leur seront soumises, et du tout feront leur rapport à la dite Cour Supérieure, sous trois mois de cette date, ou tout autre délai qui pourra être fixé par la dite Cour Supérieure, soit avant, soit après l'expiration du dit délai de trois mois.

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Cette Cour réservant à la dite Cour Supérieure d'adjuger sur le dit rapport d'experts et de déterminer les sommes pour lesquelles les dites parties doivent être colloquées, sur les deniers déposés en cette cause, après déduction faites des sommes qu'elles peuvent respectivement avoir reçues, le tout conformément à la loi.

Et cette Cour, réservant à la Cour de première instance d'adjuger sur les frais encourus et à encourir devant elle, condamne l'intimé à payer à l'appelant les frais encourus sur cet appel. Et la Cour ordonne le renvoi du dossier à la Cour Supérieure, à Québec.

Dissentiente M. le juge MONK, quant a cette partie du jugement qui dit qu'il n'y a pas de preuve du mariage.

The case was taken to the Supreme Court by Mr. Jones, and a cross-appeal instituted on behalf of the respondent. The Court, on the 8th of May 1886, decided adversely to all the appellant's pretensions and maintained the respondent's cross-appeal.

Mr. Justice TASCHEREAU, who delivered the opinion of the Court, spoke as follows:

This case presents no difficulty. The appellant Jones bases his claim to a share of the monies now in Court upon the legitimacy of Margaret Fraser, his mother, and upon the revocation of the legacy of the seigniories of Témiscouata and Madawaska, by the sale thereof, made by Fraser, subsequently to his will.

It would obviously be useless for him to succeed on the question of legitimacy (except as to his grand-mother's share as *commune en biens*, which I leave aside for a moment), if he failed in his contention that this legacy was revoked, for, if the legacy stands, all of these monies unquestionably go to the legatee. On the other hand, he would not, in any way, benefit by a judgment declaring the legacy revoked, if he failed on the question of legitimacy, for, in that case, all of these monies would escheat to the Crown.

Under these circumstances, I think it proper to consider first the question of the revocation of the legacy.

If the sale of these seigniories was made by Fraser, *necessitate urgente*, it did not carry revocation of the legacy. The question then resumes itself into a simple one of fact, which as such, has been found against the appellant, by Chief Justice

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MEREDITH and the five judges of the Court of Appeal. Upon him therefore rested the onus to establish that such a finding was clearly erroneous. He has, in my opinion, failed to do so. The disposal Fraser made of these monies is, to my mind, strong evidence that it was as representing these seigniories and, as it were, in exchange and in subrogation of them, that he thereafter held these mortgages; and as it was then clear law that where a testator exchanged a property that he had previously bequeathed by his will, even not *ex necessitate*, the legacy was not revoked but the property received in exchange passed to the legatee (2 Bourjon, 399, 5 Saintespès-Lescot, 110, Merlin, v. Subrogation de choses), we must hold that here likewise, these monies passed to the legatees as the seigniories would themselves have passed under the will. But were it otherwise, can the appellant now be admitted to plead the revocation of this legacy? Is he not debarred by his own conduct from the right to now assail it? Let us see in what position he stands.

At Fraser's death, 49 years ago, Margaret, the appellant's mother, accepted the legacy in question, thereby repudiating the said Fraser's succession Subsequently, by her own will, she instituted the appellant her universal legatee, and as such, he is now her sole legal representative. How could he under these circumstances, get over his mother's repudiation of her father's succession? (Art. 654, 866, C. C. Compare 14 Demol., No. 513 & seq, 22 Demol., No. 594 & seq. 14 Laurent, 593.)

But supposing he could get over that difficulty, how could he get over his own acceptation of his grand-father's legacy?

When his mother died, 25 years ago, he might have refused the said legacy and treated it as lapsed. But what did he do then and since? Did he renounce it? Certainly not, but on the contrary has accepted it and has received as such legatee and in virtue of his grand-father's will all he could get of the sums included in his mother's lot by the deed of 1839, besides, and this as her universal legatee, all the interests that remained unpaid at her death. He now holds and detains these sums, and yet when respondent claims his share of this very same legacy he, the appellant, retorts to him that it has been revoked. But if not revoked. if good for the appellant, why also not revoked and good for the respondent? Could the appellant so first pocket his share of it and then impeach its validity? I do

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not think so, and his conduct, as I view it, is against the position he now takes, a *fin de non recevoir*, an estoppel, which it would have been no easy matter for him to overcome had he been otherwise successful on this part of the case.

And there is another remarkable instance where he again clearly did not treat this legacy as revoked. I allude to his petition upon which he obtained from the Crown the abandonment of all claims to these monies on the ground that this legacy stood unrevoked. Would he now say that he misinformed the Crown or that he obtained that abandonment fraudulently? Would he say that it is fraudulently that he got all the monies he has received as legatee, or that it is fraudulently that he holds them?

I am of opinion that this legacy must be considered as not revoked and that the monies in question consequently passed in the same manner and proportions as the seigniories would themselves have passed under the will. It is therefore unnecessary for me to determine hypothetically who would be entitled to these monies, had there been no legacy. I deem it only proper to add, however, that if I therefore do not enter into the question of legitimacy, the appellant must not infer from my silence on this point, that I have any doubt as to the correctness of the judgment of the Court of Queen's Bench thereupon.

The question of *res judicata*, it is also needless for me to determine. I may say however that I have not so far heard or read anything in the case, which makes it at all doubtful in my mind: 1st that the principal allegation of Fraser's declaration was that this legacy was not revoked and that the primary object of his action was to have it so declared; 2nd that Jones by his *défense en fait* and other pleas asked for the dismissal of that action on the ground that the legacy was revoked and 3rd that the chief justice determined that it was not revoked. And I have failed to appreciate the soundness of the reasoning which would give to any Court, in face of that judgment, the right now or ever to dismiss Fraser's said action and authorize the curator to repocket the monies in question. Neither do I understand, as I read the chief justice's judgment, that he reserved to himself or to any one else the power to do so.

Now, on Jones' opposition, if the issue, the principal

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issue as raised by Fraser's plea, is not again the revocation or non revocation of that legacy, I have failed to understand the case; for as I have shown, how can Jones claim any of these monies as part of his grand-father's intestate succession, without first establishing that they fell into that succession, or in other words, that they were not bequeathed by the will? Bonnier, Nos. 299, 862.—2 Boitard, 203.—30 Demol. 287, 291.—*Shaw* and *St. Louis*, Supreme C. Rep. vol. 8, page 385.—Delvincourt, 71.1.100.—*Re Billon*; 73.1.292.—*Re Lambin*; 76.1.448.—*Re Viviès*.....

As to the partage of 1839, there is no doubt that it did not then bind the appellant and that he had a perfect right to repudiate it at his mother's death. But it is now clearly too late to do so. 25 Demol. 691, 694.—Solon. 2, des Nullités, Nos. 407 à 438.—Binet, 1 vol. des Nullités, 234 & seq.

Not only did he not repudiate it then, but he unequivocally ratified it, by claiming and receiving the capital sums put in his mother's lot, by that deed. Only one of these sums, besides those received from the curator himself, is clearly in evidence, in the part of the record printed upon this appeal (£150 from Vincent Dubé), but that is sufficient. There really was no partage at all necessary at Fraser's death, for in a case like this, where *créances* compose a succession, the law divides them between the heirs or legatees according to their shares in the estate. Art. 1122, C. C.—Pothier, Oblig., Nos. 299, 317.—26 Demol., Nos. 541 & seq.—11 Duranton, Nos. 269, 274. If here, for instance, these seigniories were 18 leagues in front, the three daughters being given six leagues, they were entitled to one third of each and every one of the capital sums due to Fraser at his death, this one third being sub-divided between them in equal parts. They however agreed to divide them otherwise; the appellant has acquiesced in it and he is now debarred from complaining of it. Did he ever at any time, since 25 years that his mother is dead, ask for another partage? Or has he ever ignored his mother's doings and relied on the division that the law made of these sums? Never, he has on the contrary always acted under and taken advantage of the division then made. He had no right whatsoever to receive, for instance, the £150 due by Vincent Dubé I have alluded to, if not for that deed of 1839. By the will alone, it was only a small portion of that sum that he was in law entitled to. And what is the

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acquittance he gave to the curator in 1873, for, if not for his share under that partage? But, says he, I gave that acquittance under reserve of all my rights. That is so, but reservations of that kind are of no avail: "*Facta potentiora sunt verbis et actus protestationis contrarius tollit protestationem.*" Solon. 2 des Nullités, 436.

