

NATIVE LAW

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Prepared by

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Assisted by Jeffrey Ross

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P R O C E D U R E

GUIDE TO USE

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SUBJECT BREAKDOWN

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PROCEDURE

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BRITISH COLUMBIA

COURT OF APPEAL

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

Armstrong Growers' Association (Plaintiff) Appellant
v. Harris (Defendant) Respondent

Garnishment—Indian—Attachment of Moneys Owing to Indian for Price of Grain Grown on Indian Reserve—Indian Act, Dom., SS. 99, 102—Grain Sold to Firm—Individual Garnished—Attachment of Debts Act, B.C.

By virtue of secs. 99 and 102 of *The Indian Act*, R.S.C., 1906, ch. 8, moneys owing to an Indian for the price of grain grown by him on an Indian reserve cannot be attached by garnishment, if there was nothing in the sale transaction to oust the ordinary rule that the debtor (purchaser) was required to seek out his creditor (the Indian) at home on the reserve and pay him there.

A garnishee order was held to have been properly set aside on above ground (per Macdonald, C.J.A. and McPhillips, J.A.) and (per Galliher, and McPhillips, JJ.A.) on the ground that the garnishee order, which was issued by the registrar, was ineffective, in that the grain was sold to "J. S. Galbraith & Son," whereas the garnishee order was against J. S. Galbraith only.

Martin, J.A. dissented, holding that on the evidence the only inference to be drawn was that the sale was a matter transacted outside the reserve, and so the money due to the Indian arising therefrom was a debt owing to him outside the reserve, and could be attached; also that (it being noted that the garnishee had admitted the debt and paid it into Court without any "dispute" or "suggestion" of non-liability or other claims) if the person garnished was in fact the person who comprised the said firm, then the attaching order was rightly issued in his name alone (*Walker v. Rooke*, 6 Q.B.D. 631); but if that fact was disputed by defendant the question could only be determined by an issue to be tried in the Court below.

[Note up with 4 C.E.D., *Garnishment*, sec. 40; Part IV; *Indians*, sec. 10.]

Appeal by plaintiff from the order of Swanson, C.C.J., setting aside a garnishee order attaching money owing to an Indian for the price of grain. Appeal dismissed, Martin, J.A. dissenting.

A. H. MacNeill, K.C., for plaintiff, appellant.

W. C. Brown, K.C., for defendant, respondent.

January 8, 1924.

MACDONALD, C.J.A.—This is an appeal from an order setting aside a garnishee order attaching moneys owing to an Indian for the price of wheat grown by him on an Indian reserve, and sold to a purchaser thereof on credit.

Macdonald,
C.J.A.

It is provided by sec. 99 of *The Indian Act*, R.S.C., 1906, ch. 81, that no Indian shall be taxed on his real and personal

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property, except such property as he may own outside the reserve, and sec. 102 declares that no person shall take any security or obtain any lien or charge whether by mortgage, judgment or otherwise, upon an Indian's real or personal property, which is free from taxation.

The wheat while on the reserve would not, I think, be subject to taxation, nor to process of execution, and I am of opinion that the language of the Act does not render the proceeds of it subject to taxation. It might, I do not say it would, be different where the Indian received the proceeds and deposited it, say, in a bank outside the reserve, but here, the debtor was obliged to seek his creditor at home on the reserve and pay him there. But even apart from this technical rule, I think there is a clear intention shown in the Act to exempt from taxation such a chose in action as we have here.

I would, therefore, dismiss the appeal.

MARTIN, J.A. (dissenting)—This appeal should, I think, with all deference to contrary opinions, be allowed, on the short ground that upon the evidence before us the only inference to be drawn is that this was a matter of business transacted outside the Indian reserve, and so the money due to the Indian arising therefrom was a debt owing to him outside the reserve, and therefore could be attached within the general principle to be extracted from the cases cited as to Indian property outside such reserves.

The formal objections to the proceedings should, I think be overruled; the sufficiency of the affidavit is supported by the authorities I cited during the argument, viz., *Walker v. Rooke* (1881) 6 Q.B.D. 631, 50 L.J.Q.B. 470, and *Chitty's Forms* (1912) p. 519. And it is moreover to be noted that the garnishee has admitted the debt and paid it into Court without any "dispute" or "suggestion" of non-liability or other claims, as contemplated and provided for by secs. 12-17 of the *Attachment of Debts Act*, R.S.B.C., 1911, ch. 14. If the person garnished, viz., "J. S. Galbraith," is in fact the person who comprises the firm doing business as "J. S. Galbraith and Son," then the attaching order was rightly issued in his name alone as *Walker v. Rooke* (a decision of three Judges of the Queen's Bench Division) shows, but if that fact is disputed by the respondent herein, that question can only be tried and determined as the statute directs in said sections cited, viz., by an issue to be tried in the Court below; it cannot, clearly, be entertained by this Court by anticipating the statutory tribunal of first instance, and in the absence of the evidence that would be given

GALLIHER, J.A.—I agree with Mr. Brown's submission that the registrar had no jurisdiction to issue the garnishee order.

While the garnishee order is issued as against J. S. Galbraith as garnishee, the affidavit of the defendant Harris, that the grain for which the money garnished is due, was sold to Messrs. J. S. Galbraith & Son, and that is not denied.

Now, J. S. Galbraith & Son, imports a firm or partnership and if it is not, the plaintiff could and should have shown it. Taking it as a partnership, the garnishee order which has been vacated by the learned Judge below, should have been made under sec. 20 of the *Attachment of Debts Act*, R.S.B.C., 1911, ch. 14, the registrar, in my opinion, having no jurisdiction to make it. On that ground I would dismiss the appeal.

MCPHILLIPS, J.A. — I intimated during the argument of this appeal, that I had no doubt that the order under appeal setting aside the garnishee order was rightly made, and upon further consideration I may say that I am still further convinced that His Honour Judge Swanson arrived at the right conclusion.

Mr. A. H. MacNeill, K.C., in a very careful and forceful argument, presented the view that the moneys attached were not exempt under sec. 102 of *The Indian Act*, R.S.C., 1906, ch. 81, (Dom.), the moneys being personal property subject to taxation under sec. 99 of the Act and therefore capable of being attached.

In support of this contention, *Avery v. Cayuga* (1913) 28 O.L.R. 517; *Rex v. Hill* (1907) 11 O.W.R. 20, at p. 22; *Sanderson v. Heap* (1909) 19 Man. R. 122, 11 W.L.R. 238; *Lovitt v. Reg.* (1910) 43 S.C.R. 106, at p. 131; *Atty.-Gen. v. Giroux* (1916) 53 S.C.R. 172, at pp. 198, 199, and *Sero v. Gault* (1921) 50 O.L.R. 27, at pp. 32-3, were relied upon, and it was pressed that upon the facts the *situs* of the moneys was in the city of Vernon. The facts of the present case would not appear to me to admit of the authorities cited being of any value. Here we have a sale of grain made by an unenfranchised Indian residing upon the Okanagan Indian Reserve, No. 3, (Prairie Reserve) near Larkin, in the County of Yale. There is no evidence to warrant it being said that the wheat was withdrawn by Harris from the reserve, and I assume—as I am rightly entitled to assume in the absence of evidence to the contrary—that the sale was made upon the reserve and delivery made there. It is the requirement in law for the debtor to seek out his creditor and make payment of his debt to him, and that would be to make payment to Harris upon the

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reserve. It is too clear for argument that the present case is not one which will admit of the upholding of the garnishee process. Mr. W. C. Brown, K.C., counsel for the respondent, very effectively met the argument of the learned counsel for the appellant and relied upon the following authorities, *Wharton*, at p. 831 (11th ed.—"Taxation"); *Carleton Woolen Co. v. Woodstock* (1907) 38 S.C.R. 411; *Murray v. Stentiford* (1914) 20 B.C.R. 162, 6 W.W.R. 1407, 29 W.L.R. 180; *Walker v. Cooke*, 6 Q.B.D. 631, 50 L.J.Q.B. 470.

It is clear that the property of an Indian is not subject to any form of attachment if it be not taxable and in the present case unquestionably no case has been made out to show that the moneys or property in question are subject to taxation. It is idle contention in my opinion, upon the facts of the present case, to press the view and make the submission that the moneys due and payable are personal property outside of the Indian reserve. Nothing supports this, and no property, in my opinion, can be said to be outside the reserve.

It is to be noted that the garnishee process in any case, is ineffective in that Harris made the sale of his wheat to Messrs. J. S. Galbraith & Son, of Vernon, and the garnishee order is against S. Galbraith only. This alone indicates the futility of the proceedings had and taken. The Indians are wards of the National Government (the Government of Canada) and the statutory provisions are aimed to provide statutory protection to the Indian and the public must govern itself accordingly, otherwise we would see the Indians over-reached on every hand and the Government required, in even a greater degree, to provide for and protect the Indians from the rapacious hands of those who ever seem ready to advantage themselves and profit by the Indian's want of business experience and knowledge of world affairs.

I do not import at all the appellant here has taken any advantage of Harris. In truth, I assume, which I have no doubt the fact to be, that the appellant is rightly entitled to the claimed debt, i.e., that it is a meritorious one; still, the business community and the public generally, must understand that in doing business with the Indians different considerations obtain and it must be understood that legal process cannot be invoked against Indians when the subject-matter comes within the protective clauses of *The Indian Act*, and that is the present case.

The appeal, in my opinion, should stand dismissed, and the order of His Honour Judge Swanson affirmed.

1917

Feb. 7.

[APPELLATE DIVISION.]

ATKINS v. DAVIS.

Indian—Enforcement of Judgment against—Property of Resident on Reserve—“Person”—Indian Act, R.S.C. 1906, ch. 81, secs. 2(c), 102.

The word “person,” as used in sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, is not to be read with the restricted meaning, “an individual other than an Indian,” given in sec. 2 (c), for the context otherwise requires.

Where judgment was recovered by an Indian against an Indian upon a promissory note made by the defendant Indian to a person not an Indian, who endorsed and transferred it to the plaintiff Indian, it was held, that the latter was prevented from enforcing his judgment against the defendant Indian by seizure and sale of his goods and chattels on the Reserve upon which he resided.

An appeal by the plaintiff from the judgment of the County Court of the County of Brant in favour of the defendant in an issue directed to try the question whether sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, had the effect of preventing the plaintiff from enforcing a judgment against the defendant by seizure and sale of his goods and chattels upon his premises or dwelling-place in an Indian Reserve. Both the plaintiff and the defendant were Indians, and the judgment against the defendant was recovered in an action upon a promissory note made by him to the order of one Thompson, not an Indian, who endorsed and transferred it to the plaintiff.

January 11. The appeal was heard by MEREDITH, C.J.O., MACLAREN, HODGINS, and FERGUSON, J.J.A.

H. Arrell, for the appellant, referred to sec. 102 of the Indian Act, and argued that, reading that section in connection with sec. 2 (c), the plaintiff, who was an Indian, was not prevented from enforcing against the defendant, who was also an Indian, a judgment upon a promissory note made by him to a person who was not an Indian, who subsequently transferred it to the plaintiff. He cited *Bryce v. Salt* (1885), 11 P.R. 112.

W. A. Hollinrake, K.C., for the respondent, the defendant Parry Davis, argued that the payee of the note could not give the plaintiff, his endorsee, any higher right than he had himself, and that the word “person” in sec. 102 should be interpreted to mean “any person,” whether an Indian or not.

A. M. Harley, for the defendant Sarah Davis, who was not a party to the appeal, took no part in the argument.

February 7. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 15th November, 1916, of the County Court of the County of Brant, pronounced after the trial of the action without a jury on the previous 3rd October.

The question for decision is, whether or not sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, has the effect of preventing the appellant from enforcing his judgment against the respondent by seizure and sale of his goods and chattels on the Reserve upon which the respondent resides.

Both parties are Indians, and the judgment against the respondent was recovered on a promissory note given by him to a man named Thompson, who is not an Indian, who endorsed and transferred it to the appellant.

Section 102 provides that: "No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three preceding sections: provided that any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid."

There are three classes of property which are, by the sections referred to, subject to taxation, viz.: (1) real property held by the Indian or non-treaty Indian in his individual right under a lease or in fee simple, or personal property, outside of the Reserve or special Reserve; (2) real property of an Indian acquired under the enfranchisement clauses of Part I. of the Act, after it has been declared liable to taxation by proclamation of the Governor in Council published in the *Canada Gazette*; (3) land vested in the Crown or in any person in trust or for the use of any Indian or non-treaty Indian or any band or irregular band of Indians or non-treaty Indians, with certain exceptions which for the purposes of the appeal it is unnecessary to mention.

Section 103 provides that: "Indians and non-treaty Indians shall have 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"

Section 104 provides that: "No pawn taken from any Indian

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or non-treaty Indian for any intoxicant shall be retained by the person to whom such pawn is delivered; but the thing so pawned may be sued for and shall be recoverable, with costs of suit, in any court of competent jurisdiction by the Indian or non-treaty Indian who pawned the same."

And sec. 105 provides that: "No presents given to Indians or non-treaty Indians, and no property purchased or acquired with or by means of any annuities granted to Indians, or any part thereof, and in the possession of any band of such Indians, or of any Indian of any band or irregular band, shall be liable to be taken, seized or distrained for any debt, matter or cause whatsoever."

The appellant contends that, read in connection with clause (c) of sec. 2, which provides that, unless the context otherwise requires, "person" means an individual other than an Indian, sec. 102 provides that "no individual, other than an Indian, shall take . . .," and that, as the appellant is an Indian, the prohibition does not extend to him.

The draftsman of the Act evidently supposed that, unless provision were made for Indians suing for debts or in respect of wrongs and for the performance of obligations contracted with them, they could not do so; and the provisions of sec. 103 are therefore found in the Act; but there is nothing which says that property which cannot be seized as provided by sec. 102 can be levied upon under an execution issued on a judgment which an Indian has recovered.

It is reasonably clear that, in some instances at least, as the draftsman must have thought was the case, the word "person" is not used in the restricted sense mentioned in clause (c) of sec. 2. The word is used in sec. 104, and it can hardly have been intended that its provisions should apply only where a person other than an Indian had obtained a pawn for an intoxicant. So, too, the provisions of secs. 129, 130, 131, and 132, cannot have been intended to apply only to individuals other than Indians. Again, if in sec. 136 "person" has this restricted meaning, all that would be necessary to avoid the effect of the prohibition which it enacts would be to have the boat in charge of an Indian, and, so far as the section is concerned, an Indian might have charge of the boat from or on board of which intoxicants might be supplied to Indians with impunity.

Coming back to sec. 102, if the contention of the appellant is to prevail, there would be nothing to prevent its provisions from being evaded. All that would be necessary for a non-Indian having a claim against an Indian to do would be to transfer it to an Indian, and so to convert a claim, a judgment upon which could not be enforced upon the property which sec. 102 in effect declares shall not be taken in execution, into one a judgment upon which could be so enforced.

If Thompson, who held the promissory note upon which the judgment was recovered, had given it to the appellant, the respondent would have had no answer to the latter's action upon it, and judgment must have gone against him.

I cannot conceive that it was intended that that should be possible, and I am forced to the conclusion that the context requires that the word "person," as used in sec. 102, is not to be read with the restricted meaning which clause (c) of sec. 2 would otherwise give to it.

I would affirm the judgment and dismiss the appeal with costs.

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[APPELLATE DIVISION.]

1917

Feb. 7.

RE LITTLE AND BEATTIE.

Landlord and Tenant—Lease—Rent Payable in Advance—Proviso for Fixing of New Rent upon Happening of Named Event during Term—Application to Rent Falling Due before Event—Distress—Apportionment Act, R.S.O. 1914, ch. 156—Application of.

In the lease of an hotel property for a term of ten years from the 1st May, 1912, the rent was made payable quarterly in advance, and it was provided that "if . . . any Act . . . preventing the sale of intoxicating liquors over the bar should come into force . . . during the currency of this lease the rental to be paid for all the premises leased shall be determined by arbitrators . . ." On the 27th April, 1916, the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50, was passed; it came into force on the 16th September, 1916; and the effect was to bring into operation the proviso of the lease just quoted:—

Held, that the proviso applied only to rent which by the terms of the lease should become payable after the happening of the event mentioned, and that the landlord had the right to require payment of the quarter's rent in advance which fell due on the 1st August, 1916, i.e., before the happening of the event, and (if not paid) to distrain for it either before or after the happening of the event.

Bickle v. Beatty (1859), 17 U.C.R. 465, *Mitchell v. McDuffy* (1880), 31 U.C.C.P. 266, and *Hessey v. Quinn* (1910), 20 O.L.R. 442, distinguished.

Held, also, that the Apportionment Act does not apply to rent payable in advance.

Ellis v. Rowbotham, [1900] 1 Q.B. 740, followed.

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services were to be performed it may be that the defendant could not recover for an allowance on purchase price not expressed in the written contract. In so far as this action is concerned, as there were services to be performed for which Benson agreed to pay, I think verbal testimony of such contract is admissible and that the defendant may recover on his counterclaim.

There will be judgment for the plaintiffs for \$1,800, and judgment for the defendant on his counterclaim for \$1,800. Following the ordinary course there would be costs to each party following these events. But as these would very likely about equalize, and after consultation with counsel, I allow no costs to either party.

Judgment accordingly.

AVERY v. CAYUGA.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclareen, Magee, and Hodges, J.J.A. April 21, 1913.

MAN.

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ONT.

S.C.
1913

1. GARNISHMENT (§ IC-15)—WHAT SUBJECT TO—BANK DEPOSIT OF INDIAN LIVING ON RESERVE.

Money deposited to his own credit in a bank beyond the Indian reserve by an unenfranchised Indian living on a Reserve, is subject to garnishment as personal property outside of the Reserve and not within the prohibition of sec. 102 of that Act as to liens or charges on non-taxable property of Indians.

[*R. v. Lovitt*, 28 Times L.R. 41, referred to.]

2. GARNISHMENT (§ IC-15)—WHAT SUBJECT TO—PROPERTY OF INDIAN—PERSONALITY NOT SUBJECT TO TAXATION.

The fact that personal property is not subjected to taxation by the laws of the province, does not prevent money deposited in a bank beyond a Reserve by an unenfranchised Indian living on a Reserve, being subject to garnishment or other charge under sec. 102 of the Indian Act, R.S.C. 1906, ch. 81.

AN appeal by the primary debtor from the judgment of the Judge of the County Court of the County of Haldimand, in an action in the First Division Court in that county, adjudging that the garnishees should pay to the primary creditor a debt due by the garnishees to the primary debtor.

Statement

G. D. Heyd, for the appellant.—It is sought by the respondent to attach moneys standing to the appellant's credit in the Union Bank at Hagersville. The appellant is an unenfranchised Indian, living on an Indian Reserve, and it is submitted that the deposit in question is not "personal property outside of the reserve," within the meaning of sec. 99 of the Indian

Argument

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ch. 23, sec. 5, sub-sec. 15, a farmer's income derived from his farm is not subject to taxation. Under the present law personal property is no longer subject to taxation; and this money is, therefore, exempt, even in the hands of a white man. He referred to *Simkevitz v. Thompson* (1910), 16 O.W.R. 865, a Division Court case.

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H. Arrell, for the respondent, argued that the *locus* of the property was "outside of the reserve," being in the bank at Hagersville, and that it was subject to taxation under the correct construction of sec. 102 of the Indian Act. It was, therefore, exigible in execution under that section.

The judgment of the Court was delivered by

Meredith,
C.J.O.

MEREDITH, C.J.O.—The appellant is an unenfranchised Indian, living upon an Indian reserve; and the debt due by the garnishees to him is represented by a deposit standing at his credit in the branch of the garnishees' bank at Hagersville.

The questions for decision are: (1) whether this deposit is personal property outside of the reserve, within the meaning of sec. 99 of the Indian Act; and (2) whether it is property within the exception mentioned in sec. 102 of that Act.

Section 99 reads as follows: "99. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds, in his individual right, real estate under a lease or in fee simple, or personal property outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate."

That the deposit is property situate outside of the reserve, within the meaning of sec. 99, seems not to be open to question: *Commissioner of Stamps v. Hope*, [1891] A.C. 476, 481-2; *Lovitt v. The King*, 43 Can. S.C.R. 106; *The King v. Lovitt* (1911), 28 Times L.R. 41.

The answer to the second question depends on the meaning of the exception expressed in the words, "except on real or personal property subject to taxation under the last three preceding sections," contained in sec. 102.

Section 102 reads as follows: "102. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three preceding sections: Provided that . . ."

Are the words "subject to taxation under the last three preceding sections" to be read as meaning, "may be subjected to taxation under the authority of these sections," or as meaning "are subjected to taxation under that authority?"

If the latter is the proper construction, the judgment appealed from is wrong, because personal property is no longer subjected to taxation by the Assessment Act of this Province.

I am, however, of opinion that what the exception means is, that property which secs. 99, 100, and 101 have rendered liable to be taxed, is not to be within the prohibitory enactment of the section; or, in other words, that security may be taken and a lien, or charge, by mortgage, judgment, or otherwise, may be obtained on any property of an Indian which, under the earlier sections, may be taxed, that is to say, applying the exception to sec. 99, real estate held by an Indian in his individual right under a lease or in fee simple or personal property outside of the reserve or special reserve.

Indians, and from the prohibition contained in sec. 102, as to

The intention of Parliament was manifestly, I think, to exclude from the prohibition as to taxing the property of their dealing with their property or its being made liable to satisfy judgments against them, real estate held by an Indian in his individual right under a lease or in fee simple, or personal property outside of the reserve or special reserve; and, as to these matters, to put Indians in the same position as persons who are not Indians; and I can see no reason, if that was the intention of Parliament, why the exclusion of the property of an Indian from the prohibition contained in sec. 102 should be made to depend upon whether or not the taxing body had exercised the power conferred upon it of taxing the property.

It is the ownership of the property which gives the right to tax, and at the same time excludes the property from the prohibition contained in sec. 102.

It is also to be observed that secs. 99, 100, and 101 are headed "Taxation," and the group of sections of which sec. 102 is the first is headed "Legal Rights of Indians."

In short, my view is, that the exception in sec. 102 is the equivalent of the expression "except on real and personal property which by the last three preceding sections is made liable to taxation."

I would dismiss the appeal with costs.

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Déclare irréguliers, illégaux, nuls et non avenus l'avis de modification et l'alias bref modifié obtenu par le défendeur contre les cédants de la demanderesse;

Réserve au défendeur ses recours que de droit;

Ordonne que le dépôt fait par la demanderesse sur son exception à la forme lui soit remis;

Condamne le défendeur aux dépens d'une motion pure et simple.

Beaulieu c. Petüpas

*Requête en vertu de l'art. 697*i* c.p.c. — Indien habitant la réserve de Coughnawaga — Sujet à la loi sur les Indiens — Travailleur pour sa mère comme chauffeur d'autobus — Analyse des art. 599, al. 9 et 697*i* c.p.c. — Portée de l'art. 88 de la loi sur les Indiens — L'arrêt Rivet c. De Guise [79 C.S. 68] différencié — Loi sur les Indiens [1952 S.R.C. c. 149] art. 87, 88 — Loi de l'Amérique du Nord britannique art. 91, al. 24 — Art. 599, a. 9, 697*i*, c.p.c.*

1. L'art. 88 de la loi sur les Indiens [1952 S.R.C. c. 149] rend insaisissable tous les « biens réels et personnels » de l'Indien qui sont « situés sur une réserve », peu importe que ces biens soient, tels un objet mobilier ou un bien immobilier, ou incorporels, telle une créance, et il met ces biens à l'abri de tout mode quelconque de « réquisition » ... saisie ... ou d'une exécution en faveur ou à la demande d'une personne autre qu'un Indien.

2. Quant à l'art. 697*i* c.p.c., il n'offre au créancier qu'un mode d'exécution auquel son débiteur doit se soumettre sous peine de contrainte par corps et il permet par là à ce créancier d'atteindre de façon indirecte ceux-là seulement des biens de son débiteur que celui-ci reçoit à titre de salaire et qu'il est impossible d'arrêter entre les mains de l'employeur.

3. L'exemption formelle de tout mode d'exécution, qui est accordée en vertu de l'art. 88 aux biens appartenant à un Indien et situés sur une réserve indienne, est beaucoup plus étendue que l'insaisissabilité créée par l'article 599, al. 9 c.p.c.

4. On ne saurait donc trouver d'analogie entre les faits qui se rencontrent dans le présent litige et ceux de l'arrêt Rivet c. De Guise [79 C.S. 68] où l'art. 697*i* avait été appliqué contre un fonctionnaire public à l'emploi du Gouvernement fédéral.

5. Si la Législature pouvait à bon droit déroger à l'insaisissabilité créée par l'art. 599, 9 c.p.c., il est certain que l'application à l'intimé de l'art. 697*i* c.p.c. serait incompatible avec l'exemption de l'art. 88 de la loi des Indiens [1952 S.R.C. c. 149].

Le Tribunal, après avoir entendu les parties, leurs avocats, examiné la procédure et délibéré.

M. le juge Victor Pager — Montréal, le 20 février 1959 — Cour supérieure, no 357,999 — M. Bourassa, pour le demandeur — Gingras, Trudel et Saylor, pour le défendeur.

Sur la requête des requérants en vertu de l'article 697*i* c.p.c.:

Les requérants ont obtenu le 2 octobre 1956 une condamnation contre l'intimé pour une somme de \$8,749.65 à titre de dommages-intérêts. L'intimé, qui n'a pas satisfait au jugement prononcé contre lui, habite dans la réserve indienne de Caughnawaga où il est à l'emploi de sa mère comme chauffeur d'autobus et mécanicien, au salaire hebdomadaire de \$50. Lui-même est Indien et, comme tel, sujet à la Loi sur les Indiens [1952 S.R.C. c. 149].

Alléguant que le salaire de l'intimé est saisissable en vertu des dispositions de cette loi, les requérants demandent en vertu de l'article 697*i* c.p.c. qu'il soit enjoint à l'intimé de se conformer à l'article 697*a* c.p.c., c'est-à-dire de déposer au greffe de la Cour de magistrat la partie saisissable de son salaire, après avoir produit une déclaration en énonçant le montant et l'échéance, le tout sous peine de contrainte par corps.

L'intimé, soutiennent-ils, se trouve dans le cas prévu à l'article 697*i* c.p.c. et il y a lieu d'en faire contre lui l'application.

Voici le texte de cet article:

« Article 697*i*. Si un débiteur reçoit un salaire qui ne puisse être arrêté par saisie-arrêt, le juge peut, sur requête du créancier d'un jugement exécutoire, enjoindre à ce débiteur de se conformer à l'article 697*a*, comme si son salaire était saisissable dans la proportion fixée au paragraphe 11 de l'article 599.

Avis de trois jours doit être donné de la présentation de la requête et l'ordonnance rendue sur icelle doit être signifiée au débiteur, son défaut de s'y conformer lui rend applicables les dispositions de l'article 834, édicté, 4 Geo. VI, c. 70, art. 8 ».

L'intimé soutient, d'autre part, que les exemptions créées par la Loi sur les Indiens font obstacle à l'application contre lui de l'article susdit. Les dispositions de la loi auxquelles il réfère sont les suivantes:

« Art. 87. 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. 1951 c. 29, art. 87 ».

« Art. 88. (1) Sous réserve de la présente loi, les biens réels et personnels d'un Indien ou d'une bande situés sur une réserve ne peuvent pas faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution en faveur ou à la demande d'une personne autre qu'un Indien ».

Il est peut-être utile de rappeler ici que la « Loi sur les Indiens » est une loi fédérale, et que le Parlement du Canada en l'adoptant a exercé un pouvoir exclusif que lui confère l'art. 91, paragraphe 24, de l'Acte de l'Amérique du Nord britannique.

Laquelle de ces deux prétentions contraires est bien fondée?

Le Tribunal est d'opinion que c'est celle de l'intimé. Le motif qui l'amène à cette conclusion réside dans la distinction qui existe entre la portée ou les effets de l'article 697*i* c.p.c. et ceux des dispositions précitées de la « Loi sur les Indiens ».

L'article 88 rend insaisissable tous les « biens réels et personnels » de l'Indien qui sont « situés sur une réserve, peu importe que ces biens soient corporels, tels un objet mobilier ou un bien immobilier, ou incorporels, telle une créance, et il met ces biens à l'abri de tout mode quelconque de « réquisition » ... saisie ... ou d'une exécution en faveur ou à la demande d'une personne autre qu'un Indien ».

C'est ce que disait le juge Kinnear, dans *Campbell c. Sandy* (1), décision citée par le procureur des requérants:

"Under s. 88 of the Indian Act, an Indian judgment debtor is still exempt from execution if he has no property or interests outside of the reserve".

Quant à l'article 697*i* c.p.c. il n'offre au créancier qu'un mode d'exécution auquel son débiteur doit se soumettre sous peine de contrainte de corps, et il permet par là à ce créancier d'atteindre de façon indirecte ceux-là seulement des biens de son débiteur que ce-

lui-ci reçoit à titre de salaire, et qu'il est impossible d'arrêter entre les mains de l'employeur.

Les décisions rendues dans *Rivet c. Deguise* (2), et *Patterson et Patterson Inc. c. Vanesse* (3), confirment implicitement cette distinction.

Le savant procureur des requérants, dans le mémoire qu'il a préparé, a semblé trouver que la première de ces deux causes présente une certaine analogie avec les faits qui se rencontrent dans le présent litige, en ce que c'est contre un fonctionnaire public à l'emploi du Gouvernement fédéral que l'article 697*i* avait été appliqué. Si telle est la façon de voir du savant procureur, le Tribunal est d'opinion qu'elle est erronée.

L'insaisissabilité des fonctionnaires publics n'est formellement énoncée qu'à l'article 599-9 c.p.c. Si l'on en croit le Rapport des codificateurs de 1867 (p. 132, sous l'article 627 du projet de code de procédure civile) cette disposition a sa source dans l'ancien droit français, tel qu'en a fait état Pothier (*Oeuvres posthumes*, tome 3, édition 1841, pp. 174 et 175) et Denisart, 7^e édition 1771, pp. 416 et 417. Cette insaisissabilité qui, à l'origine, s'étendait au salaire de tous les fonctionnaires a cessé d'exister, au moins pour partie comme la chose existe encore aujourd'hui, dans le cas des officiers publics de la province, et ce en vertu de la Loi 38 Victoria, chapitre 12.

Il semble bien que si elle a été maintenue dans le cas des autres fonctionnaires publics, c'est-à-dire de ceux qui sont au service du Gouvernement fédéral, la raison en est que la législature de la province de Québec ne pouvait pas rendre obligatoire envers la Couronne aux droits du Canada, une législation qui eût permis aux tribunaux de la province d'assigner le Souverain et de rendre contre lui une ordonnance, chose que l'exécution par voie de saisie-arrêt entre les mains de la Couronne aux droits du Canada aurait nécessairement impliquée.

C'est en ce sens que s'exprimait l'honorable juge Duff dans *Canadian National Railways Co. c. Croteau et Cliche* (4). Commentant dans un *obiter dictum* certaine législation qui existe dans d'aut-

(1) 1956, 4 D.L.R. (2nd) 754.

(2) 79 C.S. 68.

(3) 1957 R.P. 134.

(4) 1925 R.C.S. 384.

tres provinces, en vue d'atteindre par des voies indirectes mais différentes de celles que prévoit l'article 697*i* c.p.c., les fins que poursuit cet article, voici ce que disait le très savant juge:

"The real difficulty in attaching moneys payable by the Crown to a third person lies in the inability of the courts to make an order against the Crown. Generally speaking, moneys payable by the Crown are subject to equitable execution, the appointment of a receiver operating as an injunction prohibiting the judgment debtor from receiving the fund attached. The process involves no order against the Crown. Only by leave of the court and, of course, after fiat granted, can the judgment creditor proceed to enforce the judgment debtor's claim by petition of right. The position may be illustrated by reference to sequestration. Sequestration will lie to attach moneys payable by the Crown, subject to this, that no order against the Crown can be made. Willcock c. Terrell, 1873, 3 Ex. D. 323. Here, again, the process operates only indirectly, by precluding the judgment debtor from receiving payment".

L'exemption formelle de tout mode d'exécution, qui est accordée en vertu de l'article 88 aux biens appartenant à un Indien et situés sur une réserve indienne, est beaucoup plus étendue que l'insaisissabilité créée par l'article 599-9 c.p.c. Si la législature pouvait à bon droit déroger à cette dernière, il est certain que l'application à l'intimé de l'article 697*i* c.p.c. serait incompatible avec l'exemption susdite. Il est donc impossible pour le Tribunal d'admettre la prétention contraire des requérants.

Par ces motifs:

Rejette la requête des requérants, avec dépens.

Autorités citées par l'intimé: *Peterson c. Cree* (5); *Crepin c. Delorme et al. et Banque Canadienne Nationale* (6); *Feldman c. Jocks* (7); *Hannis c. Turcotte et Maureault* (8); *Charbonneau c. Delorimier* (9); *G.T.R. c. A.G. Canada* (10); *Re Kane* (11).

(5) 79 C.S. 1.

(6) 68 C.S. 36.

(7) 74 C.S. 56.

(8) 8 R.L. 708.

(9) 8 R.P. 115.

(10) 1907 A.C. 65.

(11) 1940, 1 D.L.R. 393.

COUR SUPERIEURE.

MONTRÉAL, 31 MARS 1914.

No. 1693.

ST. PIERRE, J.

EMERY BROSSARD, *demandeur contestant v. MOISE D'AILLEBOUT,*
défendeur opposant.

Sauvages.—Insaisissabilité.—Sauvage émancipé de facto.—C. F.
645 ; S. R. C., c. 81, s. s., 102, 105, 107 & suiv.

Jugé :—1. Il n'existe aucune telle chose qu'un sauvage émancipé *de facto*. Nul sauvage n'est émancipé à moins que, au préalable, il ne se soit conformé aux exigences des articles 107, 108 et suivants jusqu'à l'article 123 de la Loi des sauvages et qu'il n'ait reçu des lettres patentes qui proclament et sanctionnent son émancipation.

2. Les biens mobiliers et immobiliers des sauvages non émancipés sont exempts de saisie. (1)

Per Curiam :—Considérant que le défendeur opposant Moïse D'aillebout est un sauvage appartenant à la tribu iroquoise de Caughnawaga et partant soumis aux dispositions du chapitre 81 des Statuts Révisés du Canada ayant pour titre : "Loi concernant les sauvages" ;

Considérant qu'aux termes des articles 102 et 105 de la dite loi, les biens mobiliers et immobiliers des sauvages non émancipés sont exempts de saisie et qu'il est déclaré que "nul ne peut prendre de garantie ni obtenir aucun privilège en droit, soit par hypothèque, " jugement ou autrement sur les biens mobiliers ou immobiliers

(1) Autorités citées par l'opposant : *Lepage v. Watzo*, 4 Q. L. R., 81 ; 22 I. C. J. 97 ; 8 R. L. 596 ; 1 L. N. 332 (Dorion, J.)—*Durand v. Sioui*, 4 Q. L. R., 93 (Caron, J.)—*Bussières v. Eastien*, 17 C. S., 189 (Andrews, J.)—*Sumkelvitz v. Thompson & Glenwalther*, 16 Ont. Weekly Rep., 865—*Charbonneau v. de Lorimier*, 8 Q. P. R. 115 (Purcell, J. C. C.)

" d'un sauvage ou d'un sauvage non compris dans les traités, excepté sur les biens mobiliers ou immobiliers sujets aux taxes en vertu de l'article qui précédent " (Art. 101);

Considérant que quelques soient les allures d'indépendance et d'émancipation qu'un sauvage se donne dans sa manière d'exploiter ses biens, tant meubles qu'immeubles, il n'en demeure pas moins un sauvage soumis à la tutelle qui lui est imposée et est sous les dispositions de *la loi des sauvages*;

Considérant qu'il n'existe aucune telle chose qu'un sauvage émancipé *de facto*, et que nul sauvage n'est émancipé à moins que, au préalable, il ne se soit conformé, aux exigences des articles 107 et 108 et suivants jusqu'à l'article 123 inclusivement de la *loi des sauvages*, et qu'il n'ait reçu des lettres patentes qui proclament et sanctionnent son émancipation;

Considérant que le défendeur opposant Moïse D'Ailleboult n'est pas un sauvage émancipé et que les méthodes adoptées par lui ne sauraient conférer plus de droits à ceux avec lesquels il lui arrive de transiger que ces derniers n'en peuvent exercer contre un sauvage non émancipé;

Considérant que le fait reproché au dit Moïse D'Ailleboult d'avoir obtenu sous de faux prétextes une somme de cent cinquante-cinq dollars, si ce fait peut donner ouverture à une poursuite devant les tribunaux criminels, ne saurait rendre saisissables ses biens et effets mobiliers et immobiliers déclarés exempts de saisie par la loi;

Considérant que le demandeur contestant n'a pas établi le bien fondé de ses prétentions, tandis que s'opposant a démontré que les biens meubles, animaux et effets mobiliers saisis en cette cause, sont exempts de saisie aux termes de la loi;

Considérant que les parties ont déclaré que le cheval représenté comme ayant été saisi dans la ville de Laprairie aux écuries du demandeur contestant n'a jamais été saisi en réalité et que, partant, il n'y a pas lieu d'inclure ce cheval dans la liste des effets.

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énumérés au procès verbal de saisie de l'huissier qui a fait la dite saisie :—

Rejette la contestation du demandeur contestant et maintient la dite opposition du défendeur ; et, en conséquence, casse et annule la saisie pratiquée en cette cause et en donne main-levée au dit défendeur opposant, le tout sans frais, et en l'affirmative des parties faites cour tenante à l'effet que le cheval dont il a été question plus haut n'a jamais été saisi, déclare qu'il n'y a pas lieu de rien adjuger au sujet du dit cheval.

Pelletier, Létourneau & Beaulieu, avocats du demandeur contestant.

Martineau & Fodoin, avocats du défendeur opposant.

COUR SUPERIEURE.

MONTRÉAL, 4 MAI 1914.

No. 2228.

CHARBONNEAU, J.

FEARING WHITON MNFG. CO. v. HENRY MELZER.

Détails.—Confession de jugement.—C. P. 125, 527.

JUGÉ :—La confession de jugement n'est pas un plaidoyer et rien n'autorise une demande de détails sur cette pièce. (1)

Motion pour détails sur confession de jugement.

Per Curiam :—Considérant que la confession de jugement n'est pas un plaidoyer et que rien n'autorise la demande de détails sur cette pièce :—

Motion renvoyée avec dépens.

Lamothe & Tessier, avocats du demandeur.

Dusseault, Mercier & Dupuis, avocats du défendeur.

(1) *Kennedy v. Can. Fire Underwriters Ass.*, 14 Q. P. R., 191—(Lemieux, J.)

BRYCE, McMURRICH & Co. v. SALT.

Judgment—Indian—C. S. C. ch. 9—Indian Act, 1880 (D.)

On an application which was granted under Rule 80, for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve,
Held, that since the repeal of C. S. C. ch. 9, there is nothing to prevent an Indian suing and being sued, although by the Indian Act of 1880, sec. 77, (D.) the judgment will not bind any property of the Indian except that described in sec. 75.

[October 2, 1885.—*The Master-in-Chambers.*]

AN application for judgment under Rule 80.

Urquhart, for the motion.

Holman, contra, cited *McKinnon v. VanEvery*, 5 P. R. 284, and *Regina ex rel. Gibb v. White*, 5 P. R. 315.

THE MASTER-IN-CHAMBERS.—The papers are in the ordinary form. Claim for a balance due on promissory notes, balance \$668.55.

The only defence is that the defendant is one of a tribe of Indians, living with his tribe on their reserve. There is a negative of his being the holder of any real property, or personal property, outside of the reserve.

The 77th section of the Dominion Act of 1880, ch. 28, is in these words: "No person shall take any security, or otherwise obtain any lien or charge, whether by mortgage, judgment, or otherwise, upon real or personal property of any Indian or non-treaty Indian within Canada, except on real or personal property subject to taxation under section 75 of the Act. Provided always, that any person selling any article to an Indian, or non-treaty Indian, may, notwithstanding this section, take security on such article for any price thereof which may be unpaid." The real or personal property mentioned in this section is described in section 75 as real estate under a lease or in fee simple, or personal property, outside of the reserve, held in his individual right.

Upon this it is contended by the defendant that no judgment can be had against an Indian. Every individual however is capable of suing and being sued, unless some special exemption can be shewn.

There was a time, when the Consolidated Act of Canada ch. 9 was in force, when an Indian *could not* have been sued under the facts shewn here. But that was repealed long ago, and the existing law is as I have cited it above.

It is true that the judgment the plaintiff will recover will not bind any property of the Indian, except that described in section 75; but there is nothing to prevent an Indian from suing and being sued, so that the plaintiff is entitled to judgment *valeat quantum*.

Under the Consolidated Act the fact that the Indian was not seized in his own sole right of land in fee simple would have been a defence to the action, but it is not so now.

NOTE.—See *Block v. Kennedy*, Man. Rep. Temp. Wood 144.—REP.

La signification de la saisie-arrêt crée un lien de droit *promissoire* entre le saisissant et le T.S., un lien suffisant pour empêcher les T.S. de payer au défendeur son créancier original. Mais pour que ce lien devienne *absolu* ou *définitif* entre le saisissant et le T.S. il faut, ou un jugement contre celui-ci ou son consentement à payer le saisissant. C'est absolument comme dans le cas de transport de créance (et la saisie-arrêt est en réalité un transport judiciaire); le transport doit être signifié ou accepté pour former un lien définitif entre le cédant et le cessionnaire.

En bien, voilà l'effet qui s'est produit après le règlement et par le règlement. Les T.S. ont accepté le *transport judiciaire* résultant de la saisie et se sont engagés à payer Renfrew et Leclerc, en même temps qu'ils s'acquittaient vis-à-vis de McGreevy.

Dès lors les \$296.20 qu'ils retiennent pour payer Renfrew et Leclerc n'appartiennent plus au défendeur et étaient dues exclusivement à Renfrew et Leclerc.

Drouin, Pelletier & Fiset, proc. de Lacroix.

J. A. Lane, proc. des Commissaires du Hâvre.

Arch. Laurie, proc. de Renfrew.

Belleau & Belleau, proc. de Leclerc.

(CHS. L.)

1900.
Lacroix
v.
McGreevy.
Routhier, J.

COUR DE CIRCUIT.

QUÉBEC, 3 mars 1900.

Coram ANDREWS, J.

BUSSIÈRES ET AL v. BASTIEN.

Acte des Sauvages—Insaisissabilité de leurs biens—Règle nisi.

Jugé:—1. En vertu de l'acte des sauvages, 46 Vic., ch. 43, Canada, et ses amendements, les biens meubles et effets mobiliers des sauvages sur leur réserve sont exempts de saisie.

2. Le mot "propriété," employé seul dans une disposition de la loi, comprend les meubles et les immeubles indistinctement.

3. Une règle *nisi* émanée contre le défendeur, qui est sauvage, et qui s'est opposé à la saisie de ses meubles, sans toutefois commettre d'assaut sur l'huissier exploitant, sera cassée (*quashed*).

1900.
Bussières
V.
Bastien.
Andrews, J.

ANDREWS, J.:—

Trois marchands Messrs. Miller et al., J. A. Delisle, et les demandeurs dans la présente cause avaient obtenu jugement contre le défendeur pour des marchandises vendues et argent prêté pour des sommes variant de \$27 à \$100. Le défendeur qui est sauvage fait commerce à Lorette sur la Réserve des Sauvages Hurons. Les demandeurs prirent pour le montant de leur créance respective un bref de *fieri facias de bonis*, qu'ils confierent à un huissier du district de Québec. Cet huissier se rendit à la résidence du défendeur sur la réserve des Hurons de la Jeune-Lorette pour exécuter ces brefs. Le défendeur s'oppose à la saisie disant que les biens des Sauvages étaient insaisissables, qu'il ne permettait pas la saisie de ses meubles et que si l'huissier persistait à vouloir saisir qu'il appellerait les chefs de la tribu et que le dit huissier serait conduit sur le chemin public en dehors de la Réserve.

L'huissier ne put saisir et fit un retour de rébellion en justice dans chacune des causes. Des règles *nisi* furent émises contre le défendeur qui évoqua ces causes à la cour supérieure.

L'honorable Juge Andrews devant qui furent plaidées les évocations les renvoya prétendant qu'il n'y avait pas de droit futur en jeu et que la cour de circuit avait seule juridiction pour décider du mépris dont le défendeur pouvait s'être rendu coupable.

Le défendeur fit alors le plaidoyer suivant aux trois règles *nisi*:—

1. Le défendeur est un sauvage appartenant à la nation huronne de la Jeune-Lorette, dans le district de Québec, tel qu'il appert par l'exhibit "A" du défendeur, résidant sur le territoire réservé aux sauvages et communément appelé la Réserve des Sauvages.

2. Sur la dite Réserve affectée par le gouvernement du Canada à la "Bande" de sauvages dont le défendeur fait partie, ce dernier est en possession légale d'un terrain qui lui a été attribué par le conseil de la Bande en 1885, tel que cela appert par l'exhibit "B" du défendeur, le tout conformé-

ment à la loi et à la coutume, lequel titre fut reconnu et enregistré suivant la loi et la coutume en 1893, tel qu'il appert par l'exhibit "C" du défendeur.

3. Le défendeur est en possession du terrain depuis cette date, y a construit maison et dépendances, et y réside avec sa famille.

4. En vertu de l'Acte de l'Amérique Britannique du Nord, article 91, paragraphe 24, le Parlement fédéral seul a le droit de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada relativement aux sauvages et les terres réservées aux sauvages.

5. Conformément à cette loi le Parlement fédéral a légiféré par la 49 Victoria, ch. 43 et ses amendements sur l'état civil des Sauvages, et la régie de leurs biens mobiliers et immobiliers, indépendamment et exclusivement à tout loi provinciale passée à cet effet et le territoire sur lequel réside le défendeur et la bande dont il fait partie, sont régis par les susdites lois.

6. Le writ d'exécution et la règle *nisi causa* émanée sur iclui tel que le tout appert par le dossier ne sont pas exécutoires sur les biens du défendeur, situés sur la dite Réserve.

7. L'huissier chargé de l'exécution du dit writ d'exécution en cette cause, s'est présenté au domicile et résidence du défendeur, situé sur la Réserve susdite, pour y saisir ses biens mobiliers situés sur icelle.

8. Ce bref d'exécution ne peut être exécuté sur les biens du défendeur situés sur la dite Réserve, parce que les lois du Canada gouvernant la Réserve occupée par le défendeur excluent ses biens de saisie.

Pourquoi, etc.

La preuve a été faite de part et d'autre et je décide en faveur du défendeur en appliquant la loi des Sauvages 46 Vict., ch. 43, sec. 78. Le défendeur avait fait valoir ses droits en s'objectant à la saisie de ses meubles d'une manière énergique, mais qu'il n'avait pas dépassé les justes bornes. Il n'aurait pas été justifiable, cependant, s'il avait assailli ou frappé l'huissier.

Règle *nisi* cassé avec dépens.

1900.
Bussières
Bastien.
Andrews, J

1900.
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Autorités:—22 L.C.J. 97; 8 R.L. 596-708; 1 L.N. 322;
4 Q.L.R. 81, 93.

Miller & Dorion, proc. des demandeurs.
Gagnon & Corriveau, proc. du défendeur Bastien.
(CHS. L.)

COUR SUPÉRIEURE.

CHICOUTIMI, 5 mars 1900.

Coram GAGNÉ, J.

PERRON v. DUGUAY ET AL.

Action sur billet promissoire signé par la femme marchande publique—Billet donné pour dette de la communauté—Autorisation du mari insuffisante—Frais.

JUGE:—1. La femme sous puissance de mari poursuivie, comme marchande publique, assistée de son mari, sur billets promissoires, est présumée avoir consenti ces billets pour son négocié; mais s'il est établi que ceux-ci ont été donnés pour payer une dette de la communauté, l'action sera renvoyée, le mari seul devant dans ce cas être poursuivi.

2. La défenderesse n'ayant soulevé ce moyen qu'à l'audition et non par les plaidoyers, elle n'aura droit qu'aux frais d'une cause réglée après la production du plaidoyer.

Le demandeur réclame de la femme du défendeur le montant de deux billets promissoires signés par elle avec l'autorisation de son mari. La défenderesse admet sa signature mais plaide qu'elle ne doit pas, paiement, compensation, etc., etc.

La cour fait d'abord remarquer que l'action est prise contre une femme mariée commune en biens, qu'elle est poursuivie seule, son mari n'étant mis en cause que pour l'autoriser. Il n'est pas allégué dans l'action que la défenderesse soit séparée de biens et elle n'est pas poursuivie comme telle non plus. On doit donc décider qu'elle est commune en biens avec son mari. Le bref la donne comme marchande public et faisant seule commerce sous le nom de J. O. C. Duguay & Cie. On a donc eu l'intention de la poursuivre comme marchande publique.

Riddell, J.
1918

INGERSOLL
PACKING
Co.
LIMITED
v.
NEW YORK
CENTRAL
AND
HUDSON
RIVER
R.R. Co.
AND
CUNARD
STEAMSHIP
Co.
LIMITED.

March 19. The motion was heard by RIDDELL, J., in Chambers. The same counsel appeared.

March 20. RIDDELL, J.:—A motion for leave to appeal from the order of Mr. Justice Masten dismissing an appeal from an order of the Master in Chambers refusing to set aside service of the writ of summons herein.

I have in several cases—the most recent being *Goderich Manufacturing Co. v. St. Paul Fire and Marine Insurance Co.* (1918), 13 O.W.N. 443—pointed out the prerequisites for such a motion to succeed. One of them is that there should appear to the Judge applied to for leave, good ground to doubt the correctness of the decision from which it is desired to appeal.

In the present instance I entirely agree with the very careful judgment of my brother Masten—consequently, however important the matter may be, the motion must fail.

The costs will be to the plaintiff company in any event of the action.

1918

March 4.

{IN CHAMBERS.}

RE CALEDONIA MILLING CO. V. JOHNS.

Division Courts—Jurisdiction over Indian—Order for Commitment under Judgment Debtor Procedure—Contempt of Court—Execution—Division Courts Act, secs. 190 et seq.—Indian Act, sec. 102—Exemption—Powers of Provincial Legislature—British North America Act, sec. 91 (24).

The provisions of secs. 190 et seq. of the Division Courts Act, R.S.O. 1914, ch. 63, relating to the imprisonment of debtors, are not intended to apply to Indians.

An Indian who has no property other than what is, by virtue of sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, exempt from seizure under execution, cannot be committed to gaol by a Division Court Judge, after examination as a judgment debtor, even though the Judge be of opinion that the Indian has sufficient means and ability to pay the debt; the Indian Act preventing the judgment creditor from taking the assets of the Indian in execution, they cannot be reached indirectly.

There can be no contempt in withholding that which is by law exempt from seizure; and the person of an Indian—a ward of the Dominion Government and subject to the legislation of the Dominion Parliament by the British North America Act, sec. 91 (24)—cannot be taken in execution under a provincial statute.

MOTION by the defendant in a Division Court action for an order prohibiting further proceedings against him, as a judgment

debtor, in the Division Court, on the ground that he was an Indian owning no property outside of his reserve.

February 5. The motion was heard by MIDDLETON, J., in Chambers.

A. L. Baird, K.C., for the defendant.

H. Arrell, for the plaintiffs.

March 4. MIDDLETON, J.:—On the 4th March, 1917, judgment was pronounced against the defendant in the Division Court for \$164.22, and on the 23rd November he was examined as a judgment debtor, and on the 12th December the Division Court Judge, being of opinion that the defendant had sufficient means and ability to pay the debt, though his property was not liable to seizure by reason of the provisions of sec. 102* of the Indian Act, R.S.C. 1906, ch. 81, made an order for his committal to gaol for 40 days.

This motion was then made for prohibition, the defendant not being taken into custody, by arrangement, pending the hearing of the motion.

The Dominion statute prevents the execution creditor taking the assets of this Indian in execution; but the Division Court Judge in effect says, "Unless you voluntarily give to the judgment creditor that which is by law exempt from seizure under the judgment, you must undergo imprisonment." This is in effect getting at exempt assets in this indirect way.

If the proceedings are in any way regarded as based on contempt, there can be no contempt in withholding that which is by law exempt from seizure.

If the proceedings are in the nature of execution against the person—then the execution creditor is again in trouble. The Indian Act has not given any right to take the person of an Indian in execution. Certain of his property may be taken; but the Indian is, by the British North America Act, sec. 91 (24), subject to the legislation of the Dominion, and is a ward of the Dominion Government, and cannot be taken under the laws of the Province.