As to the community of property between Fraser and the Indian woman, had they been legally married, it would undoubtedly have entitled Margaret Fraser to one-fourth of these £9600. But here again, the deed of 1839, which stands in full force and effect, would preclude her from the right to claim any more than what was thereby allotted to her and accepted by her as her share of these £9600. And the appellant, I repeat it, stands in her shoes, is bound by her acts, and has moreover unequivocally ratified that deed.

As to the contention that the six leagues bequeathed to the daughters were worth more than the rest of the seigniories; the evidence is altogether against it. But were it otherwise, here again the appellant is met by the deed of 1839, as his mother's representative, and by his own acts of acquiescence in that deed.

There remains the claim made by Jones in relation to the sum of £5400 paid by the late Fraser himself in settlement of his debts out of the proceeds of the sale of these seigniories. Jones contends that as by the said Fraser's will, his mother's share was to be free from the payment of all debts, he is entitled to receive from the estate a share of the sum of £5400. Mr. Irvine has argued with great force on Fraser's part, as cross-appellant, that Jones' contention is unfounded, that by the express words of the will, it was the debts that the *testator would leave at his death* that the daughters were exempted from: that the debts he himself paid were not debts of his estate and not covered by that clause of the will: that the will speaks from the death and must be read as bequeathing to his daughters one third of the £9600, with exemption from his debts *left at his death.* In support of this contention, may be cited a passage in Montvallon, des Succes., p. 558, where it is said that if a testator pays debts, which by his will, he had obliged one of his legatees to pay, he is presumed to have discharged this legatee of the obligation to pay them. However I do not think that the

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merit of this part of Jones' claim can be determined in this case, and the cross-appeal on this point, as well as on the partition of 1839, should be allowed. That amount of £5400 was not included in the plaintiff's action, never was in the curator's hands, and is not included in Chief Justice MEREDITH'S judgment. It is not then in Court and does not form part of the monies now in question. We decide whether or not, and to what extent, Jones is entitled to the £9600 deposited by the curator, and that ends the case. His claim as to £5400 comes in this case in the nature of an *opposition en sous-ordre* which has no *raison d'être* here. We, therefore, express no opinion on this part of Jones' claim, and leave him to exercise whatever rights he may have in relation thereto, if any, by direct action, or otherwise, and as he may think fit.

The appeal should be dismissed with costs, the cross-appeal allowed with costs and Jones' opposition dismissed with costs, except as to any part of these monies which may still be due to him in virtue of the partage of 1839, if any, for which he must then be collocated.

The parties may perhaps agree as to what is the amount of the sum thus remaining due to Jones. Failing such understanding, we will see how to get it established, so as if possible, to get it to form part of the judgment of this Court, before the minutes are settled.

Tessier & Pouliot, for Appellant.

Hon. R. Laflamme, Q. C., Hon. F. Langelier, Q. C. & M. Chaloult, Counsel.

Larue, Angers & Casgrain, for Respondent.

Hon. Geo. Irvine, Q. C., Counsel.

NORTHWEST TERRITORIES

TERRITORIAL COURT — SISSONS, J.T.C.

Re Noah Estate

Eskimos — Eskimo Custom Marriage Distinguished from Trial Marriage Custom — Validity of Former Unaffected by Marriage Ordinance — Effect of 1960, Ch. 20, Can. — Applicability of Intestate Succession Ordinance to Eskimos.

A marriage in accordance with Eskimo custom is to be distinguished from the Eskimo custom of trial marriage. The former is a consensual kind of marriage which English law recognizes as one which is essentially "the voluntary union for life of one man with one woman to the exclusion of all others," and is a legal marriage.

The *Marriage Ordinance*, R.O.N.W.T., 1956, ch. 14, does not affect or abolish Eskimo marriage custom.

Parliament, by 1960, ch. 20, amending the *Northwest Territories Act*, RSC, 1952, ch. 331, has not legislated so as to abrogate, abridge or infringe the rights of the Eskimos.

Semble, while generally the *Intestate Succession Ordinance* of the N.W.T. has no application to Eskimos, there are times and circumstances (as in this case) when the provisions thereof may be applicable to an Eskimo estate.

[Note up with 10 CED (2nd ed.) *Eskimos*, secs. 1, 2.]

W. G. Morrow, Q.C., and *A. E. Williams*, for widow and child.

M. M. deWeerdt, for brothers and sisters.

November 24, 1961.

SISSONS, J.T.C. — This is an application on behalf of Frank Gramani Smith, public administrator of the Arctic-Hudson Bay judicial district, as administrator of the estate of Noah, E6-465, late of Cape Dyer and Broughton Island, in the Northwest Territories, for an order ascertaining the next-of-kin of the said deceased and such other orders as the honourable judge may deem meet.

This matter is very important, at least to the Eskimos. The primary question is whether a marriage in accordance with Eskimo custom is a valid marriage. There have been thousands of marriages in accordance with Eskimo custom and such marriages are still taking place, particularly in the Eastern Arctic. If such marriages are invalid, there are thousands of illegitimate Eskimos in the north. Parties married in accordance with Eskimo customs could not adopt a child under the provisions of pt. LV of the *Child Welfare Ordinance*. There are very many adoptions among the Eskimos. The widow and children of a man married in accordance with Eskimo custom could not share in his estate under the provisions of the *Intes-*

tate Succession Ordinance. Many estates are affected. There is also involved the rights, freedoms, laws and customs of the Eskimos, as well as their honour and reputation.

Letters of administration were granted herein to the said public administrator on June 23, 1961.

Noah, E6-465, died on or about December 25, 1959, at Cape Dyer, in the Northwest Territories.

The estate consisted of $26,377.27 in cash. made up as follows:

Where Situate	Principal	Interest	Total
Consolidated Revenue Fund of Canada	$ 19.55		$ 19.55
Consolidated Revenue Fund of Canada	25,000.00		25,000.00
Royal Bank of Canada, Frobisher Bay Branch	1,357.72		1,357.72

Net value of estate ---------- $26,377.27

The beneficiaries were listed in the application for letters of administration as:

Wife	Igah E6-411	Age 18 years
Daughter	Jeannie E6-890	7 months
Brother	Jako 5605	30 years
Brother	Eliah	19 years
Brother	Lootee 7138	17 years
Sister	Leea 7192	14 years
Sister	Peepee E6-574	10 years

Some question having arisen, or been raised, as to the beneficiaries, the public administrator applied to this court to appoint counsel to represent Igah and her daughter Jeannie and counsel to represent the brothers and sisters of the deceased.

The court appointed M. M. de Weerdt, of Yellowknife, to represent the brothers and sisters of the said deceased and Elizabeth R. Hagel, of Yellowknife, to represent Igah and Jeannie.

The public administrator gave notice that a motion would be made before the court at Frobisher Bay, in the Northwest

Territories, on August 2, 1961, at 1:30 o'clock in the forenoon, or so soon thereafter as counsel could be heard, for an order ascertaining the next-of-kin of the said deceased, and that in support of the motion would be read the affidavit of the said Frank Gramani Smith, in which he deposes on information and belief as to the facts as follows:

That the Eskimo Noah E6-465 died on December 25, 1959, between the hours of 2:00 a.m. and 9:30 a.m. at Cape Dyer, in the Northwest Territories by suffocation and/or burns during a fire which burned a bunkhouse in which he was sleeping;

That the parents of Noah were married by Eskimo custom and that both parents died in the year 1957;

That the deceased left him surviving three brothers and three sisters;

That the deceased Noah married Igah E6-411, an Eskimo woman, of Broughton Island;

That Noah and Igah lived together on a trial marriage basis in 1957;

That the marriage of Noah and Igah was not solemnized in accordance with the *Marriage Ordinance* of the Northwest Territories, but took place at Broughton Island in accordance with the Eskimo custom some time in 1958;

That the nearest person to the said Broughton Island with authority to solemnize the marriage in accordance with the said Ordinance in the year 1958 was the reverend William Graham, an Anglican priest who lived at the settlement of Pangnirtung, which is located approximately 120 miles south of the said Broughton Island, and is separated by a range of high but not altogether impassable mountains;

That the Eskimo community recognized the said deceased Noah and the said Igah as man and wife;

That the said deceased Noah and the said Igah considered that they were married to each other and that the said marriage was monogamous.

That the said Igah was admitted to Mountain sanitorium, in the city of Hamilton, in the province of Ontario, to undergo treatment for pulmonary tuberculosis;

That the said Igah gave birth to a daughter, Jeannie E6-890, at the city of Hamilton, in the province of Ontario;

That the said deceased Noah is the father of the said Jeannie E6-890.