*102. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation. . . .

1918
Re
CALEDONIA
MILLING
Co.
v.
JOHNS.

Middleton, J.
1918
 RE
 CALEDONIA
 MILLING
 CO.
 v.
 JOHNS.

I would not construe these provisions (sec. 190 *et seq.**) of the Division Courts Act, R.S.O. 1914, ch. 63, as intended to apply to Indians. I cannot think that the Province intended to confer upon the Division Court Judge any power, directly or indirectly, to interfere with Indians.

For these reasons, the prohibition must be granted. Costs may be set off *pro tanto* against the debt.

*By sec. 191, "if it appears to the Judge, by the examination of the party or by other evidence that he . . . (e) had, when or since judgment was obtained against him, sufficient means and ability to pay the debt or damages or costs recovered against him, either altogether or by the instalments which the court, in which the judgment was obtained, ordered, without depriving himself or his family of the means of living, and that he has wilfully refused or neglected to pay the same as ordered, the Judge may order him to be committed to the common gaol of the county in which he resides or carries on business, for any period not exceeding 40 days."

1918

March 4.

[MIDDLETON, J.]

RE MITCHELL.

Will—Construction—Gifts to Children—Gifts over in Event of Children Dying without having Received their Portions—Contest between Executors and Children of Deceased Child of Testator—Effect of Divesting Clause—Intention of Testator—Period of Division—Discretion of Executors.

The testator, dying in 1887, by his will set apart his house as a home for his wife and family, and then gave all his estate to his executors in trust to convert and use for the maintenance of his wife and family and to pay certain sums to his sons, and, at such time after the expiration of five years from his decease as might seem advisable to the executors, to divide among all his children, share and share alike, all his estate, save such portions as the executors might retain to provide from the interest for the wife and family residing in the homestead, any balance of income being divided yearly among all his children. The will further provided that on the death of the widow the income should be divided until the time for division previously referred to; and "in case any of my children should die without having received his or her portion . . . and leaving issue him or her surviving at the time a division of the estate shall be made among my children the child or children of such of my children so dying shall represent and receive their deceased parent's share but if any of my children should die leaving no issue him or her surviving the share or portion herein given . . . to such child shall revert to and become part of my estate and be equally divided among all my surviving children."

The executors kept the estate intact until the widow died (in 1917 or 1918), and after her death paid over to the executors of a son, who had died in 1907, leaving children, a sum representing part of his share in his father's estate:—

Held, that the children of the deceased son took under the will of their grandfather, whose executors ought to have paid to those children the sum aforesaid. The gift was to the children of the testator, subject to be diverted in favour of the child or children of such of the testator's children as should die before the actual receipt of their shares, leaving children surviving.

Where the testator has intended the gift over to take effect, and there has not been actual payment, effect must be given to that intention.

Kirby v. Bangs (1900), 27 A.R. 17, 29, and *Johnson v. Crook* (1879), 12 Ch.D. 639, followed.

FIRST DIVISION COURT OF THE COUNTY OF
HALDIMAND.

KINNEAR Co.Ct.J.

20TH MARCH 1956.

CAMPBELL v. SANDY.

Indians — Living on Reserve — Position under Provincial Laws — Wilful Failure to Attend on Judgment Summons — The Indian Act, R.S.C. 1952, c. 149, ss. 87, 88 — The Division Courts Act, R.S.O. 1950, c. 106, ss. 133, 134.

A motion for an order to commit the defendant for contempt in failing to appear under a judgment summons.

The motion was heard by Kinnear Co.Ct.J. at Cayuga.
Bryce Jones, for the plaintiff, applicant.

Kinnear Co.Ct.J.:—The plaintiff obtained a default judgment on an account for groceries against the defendant who is an Indian living on the reserve. Subsequently, the plaintiff issued a judgment summons requiring the defendant to attend for examination touching his estate and effects. The summons was served personally on the defendant, who failed to appear in answer thereto. At the time of service he expressed to the bailiff his contempt of the process, saying that he had no intention of appearing. His remarks included such statements as "Never trust an Indian", "A white man can't sue an Indian", "Collect it if you can." On his non-appearance the matter was adjourned to the next Court and the defendant was duly notified by registered mail. He failed to appear at the next Court. Counsel for the plaintiff asked for a committal order on the ground of contempt.

The pertinent sections of The Indian Act, R.S.C. 1952, c. 149, are as follows:

"87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

"88. (1) Subject to this Act, the real and personal property of an Indian or a band situated on the reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress

JUNE 8, 1956.

or execution in favour or at the instance of any person other than an Indian."

In *Ex parte Tenasse*, 2 M.P.R. 523, [1931] 1 D.L.R. 806, the Appeal Division in New Brunswick held that a civil Court had a right to entertain a claim against an Indian and enter judgment against him. In *Avery v. Cayuga* (1913), 28 O.L.R. 517, 13 D.L.R. 275, it was held under s. 102 of R.S.C. 1906, c. 81 (now s. 88) that money deposited by an unfranchised Indian, living on a reserve, in a bank situate outside the reserve was liable to attachment on Division Court process.

Re Caledonia Milling Co. v. Johns (1918), 42 O.L.R. 338, dealt with the case of an Indian examined under judgment summons. Since counsel in the present application would distinguish between it and the *Caledonia Milling Co.* case on the facts, it is important to set out the facts in each case.

In the present application, the defendant, though duly served with a judgment summons, did not appear for examination at all. He expressed his contempt for the proceedings but not in the face of the Court so as to bring s. 199 into play. Since he did not submit to examination, the Court does not know whether he has any property outside the reserve or not.

These facts are quite different from those in the *Caledonia Milling Co.* case. In that case the defendant was served with a judgment summons, appeared and was examined as a judgment debtor. It was shown by the examination that he had no property outside the reserve and therefore there was nothing liable to seizure. The judge was nevertheless of the opinion that he had "sufficient means and ability" to pay the debt and made an order for his committal to gaol for 40 days. On a motion for prohibition, the motion was granted and the order was quashed, Middleton J. holding that this was an indirect way of getting at exempt assets. He said, at p. 339:

"If the proceedings are in any way regarded as based on contempt, there can be no contempt in withholding that which is by law exempt from seizure.

"If the proceedings are in the nature of execution against the person—then the execution creditor is again in trouble. The Indian Act has not given any right to take the person of an Indian in execution. Certain of his property may be taken; but the Indian is, by the British North America Act, sec. 91(24), subject to the legislation of the Dominion, and is a ward of the Dominion Government, and cannot be taken under the laws of the Province."

He went on to say that he would not construe the judgment summons sections of The Division Courts Act as intended to apply to Indians.

To complete the picture, it should be pointed out that when the motion in the *Caledonia Milling Co.* case was heard, the provision of the present s. 87 did not exist, having been enacted by 1951 (Can.), c. 29, s. 87.

As set out above, s. 87 makes Indians subject to any provincial laws of general application except in so far as they are inconsistent with Dominion enactment or regulation. The Division Courts Act is applicable everywhere in Ontario. It is an Act of general application. Indians are therefore now subject to it save only in respect of the exceptions noted in s. 87.

The result is that *Re Caledonia Milling Co. v. Johns, supra*, can be distinguished from the present case on both fact and law and the sweeping conclusions set out in his Lordship's judgment must now be toned down to allow for the operation of s. 87.

Under s. 88 of The Indian Act an Indian judgment debtor is still exempt from execution if he has no property or interests outside the reserve. The judgment creditor, however, is entitled to examine him on judgment summons to ascertain whether he has or not and he stands in no better position so far as the examination is concerned than any other person. If on the examination it appears that he has property or interests outside the reserve and therefore subject to execution, an order can be made against him.

S. 133 of The Division Courts Act, R.S.O. 1950, c. 106, reads: "A party failing to attend in answer to a judgment summons or show cause summons shall not be liable to be committed for the default, unless the judge is satisfied that his non-attendance is wilful."

The default in this instance is so clearly wilful that I see no reason for extending to the debtor the opportunity provided by s. 134 to explain his contempt.

I grant the motion and order that, for his contempt in failing to appear for examination, the defendant be committed to the county gaol for the county of Haldimand for a period of ten days.

Order accordingly.

T-2330-75

T-2330-75

Raymond Cardinal, Chief, and Edward Morin, Charles Cowan, Romeo Morin, Alex Peacock and Alphonse Thomas, Counsellors of the Enoch Band of the Stony Plain Indians for Themselves and on behalf of the Enoch Band of the Stony Plain Indians Reserve No. 135 and the Enoch Band of the Stony Plain Indians Reserve No. 135 (*Plaintiffs*)

v.

The Queen (Defendant)

Trial Division, Mahoney J.—Edmonton, April 4, 1977; Ottawa, April 18, 1977.

Practice — Federal Court Rule 474 — Motion by defendant to have general issues of liability tried in preliminary trial, followed by issues of damages and accounting tried in a subsequent trial — Not same as application to refer damages to referee, as per Rule 480 — Alternatively, Rule 474 application to have three particular issues of law tried with undisputed facts in a preliminary trial — Federal Court Rules 474, 480.

The plaintiffs' action arises out of the surrender of part of their reservation. The defendant applied for an order under Rule 474 that the issues as to liability be tried in a preliminary trial, and that the matter of damages and accounting be considered in a subsequent trial, pending the outcome of the first trial. Alternatively, the defendant applied under Rule 474, for an order that three particular issues of law, whose relevant facts were not in dispute, be considered in a preliminary trial.

Held, the motion for an order to determine the general issue of liability separately from the issues of damages and accounting is denied. Rule 474(1)(a) is not intended to achieve the same thing as Rule 480—the deferral of the trial of issues that will be of no consequence in the absence of liability or that may well be readily settled once liability is established. To equate all “the issues as to liability” in this action with the kind of questions of law, and for questions as to admissibility of evidence, that Rule 474 contemplates to be subject of a preliminary determination, is to do some violence to the apparent intent of Rule 474. The Court is not asked to provide for the preliminary determination of a question of law that it has serious reason to believe will be an end to the action, but rather to provide for the determination of all the issues of law and admissibility of evidence necessary to determine liability in respect of all the issues raised in the action.

Held also, the motion for an order to determine three particular questions of law in a preliminary trial is dismissed. Although these questions could be dealt with conveniently in such a preliminary proceeding, there seems no very good reason

Raymond Cardinal, chef, et Edward Morin, Charles Cowan, Romeo Morin, Alex Peacock et Alphonse Thomas, conseillers de la bande Enoch des Indiens de Stony Plain, pour leur propre compte et pour celui de la bande Enoch de la réserve n° 135 des Indiens de Stony Plain et la bande des Indiens de Stony Plain, réserve n° 135 (*Demandeurs*)

b

c.

La Reine (Défenderesse)

Division de première instance, le juge Mahoney— Edmonton, le 4 avril 1977; Ottawa, le 18 avril 1977.

Pratique — Règle 474 de la Cour fédérale — Demande de la défenderesse aux fins de faire juger à titre de question préliminaire la question générale de responsabilité et de faire juger plus tard la question des dommages-intérêts et des comptes — Cette demande n'entre pas dans le cadre de la Règle 480 qui vise le référé des dommages-intérêts à un arbitre — A titre subsidiaire, demande en vertu de la Règle 474 aux fins de faire juger à titre de question préliminaire trois points de droit précis à propos desquels les faits ne sont pas contestés — Règles 474 et 480 de la Cour fédérale.

L'action des demandeurs découle de la cession d'une partie de leur réserve. La défenderesse demande, en vertu de la Règle 474, une ordonnance portant que les points litigieux relatifs à la responsabilité seront jugés à titre de question préliminaire et que, suivant les résultats, la question des dommages-intérêts et des comptes sera jugée plus tard. A titre subsidiaire, la défenderesse demande, en vertu de la Règle 474, une ordonnance portant que trois points de droit précis, à propos desquels les faits pertinents ne sont pas contestés, seront jugés à titre de question préliminaire.

Arrêt: rejet de la demande d'ordonnance aux fins de trancher la question générale de responsabilité séparément de la question des dommages-intérêts et des comptes. La Règle 474(1)a ne vise pas les mêmes fins que la Règle 480, à savoir le jugement de points litigieux qui seront sans conséquence en l'absence de responsabilité ou qui peuvent être facilement réglés lorsque la responsabilité est établie. Pour établir un parallèle entre tous les points relatifs à la responsabilité dans la présente action et tous les points de droit et les points relatifs à la recevabilité de la preuve (que la Règle 474 envisage comme faisant l'objet d'une décision préliminaire) il faut faire quelque violence à l'intention apparente de la Règle 474. On ne demande pas à la Cour de prévoir la décision préliminaire d'un point de droit dont elle à des raisons sérieuses de croire qu'elle mettra fin à l'action, mais plutôt de décider de tous les points de droit et de la recevabilité de la preuve qui sont nécessaires pour déterminer la responsabilité relative à tous les points soulevés dans l'action.

Autre arrêt: rejet de la demande d'ordonnance aux fins de trancher à titre de question préliminaire trois points de droit précis. Ces points pourraient être correctement réglés dans ces procédures préliminaires, mais il ne semble pas y avoir de

for doing so, since they are not the only issues and their disposition would not likely dispose of the action. Although it was represented that a final disposition of the three issues would facilitate the trial of other actions pending before the Court, it is not a matter properly to be taken into account. The plaintiffs are entitled to have their action tried on its own merits alone.

Emma Silver Mining Company v. Grant (1879) 11 Ch. D. 918; *Central Canada Potash Co. Ltd. v. A.-G. of Saskatchewan* [1974] 4 W.W.R. 725, applied.

APPLICATION for order under Rule 474.

COUNSEL:

A. M. Harradence, Q.C., and B. G. Nemetz for plaintiffs.
G. W. Ainslie, Q.C., and Carol Pepper for defendant.

SOLICITORS:

Harradence and Company, Calgary, for plaintiffs.
Deputy Attorney General of Canada for defendant.

The following are the reasons for order rendered in English by

MAHONEY J.: This is an action arising out of the surrender, in May, 1908, of approximately ten square miles of Reserve No. 135, near Edmonton, Alberta.

The cause of action is founded on allegations of:

1. Breach or breaches of an express trust created by the *Indian Act*¹ in effect at the relevant time.

2. Breach or breaches of a fiduciary relationship between the plaintiffs and their predecessors in title and the defendant, her predecessors in title and servants and agents for the time being.

3. Non-compliance with mandatory provisions of the Act with the result that the purported surrender was a nullity and void *ab initio*.

4. A mistake of fact or of mixed law and fact, common to the parties, upon which the surrender proceeded.

¹ R.S.C. 1886, c. 43 or R.S.C. 1906, c. 81, as amended.

bonnes raisons pour le faire, car ce ne sont pas les seuls points et leur règlement ne mettrait probablement pas fin à l'action. On a fait valoir qu'un règlement définitif de ces trois points faciliterait celui des autres actions pendantes devant la Cour, mais cela n'entre pas véritablement en ligne de compte. Les demandeurs sont fondés à faire juger leur action sur les seuls faits de la cause.

Arrêts appliqués: *Emma Silver Mining Company c. Grant* (1879) 11 Ch. D. 918; *Central Canada Potash Co. Ltd. c. P. G. de la Saskatchewan* [1974] 4 W.W.R. 725.

b DEMANDE d'ordonnance en vertu de la Règle 474.

AVOCATS:

A. M. Harradence, c.r., et B. G. Nemetz pour les demandeurs.
G. W. Ainslie, c.r., et Carol Pepper pour la défenderesse.

PROCUREURS:

Harradence and Company, Calgary, pour les demandeurs.
Le sous-procureur général du Canada pour la défenderesse.

Le juge MAHONEY: Il s'agit ici d'une action découlant de la cession intervenue en mai 1908, d'environ dix milles carrés de la réserve n° 135 près d'Edmonton (Alberta).

L'action repose sur les allégations suivantes:

g 1. Violation(s) d'une fiducie expresse créée par la *Loi sur les Indiens*¹ en vigueur à l'époque pertinente.

h 2. Violation(s) de relations fiduciaires entre les demandeurs et leurs prédecesseurs en titre d'une part, et la défenderesse, ses prédecesseurs en titre et ses préposés et agents d'alors, d'autre part.

i 3. Inobservation des dispositions impératives de la Loi, avec comme conséquence que la prétendue cession a été nulle et non avenue dès le début.

j 4. Erreur de fait ou erreur de fait et de droit commune aux parties, sur laquelle repose la cession.

¹ S.R.C. 1886, c. 43 ou S.R.C. 1906, c. 81, dans sa version modifiée.

As to 1 and 2, particulars of the breaches of trust and fiduciary relationship are identical. They are set out in paragraph 6 of the amended statement of claim and the amended particulars filed by the plaintiffs in respect thereof pursuant to an order of this Court made May 20, 1976. As to 3 and, I take it, 4, the particulars are set out in paragraph 7 of the statement of claim.

The examination for discovery of the plaintiff, Edward Morin, who was agreed to be the appropriate person to be examined on behalf of the plaintiff Band, establishes that all of the material facts relied on by the plaintiffs are set forth in their pleadings and all of their evidence is documentary. The schedule to the plaintiffs' list of documents comprises over 43 foolscap pages. The defendant admits all but three letters from a Rev. Tessier to the Hon. Frank Oliver, then Minister of the Interior and Superintendent General of Indian Affairs, while reserving her right to object to their admissibility as evidence in the cause. The three letters must be proved.

The plaintiffs seek a variety of declaratory orders giving effect to the allegations of the trust or fiduciary relationship, the fact that the surrender was null and void *ab initio* and that it was obtained through undue influence, fraud and gross breach of trust. They then seek \$50,000,000 compensation for breach of trust or, alternatively, general damages in that amount. They also seek accountings of the proceeds of the sale and in connection with all matters relating to the sale as well as costs.

The defendant now applies, in Part I of her motion, for an order that the issues as to liability be tried as a preliminary issue and that, depending on the result, the issues of damages and accounting be tried later in such manner as may be directed by the Trial Judge. I should have no doubt as to my jurisdiction to achieve something of this result if the defendant's motion were framed so as to fall

Pour les points 1 et 2, les détails des violations afférentes à la fiducie et aux relations fiduciaires sont identiques. Ils sont énoncés dans le paragraphe 6 de la version modifiée de la déclaration et a des détails déposée par les demandeurs en vertu d'une ordonnance de cette cour rendue le 20 mai 1976. Quant aux points 3 et 4, les détails sont énoncés au paragraphe 7 de la déclaration.

b

L'interrogatoire préalable du demandeur Edward Morin, qu'on a reconnu être la personne à interroger pour le compte de la bande demanderesse, établit que tous les faits matériels invoqués par les demandeurs sont énoncés dans leurs plaidoiries et que tous les éléments de preuve y afférents sont documentaires. L'annexe à la liste des documents des demandeurs compris environ 43 pages de papier écolier. La défenderesse les admet tous, sauf trois lettres émanant d'un certain Rév. Tessier et adressées à l'hon. Frank Oliver, alors ministre de l'Intérieur et Surintendant général des Affaires indiennes. Elle réserve son droit de s'opposer à leur admissibilité comme preuve dans la présente cause. Les trois lettres doivent être prouvées.

f Les demandeurs réclament diverses ordonnances déclaratoires entérinant les allégations afférentes à la fiducie ou aux relations fiduciaires et établissant que la cession a été nulle et non avenue dès le début, et obtenue par influence indue, fraude et g abus de confiance flagrant. Ils réclament une indemnité de \$50,000,000 pour abus de confiance ou, à titre subsidiaire, des dommages-intérêts généraux d'un montant équivalent. Ils réclament aussi des comptes afférents au produit de la vente h et à toutes les questions relatives à la vente, ainsi que les frais.

Dans la partie I de sa requête, la défenderesse réclame une ordonnance portant que les points litigieux relatifs à la responsabilité seront jugés à titre de question préliminaire et que, suivant les résultats, ceux relatifs aux dommages-intérêts et aux comptes seront jugés plus tard, de la manière que le juge de première instance ordonnera. Je n'aurais aucun doute sur ma compétence à cet

within Rule 480². However, the defendant plainly is not asking for a reference of the damages and accounting to a referee. In the expression adopted during argument, she wants to "split the trial". The plaintiffs question my jurisdiction to grant the order sought and the defendant asserts that it is a proper order under Rule 474.

Rule 474. (1) The Court may, upon application, if it deems it expedient so to do,

- (a) determine any question of law that may be relevant to the decision of a matter, or
- (b) determine any question as to the admissibility of any evidence (including any document or other exhibit),

and any such determination shall be final and conclusive for the purposes of the action subject to being varied upon appeal.

(2) Upon application, the Court may give directions as to the case upon which a question to be decided under paragraph (1) shall be argued.

The decision of Jessel M.R., in *Emma Silver Mining Company v. Grant*³ has been cited with approval in almost every subsequent reported case where such a motion has been seriously considered.

In a case of this kind my opinion is that the Judge must have some evidence which will make it at least probable that the issue will put an end to the action. The Plaintiff is not to be harassed at the instance of the Defendant by a series of trials, each trial taking issue on every link of the Plaintiff's case. That is not the meaning of the rule as I understand it, but it may properly be applied in such a case as that I have stated, where the Judge has serious reason to believe that the trial of the issue will put an end to the action.

² *Rule 480.* (1) Any party desiring to proceed to trial without adducing evidence upon any issue of fact including, without limiting the generality thereof,

- (a) any question as to the extent of the infringement of any right,
 - (b) any question as to the damages flowing from any infringement of any right, and
 - (c) any question as to the profits arising from any infringement of any right,
- shall, at least 10 days before the day fixed for the commencement of trial, apply for an order that such issue of fact be, after trial, the subject of a reference under Rules 500 *et seq.* if it then appears that such issue requires to be decided.

(2) An order of the kind contemplated by paragraph (1) may be made at any time before or during trial and may be made by the Court of its own motion.

³ (1879) 11 Ch. D. 918 at 927.

égard si la requête de la défenderesse était élaborée de façon à tomber dans le cadre de la Règle 480². Or, elle ne demande manifestement pas le référé des dommages-intérêts et des comptes à un arbitre. Selon l'expression dont elle s'est servie au cours des débats, elle veut [TRADUCTION] «scinder le procès». Les demandeurs contestent ma compétence pour accorder ladite ordonnance et la défenderesse soutient qu'il s'agit là d'une ordonnance pertinente en vertu de la Règle 474.

Règle 474. (1) La Cour pourra, sur demande, si elle juge opportun de le faire,

- a) statuer sur un point de droit qui peut être pertinent pour la décision d'une question, ou
- b) statuer sur un point afférent à l'admissibilité d'une preuve (notamment d'un document ou d'une autre pièce justificative),

et une telle décision est finale et préemptoire aux fins de l'action sous réserve de modification en appel.

(2) Sur demande, la Cour pourra donner des instructions quant aux données sur lesquelles doit se fonder le débat relatif à un point à décider en vertu du paragraphe (1).

Le jugement rendu par le Maître des rôles Jessel dans *Emma Silver Mining Company c. Grant*³ a été invoqué favorablement dans presque toutes les causes publiées ultérieurement, où une requête de cette nature a fait l'objet d'un examen sérieux.

[TRADUCTION] Dans une cause de cette nature, je suis d'avis que le juge doit avoir au moins la preuve que le règlement du point litigieux mettra probablement fin à l'action. Le demandeur ne doit pas, aux instances du défendeur, être harcelé par une série d'instances, donc chacune soulève une controverse pour chaque maillon de l'affaire du demandeur. Ce n'est pas le sens de la règle telle que je la comprends, mais elle peut s'appliquer correctement dans le cas que j'ai mentionné, c'est-à-dire lorsque le juge a une sérieuse raison de croire que la solution du point litigieux mettra fin à l'action.

² *Règle 480.* (1) Une partie qui désire procéder à l'instruction sans présenter de preuve sur une question de fait et notamment, sans restreindre le sens général de cette expression, sur

- a) un point relatif à la mesure dans laquelle il a été porté atteinte à un droit,
- b) un point relatif aux dommages qui découlent d'une atteinte à un droit, et
- c) un point relatif aux profits tirés d'une atteinte à un droit, doit, 10 jours au moins avant le jour fixé pour le début de l'instruction, demander une ordonnance portant que cette question de fait fera, après instruction, l'objet d'une référence en vertu des Règles 500 et suivantes s'il paraît à ce moment-là qu'il faut statuer sur cette question.

(2) Une ordonnance du genre prévu par le paragraphe (1) peut être rendue à tout moment avant ou après l'instruction et peut être rendue par la Cour agissant de sa propre initiative.

³ (1879) 11 Ch. D. 918, à la p. 927.

The applicable Rule considered by Jessel M.R., while apparently serving the same purpose as Rule 474, is quite different in terminology⁴. It is, however, very similar to Saskatchewan Rule 264, which Bence C.J.Q.B. felt did not give him jurisdiction to do precisely what the defendant is now asking me to do⁵. Since neither party in that case questioned his jurisdiction, the learned Chief Justice decided the application on its merits and his refusal to split the trial as between quantum of damages and other issues was upheld by the Court of Appeal⁶, without reference to the matter of jurisdiction.

Rule 474(1)(a) is not intended to achieve the same thing as is Rule 480—the deferral of the trial of issues that will be of no consequence in the absence of liability or that may well be readily settled once liability is established. The practical benefits of such a procedure in an appropriate case, from all points of view, are self-evident. To equate, as the defendant does here, all “the issues as to liability” in this action with the kind of questions of law, and/or questions as to admissibility of evidence, that Rule 474 contemplates be subject of a preliminary determination, is to do some violence to the apparent intent of Rule 474. I am not asked to provide for the preliminary determination of a question of law that I have serious reason to believe will be an end to the action, but rather to provide for the determination of all of the issues of law and admissibility of evidence necessary to determine liability in respect of all of the issues raised in the action.

Part I of the defendant's motion must be dismissed. Part II is advanced in the alternative. Part

⁴ Rules of Court, 1875, Order XXXVI, rule 6(1):

(1) The Court or a Judge may, in any action at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others.

⁵ *Central Canada Potash Co. Ltd. v. A.-G. of Saskatchewan* [1974] 4 W.W.R. 725.

⁶ [1974] 6 W.W.R. 374.