There was attached to the said affidavit a statutory declaration by one Oliver Walter Patrick Farley, reading as follows:

> "I, Oliver Walter Patrick Farley, of the City of Ottawa, in the County of Carleton, in the Province of Ontario, Civil Servant, do solemnly declare that:
>
> "1. I was the Northern Service Officer responsible for the administration of Eskimo affairs for the Canadian Government in the area in which Broughton Island lies, during the period from May, 1957, to March, 1959, inclusive.
>
> "2. To my knowledge, the Eskimo known as Noah E6-465, cohabited with the Eskimo woman known as Igah E6-411 and lived as man and wife.
>
> "3. The cohabitation of the said two Eskimos was recognized by the parents and by the Eskimo community as a valid marriage.
>
> "4. To my knowledge, this cohabitation first took place in the year 1958.
>
> "5. Subsequent to the marriage Noah left Broughton Island to take vocational training in southern Canada and then to take employment at Cape Dyer.
>
> "6. The wife did not at first go with her husband to his place of employment, namely, Cape Dyer, because her parents and the Eskimo community considered the area to be a bad place for Eskimos.
>
> "7. Noah's wife, Igah, lived with him continuously at Cape Dyer from December, 1958, to March, 1959, in a house rented to Noah by the Canadian Government."

There were also attached to the affidavit several certificates.

The certificate of birth of Noah E6-465 shows that his parents were married by native custom.

The certificate of birth of Jeannie E6-890 shows Igah as married.

The certificate as to the death of Noah shows that he was married and that his wife was Igah.

There is no certificate as to the marriage of the said Noah and Igah. The marriage was registerable. Instructions to district and subdistrict registrars under the *Vital Statistics Ordinance* read as follows:

> "When Eskimos marry according to their native custom, the District Registrar will complete the marriage registration as outlined above but indicating on the face of the form that this is a native custom marriage."

It would have been difficult to register this marriage. There was no district or subdistrict registrar at Broughton Island. Broughton Island is an isolated settlement with a population of about 100. There is a Hudson's Bay store. There is a school teacher. There is no church. There is an Anglican catechist, Peterloosie, the father of Igah. An Anglican minister or bishop may pay an occasional flying visit. There is no Royal Canadian Mounted Police stationed there, but there is an occasional patrol from Pangnirtung.

The court was held up on its circuit by bad weather and did not reach Frobisher Bay until the evening of August 2. Chambers were then held. Mr. Smith was present. The court advised Mr. Smith that the hearing of the application would be adjourned until the following day when the court would go to Broughton Island and hear and take evidence from the parties and others as to the facts of the marriage of Noah, and other circumstances as to marriages by Eskimo custom.

Mr. Smith stated that he had been instructed to advise the court that it should not go to Broughton Island. He stated that he had been given an argument to submit to the court in this connection and that he wished to put this argument on record according to his instructions:

"MEMORANDUM OF ARGUMENT.

"1. Laws of general application in force in the Territories whether enacted by Parliament or by the Council of the Northwest Territories are binding upon all persons in the Territories whether such persons are Whites, Indians or Eskimos. All residents take the benefit as well as the burden of these laws. Section 2 of Chapter 20 of the Statutes of Canada, 1960, being an amendment to the *Northwest Territories Act* is merely declaratory of this principal. Judicial authority dealing specifically with Eskimos is lacking. However since the decision of the Supreme Court of Canada in *Reference re Term 'Indians'* [1939] SCR 104, equated

Eskimos with Indians judicial authorities dealing specifically with Indians are relevant. The Supreme Court of Canada in *Francis v. Reg.* [1956] SCR 618, Kellogg, J. at p. 631, said:

" '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.'

"Parliament being the only body competent to legislate respecting Eskimos *qua* Eskimos has not legislated an exemption for them from laws of general application.

"2. The question in issue is whether the brothers and sisters of Noah and the woman Igah and her child are bound by the provisions of the *Intestate Succession Ordinance*. It is not whether these persons are bound by the *Marriage Ordinance*. The succession in question came into being before the enactment by Parliament of the amendment to the *Northwest Territories Act* above referred to. However, the enactment being declaratory, is retroactive in nature and has a retrospective effect.

"3. The characterization of the issue before the court is one of 'succession' and is not one of 'matrimonial incidents.'

"The deceased, Noah, was at all relevant times domiciled in the Northwest Territories, and the concubine Igah was taken by him in the Northwest Territories. Therefore, the Court having jurisdiction in the Northwest Territories is not in the same position as the Courts were in the cases cited hereunder and the rules of private international law followed in those cases are not relevant to the issue before this Court.

"4. The concubine Igah is not without a remedy. An action against the estate of Noah claiming a *quantum meruit* would presumably be available to her.

"5. Only evidence that is relevant to the issue should be accepted by the Court. Such evidence is limited to the existence of persons in a degree of consanguinity to Noah and the existence of persons having gone through the form of marriage with Noah pursuant to the laws of the Territory which in this instance are exhaustively set out in the *Marriage Ordinance*. Any other evidence, e.g. evidence

relating to the Eskimo custom of concubinage is irrelevant and the taking of such evidence is an unwarranted expenditure of funds belonging to the estate of Noah."

The court intimated that it must and would be going to Broughton Island and, if deemed necessary and possible, would go to Padloping Island and Cape Dyer.

Mr. Smith stated that he had been instructed that in such an event he was to submit a further argument. He submitted the following:

"SUPPLEMENTARY ARGUMENT.

"1. The Eskimo custom of concubinage is distinguished from the relationship of man and wife ordained by western Christendom and sanctioned by western civil law in that the relationship initially starts as a trial period. If the persons are reasonably content the relationship may extend for many years. However, its existence is no bar in the community to the male paramour making his concubine available to his guests and friends nor to the male paramour availing himself to other men's concubines. Nor is the concubine constrained to stay with the first male paramour but is free to leave him and either return to her father's house or to assume the same status with some other paramour.

"2. The group of Eskimos of which Noah and Igah are members are not barbarous aborigines. They have had the benefit of communion with and teaching by the Anglican Church for some 80 years (The Reverend Greenshields). It is fair to say that they are aware of the concept of Christian marriage and are aware of the privileges of civil law.

"3. The Court should be careful not to impose its wish as opposed to accepting the wish of Noah. It is reasonable that Noah voluntarily chose to take Igah as a concubine rather than as a lawful wife. His life and associations with the Church, the government and the white man lead to the conclusion that he was aware of the concept of a lawful wife and her privileges but chose rather another relationship whose incidents we must assume were more to his liking."

I was rather nonplussed. Mr. Smith explained that he was public administrator of the Arctic-Hudson Bay judicial district, but that he was also a civil servant, being a member of the legal division of the Department of Northern Affairs and Na-

tional Resources, and was bound by the order and instructions of his superiors, and that these instructions and arguments were the instructions, arguments and views of the Department of Northern Affairs.

The court attended at Broughton Island on August 3 and held its sittings. Mr. M. M. de Weerdt, barrister, of Yellowknife, who was present, acted as counsel for the brothers and sisters of Noah, and Mr. A. E. Williams, barrister, of Yellowknife, who was present, was appointed by the court to act as counsel for Igah and Jeannie. Mr. Smith was also present and took part in the hearing.

Igah E6-411, Martha E6-32, the mother of Igah, and Anilnik, the brother of Noah, gave evidence under oath. An interpreter had been brought along from Frobisher Bay. Court was held in the teacher's residence. It was an open court and a number of Eskimo and all the whites in the village, three ladies, were present.

Mr. Smith read into the record the above memorandum of argument and supplementary argument.

Igah gave evidence as to her marriage to Noah:

"MR. DE WEERDT: Q. Can you tell the Court where you first met Noah? A. Padloping.

"Q. And can you tell the Court when you and Noah got married? A. Here at Broughton Island.

"Q. Was it many days or years after you first met Noah? A. After many days.

"Q. Can you tell the Court how the marriage was arranged? Who decided about it; the parents or whoever it was, or you yourself? A. We were not married in a church.

"Q. Can you tell the Court how you did get married: what was the way in which it was done? A. Like, my father and mother, and his father and mother do it.

"Q. You say that your father and mother spoke to his father and mother? A. Yes.

"Q. And then after they spoke, what happened about the marriage? A. Then we got married.

"Q. Yes, then did you go away together, you and Noah? A. We were staying together.

"Q. Did you stay with your father and mother? A. My mother.

"Q. And you say that you didn't go to a church at all, is that right? A. No.

"Q. Did you see a clergyman; did you see a priest, or Commissioner? A. Yes, we saw him before.