La Règle examinée par le Maître des rôles Jessel, qui semble servir les mêmes fins que la Règle 474, est rédigée de façon très différente⁴. Toutefois, elle ressemble beaucoup à la Règle 264 de la Saskatchewan qui, de l'avis du juge en chef Bence de la Cour du banc de la Reine, ne lui donnait pas compétence de faire ce que la défenderesse me demande précisément de faire maintenant⁵. Mais, étant donné que dans cette affaire, aucune des parties n'a contesté sa compétence, le savant juge en chef a statué sur le fond de la demande et la Cour d'appel⁶ a confirmé son refus de scinder l'instance entre le quantum des dommages-intérêts et les autres questions, sans mentionner la compétence.

La Règle 474(1)a ne vise pas les mêmes fins que la Règle 480, à savoir le jugement de points litigieux, qui seront sans conséquence en l'absence de responsabilité, ou qui peuvent être facilement réglés lorsque la responsabilité est établie. Les bénéfices pratiques qui, dans une cause appropriée, à tous les égards découlent de cette procédure, apparaissent d'eux-mêmes. Pour établir un parallèle, comme la défenderesse le fait ici, entre tous les points relatifs à la responsabilité dans la présente action et tous les points de droit et les points relatifs à la recevabilité de la preuve (que la Règle 474 envisage comme faisant l'objet d'une décision préliminaire), il faut faire quelque violence à l'intention apparente de la Règle 474. On ne me demande pas de prévoir la décision préliminaire d'un point de droit qui (j'ai de sérieuses raisons de le croire) mettra fin à l'action, mais plutôt de décider de tous les points de droit et de la recevabilité de la preuve qui sont nécessaires pour déterminer la responsabilité relative à tous les points soulignés dans l'action.

La partie I de la requête de la défenderesse doit être rejetée. La partie II est présentée à titre

⁴ Règles de la Cour, 1875, Ordonnance XXXVI, règle 6(1):

[TRADUCTION] (1) La Cour (ou un juge) dans toute action, à tout moment ou occasionnellement, peut ordonner que les divers points de fait auxquels elle donne lieu soient jugés selon différents modes de jugement, ou qu'un ou plusieurs points de fait soient jugés avant les autres, et elle peut fixer le(s) lieu(x) pour leur audition et, dans tous les cas, ordonner qu'un ou plusieurs points de fait soient jugés avant un autre ou plusieurs autres.

⁵ *Central Canada Potash Co. Ltd. c. P. G. de la Saskatchewan* [1974] 4 W.W.R. 725.

⁶ [1974] 6 W.W.R. 374.

II A is founded on Rule 474 but instead of seeking simply to have all the issues of liability, generally described, tried and decided as a preliminary issue before the issue of damages or accounting, it is directed to three particular issues of law, in respect of which the relevant facts are not in dispute in view of admissions. These issues are:

I. Was the surrender valid under subsection 49(1) of the Act as, while it was approved by a majority of those members of the Band who did vote, it was not approved by a majority of the members of the Band entitled to vote?

2. Was the certification of the surrender by one principal man only sufficient compliance with subsection 49(3) of the Act?

3. Prior to their surrender, was King Edward VII trustee of the lands for the benefit of the Band members under an express trust constituted by the Act and provisions of Treaty No. 6?

While I am reasonably satisfied that these questions could conveniently be dealt with in such a preliminary proceeding, there seems no very good reason for doing so, since they are not the only issues and their disposition would not likely dispose of the action. The Court cannot ignore a general awareness of the provisions made by the Government of Canada to finance the plaintiffs' legal action to assert the claims herein. There is no good reason to think that a final disposition of anything but all the issues as to liability and, if liability be found, as to remedies raised in the action will dispose of it. I have seriously considered the representation that a final disposition of the three issues would facilitate the trial of other actions pending before the Court but have concluded that is not a matter properly to be taken into account. The plaintiffs are entitled to have their action tried on its own merits alone.

Part II B seeks to define the evidence upon which the questions in Part II A are to be answered and requires no further comment.

subsitaire. La partie II A repose sur la Règle 474, mais au lieu de demander simplement que tous les points litigieux en matière de responsabilité, généralement décrits, soient jugés et décidés à titre de question préliminaire avant celle des dommages-intérêts et des comptes, c'est à propos desquels, compte tenu des admissions, les faits pertinents ne sont pas contestés. Les voici:

b 1. La cession était-elle valable en vertu du paragraphe 49(1) de la Loi alors que, tout en ayant été approuvée par la majorité des membres de la bande qui ont voté, elle ne l'a pas été par la majorité de ceux qui avaient le droit de voter?

c 2. L'attestation de la cession donnée par un seul chef suffit-elle à répondre aux exigences du paragraphe 49(3) de la Loi?

d 3. Avant la cession, le roi Édouard VII était-il fiduciaire des terres au profit des membres de la bande en vertu d'une fiducie expresse créée par la Loi et les dispositions du Traité n° 6?

e Bien que je sois raisonnablement convaincu que ces questions pourraient être correctement réglées dans ces procédures préliminaires, je ne pense pas qu'il y ait de bonnes raisons pour le faire, car elles ne constituent pas les seules questions et leur règlement ne mettrait probablement pas fin à l'action. La Cour ne peut pas prétendre ignorer les dispositions prévues par le gouvernement du Canada en vue de financer l'action des demandeurs aux fins de faire valoir les présentes réclamations.

f Tout porte à croire que seul un règlement final de toutes les questions en matière de responsabilité et, s'il y a responsabilité, de tous les recours soulevés dans l'action y mettra fin. J'ai sérieusement considéré la proposition selon laquelle un règlement définitif des trois points faciliterait celui des autres actions pendantes devant la Cour, mais j'ai conclu qu'il ne convient pas d'en tenir compte. Les demandeurs sont en droit que leur action soit jugée sur les seuls faits de la cause.

La partie II B demande des instructions quant à la preuve sur laquelle doit se fonder le débat relatif aux questions de la partie II A et ne requiert aucun autre commentaire.

Part II C seeks

... an order pursuant to Rule 474(1)(b) of the Rules of Practice of this Honourable Court that the issue as to the admissibility of evidence, in relation to the surrender of other lands by other bands of Indians in Western Canada, including the admissibility at trial of the documents put to Herbert Taylor Vergette, on his examination for discovery, and marked for identification, be set down and tried as a preliminary issue in this action before the trial of the action;

That wording is very peculiar since what the defendant sought and what the plaintiffs opposed throughout several hours of argument was not that the question of the admissibility of similar facts be set down and tried as a preliminary issue but rather an order that such evidence be excluded. When I pointed this out, counsel for the defendant sought to amend the notice of motion and the plaintiffs' counsel refused consent. I declined to permit the amendment at that stage but I am entirely satisfied that the plaintiffs were not misled and put at any disadvantage by what happened. They were prepared to, and did, oppose what was actually sought and not what, read literally, the notice of motion sought. It was not until I called attention to the apparent anomaly that plaintiffs' counsel objected to, as distinct from opposed, an order going excluding evidence of similar facts. The substantive question of the admissibility of that evidence had also to be dealt with in the plaintiffs' concurrent motion seeking re-attendance of the defendant's officer at his examination for discovery. In the result, I see no prejudice or disadvantage to the plaintiffs in my dealing with what the parties themselves obviously intended to deal and thought they were dealing with rather than dealing with the notice of motion literally, and I see nothing but waste in not doing so.

The matters in issue are all defined by the pleadings. Evidence as to similar facts is not relevant to any of them. The circumstances surrounding the surrender of other lands, either from Reserve No. 135 in 1902, or from other reservations and, in particular, from the St. Peter's Reserve, near Selkirk, Manitoba, in September, 1907, have no bearing on whether the express trust or fiduciary relationship alleged here existed. They have no bearing on whether there was some one or more failures to comply with mandatory provisions of the Act in this instance. As to the alleged

La partie II C réclame:

[TRADUCTION] ... une ordonnance rendue en vertu de la Règle 474(1)b) de cette cour portant que la question relative à la recevabilité de la preuve concernant la cession d'autres terres par d'autres bandes d'Indiens de l'Ouest canadien, et notamment à la recevabilité à l'instance des documents colés présentés à Herbert Taylor Vergette lors de son examen préalable, doit être formulée et jugée à titre de question préliminaire dans la présente action avant l'audition de cette dernière.

Ce texte est très insolite, car ce que la défenderesse a demandé et ce que les demandeurs ont combattu pendant des heures d'argumentation, ce n'est pas la formulation et l'instruction, à titre de question préliminaire, de la question de la recevabilité de faits analogues, mais plutôt une ordonnance aux fins d'exclure cette preuve. Quand je l'ai souligné, l'avocat de la défenderesse a demandé à modifier l'avis de requête et l'avocat des demandeurs s'y est refusé. Je n'ai pas autorisé la modification à ce stade, mais je suis convaincu que les demandeurs n'ont été ni trompés ni désavantagés par ce qui s'est passé. Ils y étaient préparés et ont fait opposition à la vraie demande et non pas à celle formulée dans l'avis de requête. C'est seulement lorsque j'ai attiré l'attention générale sur l'anomalie apparente que l'avocat des demandeurs a soulevé une objection (mais n'a pas fait opposition) à une ordonnance excluant la preuve de faits analogues. L'importante question de la recevabilité de cette preuve a aussi été traitée dans la requête concurrenente des demandeurs, qui demandait une nouvelle comparution du fonctionnaire de la défenderesse aux fins d'interrogatoire préalable. En conséquence, je ne vois ni préjudice ni inconvenient pour les demandeurs à traiter de ce que les parties elles-mêmes ont manifestement eu l'intention de traiter et ont pensé qu'elles étaient en train de traiter, plutôt que de traiter de l'avis de requête dans sa rédaction littérale et je ne vois que désavantages à ne pas le faire.

Les points litigieux sont tous décrits dans les plaidoiries. La preuve afférente aux faits analogues est sans rapport avec eux. Les circonstances entourant les cessions d'autres terres, soit de la réserve n° 135 en 1902 ou d'autres réserves et en particulier de la réserve St. Peter, près de Selkirk (Manitoba) en septembre 1907, n'ont rien à voir avec l'existence ou la non-existence de la fiducie expresse ou des relations fiduciaires invoquées ici. Elles n'ont rien à voir non plus avec l'existence ou la non-existence de manquements aux dispositions impératives de la Loi dans la présente action.

breaches of the trust or fiduciary relationship, the facts are all to be proved by documents admitted by the defendant who alleges nothing in defence that would render evidence of similar facts admissible in rebuttal.

I consider it expedient to deal with the question of admissibility of evidence by way of a preliminary determination under Rule 474 because of the apparent oppressive burden that would be imposed on the defendant if it were required to produce the documents relating to the 90 odd other surrenders that occurred in Western Canada prior to World War I and the great waste involved in both parties dealing with such a mass of material for no useful purpose in so far as this action is concerned. I am indebted to counsel for the information that some 3,000 documents have been produced in connection with this claim alone.

Part II D is simply another facet of Part II C, namely an order, under Rule 476⁷, for the determination of the relevance to the issues herein of the other surrenders, before deciding whether the defendant's officer should be examined for discovery in respect of them.

Part II E seeks an order requiring Edward Morin to re-attend at his own expense to be re-examined a second time and Part II F seeks an order requiring answers to specific questions previously put to him. It should, perhaps, be emphasized that these, as all Part II motions, are made in the alternative to the Part I motion which was predicated, *inter alia*, on the parties foregoing further examinations for discovery.

⁷ Rule 476. Without limiting the generality of Rule 474 or 475, if the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, the Court, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute should be determined before deciding upon the right to the discovery or inspection, may order that such issue or question be determined first.

Quant aux prétendues violations de la fiducie expresse ou des relations fiduciaires, tous les faits doivent être prouvés par les documents admis par la défenderesse qui n'allègue rien en défense susceptible de rendre recevable en réfutation la preuve de faits analogues.

Je juge opportun de régler la question de la recevabilité de la preuve par voie de décision préliminaire en vertu de la Règle 474, en raison du fardeau abusif qui peserait sur la défenderesse si elle était requise de produire les documents relatifs aux quelque 90 autres cessions qui sont intervenus dans l'Ouest canadien avant la Première Guerre mondiale, sans parler de la perte de temps qu'entraînerait pour les deux parties l'examen d'une telle masse de matériel, sans aucun résultat pratique en l'occurrence. Les avocats m'ont informé qu'environ 3,000 documents ont été produits en rapport avec cette seule réclamation.

La partie II D n'est qu'un autre aspect de la partie II C, c'est-à-dire une ordonnance rendue en vertu de la Règle 476⁷ pour décider s'il y a un rapport entre les autres cessions et les points litigieux de la présente action, avant d'ordonner l'interrogatoire préalable du fonctionnaire de la défenderesse à leur sujet.

La partie II E réclame une ordonnance enjoignant Edward Morin de reparaître à ses propres frais pour être interrogé une autre fois et la partie II F en réclame une exigeant des réponses aux questions spécifiques qui lui ont été posées auparavant. Il faudrait peut-être préciser que ces requêtes, comme toutes celles de la partie II, ont été présentées accessoirement à la requête de la partie I qui repose, entre autres, sur la renonciation des parties à procéder à d'autres interrogatoires préalables.

⁷ Règle 476. Sans restreindre la portée générale de la Règle 474 ou de la Règle 475, si la partie dont on veut obtenir une communication écrite ou orale sous quelques formes que ce soit, ou un examen de documents, s'oppose à tout ou partie de la communication de l'interrogatoire ou de l'examen, la Cour, si elle est convaincue que le droit d'obtenir la communication ou l'interrogatoire, ou l'examen dépend de la décision d'une question ou d'un point en litige dans l'action, ou que, pour toute autre raison, il est souhaitable de décider une question ou un point en litige avant de statuer sur le droit d'obtenir la communication, l'interrogatoire ou l'examen, pourra ordonner que cette question ou ce point soient décidés en premier lieu.

The problem with Morin's answers to questions put to him is that, either personally or by his counsel, he responds to proper questions as to what facts are being relied on in support of this or that cause of action with the reply that he is relying on the documents, that is, some one or more, or something in one or more, of the 3,000. Strictly speaking that is not good enough; the duty of a person being examined for discovery to inform himself is so clear as to require no elaboration. Practically, in the circumstances, it may be about as good as can reasonably be expected. The dilemma is illustrated by the following exchange between counsel, Mr. Harradence for the plaintiffs, Mr. Ainslie for the defendant, at pages 56 and 57 of the transcript of Morin's examination:

355 MR. HARRADENCE: ... Now, our position is simply this, that we're relying on your documents to establish the inducement. And by inducement, I mean the whole general picture, and the position I'm taking is that the witness ought not to be at this stage forced to read these documents and then interpret them. Our position is that if these documents are relevant and admissible, then whatever probative value will be attached to them will have to be done by the presiding Justice and our position is that we will tell you what we know about the matters personally as we have done, but we will not comment further upon these documents unless ordered to do so by a Judge.

356 MR. AINSLIE: Thank you, Mr. Harradence. I have not asked the witness to comment on any documents. Your position, as I understand it, is any inducement by the defendant to sell the lands was improper, is that correct?

357 MR. HARRADENCE: Yes, sir.

358 MR. AINSLIE: Mr. Morin, could you just, in your own words, tell me what inducements the plaintiffs say were made by the defendant?

359 MR. HARRADENCE: Mr. Ainslie, we say we have given you those answers.

360 MR. AINSLIE: The question has not been answered.

361 MR. HARRADENCE: Well, my position is that it has.

362 MR. AINSLIE: So you're instructing the witness not to answer the question?

363 MR. HARRADENCE: Yes, sir, I am, on the grounds that he has already answered, and to do more would require the reading of these documents.

The defendant is entitled to a further general examination for discovery and there is no basis I can see for my refusing this order; however before granting it, I propose to ask the defendant to give some consideration to the utility of the exercise

Les réponses que fournit Morin, soit personnellement soit par l'entremise de son avocat, présentent une difficulté: à toutes les questions relatives aux faits invoqués à l'appui de cette cause d'action, il répond qu'il fait fond sur les documents, c'est-à-dire sur un ou plusieurs des 3,000 documents ou sur quelque point qui y figure. A proprement parler, ce ne sont pas des réponses satisfaisantes car le devoir de s'informer incombe à toute personne qui fait l'objet d'un interrogatoire préalable est si clair qu'il ne demande pas qu'on s'y étende. En pratique, vu les circonstances, on ne pouvait guère s'attendre à mieux. Il n'y a pas de meilleure illustration du dilemme que les propos échangés entre l'avocat des demandeurs, M^e Harradence, et l'avocat de la défenderesse, M^e Ainslie, qui sont reproduits aux pages 56 et 57 de la transcription de l'interrogatoire de Morin:

[TRADUCTION] 355 M^e HARRADENCE: ... Notre position est la suivante: nous comptons sur vos documents pour établir le motif; et, par motif, j'entends un exposé général. Je suis d'avis qu'à ce stade le témoin ne doit pas être forcé de lire ces documents et de les interpréter. S'ils sont pertinents et recevables, leur valeur probante doit être fixée par le juge qui préside cette instance. Nous vous dirons ce que nous savons personnellement sur les questions, comme nous l'avons déjà fait, mais nous ne ferons aucun autre commentaire sur ces documents, à moins qu'un juge nous l'ordonne.

356 M^e AINSLIE: Merci, M^e Harradence. Je n'ai pas demandé au témoin de formuler des commentaires sur ces documents. Si je comprends bien, vous soutenez que le motif invoqué par la défenderesse pour vendre les terres est incorrect, n'est-ce pas?

357 M^e HARRADENCE: Oui, monsieur.

358 M^e AINSLIE: M. Morin, pouvez-vous juste nous dire dans vos propres termes quel a été, selon les demandeurs, le motif invoqué par la défenderesse?

359 M^e HARRADENCE: M^e Ainslie, nous vous avons déjà répondu à cela.

360 M^e AINSLIE: Il n'a pas répondu à la question.

361 M^e HARRADENCE: Si, j'affirme qu'il y a été répondu.

362 M^e AINSLIE: Vous invitez donc le témoin à ne pas répondre à la question?

363 M^e HARRADENCE: Oui, monsieur, pour le motif qu'il a déjà répondu et que lui demander plus équivaut à exiger la lecture de ces documents.

La défenderesse a droit à d'autres interrogatoires préalables généraux et je ne vois aucune raison de lui refuser cette ordonnance. Toutefois, avant de la lui accorder, je lui demande d'en examiner plus attentivement l'intérêt et de considérer si des

and, perhaps, to whether interrogatories might not serve better so that the plaintiffs would have the time necessary to extract specifics from the massive documentation.

The plaintiffs are on notice as to the particular questions enumerated in Part II F. If a general re-examination is ordered under Part II F, Morin should be prepared to answer all those questions except Nos. 405, 413, 795, 797, 799 and 802. In the alternative, should the defendant opt for interrogatories, and the Court approves, the other questions may be dealt with therein.

I propose to adjourn Parts II E and F of the motion *sine die* with leave to the defendant to again bring them on with two days notice to the plaintiffs. I now turn to the plaintiffs' motion requiring the re-attendance of the defendant's officer, Herbert Taylor Vergette, at his examination for discovery.

In addition to (1) seeking answers to specific questions, the plaintiffs ask (2) an order that in so far as those questions request searches for further documents, those searches be ordered. They ask (3) for a declaration that the issues raised in questions 945 to 948 are relevant and compelling Vergette to inform himself thereon; the defendant consents to this declaration and order going and also to (4) an order under Rule 448 that the defendant file an affidavit verifying its list of documents. As to the affidavit, the plaintiffs ask, and the defendant does not consent, (5) that it disclose all documents (and that Vergette inform himself and answer questions or re-attendance) in the areas of (A) the practice of the Crown relative to the obtaining of consent of Indian Bands to surrenders between 1887 and 1945; (B) all surrenders or attempts to obtain surrenders of reserve lands held, under the 1886 Act and its successors, in Manitoba, Saskatchewan, Alberta and the Northwest Territories, which were initiated by the Crown during the tenure of Hon. Frank Oliver as Superintendent General of Indian Affairs; (C) all legal opinions received by the Department of Indian Affairs relative to the formalities necessary to obtain a valid surrender for sale of Indian lands from 1887 to 1945 and (D) those relating to

interrogatoires ne seraient pas préférables, car ils laisseraient aux demandeurs le temps d'extraire des points particuliers de cette documentation massive.

^a Les questions énumérées dans la partie II F ont été notifiées aux demandeurs. Si j'ordonne un nouvel interrogatoire général en vertu de la partie II F, Morin devra être prêt à répondre à toutes ces questions sauf aux numéros 405, 413, 795, 797, 799 et 802. Subsidiairement, si la défenderesse opte pour les interrogatoires et que la Cour l'approuve, les autres questions y afférentes peuvent être réglées.

^c Je propose d'ajourner sine die les parties II E et F de la requête, en donnant à la défenderesse l'autorisation de les introduire à nouveau avec un préavis de deux jours aux demandeurs. Je passe maintenant à la requête des demandeurs, qui réclame une nouvelle comparution du fonctionnaire de la défenderesse, Herbert Taylor Vergette, aux fins d'interrogatoire préalable.

^e Outre (1) des réponses à des questions spécifiques, les demandeurs réclament (2) une ordonnance prescrivant la recherche d'autres documents, dans la mesure où ces questions l'exigent. Ils réclament aussi (3) un jugement déclaratoire portant que les points soulevés dans les questions 945 à 948 sont utiles, et contraignant Vergette à s'informer à ce sujet. La défenderesse consent à ce jugement déclaratoire et à cette ordonnance et aussi à (4) une ordonnance en vertu de la Règle 448 lui prescrivant de déposer un affidavit qui attesterait l'exactitude de sa liste de documents. Cet affidavit, selon la réclamation des demandeurs (que la défenderesse n'accepte pas) devrait (5) divulguer tous les documents (ils demandent aussi que Vergette s'informe et réponde aux questions ou comparaître à nouveau) relatifs (A) aux pratiques utilisées par la Couronne pour obtenir que les bandes indiennes consentent aux cessions intervenues entre 1887 et 1945; (B) à toutes les cessions ou tentatives dans ce sens visant à obtenir des terres de réserve entreprises par la Couronne en vertu de la Loi de 1886 et de celles qui l'ont suivie, au Manitoba, en Saskatchewan, en Alberta, et dans les territoires du Nord-Ouest pendant la période où l'hon. Frank Oliver a occupé les fonctions de Surintendant général des Affaires indien-

questions not answered and, as a result of this application, ordered to be answered.

As to the matters embraced in Item 5(A) and (B), the application is denied, for reasons that need not be repeated, on the ground that evidence as to similar facts will not be admissible at the trial. Item 5(C) is denied; the opinion, from time to time, of legal advisers as to a question of law is irrelevant to the issue. Item 5(D) and Item 2 may conveniently be dealt with together after Item 1. Items 3 and 4 being consented to, orders will go.

In view of my conclusion that evidence as to similar facts will not be admissible at the trial, Item 1 of the plaintiff's application is dismissed as to the following questions:

- (i) 103, 104, 116, 586, 587, 625, 626, 627, 633, 818 to 821, 844 and 848, 1286 to 1299, which relate to the government's general policies and practices with respect to surrenders of reserve lands;
- (ii) 515 and 1276 to 1285, which relate to a ^f 1902 surrender of part of Reserve No. 135;
- (iii) 795 to 800, 802 to 810, 817 and 842, which relate to a surrender of a portion of the Blood Reserve near Cardston, Alberta;
- (iv) 873, 874, 1017 to 1033 and 1035 to 1114, which relate to the surrender of the St. Peter's Reserve near Selkirk, Manitoba, a subsequent Commission of Inquiry into it and the events that ensued thereon;
- (v) 914 to 916, 919, 923, 934 to 937, 939, 951, 954, 959 to 962, 964 to 967, 969, 970, 973, 975, 976, 978 to 983, 985 and 988, which relate to a surrender of reserve lands by the Seshart Band on Vancouver Island, defects perceived by the government, and the events that ensued thereon;

The following questions all ask the defendant to admit documents that have already been admitted, to identify who signed or authorized their issue,

nes; (C) à toutes les opinions juridiques reçues par le ministère des Affaires indiennes quant aux formalités nécessaires pour obtenir une vente valable des terres indiennes de 1887 à 1945; et (D) aux questions qui sont restées sans réponse, mais auxquelles il faudra répondre en vertu de l'ordonnance rendue à la suite de cette demande.

Quant aux questions qu'englobe le point 5(A) et (B), je refuse la requête pour des raisons que je n'ai pas besoin de répéter, la preuve relative aux faits analogues n'étant pas recevable à l'instance. Je refuse le point 5(C). L'opinion formulée occasionnellement par des conseillers juridiques sur la question de droit, est sans rapport avec le litige. Le point 5(D) et le point 2 peuvent être réglés ensemble sans inconvenient après le point 1. Les points 3 et 4 étant acceptés, des ordonnances seront rendues.

Vu que j'ai conclu que la preuve relative aux faits analogues ne sera pas recevable à l'instance, je rejette le point 1 de la requête des demandeurs en ce qui concerne les questions suivantes:

- (i) 103, 104, 116, 586, 587, 625, 626, 627, 633, 818 à 821, 844 et 848, 1286 à 1299, qui ont trait aux méthodes et aux pratiques générales du gouvernement en matière de cessions des terres de réserve;
- (ii) 515 et 1276 à 1285, qui ont trait à la cession d'une partie de la réserve n° 135 intervenue en 1902;
- (iii) 795 à 800, 802 à 810, 817 et 842, qui ont trait à la cession d'une partie de la réserve Blood près de Cardston (Alberta);
- (iv) 873, 874, 1017 à 1033 et 1035 à 1114, qui ont trait à la cession de la réserve de St. Peter, près de Selkirk (Manitoba), à une commission d'enquête y afférente nommée ultérieurement et aux événements qui l'ont suivie;
- (v) 914 à 916, 919, 923, 934 à 937, 939, 951, 954, 959 à 962, 964 à 967, 969, 970, 973, 975, 976, 978 à 983, 985 et 988, qui ont trait à une cession de terres de réserve par la bande Seshart dans l'Île de Vancouver, aux défauts détectés par le gouvernement et aux événements qui ont suivi;

Les questions suivantes demandent toutes à la défenderesse d'admettre des documents qu'elle a déjà admis, d'identifier ceux qui les ont signés ou

which appears immaterial in view of the fact of their admission, and as to the interpretation of or conclusion to be drawn from their rather ordinary language in the light of applicable provisions of the *Indian Act*:

121, 126, 128, 136, 150, 186, 196, 206, 217, 304, 309, 312, 522, 528, 589, 843 and 845,

and Item 1 of the plaintiffs' application is dismissed as to them.

In view of the defendant's admission that the surrender in issue was not assented to by a majority of the members of the Enoch Band entitled to vote but merely by a majority of those who did vote, Item 1 of the application is dismissed as to the following questions:

- (i) 607 to 610, 942 and 943, which seek to verify what has been admitted;
- (ii) 614, 615, 634 to 642, 644 to 647, 650, 657 to 665, 669, 670, 672 to 676, 681, 683 to 690, 738, 740 to 742, 856 to 861, 863, 865 to 869, 880 to 889, 893 to 896, which relate to the government's policy from time to time as to the correct legal interpretation of the word "majority" in the pertinent section of the Act;
- (iii) 709, 711 to 714, 718, 719, 724, 726, 733, 755 to 762, 764, 767, 770, 775, 779, 780, 784 to 786, 789 to 792, 822 to 828, 832 and 841, which relate to possible action, including amendment of the Act, that would have removed any doubt that practice and correct legal interpretation were not in conformity; and
- (iv) 991, 993 to 1003, 1007, 1008, 1010, 1011 and 1014, which relate to the policy formed and action taken in this area in 1939.

The affidavit accepted by the Governor in Council proving the surrender of the subject lands is admitted by the defendant. Whether it was sufficient in view of the mandatory provisions of the Act and the consequences of its insufficiency, if that be found, are pure questions of law. Accordingly, Item 1 of the plaintiffs' application is dismissed as to the following questions:

691 to 698, 703, 704, 706 to 708, 899, 900, 903, 904, 910, 912 and 913.

I find nothing in the material before me that would indicate the relevance to the issues of the government's practice or policy, or lack thereof, of

autorisés, ce qui apparaît peu important en raison de leur admission et de l'interprétation ou des conclusions à tirer de leur rédaction plutôt ordinaire basée sur les dispositions de la *Loi sur les Indiens*:

121, 126, 128, 136, 150, 186, 196, 206, 217, 304, 309, 312, 522, 528, 589, 843 et 845.

Je rejette le point 1 de la réclamation des demandeurs afférent à ces questions.

La défenderesse ayant admis que la cession en litige n'a pas été acceptée par la majorité des membres de la bande Enoch ayant le droit de vote, mais simplement par la majorité de ceux qui ont voté, je rejette le point 1 de la requête en ce qui concerne les questions suivantes:

- (i) 607 à 610, 942 et 943, qui demandent de vérifier ce qui a été admis;
- (ii) 614, 615, 634 à 642, 644 à 647, 650, 657 à 665, 669, 670, 672 à 676, 681, 683 à 690, 738, 740 à 742, 856 à 861, 863, 865 à 869, 880 à 889, 893 à 896, qui ont trait à la politique occasionnelle du gouvernement relative à la bonne interprétation juridique du terme «majorité» dans l'article pertinent de la Loi;
- (iii) 709, 711 à 714, 718, 719, 724, 726, 733, 755 à 762, 764, 767, 770, 775, 779, 780, 784 à 786, 789 à 792, 822 à 828, 832 et 841, qui ont trait à une mesure possible, notamment à la modification de la Loi, qui aurait enlevé tout doute à l'effet que le procédé n'a pas été conforme à la bonne interprétation juridique; et
- (iv) 991, 993 à 1003, 1007, 1008, 1010, 1011 et 1014, qui ont trait à la politique adoptée et aux mesures prises dans ce secteur en 1939.

La défenderesse a admis l'affidavit accepté par le gouverneur en conseil, qui prouve la cession des terres en litige. Est-il insuffisant en raison des dispositions impératives de la Loi? Si oui, les conséquences de cette insuffisance sont de pures questions de droit. En conséquence, je rejette le point 1 de la requête des demandeurs en ce qui concerne les questions suivantes:

691 à 698, 703, 704, 706 à 708, 899, 900, 903, 904, 910, 912 et 913.

Dans les documents produits devant moi, rien n'indique que le fait de fournir une représentation juridique indépendante à une bande d'Indiens à

providing independent legal representation to an Indian Band in connection with a proposed surrender. Accordingly Item 1 of the motion is dismissed as to questions 811 to 814 and 816. Likewise, there is nothing to indicate the relevance of any action or lack of action by the government following a debate in the House of Commons March 22, 1911 and the motion is dismissed as to questions 1115 and 1120 to 1137. No. 1139 was answered.

The defendant is not answerable in law for the actions or opinions of private citizens who are not her servants or agents. A private Member of Parliament is a private citizen in that sense, not a servant or agent of the Crown. Item 1 of the plaintiffs' application is dismissed as to the following questions because, for the above reason, they are not properly to be put to the defendant on examination for discovery:

1141, 1143, 1144, 1145, 1147, 1148, 1150, 1152 to 1155, 1157, 1159, 1160, 1161, 1163, 1165, 1167 to 1183, 1185 to 1188, 1193 to 1198, 1201 to 1205, 1208 to 1214, 1218 to 1223, 1225, 1226, 1231 to 1234, 1246 to 1249, 1251 to 1257, 1259, 1260, 1264, 1266, 1268 to 1271 and 1273.

Question 420 seeks the answer to who paid the charges for a collect telegram sent June 28, 1908 from one J. A. Markle in Gleichen, Alberta to the Department of Indian Affairs in Ottawa. It also seeks the significance of the number "327569" stamped on the copy produced by the plaintiffs. The materiality of who paid the charges and information as to the significance of that number is not immediately apparent to me; however, the cost of getting the information some 70 years after the event is obvious. Item 1 of the plaintiffs' motion is dismissed as to question 420.

Question 457 asks for an interpretation of or an admission of something in a document not admitted by the defendant and is not proper. The document is one of the letters from Rev. Tessier to Hon. Frank Oliver.

propos d'une cession proposée, ait un rapport avec les questions de politique ou de pratique, ou d'absence de politique ou de pratique, du gouvernement. Je rejette donc le point 1 de la requête des demandeurs en ce qui concerne les questions 811 à 814 et 816. Je ne trouve rien non plus qui indique un rapport entre ces questions et les mesures ou l'absence de mesures prises par le gouvernement à la suite d'un débat qui a eu lieu à la Chambre des communes, le 22 mars 1911, et je rejette la requête en ce qui concerne les questions 1115 et 1120 à 1137. Il a été répondu à la question n° 1139.

La défenderesse n'est pas responsable en droit pour les actes ou les opinions des particuliers qui ne sont ni ses préposés ni ses agents. Un membre du Parlement est un particulier dans ce sens, et non pas un préposé ni un agent de la Couronne. Je rejette le point 1 de la requête des demandeurs en ce qui concerne les questions suivantes parce que, pour la raison susmentionnée, elles ne doivent pas être posées à la défenderesse lors de l'interrogatoire préalable:

1141, 1143, 1144, 1145, 1147, 1148, 1150, 1152 à 1155, 1157, 1159, 1160, 1161, 1163, 1165, 1167 à 1183, 1185 à 1188, 1193 à 1198, 1201 à 1205, 1208 à 1214, 1218 à 1223, 1225, 1226, 1231 à 1234, 1246 à 1249, 1251 à 1257, 1259, 1260, 1264, 1266, 1268 à 1271 et 1273.

La question 420 demande d'indiquer qui a payé le télégramme à frais virés envoyé le 28 juin 1908 par un certain J. A. Markle de Gleichen (Alberta) au ministère des Affaires Indiennes à Ottawa. Elle demande aussi de préciser la signification du numéro «327569», qui est estampillé sur la copie produite par les demandeurs. L'importance de savoir qui a payé les frais et ce que signifie ce numéro m'échappe à première vue. Toutefois, une chose est certaine, c'est le coût auquel ces renseignements reviennent quelque 70 ans après que l'événement s'est produit. Je rejette donc le point 1 de la requête des demandeurs en ce qui concerne la question 420.

La question 457 demande à la défenderesse d'interpréter ou d'admettre un point qui figure dans un document qu'elle n'a pas admis. Cela est incorrect. Il s'agit en l'occurrence d'une des lettres du Rév. Tessier à l'hon. Frank Oliver.

The defendant's objection to answering the following questions obviously stems from a view, contrary to the plaintiffs', of the inferences properly to be drawn from the government offering, in advance of the surrender in issue, to make available out of the proceeds of sale of the surrendered lands, or otherwise, certain provisions, horses and equipment. I cannot, at this juncture, hold that evidence in this area would necessarily be inadmissible or irrelevant. Item 1 of the plaintiffs' application is granted as to questions 506, 509, 1309 to 1313 and 1316 to 1318 on the basis that such questions are directed to the surrender in issue and not to similar facts.

Similarly, I cannot at this point, hold that evidence as to the activities of Rev. John McDougall in an attempt to obtain a surrender from the Enoch Band in November, 1907, would be inadmissible or irrelevant to the surrender in issue provided, of course, he was acting for the Crown therein. Accordingly, questions 1300 to 1306 should be answered. Assuming that 1307 relates to those immediately before it, it also should be answered. Question 1308 is, to the extent it is not argumentative, merely repetitious of 1301.

In accordance with Items 2 and 5(D), documents pertinent to the questions ordered to be answered should be produced.

The costs of both applications will be in the cause.

La défenderesse refuse de répondre aux questions suivantes, de toute évidence, parce qu'elle a une opinion opposée à celle des demandeurs sur les déductions qu'il convient de tirer de l'offre faite par le gouvernement avant la cession en litige et qui consistait à rendre disponibles, en les prélevant sur le produit de la vente ou autrement, certains approvisionnements, chevaux et matériaux. En l'occurrence, je ne peux pas statuer que la preuve y afférente est nécessairement irrecevable ou inutile. J'accorde le point 1 de la requête des demandeurs en ce qui concerne les questions 506, 509, 1309 à 1313 et 1316 à 1318 parce qu'elles visent la cession en litige et non pas des faits analogues.

De même, à ce stade, je ne peux pas statuer que la preuve relative aux activités du Rév. John McDougall, en novembre 1907, en vue d'obtenir de la bande Enoch une cession, serait irrecevable et sans rapport avec la cession en litige, à condition naturellement qu'il ait agi pour le compte de la Couronne. Il convient donc de répondre aux questions 1300 à 1306. En présumant que la question 1307 se rapporte à celles qui la précédent immédiatement, il faut aussi y répondre. Quant à la question 1308, dans la mesure où elle n'a pas un caractère critique, elle ne fait que répéter la question 1301.

Conformément aux points 2 et 5(D), les documents afférents aux questions auxquelles l'ordonnance prescrit de répondre, devront être produits.

Les dépens pour les deux requêtes suivront l'issue de la cause.

CIRCUIT COURT.

No. 5433.

MONTREAL, NOVEMBER 17, 1906.

PURCELL, J. C. C.

F. J. CHARBONNEAU v. J. B. DE LORIMIER, *défendant-opposant.*

Opposition afin d'annuler.—Indian Act.—Proof of status of Indians.—Real and personal property exempt from seizure.—

Rev. S. C. c. 43, s. 78.

HELD :—1o. The status of an Indian as such may be proved by his certificate of birth, his general reputation, his residence in the reserve or his election as municipal councillor.

2.—The real and personal property of Indians inside the reserve is exempt from seizure. (1)

Per Curiam :—Seeing the certificate of birth filed ;

Considering in addition that it is established that opposant is reputed, as were his parents before him, to be an Indian, that he resides on the reserve, and that he has been twice elected municipal councillor, a position which can only be held by an Indian ;

Seeing R. S. C. chap. 43, sec. 78, (*Vide* in the French version where the word "Droit" is used) exempting the real and personal property of Indians inside the reserve : See 17 R. J. Q. 189 :—

Opposition maintained with costs.

Pelletier & Létourneau, attorneys for plaintiff contestant.

Victor Martineau, attorney for defendant opposant.

(Ed. F. S.)

(1) See *Lepage v. Watzo*, 4 Q. L. R. 81 ; 22 L. C. J. 97 ; 8 R. L. 596 ; 1 L. N. 322.

Durand v. Sioui, 4 Q. L. R., 93.

Bussières v. Bastien, 17 S. C. 189.

February 26, 1889.

Coram DORION, Ch. J., TESSIER, CROSS, CHURCH and
BOSSÉ, JJ.

COME S. CHERRIER,
(*Defendant in Court below*),
APPELLANT;

AND

CHARLES TERIHONKOW,
(*Petitioner in Court below*),
RESPONDENT;

Prohibition, Writ of—When it may issue—Seizure of goods of Indian—Jurisdiction—Indian Act, R.S., ch. 43, s. 78.

- HELD:—1. A writ of prohibition can be issued from the Superior Court to an inferior tribunal, only when the inferior tribunal is exceeding its jurisdiction, or is acting without jurisdiction.
2. A Commissioners' Court has jurisdiction to hear and determine a cause against an Indian, and to issue a writ of execution upon the judgment rendered in such cause; and the fact that goods have been seized which are by law declared to be exempt from seizure does not justify the issue of a writ of prohibition to the Court from which the execution issued.
3. The proper proceeding in such circumstances is an opposition *afin d'annuler*.

APPEAL from a judgment of the Superior Court, Montreal, GLOBENSKY, J., maintaining a writ of prohibition. The judgment of the Court below was as follows:—

"The Court having heard the petitioner and one Côme Séraphin Cherrier, by their respective counsel, upon the merits of the writ of prohibition issued in this cause, examined the proceedings, etc.

"Considering that on the 5th of February, 1888, the respondents, the Commissioners' Court of the parish of Laprairie, rendered judgment against petitioner in a cause bearing number 956 of its records, where one Côme Séraphin Cherrier was plaintiff, and to whom petitioner was condemned to pay a certain sum of money;

1889.
Cherrier
&
Terihonkow.

"Considering that on the 30th of April last past, a writ of execution against the goods and chattels of the petitioner, defendant in the said cause, was issued by the said respondents and that one Arthur Matte, a bailiff, did, under the authority thereof, on the 30th May last, seize and take in execution, as belonging to said petitioner, certain personal property and movables, in petitioner's possession, and give notice that the same would be sold by him under the said authority on the 12th of June last past, at the said petitioner's domicile, to satisfy the said Cherrier's claim and costs on the said judgment;

"Considering that the said petitioner on the 4th of July, obtained from the Hon. L. A. Jetté, one of the Judges of the Superior Court for Lower Canada, permission and order to issue a writ of prohibition against the respondents, ordering them to suspend all proceedings under the above mentioned judgment;

"Considering that the said Cherrier, plaintiff in the above cause, was not *mis en cause*, but appeared by counsel and contested the said writ of prohibition on the merits, waiving thereby all defects in the procedure of summoning the interested parties;

"Considering that the petitioner has joined issue with the said Cherrier, although he had not been made a party to the writ, and has thereby accepted him as his adverse party;

"Considering that the respondents have not appeared, and that default has been registered against them;

"Considering that the petitioner claims that under section 78 of the Indian Act, the aforesaid judgment is null and void and cannot be enforced, and that in consequence the writ of prohibition in this cause was properly issued and ought to be maintained;

"Considering that said Cherrier answers by his defence, that the judgment of the Commissioner's Court impugned was legally rendered in his favor against petitioner, and that the writ of execution to enforce the payment of the amount of said judgment was legal, and could legally be executed upon the goods and chattels of petitioner;

"Considering that by law no person can take or obtain lien or charge whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under another section of the said Indian Act which defines what real or personal property of an Indian is subject to taxation ;

"Considering that it has been proved in evidence that said petitioner is an Indian to whom the Indian Act does apply ;

"Considering that the said Cherrier has not proved that the personal property taken in execution and seized under the said writ of the Commissioner's Court, was real or personal property subject to taxation ;

"Considering, therefore, that said Cherrier could not, by his said judgment, obtain any lien or charge upon the said personal property as taken in execution ;

"Doth dismiss the defence of Côme Séraphin Cherrier and maintain the said writ of prohibition against respondents, and order them to suspend all proceedings upon the said writ of execution above mentioned and the judgment by them rendered against said petitioner, without costs against said respondents, but with costs against the said Côme Séraphin Cherrier, *distracts, etc.*"

Jan. 15, 1889.]

Fortin, for the appellant :—

La prétention de l'intimé est celle-ci :

La loi dit qu'on ne peut prendre aucune garantie, privilége ou droit soit par hypothèque, jugement ou autrement, sur mes biens; or vous avez obtenu jugement contre moi; donc le tribunal qui m'a condamné a commis un excès de juridiction et je suis bien fondé à me pourvoir par la voie du bref de prohibition.

Cette prétention, au moins singulière, suivant nous, a été accueillie par la cour inférieure.

La seule question qui se présente est donc une question de compétence ou de juridiction.

Molson et al. & Lambe et al., 11 Leg. News, p. 291, Cour Suprême, Canada :

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1889. "In cases where there is jurisdiction over the subject matter, prohibition will not go for mere irregularity in the proceedings, or even a wrong decision on the merits."

Mayor of London & Cox, L. R., 2 H. L. 276, citée *re Molson & Lambe*:

"The proceeding in prohibition, therefore, does not stand upon the footing of an action for a wrong."

"In a prohibition for want of jurisdiction, the question is not whether the party or the Court has done a wilful wrong, but whether the Court has or has not jurisdiction." *Ib.*, p. 293.

La cour des commissaires a-t-elle excédé sa juridiction dans l'espèce?

La compétence d'un tribunal est de deux sortes : *ratione personæ* et *ratione materiæ*.

Ratione personæ quand la personne même que l'on assigne n'est pas justiciable du tribunal devant lequel elle est assignée;

Ratione materiæ quand la matière qui fait le sujet du procès échappe à la compétence de la cour.

Par exemple, quand l'on assigne une personne devant la cour supérieure, dans une demande dont l'objet est de moins de \$100, et qui est du ressort exclusif de la cour de circuit.

Ces distinctions sont élémentaires, mais il paraît utile de les rappeler.

Pour réussir, l'intimé devra donc démontrer à cette cour que la Cour des Commissaires n'avait pas dans l'espèce, l'une ou l'autre de ces jurisdictions. En d'autres termes, il doit démontrer que la cour a excédé sa juridiction *ratione personæ* ou *ratione materiæ*; il n'y a pas de milieu.

L'intimé allègue avoir été poursuivi en paiement d'un compte pour marchandises; il n'y a donc pas excès de juridiction *ratione materiæ*, puisqu'aux termes de l'art. 1188 du C.P.C., la Cour des Commissaires possède la juridiction voulue sur ces matières. Au reste, l'intimé ne prétend pas que le défaut de juridiction soit de cette nature.

Mais y a-t-il défaut de juridiction *ratione personæ*?

L'intimé n'exprime pas assez clairement sa prétention, comme l'on a vu, pour affirmer que c'est là ce qu'il soutient; mais comme il faut nécessairement qu'il y ait quelque part le défaut de juridiction qu'il invoque, et que ce ne peut être autre chose que l'incompétence *ratione personae*, voyons si la loi soutient ses allégations.

Nous soumettons que, pour soustraire l'intimé à la juridiction des tribunaux, il faudrait une loi formelle à ce sujet, un texte parfaitement clair.

Y a-t-il quelque loi semblable? Nous n'en connaissons aucune et l'intimé n'en cite pas. La section 78 invoquée par lui ne dit rien de semblable, et n'appuie en aucune façon sa prétention.

La section 77 commence par déterminer quels biens, appartenant aux sauvages, sont susceptibles d'être taxés. La section 78 vient ensuite pour déclarer que l'on ne pourra prendre de garantie sur les biens d'un sauvage, "soit par hypothèque, jugement, ou autrement," c'est-à-dire, qu'on ne pourra obtenir un droit de préférence sur les biens d'un sauvage, par hypothèque conventionnelle ou judiciaire—résultant d'un jugement; voilà tout. Excepté, dit la section, sur les biens susceptibles d'être taxés.

Si nous comprenons bien la portée de cette section de la loi des sauvages, elle décrète que, règle générale, les biens d'un sauvage ne peuvent être engagés ou hypothiqués, si ce n'est ceux qui sont susceptibles d'être taxés. Peut-on en conclure qu'un sauvage ne peut être poursuivi? Evidemment non. Or, encore une fois, c'est la seule question qui se présente en cette cause.

L'intimé ne prend pas une action en radiation d'hypothèque; il dit tout simplement: "Vous n'avez pas le droit de me poursuivre."

Il y a plus. La section 81 de l'acte des sauvages déclare insaisissables certains biens appartenant aux sauvages; ce sont les présents faits aux sauvages, et les biens acquis au moyen des annuités qui leur sont accordées.

Qu'en résulte-t-il?

Du fait que la loi dit: tels ou tels biens sont insaisis-

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sables, n'en résulte-il pas que les autres biens sont saisissables ? Quand la loi crée une exception, est-ce qu'elle ne reconnaît pas par là même, l'existence d'une règle générale à laquelle elle entend déroger ?

Et si les autres biens sont saisissables, n'est-il pas évident que l'on pourra prendre jugement contre un sauvage, et, pour y arriver, le poursuivre ?

J. S. Hall, Q.C., and A. D. Nicolls for the respondent :—

It is beyond all controversy that Terihonkow is an Indian residing on the Indian Reserve at Caughnawaga, and that the judgment of the Commissioner's Court was rendered for an ordinary account, and that in execution of it the movable effects of Terihonkow on the Reserve were seized and about to be sold.

The judgment is based mainly on Section 78 of the Indian Act. Under this section the respondent contends no judgment ought to be rendered against him nor any seizure of his goods made or any lien or charge made on him or his property, except it be on property subject to taxation under Sec. 77 of the same Act. The property seized here was not property subject to taxation.

BOSSE, J.:—

L'appelant avait, le 5 février 1883, obtenu devant la Cour des Commissaires de la paroisse de Laprairie, jugement pour \$20, contre l'intimé, l'un des sauvages résidants sur la réserve de Caughnawaga.

Sur ce jugement, un bref d'exécution a été émané, et des effets mobiliers appartenant à l'intimé ont été saisis à son domicile sur la réserve.

La vente en avait été annoncée, mais avait été arrêtée sur paiement d'un à compte, et pour empêcher d'autres procédures l'intimé a alors présenté à la Cour Supérieure siégeant à Montréal, une requête pour bref d'injonction par laquelle il concluait, "that a writ of prohibition do issue from this Honorable Court, prohibiting said respondent from issuing any further or other or alias writ of execution, and from proceeding or allowing its officers or any of them to proceed upon the writ of execution

"already issued under said judgment of said Court
 "against respondent in said cause bearing the number 956,
 "wherein said Côme Séraphin Cherrier was plaintiff and
 "your petitioner was defendant, and be also prohibited
 "from allowing said judgment of said Court against
 "respondent to become, by means of a writ of execution
 "or otherwise, a charge or lien upon the property and
 "effects of your petitioner situated on said reserve or
 "otherwise affecting the same, and that said judgment be
 "declared to have been illegally and erroneously rendered
 "and to be unfounded, and that the same be set aside and
 "declared null and of no effect, the whole with costs,
 "*distracts.*"

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Après contestation et enquête, la Cour Supérieure a maintenu la requête et enjoint au demandeur "to suspend all proceedings upon the said writ of execution above mentioned and the judgment by them rendered against said petitioner, without costs against respondents, but with costs against the said Côme Séraphin Cherrier, *distracts, etc.*"

Il me paraît que ce jugement ne peut être maintenu.

Il faut noter que quoique la saisie ait été pratiquée au domicile d'un sauvage sur la réserve de la tribu à laquelle il appartient, et que la requête libellée allègue ce fait et demande entre autres choses, qu'il soit fait défense de procéder à la vente des objets saisis sur cette réserve—it est aussi demandé, que le jugement de la Cour des Commissaires soit déclaré illégal pour défaut de juridiction, que comme tel il soit mis de côté et que défense soit faite aux officiers de la Cour de le mettre à exécution.

Il faut aussi observer que le jugement dont est appel ne déclare pas le jugement nul, et ne procède pas non plus sur le fait que les meubles saisis l'ont été sur une réserve d'une tribu de sauvages et au domicile de l'un des sauvages dans cette réserve, mais ne contient qu'une seule disposition, à savoir, l'ordre de suspendre toute procédure pour l'exécution de ce jugement.

Le jugement de la Cour des Commissaires me paraît avoir été rendu par une Cour ayant juridiction pour le

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rendre, et contre une personne qui pouvait être condamnée.

Le sauvage quoique soumis à une espèce de tutelle exercée par le gouvernement en raison des terres réservées aux tribus, des biens meubles qu'il peut avoir sur cette réserve, des présents et pension qui lui sont faits, et des choses qu'il peut avoir achetées avec cette pension, est cependant capable de contracter. Il peut acquérir en son nom et posséder des biens meubles ou immeubles en dehors de la réserve. Aucun contrat ne lui est défendu en raison de ces derniers biens, et il peut, de même que toute personne majeure et usant de ses droits, faire toute transaction que bon lui semble, acquérir des droits et en poursuivre l'exécution en justice, sauf pour les seuls biens réservés dont je viens de parler, en raison desquels il ne peut ni contracter ni être taxé. Ceci ressort des sections 14, 16, 18, 30, 33, 43, 54 et 77 à 81 de l'Acte des Sauvages, S. R. C., chap. 43.

L'intimé a donc pu être bien condamné par la Cour des Commissaires pour la dette qu'il devait à l'appelant, et si dans l'exécution de ce jugement, le demandeur avait fait saisir quelques-uns des objets réservés, il y avait lieu à demander la nullité de la saisie par opposition suivant l'article 1213 du Code de Procédure Civile, mais il n'y avait pas lieu pour cela au bref d'injonction pour empêcher la vente.

Il y avait encore bien moins lieu à ce bref pour défendre à la Cour des Commissaires de faire exécuter son jugement, et à l'intervention de la Cour Supérieure pour donner un ordre à un officier de la Cour des Commissaires et l'arrêter dans l'exécution du bref émané de cette Cour.

Je suis d'avis de renverser le jugement dont est appel et renvoyer la requête libellée avec dépens des deux cours contre l'intimé.

DORION, Ch. J. :—

The Commissioners' Court had jurisdiction. An Indian may be sued for a debt; and the Commissioners' Court had a right to condemn him to pay it; but the law has

declared certain things exempt from seizure, and there is no doubt that the things seized here were unseizable. But a writ of prohibition is not the proper mode of opposing the seizure of things which are exempt from seizure. The writ of prohibition applies where a tribunal is acting without jurisdiction or in excess of jurisdiction. Here the Commissioners' Court was exercising a jurisdiction which it had a right to exercise. What the respondent should have done was to make an opposition to have the seizure declared null. The judgment must therefore be reversed.