"Q. I am sorry, I didn't hear that? A. There has been a minister here.

"Q. Was there a minister here after the time your parents and Noah's parents decided about the marriage? A. Yes.

"Q. Can you remember when he came in? A. After they got married one minister was here, you know.

"Q. Did you or your parents speak to the minister about getting married by him? A. The minister was here not very long ago, just by plane, you know.

"Q. Now, is there anything that you and Noah did to show that you were married, to the people that live here? A. Yes.

"Q. What did you do; how did you show this to them? How did they know you were married? A. I guess we married, and everybody knew about it.

"Q. Everybody knew about it, is that correct? A. Yes.

"Q. Who told the other people you were married? A. Everybody knows about it, because they heard about it, everybody.

"Q. Well, let me ask you a different question, then. You have said you felt you were husband and wife, even though you were not married in church? A. Yes.

"Q. How long was this to last; how many years or days? How long would it remain that you were husband and wife? A. Been married two years, many years.

"Q. That is how long you were actually married, but at the time you were married, at the very beginning, when you looked ahead, was it to be forever, all your life? A. Yes, yes.

"Q. Now I hope you won't mind this question, but I must ask it. This marriage, was it forever? Was it to be only one husband, one wife? A. Yes.

"Q. Were you or Noah married before to anybody, before you got married? A. No."

Martha E6-32 is the mother of Igah. She testified as follows:

"MR. DE WEERDT: Q. Can you tell the Court about Igah and Noah, when they were married? Can you tell the Court if she was married to Noah? A. Yes.

"Q. Can you tell the Court when that happened; when it was arranged? A. 1958.

"Q. How was it arranged; how did it come to be decided? A. He asked her to get married, and she said okay.

"Q. Did you talk about it to Noah's father and mother? A. Noah's father and mother told me Noah like to get married to Igah and I said okay.

"Q. Now after that time, did they actually get married then? A. Yes.

"Q. Was it soon after? A. They got married right away then after that.

"Q. Was there any time that they lived together while they were trying to make up their minds about getting married? Did they have a trial marriage? Did they live together to see if they would get married? A. Yes.

"Q. And then after that did they get married proper? After that time, did they get married for keeps? A. Yes.

"Q. And then after that did they get married proper? How did they decide to get married for keeps; how did that come about? A. Because everything alright then, so okay, and got married.

"Q. Good, now was there a Commissioner or Minister, or Priest in the settlement after the first time they decided about Noah and Igah. Was there a Commissioner here after the first time they decided to live together? A. Yes, a Minister was here after they got married.

"Q. Was that after they got married for keeps, or before they got married for keeps? A. Quite a while after they were married, quite a while after they got married the minister came here.

"Q. And did you or Igah or anybody try to get the Minister to marry them? A. No.

"Q. Can you tell the Court if you had a special reason for that, if you had a special reason for not getting married with the Minister? A. She was sick at that time the Min-

ister came here, and she didn't see the Minister and that's why she didn't tell the Minister.

"Q. Were Igah and Noah in the settlement at that time? A. Yes.

"Q. Do you know if Igah and Noah went to see the Minister? A. They went to Church and she forgot to tell the Minister, and that is why they didn't get married.

"Q. Oh, I see. Now after they got married, did they live in your place? A. Yes.

"Q. And did they sleep together there? A. Yes.

"Q. And was that after the time that they decided to get married for keeps? A. Yes.

"Q. Can you tell us about how other people here get married. Do they do it in the same way? A. Some of them get married in Church, some are not.

"Q. How can they tell that they are married; that is what I want to know, and it's not perhaps that they are just trying it out, or testing? A. The wife and the husband, everybody know about it, and the white people, they know about it too.

"Q. Do you drive out of the settlement with your dogs; does everybody see you going? Is that how they can tell? How can they tell you are husband and wife? How can they tell about this change? A. The mother and father the boss. If somebody say no, can't do it. If they say okay, then they get married.

"Q. When the mother and father say? A. Yes.

"Q. Did you say it was okay for Noah and Igah? A. Yes, Noah been asking want to marry Igah, so we say okay.

"Q. Now, when young people get married like that, what — and the wife's mother and father say yes, now how long is that marriage for, how many years? A. Stay forever until die.

"Q. And was that just to be one husband and one wife? A. Yes.

"Q. Or were there possibly to be one or two more? A. No, nobody else."

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"MR. WILLIAMS: Q. When Noah and your daughter got married, had Eskimos been getting married like that before? A. Yes.

"Q. Can you remember any other way? Any other way Eskimos used to get married; any other way besides this way in the Church? Is there any other way they used to get married? A. Used to be a long time ago; they didn't go to Church a long time ago.

"Q. Then would I be right if I said that these Eskimos always got married the way Noah and your daughter got married? A. Yes.

"Q. Do the mother and father of the boy, and the mother and father of the girl always talk first to see if the son and daughter are going to get married? A. Yes.

"Q. How long would they stay together? A. Forever.

"Q. Forever; but they say there is no trouble. Are they married right away, or is there a little while while they find out if they can get along together? A. Right away.

"Q. There is no trial marriage? A. No."

Anilnik called and testified as follows:

"MR. DE WEERDT: Q. Are you the step-father of Noah? A. Like I was step-brother. It was my mother adopted Noah.

"Q. And then when he came to your family, who was there besides yourself in that family; yourself, Noah, were there any other boys and girls? A. Just Noah.

"Q. Just Noah and yourself? How old was Noah when he came to stay with your family? A. When he was born, right away.

"Q. He was just a little baby? A. Yes.

"Q. Now can you please tell us, Anilnik, how people get married in this part of the world? A. They tell them, their mother and father, to be a good wife and husband and stay together.

"Q. Now, do Eskimo people live together for a little while before they decide to get married? A. After a few days stay together, you know.

"Q. And then do the parents make up their minds? A. Yes.

"Q. And when the parents agree, and then the marriage is decided, how do the other people around know? Who tells them? A. Everybody have a party. Everybody knows about it.

"Q. They know all that goes on? A. Yes."

"MR. WILLIAMS: Q. There is one little point that might be cleared up. You said the mother and father of the son, and the mother and father of the daughter agree; supposing one say no, if they don't all agree, is there no marriage, or what happens when somebody says no? A. There is no marriage.

"Q. If just one say no, and the other three say yes? A. If one says no, no marriage. All must say yes.

"Q. Or there is no marriage? A. No."

"MR. SMITH: Q. I want to ask questions about the relationship between a man and a woman once married. I have heard it said that it is sometimes the custom to treat an honoured guest who comes into camp, and a woman is given to him. Does sometimes this happen, that a man will give his wife to a respected guest in camp. Does this ever happen? When a man comes to an Eskimo camp, and they like him and want to treat him well, can he * * *, does a man give his wife to that man for the night? Does that ever happen? A. No, it doesn't.

"Q. There is no such custom? A. No.

"Q. It is not a custom? A. I have not heard of it."

"MR. DE WEERDT: Q. Who decided for Noah on the marriage; was it your father and mother, or Kadoolah and Mary? Who decided about that? A. All agree."

It was not necessary to go to Padloping Island or Cape Dyer. The judicial party was held up for three days at Broughton Island by storms over the mountains. The time was not wasted. Indeed the enforced stay at Broughton Island proved helpful. Several canoes arrived from Padloping Island with relatives and friends of Noah and Igah. Peterloosie, the father of Igah, returned from a seal hunt. The court and counsel visited and talked with these people and met most of the people of the settlement and secured a better understanding and appreciation of the community and of Eskimo life and customs on Broughton

Island, and of the present matter and the people involved. This was in accordance with the general practice of the bar of the Northwest Territories. They learn first hand.

The application was adjourned from Broughton Island to Yellowknife for argument. Written and oral arguments were requested.

There had, meanwhile, been a change in administrator and counsel. The Territorial Council at its session in July by amendment of the *Judicature Ordinance* abolished the two judicial districts of Yellowknife-Mackenzie and Arctic-Hudson Bay and set up one judicial district to be known as the Northwest Territories judicial district. The appointments of Elizabeth R. Hagel as public administrator of the Yellowknife-Mackenzie judicial district, and of Frank Gramani Smith as administrator of the Arctic-Hudson Bay judicial district, were revoked. Elizabeth R. Hagel was appointed public administrator for the Northwest Territories judicial district, and was granted letters of administration *de bonis non* of the estate of Noah E6-465.

Mr. William G. Morrow, Q.C., was appointed by the court to represent Igah and Jeannie in substitution of Elizabeth R. Hagel.

On November 15, 1961, at Yellowknife, Northwest Territories, the application was spoken to and written, and oral arguments submitted by W. G. Morrow, Q.C., M. M. de Weerdt and A. E. Williams.