The judgment in appeal is as follows:—

“ La Cour etc.....

“ Considérant que les commissaires pour la décision des causes sommaires dans la paroisse de Laprairie, avaient juridiction pour connaître et juger la cause intentée par l'appelant contre l'intimé, et pour faire émettre un bref d'exécution, comme ils l'ont fait, contre les meubles du dit intimé, qui ne sont pas par la loi déclarés exempts de saisie ;

“ Et considérant qu'un bref de prohibition ne peut émaner de la Cour Supérieure que lorsqu'un tribunal inférieur excède sa juridiction, ou agit sans juridiction, et que la saisie de biens exempts de saisie ne peut donner lieu à l'émanation d'un bref de prohibition, mais bien à une opposition afin d'annuler, qui est la procédure que l'intimé Terihonkow aurait dû adopter en cette cause ; .

“ Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal, le 29 ième jour de septembre 1888 ;

“ Cette Cour casse et annule le dit jugement du 29 septembre 1888, et procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, rejette le bref de prohibition comme ayant émané sans droit, et condamne l'intimé à payer à l'appelant, les dépens encourus tant en cour de première instance, que sur l'appel.”

Judgment reversed.

Robidoux, Fortin & Rocher, attorneys for appellant.

J. S. Hall, Q.C., attorney for respondent.

(J.K.)

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The Court doth dismiss the plaintiff's action, with costs.

Montréal CREPIN v. DELORIMIER et Autres, et BANQUE CANADIENNE NATIONALE, tierce-saisie.
1929

29 novembre. *Indiens — Insaisissabilité — Dépôt de banque — Loi des Indiens (S. R. C., 1927, ch. 98), art. 102 et 105.*

Aux termes de la loi des Indiens, un dépôt de deniers effectué dans une banque par un Indien, constituant un droit incorporel non susceptible d'être taxé par les lois actuelles, est insaisissable.

Saisie-arrêt pratiquée entre les mains d'une banque par le créancier d'un Indien relativement à un dépôt de deniers.

Motifs du jugement: Il s'agit de décider si un dépôt dans une banque à Valleyfield, appartenant à un Iroquois de Caughnawaga, peut être saisi. L'art. 105 du ch. 98, S. R. C. décrète qu'on ne peut saisir que les biens d'un sauvage qui sont imposables, *subject to taxation*. L'art. 102 pose la règle que les biens des sauvages ne sont pas imposables, unless he holds, in his individual right, real estate under a lease or in fee simple, or personal property outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate.

1. L'art. 105 ne permet de saisir que les biens *subject to taxation*. Cela veut dire, en vertu des lois existantes et non en vertu des lois qui pourraient être adoptées (1).

2. La loi a en vue les taxes ordinaires, savoir les taxes municipales et scolaires: les derniers mots de l'art. 102 le démontrent.

M. le juge Philippe Demers.—No 168.—Mercier et Fauteux, pour le demandeur.—Crankshaw, Crankshaw et Gaboury, pour certains défendeurs.—Gérin-Lajoie et Beaupré, pour la tierce-saisie.

(1) 16 Ont. W. R. 865.

3. Ce dépôt ne peut être affecté par aucune taxe en vertu de nos lois actuelles.

4. Ce dépôt, c'est une créance,—droit incorporel,—donc de sa nature n'ayant point de *situs*. S'il en avait un, ce serait le domicile du créancier. *Mobilia sequuntur personam* est une fiction quant aux meubles corporels, mais non quant aux créances. Les dettes actives, les droits et actions sont de leur nature attachés à la personne.

Je suis d'avis que l'art. 102 n'a en vue que la taxe des immeubles et des meubles corporels situés en dehors de la réserve et, à regret, je me considère obligé de casser la saisie-arrêt avec dépens.

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et Autres, et
Banque
Canadienne
Nationale.

SABOURIN v. LORRAIN et Autres.

Iberville

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12 février.

Droit scolaire — Contestation d'élection — Cens d'éligibilité — Loi de l'instruction publique (S. R. Q., 1925, ch. 133), art. 124.

Un contribuable qui est partie à une instance en annulation d'une résolution adoptée par une commission scolaire ne laisse pas d'être éligible à la charge de commissaire d'écoles.

Demande en contestation de l'élection de commissaires d'écoles.

M. le magistrat en chef FERDINAND ROY. Par sa requête en contestation de l'élection des intimés à la charge de commissaires d'écoles de la cité de St-Jean, le requérant allègue que ladite élection est entachée de corruption et de fraude. Les actes de corruption et de fraude consisteraient dans le fait par les intimés (a) d'avoir "fait circuler et distribuer, le jour de l'élection, dans les limites de ladite municipalité scolaire, des pamphlets ou feuillets ayant trait à l'élection, contenant toute espèce de calomnies et d'insinuations mensongères à l'adresse des autres candi-

M. le magistrat
en chef
Ferdinand
Roy.

M. le magistrat en chef Ferdinand Roy.—Cour de magistrat de district.—No 2546.—Poulin et Demers, pour le requérant.—Jacques Cartier, pour les intimés.

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RAPPORTS JUDICIAIRES DE QUÉBEC

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no room for doubt, in my opinion, that the appellant was always willing to accept engagement as a day laborer; it was his dismissal only that caused him to seek remuneration as an employee, engaged by the mouth, with its advantage of a month's notice of dismissal.

I would dismiss the appeal.

L.-A. P.

Montreal DELORIMIER (Defendant), *Appellant* v. CROSS
1937 (Plaintiff), *Respondent.*

January 25. Indians — Land in a Reserve — Possessory Action
Superior Court — Provincial Jurisdictions — Superintendent General of Indian Affairs — British North America Act, 1867 (30 Vict., c. 3), art. 91 (para. 24), 92 (para. 14) — Indian Act (R. S. C., 1927, c. 98, arts. 25, 31, 32, 33, 38, 39, 55s, 105, 106, 110 (para. 5), 115, 116, 119—C. C., art. 2194—C.P., art. 1064s.

The Superior Court has no jurisdiction *ratione materiae* to hear and adjudge a possessory action taken by an Indian on the Caughnawaga Reserve against another Indian on the same Reserve.

The judgment of the Superior Court (Montreal), rendered by Mr. Justice Guibault (May 28, 1935) (1) in favour of the plaintiff, is reversed.

Possessory action concerning land in an Indian Reserve.

Judgment: Whereas the plaintiff-respondent, who is an Indian on the Caughnawaga Reserve, took a possessory action against the defendant-appellant, who is another Indian on the same reserve;

Sir Mathias Tellier, Chief Justice of the Province, Rivard, Galipeault, St. Germain and Barclay, JJ. — No. 1091 (S. C. 128.154). Crankshaw, Crankshaw, Gaboury and Almond, for appellant. Boyer and Simard, for respondent.

(1) 1935, 73 S. C. 377.

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Whereas the plaintiff-respondent alleges in support of his action that he has possessed as proprietor since the 9th of June, 1911, the following immovable: A lot of land known under the number 130a in the registers of the Department of Indian Affairs at Caughnawaga and of the Department of Indian Affairs at Ottawa; that less than a year ago, without any valid reason, the defendant troubled him in the peaceable possession of his said immovable by preventing him from cutting firewood and by upsetting his cart in a ditch in the vicinity of the said lot 130a;

Whereas the defendant-appellant contested the said action, denying each of the allegations of the declaration and specially alleging that he was the sole owner of the said lot in question, as legatee of his grandfather, J. B. DeLorimier, under the terms of the latter's will passed before Mtre. L. C. Tassé, Notary, on the 12th of August, 1926;

Whereas at the hearing of this case before the Superior Court the defendant-appellant declined the jurisdiction of the said Court *ratione materiae*, claiming that, by the present action the right to the possession of land forming part of the lands reserved for Indians being put in question between two Indians of the same reserve, the decision of this litigation was under the exclusive jurisdiction of the Department of Indian Affairs at Ottawa;

Whereas the Superior Court rejected this declinatory objection and maintained the action of the plaintiff-respondent on the ground that the said plaintiff-respondent had proved the allegations of his declaration and that, on the other hand, the reasons invoked by the defendant-appellant, tending rather to establish his title of proprietor of the said lot, were not valid reasons against a possessory action;

Whereas the defendant appealed from the said judgment;

Considering that, in virtue of section 91 of the British North America Act, the power to legislate with regard to Indians and lands reserved for Indians was given exclusively to the Parliament of Canada and that con-

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sequently the Parliament of Canada had the exclusive right to legislate regarding Indians and lands reserved for Indians, not only as regards administration but also judicially;

Considering that, by the Indian Act, chapter 98 of the Revised Statutes of Canada (1927), it was provided not only for the administration of the moneys and of the lands reserved for the Indians but also for judicial power to which there would be recourse, if necessary, in any litigation concerning Indians and lands reserved for Indians;

Considering that, according to the dispositions of the said Act, the Superior Court of this Province had no jurisdiction *ratione materiae* to hear and adjudge the said possessory action taken by the plaintiff-respondent, who is an Indian on the Caughnawaga Reserve, against the defendant-appellant, who is an Indian on the same reserve;

Considering, therefore, that there is error in the judgment appealed from, to wit, the judgment rendered by the Superior Court sitting for the District of Montreal on the 28th day of May, 1935;

The Court doth maintain the present appeal with costs... doth dismiss the action of the plaintiff-respondent with costs.

Mr. Justice
Barclay.

Mr. Justice BARCLAY. This case concerns a dispute between two Indians, admitted by Counsel for both parties to be members of the same band of Indians living on the Indian Reserve at Caughnawaga, the land in dispute being part of the reserve.

This land, being part of the reserve, is land which has been set apart for the use or benefit of this particular band of Indians and of which the legal title is in the Crown. The legal title, therefore, is not and cannot be in either of the parties to this dispute. All that an Indian of the band can obtain is a right to possess or occupy.

The plaintiff in this case took an ordinary possessory action in the manner and form known to the law of this Province, and therefore the only question to be

(GRANADA)

decided in such an action is whether the plaintiff has established possession for a year and a day prior to the taking of the action. In ordinary cases, this right is given to the possessor of a year and a day because the law presumes that the person possesses for himself as proprietor, if it be not proved that his possession was begun for another (Art. 2194 C. C.). In other words, the law of this Province recognizes a right on the part of a possessor for more than a year and a day and gives him an action to protect that right. But we are not here dealing with an ordinary case; we are dealing with a dispute between two Indians, and the case is not governed by the Civil Code but by the Indian Act, R. S. C. (1927), chapter 98, because, under the terms of the B. N. A. Act, Indians and lands reserved for Indians come under the exclusive legislative authority of the Parliament of Canada.

By section 21 of that Act, it is enacted that no Indian shall be deemed to be lawfully in possession of any land in a reserve, unless he has been or is located for the same by the band, or council of the band, with the approval of the Superintendent General. — — —

It will be seen at once that this law differs essentially from the law of this Province. So far from recognizing any right on the part of the mere possessor of a year and a day, it formally declares that no Indian is legally in possession of lands in a reserve unless he has been located with the approval of the Superintendent General. In the face of that section, no court would be justified in holding that the plaintiff is entitled to possession otherwise. No Indian can have anything more than possession, and the law provides the only manner in which he can obtain the right to possess.

That this is so is further borne out by the provisions of section 119 of the Indian Act, which declares that every Indian of the band who, without the licence in writing of the Superintendent General, or of some officer or person deputed by him for that purpose, cuts, carries away or removes from land in a reserve held by another Indian under a location title or by an Indian otherwise recognized by the Department as the occupant thereof any of the trees, etc.,

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commits an offence for which he incurs penalties provided by the Act. Yet it is the very cutting of the trees on this land which is advanced by the plaintiff as constituting an act of possession on his part sufficient to entitle him to maintain his action. As the cutting of trees on any land on which another Indian is located, or whose presence thereon is recognized by the Department, constitutes an offence, surely the plaintiff would have to establish, in order to found his action upon the cutting of the trees, that he was not committing any offence, or, in other words, that no other Indian was located upon or recognized by the Department as being rightfully on that lot. This again shows the distinction between the law of this Province and the law enacted for Indians.

In a possessory action taken by one Indian against another of the same band concerning land in the reserve — if such an action can be taken at all — the plaintiff must show that he has a legal right to possession. Possession for a year and a day is not sufficient; he must show that he has been located in the manner provided by the statute.

There is another question raised on this appeal which is of still greater importance and which logically I should have dealt with first, and that is whether the Superior Court has any jurisdiction in the matter.

The appellant bases his argument in the negative on section 39 of the Indian Act, which reads in part as follows:

If the possession of any lands reserved or claimed to be reserved for the Indians, or of any lands of which the Indians or any Indian or any band or tribe of Indians claim the possession or any right of possession, is withheld, or if any such lands are adversely occupied or claimed by *any person*, or if any trespass is committed thereon, the possession *may* be recovered for the Indians or Indian or band or tribe of Indians, or the conflicting claims may be adjudged and determined or damages *may* be recovered in an action at the suit of His Majesty on behalf of the Indians or Indian...

2. The Exchequer Court of Canada shall have jurisdiction to hear and determine *any such action*.

In my opinion, this section does not apply to the present case for two reasons:

Firstly, because the adverse possession referred to in this section is possession by any *person*. A "person", for the purpose of the Act, is defined as "an individual other than an Indian". Here we are not dealing with adverse possession by a person, but with adverse possession by another Indian.

Secondly, because the action referred to is an action taken at the suit of His Majesty on behalf of the Indian claiming the possession or right of possession, and not, as here, an action between two Indians. The Exchequer Court is given jurisdiction in any such action, namely, any action taken at the suit of His Majesty.

If the Superior Court has no jurisdiction, it is not in consequence of the foregoing section.

Under the terms of the Act, the Minister of the Interior is the Superintendent General of Indian Affairs and as such has the control and management of the lands and the property of the Indians in Canada. The Department of Indian Affairs has the management, charge and direction of Indian affairs. As already seen, no Indian is lawfully in possession of any land unless located with the approval of the Superintendent General. In matters of probate and letters of administration, the ordinary courts may grant probate only with the consent of the Superintendent General, and after probate no court has jurisdiction to make any disposition regarding any right or interest in land in a reserve except with the consent of the Superintendent General. By section 35, there is a machinery set up by the Act for the removal of trespassers, including Indians themselves. That section says that, if any Indian — and an *Indian* is defined as "any male person of Indian blood reputed to belong to a particular band" — is illegally in possession of any land on a reserve (and he is illegally in possession unless located in the manner above stated), the Superintendent General or such other officer or person as he deputes or authorizes, shall, on complaint made, and on proof of the fact to his satisfaction, issue a warrant commanding any literate person to remove from the said land any Indian illegally in possession of the same.

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The whole scheme of the Act seems to be to have all such matters dealt with exclusively by the Superintendent General or with his authorization, and to have all such matters controlled and administered by one central authority.

Read literally and by itself, section 106 seems to be out of harmony with this idea. It enacts that Indians... shall have 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.

But if this section is dealt with, not as an isolated section, but in conjunction with the Act as a whole, I think it must be held as was held by the late Mr. Justice Armour in the case of *Point v. Dibblee Construction Company* (1), that the section refers to a personal tort or wrong, such as an assault.

Anyhow, he adds, an action such as the present one (and it was an action for trespass) must, in view of the plaintiff's limited right of occupation and of the statutory provisions for the recovery of land and the removal of trespassers therefrom... be excepted from the rights of action given to Indians by this section.

Any other interpretation would lead to an impossible situation. While one dispossessor was having recourse to the Provincial courts, the other might complain to the Superintendent General and put in operation the machinery provided by section 35 of the Act, and there might be conflicting decisions, and certainly the intention of the Act is that the Superintendent General is the sole judge of such questions and that his authority should not be interfered with by the Provincial courts. If, after his order is made and the trespasser is removed, he returns to the land in question, the Superintendent General has the right to cause his arrest and imprisonment, and his judgment is, by section 38, declared to be final and not open to appeal or removal by *certiorari* or otherwise.

In my opinion, therefore, the Superior Court had no jurisdiction to deal with this matter and, even if it had, the judgment was unfounded and should in any event be set aside.

(1) 1934 O. R. 152.

I would, therefore, maintain the appeal and dismiss the plaintiff's action, with costs of both Courts.

Sir MATHIAS TELLIER. J'arrive à la même conclusion que mes collègues au sujet de la compétence des tribunaux ordinaires, relativement au cas particulier dont il s'agit.

Je ferais droit à l'appel, et, infirmant, rejetterais l'action, le tout avec dépens.

M. le juge RIVARD. Avant toute autre, doit être résolue la question de la compétence des tribunaux ordinaires, en l'occurrence de la Cour supérieure.

Les deux parties sont des *Indiens*, appartenant à la même *bande* ou tribu, et qui se disputent la possession d'un terrain faisant partie de la réserve de Caughnawaga.

La Loi des Indiens (R. S. C. 1927, chap. 98) s'applique à ce débat, qui tombe sous la juridiction définitive du surintendant général des affaires indiennes (art. 35 à 38). Ce dernier exerce, en pareille matière, un véritable pouvoir judiciaire, à l'exclusion des autorités de droit commun.

Par les motifs exposés par M. le juge St-Germain, dans ses notes, je ferais droit à l'appel et rejetterais l'action.

M. le juge ST-GERMAIN. L'honorable juge de première instance a rejeté ce moyen déclinatoire de la juridiction de la Cour supérieure, par les considérants suivants :

Considérant que la possession que les parties se disputent entre elles dépend de certains faits susceptibles d'être établis par une enquête, et qu'il appartient à l'autorité judiciaire, interprète de la loi, de statuer sur le caractère légal des faits possessoires prouvés devant elle;

Considérant que c'est à la Cour supérieure et non au pouvoir administratif qu'ils appartiennent de décider des questions de fait et de droit qui peuvent donner lieu au maintien ou au rejet d'une action possessoire, et qu'il est indifférent que cette dispute concerne ou non des Indiens ou des terres indiennes;

Considérant que le pouvoir administratif conféré au Département des affaires indiennes ne fait nullement obstacle à l'exercice de l'autorité judiciaire dans un conflit de cette nature-ci et qu'il n'y

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a pas lieu de s'arrêter au moyen que le défendeur invoque incidemment dans son mémoire pour décliner la juridiction de cette Cour;

Sur le mérite de la présente action, l'honorable juge de première instance en est venu à la conclusion que, d'après la preuve, le demandeur avait prouvé les allégations de sa déclaration, et que par ailleurs les moyens invoqués par le défendeur dans son plaidoyer tendaient plutôt à établir son titre de propriété relativement à ce lot, que ces moyens ne pouvaient être opposés à la demande au possesseur, et que partant, l'action du demandeur était bien fondée.

C'est ce jugement qui fait l'objet du présent appel.

Il convient d'examiner tout d'abord ce moyen déclinatoire soulevé par l'appelant, puisque ce n'est que dans le cas où il serait jugé mal fondé en droit qu'il y aurait lieu d'examiner le mérite de la présente action, que l'appelant conteste aussi d'ailleurs dans son mémoire.

Nous avons vu que l'honorable juge de première instance, pour déclarer que dans l'espèce, la Cour supérieure était compétente, s'était surtout basé sur la distinction qu'il y a à faire entre le pouvoir administratif et le pouvoir judiciaire: (*Supra*, p. 105).

Il n'y a aucun doute qu'il faut savoir distinguer entre le pouvoir administratif et le pouvoir judiciaire, mais en vertu de l'art. 91 de l'Acte de l'Amérique Britannique du Nord, il a été attribué exclusivement au Parlement du Canada de légiférer sur les Indiens et les terres réservées pour les Indiens, et par conséquent, le Parlement du Canada avait le pouvoir de légiférer relativement aux Indiens et aux terres réservées pour les Indiens, tant au point de vue administratif qu'au point de vue judiciaire, et ce, bien que par l'art. 92 dudit Acte de l'Amérique Britannique du Nord, l'administration de la justice dans chaque province, y compris la création, le maintien et l'organisation de tribunaux de justice pour chaque province, fût attribuée exclusivement à la législature dans chaque province.

Or, si nous examinons la Loi des Indiens, reproduite au chap. 98 des Statuts revisés du Canada (1927), nous

constatons que le législateur, non seulement a pourvu à l'administration des deniers et des terres réservées pour les Indiens, mais qu'il a aussi légiféré sur les droits civils des Indiens et qu'il a en même temps désigné l'autorité judiciaire à laquelle il y aurait lieu d'avoir recours, suivant le cas en litige.

Tout d'abord, mentionnons que le titre légal des terres réservées pour les Indiens est attribué à la Couronne, et ces terres sont administrées par le surintendant général des affaires indiennes.

Les Indiens d'une même réserve forment une bande ou un groupe d'Indiens qui possèdent en commun cette réserve dont le titre légal est aussi attribué à la Couronne, et ils participent également à la distribution d'annuités ou d'intérêts dont le Gouvernement du Canada est responsable.

La Loi détermine les cas où un Indien peut cesser d'être membre d'une bande, et aux termes de l'art. 18, le surintendant général peut, à toute époque, sur le rapport d'un fonctionnaire, ou d'une autre personne spécialement nommée par lui pour s'enquérir des faits, décider la question de savoir qui est ou qui n'est pas membre d'une bande d'Indiens en droit de participer à la propriété et aux annuités de la bande. La décision du surintendant général, en pareil cas, ajoute l'article, est définitive, sauf appel au Gouverneur en son conseil.

Voilà, il me semble, un premier cas où le législateur a confié au surintendant général des affaires indiennes des fonctions qui sont plus que des fonctions administratives, puisqu'il s'agit de décider, après enquête, si tel ou tel Indien a cessé ou non d'être membre d'une bande particulière.

Maintenant, relativement aux réserves affectées aux Indiens, le surintendant général peut autoriser l'arpentage d'aucune de ces réserves et sa subdivision en lots, en tout ou en partie, mais nul Indien n'est censé légalement en possession d'une terre dans une réserve, à moins que cette terre ne lui ait été ou ne lui soit attribuée par la bande ou par le conseil de la bande, avec l'approbation du surintendant général (art. 21) et lorsque le surintendant général approuve ainsi l'attribution.

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bution d'une terre, il émet un billet qui confère à cet Indien un titre d'occupation (art. 22).

Or aux termes de l'art. 35, si un Indien est illégalement en possession d'une terre située dans une réserve, le surintendant général, ou le fonctionnaire, ou la personne qu'il délègue ou autorise à cet effet, émet, sur plainte à lui faite, et *sur preuve des faits à sa satisfaction*, un mandat sous ses seing et sceau, adressé à toute personne sachant lire et écrire qui consent à agir en l'espèce et lui enjoignant d'expulser immédiatement dudit terrain tout tel Indien qui est ainsi illégalement en possession de ce terrain.

Voilà bien un second cas où non pas, cette fois, touchant le droit d'un Indien de faire partie d'une bande particulière, mais relativement à la légalité de la possession d'une terre, le surintendant général est encore appelé à exercer plus que des fonctions administratives, mais de véritables fonctions judiciaires, puisque, après enquête sur plainte à lui faite, il peut émettre un mandat pour expulser un Indien d'une terre que cet Indien occupe illégalement.

Suivant le même article, non seulement le surintendant général exerce ces fonctions judiciaires, dans le cas où c'est un Indien de la réserve qui est illégalement en possession d'une terre située dans cette réserve, mais même dans le cas où cette terre est illégalement occupée par tout autre individu, c'est-à-dire par toute autre personne soumise à la loi commune de la province dans laquelle est située la réserve.

Le législateur a aussi pourvu dans cette Loi concernant les Indiens au droit pour ces derniers de léguer par testament toute espèce de biens, de la même manière que les autres personnes, et voici ce que décrète l'art. 25 à ce sujet:

Les Indiens peuvent donner par testament ou léguer toute espèce de biens, de la même manière que les autres personnes.

2. Le testament portant disposition de terre ou d'intérêt dans la terre située dans une réserve ne peut avoir force d'exécution ni d'effet qu'après avoir été approuvé par le surintendant général, et si celui-ci refuse d'approuver un testament, l'Indien qui a fait le testament est réputé mort intestat; et le surintendant général peut approuver le testament généralement et refuser son approbation

à toute disposition testamentaire de terre ou d'intérêt dans une terre située dans une réserve; auquel cas le testament ainsi approuvé a son effet et exécution, à l'exception de la disposition non approuvée, à l'égard de laquelle l'Indien est réputé mort intestat relativement à la terre ou à l'intérêt auquel s'applique le refus d'approbation.

L'article 31 ajoute :

Celui qui réclame une terre ou quelque intérêt dans une terre située dans une réserve, à titre de légataire ou d'héritier d'un Indien décédé, n'est pas censé en avoir légalement possession ni en être le possesseur reconnu tant qu'il n'a pas obtenu du surintendant général un billet d'occupation.

Puis l'article 32 décrète :

Le surintendant général peut décider toute question qui s'élève sous le régime de la présente partie, au sujet du partage, entre les ayants droit, des biens d'un Indien décédé, et il est seul et unique juge du titre d'ayant droit.

N'est-ce pas là encore une attribution de pouvoir judiciaire conféré au surintendant pour juger des droits des héritiers quant aux biens d'un Indien décédé?

Enfin l'article 33, qui est le dernier des articles relativement au droit d'héritage, est dans les termes suivants :

Par dérogation à toute disposition de la présente partie, il est loisible aux cours compétentes en cette matière, dans le cas de personnes autres que les Indiens, avec le consentement du surintendant général, mais non sans ce consentement, d'accorder l'homologation des testaments des Indiens, et de délivrer des lettres d'administration pour les biens et effets des Indiens décédés intestat; auquel cas ces cours et les exécuteurs testamentaires et les administrateurs qui obtiennent l'homologation, ou sont nommés par lettres, ont la même compétence et les mêmes attributions que dans les autres cas; excepté qu'il ne peut se faire, sans le consentement du surintendant général, aucune alienation de droit ni d'intérêt dans une terre d'une réserve ou dans une propriété pour laquelle un Indien est exempt de taxes en vertu des dispositions de la présente partie.

Si le législateur a cru qu'il fallait une disposition spéciale pour donner aux tribunaux de droit commun juridiction aux fins d'accorder l'homologation des testaments et de délivrer des lettres d'administration pour les biens et effets des Indiens décédés intestat, c'est donc qu'il a considéré que les Indiens, à moins de dispositions spéciales, étaient soustraits à la juridiction des tribunaux établis dans chaque province. De plus, le fait qu'il prend la peine de mentionner que les admi-

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nistrateurs qui sont nommés par les lettres d'administration, tout en ayant les mêmes attributs que les autres administrateurs, ne pourront cependant, sans le consentement du surintendant général, faire aucune aliénation de droit ni d'intérêt dans une terre d'une réserve indienne, démontre bien ici encore que d'après l'économie de cette loi, toute l'autorité quant à la possession ou quant à l'aliénation, soit par testament ou autrement, d'une terre faisant partie d'une réserve indienne, réside exclusivement dans la personne du surintendant général des affaires indiennes.

Ladite loi pourvoit par ailleurs au cas où toute autre personne qu'un Indien retient la possession de terres réservées pour les Indiens. Dans ce cas, s'il s'agit de réclamer la possession d'aucune de ces terres, une instance peut être formée par Sa Majesté, au nom des Indiens, ou de l'Indien de la bande ou tribu d'Indiens, qui en revendiquent la possession, et la Cour compétente pour connaître cette action est la Cour de l'Echiquier du Canada, qui est une Cour fédérale et non provinciale.

Aux articles 55 et s. de cette loi concernant les Indiens il est pourvu à la vente et cession des terres des Indiens, et l'art. 55 décrète que tout certificat de vente donné par le surintendant général, tant que la vente à laquelle se rapporte ce certificat est valable et non rescindée, donne droit à l'individu à qui il est délivré, ou à son cessionnaire, de prendre possession du terrain désigné et de l'occuper, conformément aux dispositions de la vente et, ajoute l'article, à moins que cette vente n'ait été révoquée ou annulée, de soutenir, en vertu de ce titre, des actions et poursuites contre un auteur de dommages ou un violateur de droit de propriété, tout comme il pourrait le faire en vertu de lettres patentes de la Couronne.

Voilà, suivant mon humble avis, un autre article qui démontre encore que le recours aux tribunaux de droit commun, relativement aux terres des Indiens, n'a lieu que dans des cas particuliers, et le législateur, par cet article, a accordé ce recours à toutes personnes (et le mot « personne » dans la loi exclut le mot « Indien »)

à toute personne qui a obtenu un certificat de vente du surintendant, aussi longtemps que ce certificat n'a pas été annulé. C'est donc, encore une fois, que le législateur considérait qu'à moins d'une disposition spéciale, ce porteur de certificat de vente n'aurait pas pu faire valoir son droit de propriété concernant les terres faisant l'objet du certificat devant les tribunaux de droit commun, s'il n'y avait été ainsi pourvu.

Au reste, il suffit, je crois, de se référer aux art. 105 et s. de ladite loi concernant les Indiens, sous le titre de *Droits légaux des Indiens*, pour se rendre compte exactement des droits que les Indiens peuvent exercer en leur nom devant les tribunaux provinciaux, aussi longtemps qu'ils n'ont pas été émancipés, tel que pourvu par ladite loi. Voici en effet ce que déclare l'art. 106:

Les Indiens et les Indiens non soumis au régime d'un traité ont le droit d'intenter des actions en recouvrement de leurs créances ou en réparation des torts qu'ils ont subis, ou pour obtenir l'exécution des engagements contractés envers eux.

Indians and non-treaty Indians shall have the right to sue for debts due 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.

Il est bien évident que si le législateur avait voulu laisser aux Indiens tous les recours de droit que possède toute autre personne, il n'aurait pas pris la peine de limiter la nature des actions que ces Indiens pouvaient instituer, et si nous considérons les pouvoirs ci-dessus mentionnés accordés aussi bien au surintendant général des affaires indiennes qu'à la Cour de l'Echiquier, concernant les conflits qui peuvent se soulever quant au droit de possession des terres réservées aux Indiens, il n'y a aucun doute, suivant mon humble avis, et avec le plus grand respect pour l'honorable juge de première instance, que le législateur n'a pas voulu donner juridiction aux tribunaux provinciaux pour la décision de ces litiges. C'est d'ailleurs ce qui a été décidé dans une cause de *Point v. Dibblee Construction Company & al* (1). Voici comment s'exprime l'hon. juge Armour dans cette cause:

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Sections 34, 35, 115 and 116 afford summary methods of dealing with persons who trespass on or occupy or use land in a reserve ...

Enfin, aux termes de l'art. 110 de ladite loi, ce n'est qu'après qu'un Indien d'une bande a été émancipé qu'il peut jouir de tous les droits des autres sujets de Sa Majesté; jusque là, cet Indien n'a que les droits très limités qui lui sont accordés par le Statut. Voici comment se lit le paragraphe 5 de cet article:

Sur le rapport du surintendant général qu'un Indien ou une Indienne, âgé ou âgée de plus de vingt et un ans, est qualifié pour être admis ou admise à jouir des droits ou priviléges de citoyen, le Gouverneur en conseil peut par arrêté, enjoindre que cet Indien ou cette Indienne soit admise à cette jouissance à l'expiration de deux ans à compter de la date de cet arrêté, ou plus tôt si cet Indien ou cette Indienne lui en fait la demande; et à partir de la date de cette admission, les dispositions de la présente loi ou de tout autre acte ou loi établissant une distinction entre les droits, priviléges, incapacités et obligations légales des Indiens et ceux des autres sujets de Sa Majesté, cessent de s'appliquer à cet Indien ou à cette Indienne ou à ses enfants mineurs non mariés, ou, s'il s'agit d'un Indien marié, à l'épouse de cet Indien, et cet Indien, cet enfant et cette épouse ont et possèdent désormais tous les pouvoirs, droits et priviléges légaux des autres sujets de Sa Majesté, et en jouissent, et ne sont plus censés être des Indiens au sens de toutes lois relatives aux Indiens.

Il ressort des différents articles auxquels nous avons ci-dessus renvoyé que non seulement le législateur a légiféré sur les pouvoirs administratifs, mais bien aussi sur les pouvoirs judiciaires relativement aux Indiens et aux terres réservées aux Indiens, et d'après ces articles, la Cour supérieure n'avait pas, suivant mon humble avis, juridiction pour entendre et décider la cause de ces deux Indiens d'une même réserve, se disputant la possession légale d'une terre faisant partie de la réserve de Caughnawaga.

En arrivant à cette conclusion, il n'y a pas lieu conséquemment d'examiner le mérite de la cause; j'accueillerais donc l'appel et rejetteerais l'action du demandeur intimé, sur l'unique moyen du défaut de juridiction de la Cour supérieure, *ratione materiae*.

de l'accident, il se trouve en vertu de la convention, la responsabilité se déplace et n'incombe qu'au second commettant (1).

Par ces motifs, le Tribunal déboute la demanderesse de son action avec dépens.

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Un Indien qui obtient un jugement en dommages-intérêts contre un autre Indien peut, avec l'autorisation de son avocat, pratiquer une saisie-arrêt pour les dépens.

Saisie-arrêt après jugement émise pour des dépens (\$259.20).

Motifs du jugement: Considérant que la présente saisie-arrêt qui fait l'objet du présent litige est née d'une action principale en recouvrement de dommages-intérêts originiairement intentée par James Delorimier, de race indienne, contre John Delorimier et Louis Delorimier, également de race indienne, action légalisée par le chapitre 98 des Statuts revisés du Canada, 1927, art. 106 de ce chapitre, lequel édicte que « les Indiens et les Indiens non soumis au régime d'un traité, ont le droit d'intenter des actions en recouvrement de leurs créances ou en réparation de torts qu'ils ont subis, ou pour obtenir l'exécution des engagements contractés envers eux », action principale qui aurait été maintenue, par cette Cour, avec dépens, lesquels sont actuellement, en vertu de la présente saisie-arrêt après

M. le juge Mercier.—No 116.468.—Boyer et Simard, pour le demandeur.—Mercier, Blain et Fauteux, pour les défendeurs.

(1) *Gazette du Palais*, 1922. 1. 655; D. P. 88. 2. 310; D. P. 25. 1. 134; D. P. 28. 1. 17; 59 D. L. R. 445.

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jugement, réclamés aux défendeurs, par le demandeur, et ce, après avoir été régulièrement taxés à toutes fins que de droit, les procureurs du demandeur ayant préalablement autorisé ledit demandeur à exécuter, en son nom personnel, quant aux frais en dépendant, le jugement rendu, en sa faveur, sur l'action principale;

Considérant que la seule question légale qui se présente est de savoir si le demandeur principal qui est un Indien peut prendre une saisie-arrêt après jugement ou une exécution quelconque contre les défendeurs qui sont également Indiens, aux fins d'assurer la rentrée des frais auxquels ont été condamnés, en son action, les défendeurs, frais dont le demandeur, Indien, est redevable à ses procureurs *ad litem*, et ce, en exerçant les droits que ces procureurs, avocats distrayants, lui ont transportés, frais, que les défendeurs, Indiens, ont été condamnés à payer au demandeur, Indien, à la suite de l'action en dommages que ce dernier a intentée contre eux, également de race indienne;

Considérant que s'il est un cas où l'axiome : « L'accessoire suit le principal », doit recevoir son application, c'est bien le présent cas;

Considérant que l'interprétation qu'a donnée le juge de première instance de l'article 106 ci-dessus mentionné, en maintenant l'action principale mise entre deux personnes de race indienne, ne peut être discutable en face des termes précis de cet article 106; que si cet article est applicable quant au principal, il ne doit pas l'être moins quant à l'accessoire qui découle absolument de ce principal, et ce, d'autant plus que cet accessoire est la conséquence absolue de l'exercice du droit principal; que ce serait, non seulement un nonsens, mais une hérésie légale de refuser à ce demandeur, de race indienne, l'exécution, quant aux frais, d'un jugement qu'il aurait obtenu, à la suite de son action, et dont il serait débiteur envers ses procureurs, contre des personnes, de race indienne, défenderesses dans cette action, alors que le législateur lui donne le droit d'exercer, en pareil cas, cette action contre ses frères Indiens;

Considérant qu'en d'autres termes, permettre à un Indien de poursuivre un autre Indien, et d'employer, à cette fin, des avocats, et lui refuser de se servir des moyens que la loi met à sa disposition pour se faire payer, non seulement la somme capitale et les frais qui en dépendent, et dont il est absolument comptable envers ses procureurs, nonobstant la distraction de ces frais que la loi accorde à ces derniers, serait méconnaître l'intention du législateur et frustrer les droits que le chapitre 98: « Loi concernant les Indiens » lui accorde, par et en vertu dudit article 106 de ce chapitre; que ce serait, en fin de compte, donner et retenir, et, partant, concéder des avantages et les anéantir, ce qui répugne au bon sens et à une saine raison juridique;

Considérant que le fait que les procureurs du demandeur de race indienne seraient, en l'espèce, de race blanche, ne pent constituer une fin de non-recevoir à l'exercice du droit qu'exerce actuellement le demandeur, avec l'autorisation spéciale de ses procureurs, conformément aux dispositions de l'article 555 du Code de procédure civile, et ce nonobstant le *proviso* que contient cet article, lequel *proviso* ne peut être, en l'espèce et dans les circonstances, invoqué par les défendeurs de race indienne, ces défendeurs étant les débiteurs personnels d'un créancier, de race indienne, de ces frais, comme ils le sont, d'ailleurs, du capital de la condamnation prononcée contre eux par la Cour saisie de l'action principale;

Considérant que la Cour est, cependant, disposée à admettre que le *proviso* en question pourrait, par exemple, être invoqué par les défendeurs dans le cas où les procureurs du demandeur seraient endettés, envers eux, en une *somme claire et liquide* plus considérable, ou équivalente, ou même moindre que celle que représentent les frais en question, les défendeurs pouvant, en pareil cas, opposer, en compensation, leur créance, à celle que représente le montant desdits frais, toutes choses que les défendeurs n'invoquent pas en leurs contestation et qui, de fait, n'existent pas;

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général
des affaires
indiennes
et un Autre.

Considérant que le fait que les procureurs du demandeur ont droit, en vertu dudit article 553 C. P. qui est de droit nouveau, à la distraction de leurs frais aux fins d'en contrôler eux-mêmes la perception, ce fait seul n'exclut pas le droit de ces derniers, s'ils le jugent à propos, d'autoriser, tel que le leur permet l'article 555 ci-dessus mentionné, leur client ou mandant à qui les frais en cette cause ont été accordés par le jugement de la Cour, à percevoir lui-même le montant de ces frais par voie de bref de saisie-arrêt après jugement ou par voie d'exécution de *bonis et de terris*, si besoin est, ce qui a été légalement pratiqué, en la présente cause, par voie d'une saisie-arrêt après jugement, émise sur le *fiat* des procureurs du demandeur, autorisant spécialement ce dernier à ainsi procéder, en son nom personnel, au recouvrement des frais en question, le demandeur, en ce cas, ne faisant que réclamer, de ses frères indiens, le montant des frais auxquels ils ont été condamnés en vertu du jugement rendu, en sa faveur, sur l'action principale;

Considérant, ainsi qu'il est dit ci-dessus, que l'exception tirée du fait que les procureurs du demandeur sont de race blanche, ne peut, dans les circonstances, valoir pour la raison que le demandeur, de race indienne, ne fait, sur la présente saisie-arrêt, que continuer l'exercice du droit qu'il a exercé en vertu de l'action principale, et ne donne, par conséquent, qu'effet juridique au jugement que la Cour supérieure a rendu, en sa faveur, sur cette action principale;

Considérant, d'abondant, que la distraction de frais, accordée aux procureurs *ad litem*, ne leur a été accordée en vertu de l'article 553 que pour les protéger contre tous arrangements que les parties pourraient faire à leur préjudice, ainsi que l'ont décidé, d'ailleurs, les tribunaux et, plus spécialement, celui saisi de la cause de *Sheffer v. Demers et Paré* (1); que, de fait, cette distraction de frais n'empêche pas l'avocat distrayant de renoncer aux droits que lui confère cette distraction, et ne lui enlève pas, non plus, le droit que

(1) 3 R. de J. 371.

lui octroie l'article 555 d'autoriser son client à exécuter, au nom personnel de ce dernier, quant à ces frais, le jugement dont ces frais relèvent;

Considérant, au surplus, que poser et sanctionner le principe qu'un avocat de race blanche qui met ses services professionnels à la disposition d'un Indien dans une action que ce dernier intente légalement contre un autre Indien, ne peut recouvrer de cet Indien, par voie judiciaire, le coût de ces services professionnels, serait priver effectivement la race indienne des services de l'homme de loi, soit au civil, soit au criminel, et ainsi exposer la race indienne à de graves préjudices, ce que la loi concernant les Indiens n'a jamais eu en vue, chose qui serait, d'ailleurs, diamétralement opposée au but de cette loi qui n'a été édictée qu'en vue de la protection de la race indienne;

Considérant qu'il résulte des considérants ci-dessus que la contestation de ladite saisie-arrêt, par les défendeurs, est mal fondée en fait et en droit et qu'elle doit être rejetée à toutes fins que de droit.

En conséquence, la Cour maintient la saisie-arrêt après jugement intentée par le demandeur contre les défendeurs; la déclare valable en loi et rejette la contestation des défendeurs, avec dépens.

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Delorimier
v.
Delorimier
et un Autre
et
Surintendant
général
des affaires
indiennes
et un Autre.

COUSINEAU v. VAILLANCOURT.

Montréal
—
1936
—
14 mars.

*Louage de choses — Logement — Chose indivisible
Locataires conjoints — Solidarité — C. C., art.
1105, 1601 et s.*

Lorsqu'un logement a été loué indivisément à plusieurs personnes, elles sont tenues solidairement responsables du loyer.

Poursuite en recouvrement de loyer (\$69).

Jugement: Le 18 mars 1933, le demandeur a loué au défendeur et à son frère, Eugène Vaillancourt, un

M. le juge Magnan.—Cour de circuit du district de Montréal.
No 14.447.—Mercier et Cousineau, pour le demandeur.—F.-Eugène Therrien, pour le défendeur.

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Ville de
Saint-Jérôme
v.
Carreau.

Considérant qu'il a été établi que le compte réclamé par les Soeurs de l'hospice de St-Jérôme est loin d'être exagéré;

Considérant que la demanderesse n'a fait que son devoir dans la limite de ses pouvoirs, en payant pour le défendeur, à l'avantage de sa famille, la somme de \$375, due à l'hospice de St-Jérôme, pour la famille du défendeur;

Considérant que la ville de St-Jérôme a accepté le solde du compte au montant de \$45 dû encore pour la famille du défendeur à l'hospice de Saint-Jérôme et que partant elle s'en est rendue responsable;

Jugement pour \$420.

Montreal

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1940
November 30.

DIABO v. Dame RICE.

Indians — Seizure of an immoveable — Nullity — Jurisdiction — Judgment not susceptible of execution — Indian Act (R. S. C. 1927, ch. 98), arts. 4, 6, 21, 23, 27, 106 — British North America Act (1867, 30-31 Vict. ch. 3), art. 91, par. 24 — C. P., arts. 541, 778 to 783.

An immoveable property on an Indian Reserve and belonging to the estate of a deceased Indian cannot be seized in satisfaction of a judgment rendered against his widow. An opposition to the seizure should be maintained. A judgment of the Court ordering the sale to proceed would not be susceptible of execution and furthermore, the Superior Court is without jurisdiction *ratione materiae* to order such a sale.

OPPOSITION to the seizure of an immoveable property.

Reasons for judgment : Considering that it is in proof and is admitted that the parties hereto are Indians belonging to the Caughnawaga Indian Reserve; that the immoveable property, the seizure and sale of which is opposed herein, is an immoveable property situated on an Indian Reserve, to wit, in the Indian Reserve of Caughnawaga; that the immoveable property seized herein belonged to the late Gordon Diabo, first husband of the present opposant, who died intestate on January 24, 1930; it is also in evidence (see deposition of Mr. François Brisebois, Indian Agent in Caughnawaga) that the property under seizure belongs to the estate of the late Gordon Diabo in which the opposant Ida Rice has a one-third interest, the other two-thirds interest belonging to Eunice Diabo, minor child of Ida Rice;

Mr. Justice Joseph Archambault. — No. A-120,920. — Boyer and Coderre, for plaintiff. — Asselin, Crankshaw, Gingras, and Trudel (*Norman Saylor*), for opposant.

Considering, therefore, that the property under seizure being immovable property situated on an Indian Reserve, the provisions of the Indian Act, R. S. C. 1927, ch. 98, apply in the present matter. Articles 4 and 6 of the Indian Act state that the Superintendent of Indian Affairs shall have the control and management of the lands and property of the Indians in Canada.

Articles 21 and 23 of the above mentioned Act state who shall be deemed to be lawfully in possession of land in a Reserve and that a ticket granting a location title will be issued by the Superintendent General. Article 23 of the said Act enacts that the conferring of any such location title shall not have the effect of rendering the land covered thereby subject to seizure under legal process, and such title shall be transferable only to an Indian of the same band and then only with the consent and approval of the Superintendent General.

Considering that art. 91, par. 24, of the B. N. A. Act, places Indians and lands reserved for Indians within the exclusive legislative authority of the Parliament of Canada — *St. Catherines Milling & Lumber Co. v. The Queen*, per Lord Watson (1); *Tennant v. Union Bank of Canada* (2); and therefore, the Indian Act differs essentially from the law of this province and is of paramount authority, being Dominion legislation;

Considering that a sheriff's sale is a contract and is subject to the rules of the contract of sale, in other words, the sheriff has to have legal title to any property he proposes to sell, before he can convey the sale to any *adjudicataire*. In face of the provisions of the Indian Act, it is absolutely impossible for the sheriff of Montreal to convey any title of property on an Indian Reserve unless he has the approval and consent of the Superintendent General of Indian Affairs. Any sale of the property under seizure would be a violation of the provisions of the Indian Act. It is, therefore, impossible to give any legal effect to the sheriff's sale as required by arts. 778 to 783 C. P. If this Court ordered the sale of the property herein to be proceeded with, such judgment would virtually mean that the Superior Court recognized the right of the sheriff to sell property on an Indian Reserve without complying with the formalities and requirements demanded by said public Act;

Considering, furthermore, that any judgment of this Court ordering the sale to proceed would not be susceptible of execution and would not comply with art. 541 C. P. which reads:

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v.
Dame Rice.

(1) (1889) 14 A. C. 31. (2) [1894] A. C. 31.

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Every judgment must mention the cause of action and must be susceptible of execution.

Considering, furthermore, that the Superior Court of the Province of Quebec has no jurisdiction *ratione materiae* to hear and adjudge and order the sale of the property under seizure to proceed, *Delorimier v. Cross* (1); *Montour v. Diabo*, S. C. Montreal, No. B-109,735, March 1, 1934, Desaulniers J.;

Considering that in virtue of the provisions of the Indian Act, the opposant Ida Rice has the administration and charge of the property of her minor child and she not only has the right but also the obligation to protect the rights and property of her minor child; such right and obligation are apparent from art. 27, par. 1, of the Indian Act and, therefore, in making the present opposition, she does not plead the rights of others, her minor child being entitled to two-thirds and herself one-third of the property;

Considering that the decision in *Doré v. Perron* (2), does not apply in the present case, because although the opposition does not allege prejudice, prejudice has been proved. The case of *Security Loan Syndicate v. Liedermann* (3) does not apply also in the present case because the opposant had no rights whatsoever in the property seized:

Considering also that there is no *chose jugée* in the judgment rendered by Mr. Justice Mackinnon on May 2, 1934, because that judgment was a condemnation against Ida Rice personally and was based on a certain agreement, and art. 105 of the Indian Act makes an exception which permits the Indians to sue for debts due to them or in respect to any tort or wrong inflicted upon them or to compel the performance of obligations contracted with them;

Point v. Dibblee Construction Co. (4). Furthermore, although the plea of defendant in the original action seemed to raise the same points as the ones raised in the opposition, the defendant seems to have abandoned these points at trial because the agent of the Indian Affairs was not brought in as a witness and the judgment of Mr. Justice Mackinnon does not deal with these points but simply states that the proof has been made that the defendant owed the sum claimed by the plaintiff;

Opposition maintained.

(1) (1937) 62 K. B. 98.

(4) [1934] O. R. 142, 152 or

(2) (1931) 35 P. R. 242.

[1934], 2 D. L. R. 785.

(3) (1929) 67 S. C. 142.

Montreal FELDMAN v. JOCKS, *Defendant and Opposant.*

1935

November 20. *Exemption from seizure — Indians — Moveable property outside of the Reserve — Automobile Repairs — Seizure — Taxation — Indian Act (R. S. C., 1927, c. 98), arts. 102, 105, 108 — Motor Vehicles Act (R. S. Q., 1925, c. 35), arts. 3, 14.*

Only goods of an Indian which are subject to taxation can be seized. The fees paid for the registration of a motor vehicle and for the licence or permit to drive it are not taxes within the meaning of the Indian Act.

The automobile of an Indian which is outside of the Reserve (Caughnawaga) and is there merely for the purpose of some temporary repairs is not personal property held "outside of the reserve" and is not subject to seizure by a judgment creditor.

Opposition to the seizure of an automobile. The opposant is an Indian domiciled in the Reserve of Caughnawaga where he has always lived. He owned an automobile which he had driven from Caughnawaga to have certain repairs done to it. His vehicle was seized in Montreal.

Reasons of the judgment: The whole difficulty in the present case centres upon the interpretation of sections 102, 105 and 108 of the Revised Statutes of Canada, being the Indian Act, cap. 98. Sec. 102, in part, reads as follows:

No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property unless he holds in his individual right real estate under a lease or in fee simple, or personal property outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate.

This provision presents no particular difficulty. No real or personal property owned by an Indian and situated within the territorial limits of the Reserve,

is subject to be taxed with respect to that property, real or personal. If, however, he owns real and personal property situate outside the Reserve, and subject to taxation, he may be taxed for that property at the same rate as others, not Indians, may be taxed for like property situate in the same locality.

Sec. 105, which has for its caption, "Legal Rights of Indians", makes the following provision:

No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three preceding sections: provided that any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price remaining unpaid.

This section is also free from difficulty. Even an Indian may validly pledge goods which he bought for any amount due on their purchase price to the vendor of the goods:

At the argument at Bar it was frankly admitted, that if instead of an automobile the plaintiff had seized a horse and carriage, the property of the defendant opposant, under similar circumstances, the opposition to that seizure would and must be maintained. The reasons relied upon by the plaintiff in support of the contestation of the opposition are:

- a) That the automobile was seized at a time when it was not within the territorial limits of the Indian Caughnawaga Reserve;
- b) Because the defendant opposant when he purchased the automobile was obliged to pay to the Government of the Province of Quebec under a Statute a certain amount as owner's registration fee, and another amount, in order to obtain a permit to operate or drive the machine within the limits of the Province of Quebec.

So far as the first reason is concerned, I am against the plaintiff's pretension. The wording of the clause with respect to the situation or situs of property is,

Unless he holds in his individual right real estate under a lease or in fee simple or personal property outside of the Reserve.

In this case, as has been already said, this automobile was accidentally and temporarily off and outside of the territory of the Reserve, and was there merely for the purpose of some temporary repairs. The owner of the car, the opposant, had the intention

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of returning the car to his garage within the territory of the Reservation, and I declare and hold, that that automobile was not personal property held by the opposant "outside of the Reserve".

As to the second ground (b): No tax was imposed by any Government or any authority upon the automobile itself. Sec. 3 of the Act requires that registration of a motor vehicle shall be applied for by the owner by following the formalities prescribed and by paying the required amount of fees, and upon that application and the payment of the required fees the owner shall obtain a certificate to the effect that he is the owner. The purpose of the registration is to give publicity to the ownership of a machine, which in its operation may be dangerous. This, I repeat, is not a tax on property as contemplated by sec. 102 of the Indian Act.

Moreover, after that owner has registered his ownership and obtained his certificate, he must do something else before he may use his newly acquired car; he must get a license or permit. Sec. 14 of the Motor Vehicles Act says, in part:

The license or the permit shall be applied for by following the formalities prescribed and by paying the required amount of fees, and it shall be granted upon the approval of the proper authority and be established by a certificate issued.

This is the owner's permit or license to drive his car. If a person who is not the owner wishes to obtain a license to drive a car, he applies to the proper authority for a driver's license, and he gets one, if he is qualified and pays a license fee of \$5. Neither of these, the owner's license to drive his car, nor a chauffeur's license to operate another car, is a tax, within the meaning of the Indian Act.