It was agreed that the application be enlarged to include determining of beneficiaries and directing distribution.

The issue to be determined is whether Igah E6-411 is the "widow" and Jeannie E6-890 is the "issue" of Noah E6-465, so as to entitle them to share in his estate in accordance with the *Intestate Succession Ordinance*.

Specifically, *the question is whether a marriage in accordance with Eskimo custom stands on the same legal footing as a marriage which has been duly solemnized under the Marriage Ordinance.*

As I understand Northern Affairs' "supplementary argument," *supra*, it is submitted that a marriage in accordance with Eskimo custom is not a marriage, it is simply "the Eskimo custom of concubinage."

I feel that I must deal with the argument as I consider it casts unwarranted aspersions on Igah and Noah and on Eskimos.

The supplementary argument is fanciful and scandalous, both as regards to the Eskimos and as regards Noah and Igah.

A marriage in accordance with Eskimo custom is not "the Eskimo custom of concubinage."

Igah was not a concubine. Noah was not a paramour. And he was not a philanderer.

An Eskimo marriage does not initially start as a trial period any more than a western marriage starts as an "engagement" or "going steady" period. A trial marriage and a marriage are quite distinct. We are here concerned with a marriage, not a trial marriage.

There is generally among the Eskimos what has been termed a trial marriage. There is this whether the couple is later married in the church or in accordance with Eskimo custom. Trial marriage may well have something to commend them to others in these days of unsuccessful marriages and frequent divorces. They do not appear to be frowned on in the north, even by the church. Indeed, it is reported and of common knowledge that some years ago a very noted and very experienced and wise missionary in the north refused to marry an Eskimo couple in his church until there had been a trial marriage. Parties married in accordance with Eskimo custom quite often when a minister is available have their marriage solemnized in church. There is no hurry about this. The missionaries, generally, understanding the Eskimos and their character and customs, do not pressure the Eskimo to do this. The missionaries do not, nor do the R.C.M.P. or others in the north, disparage marriages in accordance with Eskimo custom.

Marriage among the Eskimos is not, as suggested by the argument, a morally loose affair.

Morality pertains to or is concerned with right conduct and it is generally accepted custom of conduct and right living in one's own society which govern. It may be that in spite of our conceits that customs other than our own may be generally accepted or condoned in other societies, and may even be more moral. The sexual customs of the Eskimos may be different from ours, but that does not constitute immorality.

Eskimos have their own code of morality and adhere very strictly to this, not only for its own sake but for the good of their society, and punish transgressors in their own effective way. The standard of morality among the Eskimos at Broughton Island is very high.

The old Eskimo could not understand the white man's obsession towards sex. Among them, sexual life was not directly connected with marriage. Sexual desire was entirely natural and normal, and young people were free to be quite promiscuous before marriage.

Eskimo marriage was a matter of mutual interest and necessity. Married people were generally very devoted to each other and remained faithful to each other throughout life. Their devotion had very little to do with sex.

It is said that there was in the old days some arranged exchange of wives, and there was some lending and borrowing. This did not mean immorality and certainly did not mean that a man could make use of a wife behind her husband's back and accept favours from her. This was considered as very bad and such a man was a disgrace to his fellows and was held in contempt. The husband had been insulted and action was called for. The wife was often beaten in public whether it was her fault or not. The husband sought out the paramour and took his revenge, sometimes even killing him, and this was approved.

The evidence taken at Broughton Island indicated that there is no custom as to a man making his wife available to a guest. The witness Anilnik said, in fact, that he had never heard of such a thing.

Eskimo marriage customs, like all customs, change and are changing. They also vary somewhat and perhaps sometimes considerably from one area to another. The distinguishing feature, if there is one, seems to be that marriages in Eskimo society are very much a family and community affair as well as an individual and personal matter, as indicated by the evidence taken at Broughton Island.

The argument admonishes this court that "The court should be careful not to impose its wish as opposed to accepting the wish of Noah."

The suggestion that Noah did not wish to marry Igah but to have her as his concubine is pure fantasy. The evidence is that Noah wished to marry Igah and that he expressed this wish to Igah and to her parents and to his parents, and that he did marry Igah and everybody on Broughton Island knew he was married to Igah, and that he remained married to her until his death, and that Jeannie is their child born in wedlock.

The evidence taken at Broughton Island showed that Noah and Igah had known each other for some years and had been going together for a considerable time. "Because everything alright then," Noah asked Igah to marry him and she said okay. Noah then told his parents that he wished to marry Igah and they said okay. Noah and his parents then went to Igah's parents and they said okay. "All agree." If anyone had said no, there could have been no marriage. Noah and Igah were then married.

"Everybody knew about it." "The wife and the husband, everybody know about it, and the white people—they know about it too."

"Was it forever, all your life? Yes, yes.

"Was it to be only one husband, one wife? Yes."

This marriage was in accordance with Eskimo custom as followed on Broughton Island. It was the way in which Noah's parents were married, and his paternal grandparents and his maternal grandparents.

The kind of marriage which English law recognizes is one which is essentially "the voluntary union for life of one man with one woman to the exclusion of all others."

This marriage of Noah and Igah is such a union and seems to comply in every respect with the requirements of what was known, according to the old law of England, as a consensual marriage, that is formed or existing by mere consent. The old law of England recognized a consensual marriage. The general law of Europe apparently also accepted a consensual marriage as being in all respects perfect.

It is not necessary to refer to the many English and Canadian cases on this subject.

The decisions of the courts in the United States generally follow the same line as the English cases and the Canadian cases.

For example, in a decision of the Court of Appeal of New York, namely, *Fisher v. Fisher* (1929) 165 NER 460, it is held:

> "Marriage is a civil contract, and law deals with it as it does with other contracts, and pronounces a marriage to be valid wherever a man and woman able and willing to contract do, *per verba de praesenti,* promise to become husband and wife.

"A formal ceremony of marriage, whether in due form or not, must be assumed to be by consent, and therefore *prima facie* a contract of marriage *per verba de praesenti*.

"According to common law of all Christiandom, consensual marriages, that is, marriages resting simply on consent *per verba de praesenti*, between competent parties, are valid, but this common right or common law does not extend to marriages which are polygamous or incestuous or which civilization commonly condemns.

"Since regulations restrictive of common rights of marriage by mere consent or imposing conditions on it are exceptional and dependent on local statutes, one claiming that a case falls within such an exception has burden of proof.

"Every presumption lies in favour of validity of marriage."

At p. 816, 55 *Corpus Juris Secundum*, we find the following statement of the law:

"A common-law marriage may be briefly described as a marriage without formal solemnization, or with formalities. It is sometimes termed a 'consensual' marriage or a marriage 'in fact,' although the latter designation is also used to distinguish an actual marriage from one merely alleged. The propriety of the use of the term 'common law' as to such a marriage is sometimes questioned on the ground that, under the earliest adjudications of the temporal courts of England, the doctrine of the canon law, sustaining the validity of marriages without religious solemnization, was expressly repudiated.

"The validity of informal or common-law marriages has been widely recognized, but in an increasing number of jurisdictions generally by reason of statute, a valid marriage may not be contracted informally, although many of these jurisdictions previously recognized the validity of such marriages."

There has been considerable legislation in England concerning the changeover from the common-law marriages, and eventually requiring that marriages be performed before clergymen, *et cetera*. The first was the statute commonly called *Lord Hardwicke's Marriage Act*, 1753 (26 Geo. II, ch. 33), which however, has a specific paragraph making it effective and binding only to England, and it has no extra-territorial effect

The next statute is the *Marriage Act,* 1823 (4 Geo. IV, ch. 76). This statute repealed *Lord Hardwicke's Act,* and goes on to alter and modify certain marriage laws and rules effective in England, but here again the statute was restricted to England, and was given no extra-territorial effect.

The next Act after that was passed in 1898. The laws of England of 1870, which are in effect in the Northwest Territories, have been unchanged from the old common-law position in England unless, of course, new legislation within the Territories itself has changed it.

It is necessary to consider *whether the Eskimo marriage custom has been affected or abolished by laws in force in the Northwest Territories.*

The *Marriage Ordinance,* RONWT, 1956, ch. 14, has no provision stating that a native marriage is invalid and no statement that a marriage carried out on the basis of common-law is null and void and invalid. This ordinance probably could not have so legislated. This ordinance is misnamed. In spite of its title, this is not a marriage ordinance but a solemnization of marriage ordinance. Solemnization of marriage is for the territory or province. Marriage is for the dominion.

I agree with the submission of Mr. Morrow that:

> "When we examine this statute [*Marriage Ordinance*], we find first, par. 2 (*e*) has a definition of a religious body, and the phraseology is that such a body includes a church, religious denomination, sect, congregation or society. It can be argued that the word 'includes' does not restrict, and that therefore one could suggest that a native ritual comes within the definition of a religious body, or at least is not excluded. This may be important further on, when we read such sections as 23 (1), where a marriage can take place by the publication of banns, and where we read, sec. 18, which states that no marriage is invalid by reason only that the person performing the ceremony was not registered, and further, sec. 27, to the effect that no irregularity in the proclamation of the intention to marry where banns are published shall invalidate a marriage.
>
> "The whole purport of the Ordinance, when one reads it from start ot finish, is to lay down two types of marriage ceremony, but to be very careful to indicate that *mere irregularities, or failure to comply with this or that section, will not, of itself, invalidate the marriage.* Then, when we read sec. 52, we find, 'Every person who solemnizes a mar-

riage contrary to the provisions of the Ordinance is guilty of an offence.' The penalty, therefore, is not to invalidate the marriage, but to prosecute or fine the person who carries out the ceremony in breach of the Act.

"Nowhere in this statute, either, *can one find a specific paragraph* stating, in so many words, *that a marriage based on the common-law, or a consensual marriage, or a marriage such as we have in the case,* is, by the mere fact of the parties having failed to comply with the licensing and other provisions of the Ordinance, *thereby ruled null and void or invalid."*

Is a marriage according to Eskimo custom a valid marriage?

There appear to be no cases relating to marriage in accordance with Eskimo custom. There are cases relating to marriages in accordance with Indian custom.

In *Reg. v. Nan-E-Quis-A-Ka* (1885) 1 Terr LR 211, Wetmore, J., delivering the judgment of the court *in banc,* referred to the judgment of Monk, J. in *Connolly v. Woolrich* (1867) 11 LCJ 197, 3 UCLJ 14, 1 LCLJ 253:

"If mere consent coupled with Indian custom is sufficient to establish a legal and binding marriage *quoad* the Indians in this Territory, it has been established by the facts I have recited. The first question which arises is, Would such a marriage if contracted before the laws of England were introduced into this Territory be recognized as legal marriage? I am of opinion that it would. In the case of *Connolly v. Woolrich* [*supra*] Mr. Justice Monk in a very able and exhaustive judgment deals with the subject of a marriage according to Indian custom of a Christian white man with an Indian woman. The marriage in question in that case was contracted in the year 1803 in Athabasca which country for the purposes of the case Mr. Justice Monk assumed to be included within the Territories embraced by the charter of the Hudson's Bay Company. He says at page 214: 'The charter did introduce the English law, but did not at the same time make it applicable generally or indiscriminately; it did not abrogate the Indian laws and usages. The Crown has not done so. Their laws of marriage existed and did exist.' I adopt this view of the law in so far as the marriage customs and laws of the Indians are concerned as among themselves without, however, recognizing as valid any law or custom authorizing polygamy."

And at p. 215, Wetmore, J. goes on to say:

> "In the first place are the laws of England respecting the solemnization of marriage applicable to these Territories *quoad* the Indian population? I have great doubts if these laws are applicable to the Territories in any respect. According to these laws marriages can be solemnized only at certain times and in certain places or buildings. These times would be in many cases most inconvenient here and the buildings, if they exist at all, are often so remote from the contracting parties that they could not be reached without the greatest inconvenience. I am satisfied however that these laws are not applicable to the Territories *quoad* the Indians. The Indians are for the most part unchristianized; they yet adhere to their own peculiar marriage custom and usages. It would be monstrous to hold that the law of England respecting the solemnization of marriage is applicable to them. I know of no Act of the Parliament of the United Kingdom or of Canada, except as hereinafter stated, which affects in any way these customs or usages. The Ordinance respecting Marriage, chapter 29 Revised Ordinances (1888) does not in my opinion affect the question. The conclusion I have arrived at is that a marriage between Indians by mutual consent and according to Indian custom since 15th July, 1870, is a valid marriage, providing that neither of the parties had a husband or wife, as the case may be, living at the time; at any rate so as to render either one, as a general rule, incompetent and not compellable to give evidence against the other on trial charged with an indictable offence."

And at p. 216 he submits that the provisions of the *Indian Act:*

> " * * * amount to a statutory recognition of these marriages according to Indian custom in the Territories."

In *In re Succession Duty Act; Lee Sheck Yew v. Atty.-Gen. for B.C.* [1924] 1 WWR 753, at 769, 33 BCR 109, Martin, J.A. refers to *Connolly v. Woolrich, supra,* and says:

> "Speaking as a whole the Judge came, I think, to the right conclusion, and a judgment given nearly 60 years ago which is peculiarly adapted to the social requirements of the development of our great country, vast portions of which are still in a wild state, should not be lightly disturbed and I would not be a party to its disturbance, particularly and justly bearing in mind how many families of pioneers are

affected by the marital principles it lays down as appropriate to the country based upon sound sense, law and morality, and being consistent in general with the decisions of the Courts of the United States which have had to deal with the same special question of Indian marriages * * *."

As Martin, J.A. points out, the United States courts have had considerable experience with native marriages relating to various Indian tribes under their jurisdiction, and these cases may be of some value to us. In 55 *Corpus Juris Secundum,* there appears the following, at p. 815, subpar. (c):

"As a general rule, the North American Indians continuing in their tribal relations, although within the territorial jurisdiction of a state, are not subject to its law in respect of marriage, and marriages between Indians prior to the extension of state law over Indian territory are regulated by tribal laws and customs. Accordingly, where tribal relations and government prevail, a marriage of persons within the tribal community and in conformation to the local customs will be recognized as valid, whether or not it would have satisfied the requirements of the state law, and although such communities may sanction polygamous unions."

McFarland v. Harned (1926) 243 P 141 (Oklahoma) holds:

"A marriage contracted between members of an Indian tribe in accordance with the customs of such tribe, where the tribal relations and government existed at the time of such marriage, and there was no federal statute rendering the tribal customs invalid, will be recognized and upheld by the courts of this state as a regular and valid marriage for all purposes. Such marriages are not to be treated as common-law marriages, but as legal marriages, according to the customs of the tribe."

Is it true, that the marriage of Noah and Igah "was not solemnized in accordance with the Marriage Ordinance of the Northwest Territories?"

I think there was considerable solemnization in this marriage, even if tinged with irregularity.

The solemnization of an Eskimo marriage follows pretty well that of the Anglican church, or rather the Anglican church's solemnization seems to follow that of the Eskimos. In Christian countries marriage did not become a religious ceremony before the 9th century, when newly wed couples began coming to the

church door to have their union blessed by the priest. The marriage had already taken place and was generally a family and community affair.

The Anglican solemnization appears in the Book of Common Prayer under the heading of "The Form of Solemnization of Matrimony."

There is under the Anglican solemnization the publication of banns—notice of the intended marriage, the request for declaration of any known impediment, the gathering together for the marriage, the giving away of the bride, the promises of the parties to take as wedded wife and wedded husband, the ring, the prayers, the pronouncement, the blessing.

This was pretty well followed in the marriage of Noah and Igah. There certainly could be said to be publication of banns and most effectively. Among the Eskimos if one say no or indicates his dissent by remaining silent, there can be no marriage.

There was in this marriage some religious elements.

Since I started to write this judgment, I have received from a party at Broughton Island the following telegram:

> "The Canadian Press reports that public trustee administering estate of Noah E6-465 deceased has stated that he was married through Eskimo ritual. Noah was married in a regular Anglican marriage ceremony performed by Eskimo minister Peterloosie E6-31."

This party is a recent arrival at Broughton Island and was not there when we were taking evidence. The statement is not in accord with the evidence taken where all the witnesses deposed that this was not a church marriage. I do not accept it as evidence or as correct in asserting that this was a "regular" Anglican marriage.

However, it is clear that Peterloosie E6-31, the father of Igah, is the Anglican catechist, the church leader, and probably the community leader, at Broughton Island and was prominent at the solemnization of the marriage and gave it his blessing, and no doubt brought some religious elements into the marriage.

The solemnization of an Eskimo marriage does not only resemble that of the Anglicans. It resembles that of other "religious bodies." The marriage custom of the Society of Friends (Quakers) seems very much like that of the Eskimos. The friends marry at a special meeting called for the occasion,

the only formality being a public declaration of the marriage by the couple and the signing of a certificate by all present as witnesses.

Have marriages in accordance with Eskimo custom been wiped out by ch. 20 of Statutes of Canada, 1960?

The Department of Northern Affairs' "memorandum of argument," *supra*, submits that Eskimos are bound by all laws of general application in force in the Territories, including the *Game Ordinance*, the *Marriage Ordinance*, the *Intestate Succession Ordinance*.

The argument relies on sec. 2 of ch. 20 of the Statutes of Canada, 1960, being an amendment to sec. 17 of the *Northwest Territories Act*, RSC, 1952, ch. 331.

This provision reads as follows:

> "(2) All laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories."

It is a cardinal rule of legal interpretation that the purpose of the enactment, the mischief or defect to be prevented, and the reason of the remedy which the legislature intendd to apply, should be discerned and considered.

The mischief or defect which secs. 1 and 2 of ch. 20 of the Statutes of Canada, 1960, sought to prevent or cure, obviously was that flowing from the propositions and decisions in *Reg. v. Kogogolak* (1959) 28 WWR 376, 31 CR 12, and *Reg. v. Otokiak* (1959) 28 WWR 513, 30 CR 401, as indeed was intimated by the Minister of Northern Affairs and National Resources when introducing the measure in the House of Commons.

The remedy which these amendments to the *Northwest Territories Act* intended to apply was to make legislation of the Territorial Council of the Northwest Territories in relation to preservation of game into federal legislation relating to Indians and Eskimos and of general application.

The obvious intent of these amendments to the *Northwest Territories Act* was to authorize the abrogation, abridgment or infringement of the hunting rights of the Eskimos and other rights of the Eskimos by the territorial government. The legislation is not effective. Eskimo rights could be extinguished by the Parliament of Canada. However, vested rights are not to be taken away without express words or necessary intendment or implication.

The *Canadian Bill of Rights,* 1960, ch. 44, also stands in the way:

> "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights,* be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared."

If these amendments were to accomplish their purpose, there should have been a provision that they would "operate notwithstanding the *Canadian Bill of Rights.*"

The argument submits that Parliament being the only body competent to legislate respecting Eskimos *qua* Eskimos has not legislated an exemption for them from laws of general application. That is not the point. The point is whether Parliament has legislated so as to abrogate, abridge or infringe the rights of the Eskimos. I find Parliament has not done so.

What effect has the Intestate Succession Ordinance?

Northern Affairs memorandum of argument, above, submits:

> "The question in issue is whether the brothers and sisters of Noah and the woman Igah and her children are bound by the provisions of the *Intestate Succession Ordinance.* It is not whether these persons are bound by the *Marriage Ordinance.* The succession in question came into being before the enactment by Parliament of the amendment to the *Northwest Territories Act* above referred to. However, the enactment being declaratory is retroactive in nature and has a retrospective effect."

And—

> "only evidence that is relevant to the issue should be accepted by the Court. Such evidence is limited to the existence of persons in a degree of consanguinity to Noah and the existence of persons having gone through the form of marriage with Noah pursuant to the laws of the Territories which in this instance are exhaustively set out in the *Marriage Ordinance.*"

Mr. de Weerdt, in an able argument, submits that Eskimos are not bound by the provisions of the *Intestate Succession Ordinance,* that the Eskimos have their own custom of succession, and that this custom has not been abrogated.

That there is an Eskimo custom as to succession appears from the evidence taken at Broughton Island. Martha E6-32, mother of Igah, gave this evidence:

> "Q. Now when a person dies, is there any special custom about what happens to his things, his clothes and spears, and things like that? Is there any way to give this away? What happens to those things? A. Sometimes some people go away with other people.
>
> "Q. Can you tell us if there is any special rule about this, any way it always happens—certain things going to certain people? Or how is that done? A. Sometimes other Eskimos poor people, and they get their clothes.
>
> "Q. Do the parents of the person get something special? A. Well, sometimes the parents give them.
>
> "Q. Do the brothers and sisters . . . do they share at all? A. Yes.
>
> "Q. And if there is a widow and children, what happens to them? What happens to the widow and child if it is a married man who dies? A. Stay with their relatives.
>
> "Q. Now, if Noah had anything, like money at 'the Bay,' what would happen to that? What would happen if Noah had some credit at 'the Bay.' If 'the Bay' had things to give to him because he did business there, who would be able to go to 'the Bay' to get those things? A. You mean the money?
>
> "Q. Yes? A. His father should know.
>
> "Q. He would decide that, would he? Would his father decide what was to happen to the things? A. Yes . . . I don't know what they do. I said the father."

[Reference to what "they do" seems clearly to be an interpretation by the interpreter as to his personal knowledge, not the testimony of the witness.]

As Mr. Williams points out, this evidence is vague and does not help very much.

Mr. de Weerdt recognizes this and suggests the taking of further evidence on this point, particularly as to the share the wife and child would take under Eskimo custom.

Mr. Williams further points out that the Eskimo leading his traditional life did not and does not leave any property other than his personal belongings, tools and weapons. However, now

many Eskimos have changed their mode of life and may accumulate estates of considerable size, but they have no established rules or customs concerning disposal of such estates. He suggests that in such cases the law of Canada as to succession should prevail, and that the estate of Noah devolve upon Igah, his widow, and Jeannie, his child.

Mr. Morrow thinks the *Intestate Succession Ordinance* does apply to Eskimos.

I agree with Mr. de Weerdt that the matter of Eskimo intestate succession does require further study, and much study, and immediate study, and that the Eskimos and Eskimo rights and customs should not be further ignored.

I also am inclined to agree that Eskimos are not bound by the *Intestate Succession Ordinance.*

This ordinance does not apply to Indians. The *Indian Act* has its own provisions for intestate succession, differing somewhat from those of the ordinance, and presumably accepted by the Indians as in accord with their native customs of succession. Apparently some provisions differing from their native succession customs were adopted by them as being more practical in this changing society.

The rights and customs of the Indians have not been completely ignored. They have their treaties and their *Indian Act,* codifying some at least of their rights and customs.

The Eskimos have no treaty. They have not given the covenant appearing in the Indian treaties, whereby:

> "They promise and engage that they will, in all respects, obey and abide by the law * * *."

They have no Eskimo Act. As Mr. de Weerdt points out, they have no one to represent them in Parliament. They have no representation on the Territorial Council of the Northwest Territories. This court must guard their rights, when it can, and sometimes must write upon a clean slate.

While I think that generally the *Intestate Succession Ordinance* has no application to Eskimos, I think there are times and circumstances when these provisions are applicable to an Eskimo estate.

Noah had left his father's house and community and Eskimo society and had become part of another society and economy where different laws and customs prevailed. He accepted those laws and customs. He trained for a job, and he worked for wages and saved a fair part of his wages and deposited this money in a bank to his credit for the use of himself and his own family. He did not make this money available to his father and the Eskimo community at Broughton Island.

There is no mention in the application for administration of such assets as personal belongings, tools, implements and weapons. This portion of the estate may have been administered and probably was administered in accordance with Eskimo custom.

I think that under these circumstances the *Intestate Succession Ordinance* does apply to this estate.

I think that this is the practical and right conclusion in the case. However, I adopt the words used by Lord Kenyon in *Reed v. Passer* (1794) Peake 303, 170 ER 164: "I think, though I do not speak meaning to be bound." It may be that Eskimo custom of succession, of which we know too little, does cover such a situation or that the Eskimos, if given an opportunity, might work out the problem differently.

I find that the marriage of Noah and Igah was a marriage in accordance with Eskimo custom and was a legal marriage under the laws of the Northwest Territories.

I further find that Igah is the widow of Noah and that Jeannie is the issue of Noah and that they are entitled to share equally in the estate of Noah.

I wish to express my very sincere appreciation of the keen interest counsel have evidenced in this matter and of the able and helpful arguments they have advanced.

Mr. Morrow, Mr. Williams and Mr. de Weerdt did a tremendous amount of research work and examined every issue exhaustively and almost overwhelmed me with arguments and authorities. I regret that in this judgment I have not been able to make use of all the material. Counsel will have their costs out of the estate, although I know they are not particularly interested in that angle. I am also very appreciative of the interest shown and the assistance given by Mr. Smith and Mrs. Hagel.

BRITISH COLUMBIA

SUPREME COURT LORD, J.

Re Williams Estate and Trustee Act
Re Indian Act

Indians — Devolution of Indian's Estate — Applicability of Administration Act, S. 126 — Effect of Indian Act, SS. 48-50 — Inapplicability of Indian Act, S. 48 (3) (a) to Illegitimate Child.

Sec. 126 of the *Administration Act*, RSBC, 1948, ch. 6, by virtue of sec. 87 of the *Indian Act*, RSC, 1952, ch. 149, applies to the estate of an Indian.

There is no inconsistency between the provision of sec. 126 of the *Administration Act, supra*, and secs. 48-50 of the *Indian Act, supra*.

Sec. 48 (3) (*a*) of the *Indian Act, supra*, does not apply to an illegitimate child, the words "children of the deceased" therein being applicable only to legitimate children.

[Note up with 8 CED (2nd ed.) *Devolution of Estates*, sec. 14; 2 CED (CS) *Indians*, as new sec. 18A, "Devolution of Estates."]

J. C. Davie, for Royal Trust Company.

J. Allan Baker, for guardian *ad litem* of infant son.

L. Heard, for wife.

Alistair MacDonald, for D. B. Williams.

February 26, 1960.

LORD, J. — The deceased is an Indian who married an Indian woman in 1940, but they were permanently separated in 1945. One child was born of the marriage in October, 1944, who lived with and was in the custody of the deceased father until December, 1958, when the father was killed in an automobile accident. For the purpose of the questions put to the court for answering, it was agreed by all parties, subject to proof at a later hearing, that the deceased's widow, for about five years preceding her husband's death had been living as man and wife and in adultery with Gabriel Jack. An Indian girl, born in 1940, claims to be an illegitimate daughter of the deceased.

I am asked to determine the following questions:

(1) Does sec. 126 of the British Columbia *Administration Act*, RSBC, 1948, ch. 6, through sec. 87 of the *Indian Act*, RSC, 1952, ch. 149, apply to estate of the deceased?

(2) Does sec. 48 (3) (*a*) of the *Indian Act* apply to an illegitimate child?

The sections read as follows:

Administration Act, sec. 126 (1):

"126. (1) If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate."

Indian Act, secs. 48 (3) (*a*) and 87:

"48. (3) Notwithstanding subsecs. (1) and (2),

"(*a*) where in any particular case the Minister is satisfied that any children of the deceased will not be adequately provided for, he may direct that all or any part of the estate that would otherwise go to the widow shall go to the children, and

* * *

"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.*"

Mr. Baker, counsel for the son of the deceased, argues that by virtue of sec. 87 of the *Indian Act*, sec. 126 (1) of the *Administration Act* takes effect which would result in the whole estate going to the son.

Respective counsel for the widow and the illegitimate child submit that secs. 48, 49 and 50 of the *Indian Act* which are headed "Distribution of Property on Intestacy" form a complete code respecting the estate of an Indian who has died intestate and any provincial statute which would add to that procedure and code would be inconsistent with the *Indian Act*.

This argument overlooks the plain wording of sec. 87 where it is made very plain that the test is inconsistency which to my mind means something which is at variance, or incompatible or contrary. Fry, L.J. put it succinctly in *In re Knight and Tabernacle Permanent Bldg. Soc.* [1891] 2 QB 63, 60 LJQB 633, at 636, when he said that the inconsistency connoted must be one

" * * * so at variance with the machinery and procedure indicated by the previous Act, that, if that obligation were added, the machinery of the previous Act would not work."

An appeal was taken to the House of Lords [1892] AC 298, 62 LJQB 50, where Lord Halsbury, L.C. said at 302:

> "If the two provisions may stand together I am unable to follow the argument that the one is inconsistent with the other, and the whole argument depends upon the word 'inconsistent' in the later statute. It is obvious to inquire, where is the inconsistency if both may stand together and both operate without either interfering with the other?"

I can see no inconsistency in the provisions of the two Acts and Q. 1 is answered in the affirmative.

Q. 2 must be answered in the negative. The words "children of the deceased," as they are used in that section can only apply to legitimate children. The effect of including illegitimate children in the category of children is not more "consonant with the object of the statute:" *Woolwich v. Fulham* [1906] 2 KB 240, 75 LJKB 675.

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Criminal law - Criminal Code, s. 278(a) - Polygamy - Indian marriage.

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Infants - Whether non-Indians may adopt Indian child - The Adoption Act, R.S.B.C. 1960, c. 4 - The Indian Act, R.S.C. 1970, c. I-6 - The Canadian Bill of Rights, R.S.C. 1970, App. III.

Black Plume v. Black Plume (1972) 4 R.F.L. 149 429

Custody - Indian children - Section 67 of The Indian Act, R.S.C. 1952, c. 149, not ousting the jurisdiction of Family Court under The Domestic Relations Act, R.S.A. 1955, c. 89.

Canard v. Attorney-General of Canada (1972) 4 WWR 618; 3 WWR 678 452

Constitutional law - Indians - Appointment by Minister of official as administrator of estate - Legislation and Regulations relating to estates of deceased Indians - Validity - No conflict with Bill of Rights - Meaning of "ordinarily reside on a reserve" - Indian Act, R.S.C. 1970, c. I-6, ss. 4(3), 42, 43 - Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1(b) - British North America Act, 1867, s. 91(24).

Courts - Jurisdiction of Supreme Court of Canada - Supreme Court Act, R.S.C. 1970, c. S-19, s.47 - Federal Court Act, R.S.C. 1970 (2nd Supp.) c. 10.

Children's Aid Society of Eastern Manitoba v. Rural Municipality of St. Clements (1952) 6 WWR (NS) 39 431

Infants - Neglected Children - Liability for Maintenance - Illegitimate Child of Treaty Indian Mother - Child Welfare Act - Municipal Act - "Institution" - "Resident" - "Residence" - "Lives" - "Living".

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Evidence - Witnesses - Competence - Compellability - Whether Indian couple living together without formal marriage ceremony husband and wife in law - Whether woman competent and compellable witness for prosecution - Canada Evidence Act, R.S.C. 1952, s. 4.

Re Deborah E4-789 (1972) 5 WWR 203; 3 WWR 194 362

Eskimos - Adoption of children by native custom - Validity of.

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Indians - Capacity to make a will - Female Indian - 43 Vict., c. 28, ss. 16-20 (d.) - R.S.C., c. 43.

Jones v. Fraser (1886) 12 Que. L.R. 327 — 467

Legacy - Revocation of - Sale of object bequeathed - Res Judicata - Marriage in North West Territory.

Re Katie's Adoption Petition (1961) 68 WWR 100 — 385

Infants - Adoption - Child Welfare Ordinance - Adoptions by Eskimo Adoption Custom as Adoptions "According to the laws of the Territories" with S. 103 and of Same Effect as if made under Ordinance.

Eskimos - Adoption Customs - Preservation of by Indian Act, S. 48(16) - Non-abrogation of by Northwest Territories Act S.17 - Effect of Canadian Bill of Rights - Unsuitability of Child Welfare Ordinance, Pt. IV.

R. v. Nan-E-Quis-A-Ka (1889) 1 Terr. L.R. 211 — 322

Crown case reserved - N.W.T. Act - Indian marriage - Evidence of - Wife's evidence - Applicability of English law.

Natural Parents v. Superintendant of Child Welfare (1976) 1 WWR 699 — 391

Indians - Whether non-Indians may adopt Indian child - Effect of s. 88 of the Indian Act, R.S.C. 1970, c. I-6, on The Adoption Act, R.S.B.C. 1960, c. 4.

Nelson and Nelson v. Children's Aid Society of Eastern Manitoba (1974) 5 WWR 449 — 421

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Re Noah Estate (1961) 36 WWR 577 513

Eskimos - Eskimo Custom Marriage Distinguished from Trial Marriage Custom - Validity of Former unaffected by Marriage Ordinance - Effect of 1960, Ch. 20, Can. - Applicability of Intestate Succession Ordinance to Eskimos.

Robb v. Robb, 20 O.R. 591 328

Husband and wife - Indian marriage - Evidence of lawful marriage - Declarations of deceased husband as to - Legitimacy of children.

Re Sheran, 4 N.W.T. L.R. 83 341

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Smith v. Young (1892) 34 Can. L.J. 581 353

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Re Vandenberg and Guimond, 1 D.L.R. (3d) 473 441

Infants - Custody - Illegitimate child - Right of mother of illegitimate child to custody at common law - Modified by equitable rule making welfare of child paramount - Whether position changed by legislation - Child Welfare Act (Man.).

Infants - Custody - Equitable principles are to be applied in custody matters by Courts of Manitoba.

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Criminal law - Trial for murder - Evidence - Witness - Wife of accused - Married By Indian custom - Admissibility.

Re Williams Estate (1960) 32 WWR (NS) 686 541

Indians - Devolution of Indian's Estate - Applicability of Administration Act, S. 126 - Effect of Indian Act, ss. 48-50 - Inapplicability of Indian Act, S. 48 (3) (a) to illegitimate child.