Plaintiff's counsel has made reference to a case decided by Mr. Justice Philippe Demers in 1929 (1). In that case a certain amount of money was deposited to the credit of an Indian in a Bank doing business outside the Indian Reserve where the Indian,

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to whose credit the deposit was made, lived. A judgment creditor of the Indian sought to attach the amount in satisfaction of a judgment against the Indian. The judgment debtor, the Indian, contested the seizure and urged that under the Indian Act the seizure was illegal. In a very short judgment the learned judge said:

I am called upon to decide in the present case if a deposit in a Bank at Valleyfield belonging to a Cayungan Indian can be seized under Art. 103 of the Indian Act, wherein it is decreed that only goods of an Indian which are subject to taxation can be seized.

The learned judge quotes the section 102, which I have already quoted, and he concludes that the expression "subject to taxation" means, subject to taxation in virtue of existing laws and not in virtue of laws that may be adopted.

He also adds, that the Indian Act has in view ordinary taxes, such as municipal and school taxes; he further adds, that the closing words of the sec. 102 carry out his view, and since a deposit in a bank is free from any tax, it is not seizable; but he adds, which is of some importance, that a bank deposit is a credit, an incorporeal right, and from its very nature it has no situs. If it had one, he says, it would certainly be the domicile of the creditor of the deposit. The concluding words of his judgment are:

I am of opinion that the Art. 102 has in view only a tax on immovable and corporal moveables situated without the territorial limits of the reserve.

And he quashed the seizure.

Another case to which reference was made is that of *Simkevitz v. Thompson and Glenwalter Cheese Factory*, Tiers-saisie. In this case an Indian, a member of the St. Regis band of Indians, and living on a Reserve, sent his milk to a factory outside to be made into cheese; when the cheese was manufactured it was sold by the cheese factory, the tiers-saisie, and

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factory by garnishee or saisie arret proceedings. It was contested, and Mr. Justice Little, a county judge in Ontario gave a judgment. He held, that this money could not be seized. In part he said:

Under the law as it stands at the present time a judgment may be obtained against an Indian for debt, but when the judgment creditor seeks to obtain the fruits of his judgment, he is confronted by sec. 102 of the Indian Act, which limits the property of the Indian which is exigible, to such real or personal property as is the subject of taxation under the pertinent applicable section of the Indian Act.

In that case the whole argument or difficulty seemed to have been, whether the milk money, as it was called, was a part of the Indian's income or not. Upon the whole the judgment went in favor of the Indian, and the attachment was quashed.

I was also asked to look at the case of *Avery v. Cayuga* (1). In that case it was held, that money deposited to his own credit beyond the Indian reserve by an unenfranchised Indian living on a Reserve, is subject to garnishment as personal property outside of the Reserve, and not within the prohibition sec. 102 of the Indian Act as to liens. Meredith, Chief Justice, gave the judgment of the Court and in part said:

The questions for decision are, (1) whether this deposit is personal property outside of the reserve within the meaning of sec. 99 of the Indian Act; and (2) whether it is property within the exception mentioned in sec. 102 of the Act.

He then quotes sec. 99, which corresponds to sec. 102 in the Revised Statutes of 1927. That section I have already quoted; and he holds, that the deposit is property outside of the Reserve within the meaning of sec. 99, and he quotes authority. As to the second question he says it depends on the meaning of the exception expressed in the words, "except on the real or personal property subject to taxation under the last preceding three sections". The conclusion reached was, that the deposit was seizable. I am unable to agree with this holding, but fortunately,

t is not necessary for the purpose of this case to enter a respectful dissent from it. The learned judge found that a deposit was personal property owned by the Indian and situate beyond the Reserve, within the meaning of sec. 102. In the present case I hold, that the automobile seized was the personal property of the Indian, having its situs within the territorial limits of the Reserve, and was not taxed or made the subject of any taxation, and I will maintain the opposition to the seizure.

Considering that when the automobile in question was seized it was not personal property held by the owner, the opposant, outside of the Reserve on which the defendant lived and had always lived;

Considering that the circumstances under which the roof reveals the automobile, on the 3rd of May, 1934, was in the City of Montreal, does not amount to the holding of personal property outside the Indian Reserve of Caughnawaga;

Considering, moreover, that the automobile was not subject or liable to taxation within the true meaning and construction of the Indian Act;

Considering the defendant's opposition is well founded and should be maintained, and the contestation is unfounded in fact and in law;

Opposition maintained.

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anee which shall be certified to remain due to them in respect of such purchase money and interest and costs.'"

I have no doubt that if words comparable to the above were in the petitioner's judgment they would not have been in a position to issue a writ of *fieri facias* without leave. But their personal judgment, which I have quoted earlier, is unconditional. The present respondent did not choose to exercise his remedy by way of appeal.

The share certificates were in fact deposited in Court as exhibits and remain there. I am not impressed by the argument that the petitioners are not in a position now to deliver shares of a company in good standing. For one thing the respondent could easily have brought the company up to date. Perhaps more important is the fact that the share structure of the company was of little or no use to the respondent, as he had already taken possession of (and still has) all the assets of the company when he made his small down payment.

I hold that no leave was necessary to issue the writ of *fieri facias* as it was based on a personal judgment which had not been appealed. The second objection falls with the first, as the petitioners have an unequivocal dollars and cents judgment, and the fact that it originated from a claim for specific performance does not affect its validity as a debt on which bankruptcy may be founded.

Costs to the petitioners.

GEOFFRIES v. WILLIAMS (alias WELL)

Vancouver County Court, British Columbia, Swencisky Co.Ct.J.
September 16, 1958.

Indians—Garnishment I B, D—

Whether garnishment lies against Reservation Indian with respect to debt owed latter—Indian Act (Can.), ss. 87, 88(1)—Since the enactment in 1951 [c. 29] of s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, a debt owing to a Reservation Indian is subject to attachment in garnishment proceedings brought by his judgment creditor and this is so in spite of s. 88(1) of the Act which provides that "subject to this Act, the real and personal property of an Indian situated on a reserve is not subject to attachment". The 1951 amendment provides that "all laws of general application in any province are applicable to Indians in the province, except to the extent that such laws are inconsistent with [the Indian] Act" and, as a result, the British Columbia *Attachment of Debts Act*, R.S.B.C. 1948, c. 20, under which the garnishment proceedings were brought, is applicable to Reservation Indians, and their property, in the absence of any specific exemption in the *Indian Act*. Semble, also, that as the debt owing to the Indian, which was the subject of the garnishment, was an ordinary debt, its *situs* was the residence of the debtor and consequently was not "personal property situated on a reserve" within the provisions of s. 88(1). [Armstrong Growers' Ass'n v. Harris, [1924], 1 D.L.R. 1043, 1 W.W.R. 729, 33 B.C.R. 285, expld & distd]

APPLICATION for payment out of monies paid into Court pursuant to garnishing order.

J. R. Nicholson, for plaintiff.

H. G. Castillon, for defendant.

SWENCKSKY Co.Ct.J.:—The facts are that the defendant is an Indian and member of the Squamish Band. He felled and bucked a quantity of timber on the Cheakamus Indian Reserve pursuant to a permit duly issued. He entered into an agreement to sell to R. & H. Rustad Logging Co. Ltd. of 1115 West Pender St., Vancouver, B.C., the felled and bucked sawlogs estimated at 1,500,000 ft. board measure. The plaintiff obtained a judgment against the defendant and issued a garnishing order against R. & H. Rustad Logging Co., which paid the money involved into Court.

An application was made before me in Chambers for an order for payment out to the plaintiff of monies paid into Court by R. & H. Rustad Logging Co., pursuant to the terms of a garnishing order after judgment.

The defendant opposes the application on the ground that the money owing by R. & H. Rustad Logging Co. to the defendant was "personal property of an Indian or a band situated on a reserve" within the meaning of that expression as found in s. 88(1) of the *Indian Act*, R.S.C. 1952, c. 149, which reads as follows: "88(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian" and by reason thereof is not subject to attachment.

Counsel for the defendant relies very largely on the decision of our Court of Appeal in *Armstrong Growers' Ass'n v. Harris*, [1924] 1 D.L.R. 1043, 33 B.C.R. 285. It will be necessary to examine this decision carefully and the amendments that were made to the *Indian Act* subsequent to the above decision. The Court consisted of Macdonald C.J.A., Martin, Galliher and McPhillips J.J.A. It is to be noted that Galliher J.A. based his decision on the technical ground that the person named as garnishee was improperly described. His decision is therefore of no help on the question before me. Martin J.A. dissented from the majority decision and would have allowed the appeal. His judgment is consequently directly in favour of the plaintiff in the case before me. Macdonald C.J.A. at p. 1044 D.L.R., p. 287 B.C.R. says: "The wheat while on the Reserve would not, I think, be subject to taxation, nor to process of execution, and I am of opinion that the language of the Act does not render the proceeds of it subject to taxation." If the *Indian Act* had not meanwhile been amended, then such judgment

would clearly support the position taken by the defendant. McPhillips J.A. at p. 1046 D.L.R., p. 289 B.C.R. states: "It is clear that the property of an Indian is not subject to any form of attachment if it be not taxable—and in the present case unquestionably no case has been made out to shew that the moneys or property in question are subject to taxation." The question of whether the chose in action, with which I am dealing, is or is not taxable is not an issue before me. The only issue with which I have to deal is whether or not the chose in action (the debt owing by R. & H. Rustad Logging Co. to the defendant) is "situated on a reserve" as set out in s. 88(1) of the Act.

It is necessary to consider the question of the *situs* of a chose in action by way of debt. If the *situs* of an ordinary debt, as opposed to specialty debt, is the residence of the creditor, then I would have to hold that the debt was "situated on a reserve". If, on the other hand, the *situs* is the residence of the debtor, then I would have to hold that the debt is not "personal property of an Indian situated on a reserve". Clearly, the debt owing by R. & H. Rustad Logging Co. to the defendant is an ordinary debt. I adopt the statement of the law expressed by Atkin L.J. in the case of *New York Life Ins. Co. v. Public Trustee* (1924), 93 L.J. Ch. 449 at pp. 462-3, wherein he states: "Now, one knows that, ordinarily speaking, according to our law, a debtor has to seek out his creditor and pay him; but it seems plain that the reason why the residence of the debtor was adopted as that which determined where the debt was situate was, because that it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt . . . but the ordinary rule in respect of a debtor is that the debt is situate where the debtor resides, because there the debt can be enforced against him by process of law." Similar law is pronounced in *Com'r of Stamps v. Hope*, [1891] A.C. 476 at pp. 481-2, which decision has been consistently followed by the Courts. Some taxation statutes specify where, for the purposes of the particular Act, personal property shall be deemed to be situated. But the *Indian Act* has no such special provision.

I indicated earlier that if the *Indian Act* had not been amended the decision in *Armstrong Growers' Ass'n v. Harris, supra*, would be binding upon me and would determine the matter. However, in 1951 [c. 29] the *Indian Act* was revised and very material changes were enacted. I have particular reference to s. 87 which was added, and reads as follows: "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."

Clearly the provisions of our provincial statute, the *Attachment of Debts Act*, R.S.B.C. 1948, c. 20, apply to Indians and personal property of Indians unless made specifically exempt under any provision in the *Indian Act*. I do not find any such provision.

Counsel for the defendant cited the cases of *Feldman v. Jocks* (1936), 74 Que. S.C. 56, and *Crepin v. Delorinier et Autres, et Banque Canadienne Nationale* (1930), 68 Que. S.C. 36, but such cases are readily distinguishable and no longer of any force in view of the changes that have been made in the *Indian Act*.

In my view there is nothing in the *Attachment of Debts Act*, which is inconsistent with the *Indian Act* so far as the matter before me is concerned. Decisions which support the plaintiff's application are to be found in *Avery v. Cayuga* (1913), 13 D.L.R. 275, 28 O.L.R. 517; *Campbell v. Sandy*, 4 D.L.R. (2d) 754, [1956] O.W.N. 441; and *Pope v. Paul*, [1937] 2 W.W.R. 449.

Counsel for the defendant also argues that if the legal effect of the amendments to the *Indian Act* passed in 1951 is to take away some of the benefits previously enjoyed by Indians, then such is beyond the power of the Government of Canada to enact and is therefore *ultra vires*. In support of this argument he refers to the terms of union of the Province of British Columbia with Canada wherein it was provided that the Dominion Government should follow a policy as liberal as that hitherto pursued by the British Columbia Government. If counsel for the defendant intended to challenge the legality of the *Indian Act* as enacted in 1951, he would have to follow the procedure set out in the *Constitutional Questions Determination Act*, R.S.B.C. 1948, c. 66, s. 9. There was nothing before me to indicate counsel for the defendant had carried out the necessary preliminary steps to entitle him to question the legality of the *Indian Act* as enacted in 1951. However, even if he had laid the foundation, there is nothing in the material before me to indicate that prior to union the Province of British Columbia had treated Indians any more generously than is authorized by the *Indian Act* as enacted in 1951.

For the above reasons, the plaintiff is entitled to succeed in his application. An order will go for payment to the plaintiff of the monies paid into Court by the garnishee, R. & H. Rustad Logging Co., pursuant to the garnishing order after judgment. Plaintiff is also entitled to costs of the application.

COUR SUPERIEURE.

SOREL, 9 JUILLET, 1878.

Coram L. B CARON, J.

No. 125.

Ex parte.

LOUIS HANNIS,

REQUÉRANT *Certiorari.*

ZOEL TURCOTTE,

RÉPONDANT.

THOMAS MAURAUXT,

COMMISSAIRE.

JUGÉ: Que les biens mobiliers d'un Sauvage sont insaisissables.

Le jugement de la Cour des Commissaires de la paroisse de St. Thomas de Pierreville était en ces termes :

CANADA
PROVINCE DE QUÉBEC,
District de Richelieu.

COUR DES COMMISSAIRES DE LA PAROISSE DE ST. THOMAS DE PIERRVILLE.

Terme du 7 Janvier 1878.

Présent: THOMAS MAURAUXT, Ecuier, Commissaire.

Cause No. 869.

ZOEL TURCOTTE, ECUIER,
Marchand de la paroisse de St. Thomas de Pierreville, dans le dit district de Richelieu,

DEMANDEUR.

vs.

LOUIS HANNIS,

Chasseur du village Abénakis de St. François de Sales dans le dit district de Richelieu,

DÉFENDEUR.

Le dit LOUIS HANNIS, Opposant afin d'annuler.

Le vingt-sept d'Octobre dernier, cette Cour a émaner un bref

d'exécution dans la cause, et le cinq de Novembre dernier une opposition a été admise par le sus-nommé Commissaire.

" Le douze du même mois de Novembre dernier un nouveau bref d'exécution a été émané, le demandeur ayant désisté de la première saisie. Le vingt-six même du mois de Novembre dernier, il a été émané un bref de saisie en vertu d'une opposition du défendeur. Le trois de Décembre dernier, l'opposition a été plaidée. Le Demandeur a payé les frais de la première opposition, Cour tenante, et la cause a été prise en délibéré par le susdit commissaire et remise au sept de Décembre dernier pour jugement, à sept heures après-midi, et le dit commissaire ayant alors ouvert la Cour et déclaré qu'il n'était pas encore prêt à rendre jugement, il remit la cause à ce jour, et maintenant rend le jugement suivant :

" Le Défendeur ayant porté opposition à la dite saisie afin d'annuller, alléguant certains défauts de forme et prétendant qu'au fond l'on ne peut saisir des effets mobiliers appartenant à un Sauvage, possédant ces effets dans les limites des terres réservées aux Sauvages, et ce d'après l'Acte des Sauvages de la Chambre Fédérale de 1876, je rejette la dite opposition quant à la forme, ne trouvant pas qu'il y ait défaut de forme d'une gravité suffisante pour annuler les procédés.

" Et quant au fond : 1o. Je ne trouve pas l'objet saisi compris du tout dans l'interprétation de l'expression, *réservé* donnée dans l'acte suscité.

2o. L'article douze du Code Civil du Bas-Canada, dit que " lorsqu'une loi présente du doute ou de l'ambiguité, elle doit être interprétée de manière à lui faire remplir l'intention du législateur et atteindre l'objet, pour lequel elle a été passée ; Or l'intention du Législateur ne pouvait être d'exempter l'objet en question de la saisie, qui est une jument ; car supposer le contraire, l'acte suscité serait un véritable amendement au dit Code Civil, et cela, par la dite Chambre Fédérale, et, conséquemment, inconstitutionnel, la Chambre Locale ayant exclusivement le contrôle du droit civil dans notre Province.

30. "La Section 7 cap. 94 des *Statuts Refondus du Bas-Canada* dit: "La Cour des Commissaires aura le pouvoir d'entendre juger et de décider d'une manière sommaire, d'après les droits des parties en bonne conscience, selon l'équité et au meilleur de la connaissance et du jugement des commissaires ou commissaires qui la tiendront."

40. Que si l'interprétation donnée pour la dite opposition de l'Acte des Sauvages sus-cité, fut fondée, les pauvres Sauvages qui errent dans les forêts et qui ont le plus de besoin de protection, seraient dans la Province de Québec, presque les seuls qui posséderaient des effets saisissables, n'ayant point l'avantage d'une cité de refuge ou réserve pour y déposer leurs effets à l'abri de la justice. Or, il est bien à présumer que si le législateur de l'acte des Sauvages suscité, avait le pouvoir et l'intention d'exempter de la saisie tous les effets mobiliers des Sauvages, il n'avait pas fait exception de ceux qui en ont le plus besoin.

"Je déboute et rejette donc la susdite opposition et ordonne que la saisie soit déclarée bonne et valable et que la vente de la jument saisie ait lieu suivant la procédure ordinaire, avec dépens contre le Défendeur ou Opposant."

"Donné sous mon seing et sceau, ce sept Janvier
dans l'année de Notre-Seigneur mil huit cent
soixante-dix-huit."

"THOMAS MAURAUFT."

"COMMISSAIRE."

L'affidavit de circonstance pour l'obtention du bref de *certiorari* était en ces termes:

"Louis Hannis, chasseur du village Abénakis de St. François de Sales, dans le district de Richelieu, étant dûment assermenté, dépose et dit:

"Qn'il aurait été poursuivi devant la Cour des Commissaires de la paroisse de St. Thomas de Pierreville dans le dit district, par Zoël Turcotte, Ecuier, marchand de la paroisse de St. Thomas de Pierreville, dit district pour une somme de vingt-quatre piastres et cinquante sept centins, par action rapportée le sept Août, mil huit

cent soixante et seize (1876), lequel dit jour jugement aurait été rendu contre lui, dit déposant, par défaut, par la dite Cour, et pour la susdite somme en faveur du dit Zoël Turcotte;

" Que par après, savoir, le vingt sept Octobre dernier (1877), un Bref de Saisie-Exécution, en vertu du susdit jugement, serait émané de la dite Cour contre les biens meubles et effets du dit déposant, en vertu duquel Bref, auraient été saisis et pris en exécution, une jument blonde âgée de cinq ans et son licou, les propriétés du dit déposant.

" Que le cinq Novembre dernier (1877) le dit déposant aurait porté opposition afin d'annuler à la dite saisie, pour informalités et irrégularités de la dite saisie, et pour les priviléges et exemptions, en faveur du dit déposant, ci-après mentionnés, concluant à mainlevée de la dite saisie, avec dépôts contre le dit Zoël Turcotte, laquelle opposition étant dûment asserventée, fut admise et accompagnée d'un ordre de sursis par l'un des Commissaires de la dite Cour, signifié à l'huissier saisissant et rapportée devant la dite Cour.

" Que le douze Novembre dernier après les signification et rapport de la dite opposition, ayant qu'aucun jugement eut été rendu sur icelle et avant aucun désistement, valable de la susdite saisie, et avant paiement des frais occasionnés sur icelle et sur la dite opposition, le dit Zoël Turcotte, aurait fait émaner, de la dite Cour, un autre Bref de Saisie-Exécution contre les biens meubles et effets du dit déposant, en vertu du susdit même jugement, et aurait, au moyen d'icelui Bref, fait saisir et prendre en exécution, de nouveau, le treize de Novembre dernier (1877) les susdits jument blonde âgée de cinq ans et son licou, ci-dessus mentionnés, appartenant au dit déposant et en sa possession, à son domicile, au village Abénakis de St. François de Salles, dit district.

Que le vingt-six Novembre dernier (1877), le dit déposant aurait aussi porté opposition, afin d'annuler à la dite saisie, ci-dessus en dernier lieu mentionnée, basée sur informalités et irrégularités de la dite saisie, et sur les priviléges et exemptions, en faveur du

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dit déposant ci-après mentionné, laquelle dite opposition fut alors dûment assermentée par le dit opposant, admise et accompagnée d'un ordre de sursis par l'un des Commissaires de la dite Cour et signifiée à l'huissier saisisant et rapportée devant la dite Cour.

“ Que le sept Janvier courant (1878) après contestation de la dite opposition, en dernier lieu ci-dessus mentionnée par le dit Zoël Turcotte et après preuve faite par le dit déposant de tous les faits, priviléges et exemptions allégués et invoqués en sa dite opposition, Thomas Maureault, Eeuier, l'un des Commissaires nommés pour tenir la susdite Cour des Commissaires de la paroisse de St. Thomas de Pierreville, dans le dit district en sa dite qualité, siégeant et tenant seul une séance de la dite Cour, en la dite paroisse de St. Thomas de Pierreville, dit district, aurait rendu jugement, sur la dite opposition, déboutant et rejetant la dite opposition ci-dessus en dernier lieu mentionnée, maintenant la dite saisie ci-dessus mentionnée, et ordonnant la vente des animal et effets susdits, du dit déposant, saisis tel que susdit, le tout avec dépens contre le dit opposant, tel qu'il appert au dit jugement dont copie est produite au soutien des présentes ;

“ Que, à toutes et chacune les dates et époques susdites, avant, depuis et encore actuellement, le dit déposant était, et est un sauvage non-émancipé, dans le sens de l'Acte des Sauvages 1876,” de la bande ou tribus des Abénakis, résidant et possédant en commun des terres dans une réserve de la Couronne, accordée et affectée à la dite bande ou tribu, au village Abénakis de St. François de Salles, dans le district de Richelien ; et tous et chacun les animal et effet ci-dessus mentionnés, savoir : “ une jument blonde âgée de cinq ans, et son licou,” saisis et pris en exécution, tel que susdit, étaient et sont des propriétés et biens mobiliers appartenant au dit déposant et étant par lui possédés, dans la limite de la susdite réserve ;

“ Que par et en vertu du susdit “ Acte des Sauvages 1876,” les susdits animal et effet propriétés et biens mobiliers, étaient alors et sont encore aujourd'hui exempts de saisie et vente pour dettes ou cause quelconque ; et que le dit Zoël Turcotte, par le

susdit jugement du sept d'Août, mil huit cent soixante et seize (1876), de la Cour susdite, n'a pu prendre ni obtenir aucun privilége en droit sur icenz, propriétés et biens mobiliers du dit déposant, et que la dite Cour des Commissaires, et le dit Thomas Maureault ès-qualityé n'avaient aucune juridiction, ni pouvoir sur les dits propriétés et biens mobiliers, pour en ordonner les saisis et vente, tel que susdit.

“ Qu'en conséquence le dit Thomas Maureault, Ecnier, en sa qualité susdite en rendant et prononçant le jugement susdit, du sept Janvier courant (1878), sur la dite opposition ci-dessus en dernier lieu mentionnée, du dit déposant, aurait agi et jugé sans juridiction et aurait commis un excès de juridiction, illégalement et arbitrairement, et en violation du dit “Acte des Sauvages 1876.”

“ Que de plus la procédure sur les dites saisie et opposition, ci-dessus en dernier lieu mentionnées, contient de graves informalités, important nullité d'icelles, entre autres, les suivantes, savoir :—
1o. Parceque, tel que susdit le second Bref de Saisie susdit et la Saisie faite en vertu d'icelui auraient émané et été pratiquée après les admission, signification et rapport de la première opposition susdite avant jugement sur icelle, sans désistement valable de la dite première saisie et des procédés sur icelle, et avant paiement, par le dit Zoël Turcotte, des frais encourus, par le dit déposant sur les dites premières saisie et opposition. 2o. Parceque en pratiquant la susdite seconde saisie, l'huissier saisissant, au lieu de nommer le gardien solvable à lui indiquée par le dit saisi, le déposant aurait exigé de lui indication d'un gardien, résidant dans un autre endroit que celui où était pratiquée la dite saisie, et qu'il se serait, le dit huissier, constitué lui-même seul gardien des dits effets saisis ; et que justice n'a pas été rendue au dit déposant.

“ Que le dit déposant aurait été ainsi condamné illégalement et aurait souffert des dommages contre lesquels il a droit de se pourvoir par un Bref de *certiorari*, droit auquel, il n'a pas renoncé; mais qu'au contraire il s'est expressément réservé par les susdites oppositions, et lecture faite, le déposant a déclaré ne pouvoir signer.

Per Curiam : Hannis est un sauvage Abénakis de Pierreville : étant en défaut de payer une dette qu'il devait à Turcotte, marchand de l'endroit, ce dernier l'a poursuivi devant la Cour des Commissaires de la paroisse, obtint jugement et fit saisir un cheval appartenant à Hannis. Celui-ci fit opposition, alléguant que les biens des sauvages sont insaisissables d'après la loi, et concluant à la nullité de la saisie, tout en se réservant son recours par voie de *certiorari* ou autrement. M. le Commissaire Manrault, dans un jugement bien élaboré et qui indique du travail en même temps que de l'intelligence, renvoya cette opposition avec dépens, prétendant entre autre choses que, la loi fédérale concernant les sauvages voulut-elle dire que leurs biens sont insaisissables, elle ne devait pas recevoir son application en autant qu'elle est inconstitutionnelle, en ce que c'est là une question de droit civil relevant de la législation provinciale et non pas de la législature fédérale.

Je considère qu'il se trompe et il a excédé la juridiction en jugeant contrairement à la loi, et qu'il y avait lieu au bref de *certiorari* en faveur de Hannis pour faire casser ce jugement. L'on a prétendu que la Cour des Commissaires ayant juridiction *ratione-materiae* (c'est une demande £6.), il n'y avait pas ouverture au *certiorari* et que tout au plus pouvait-on procéder par voie du Bref de prohibition pour arrêter les procédés illégaux adoptés contre Hannis. Je ne dis pas que le remède du Bref de Prohibition n'existe pas, mais ce procédé aurait occasionné des frais beaucoup plus considérables, donnant lieu à une contestation écrite avec enquête etc., pour arriver au même résultat. Il faut dire d'ailleurs que les tribunaux inférieurs, commettent des excès de juridiction chaque fois qu'ils condamnent les justiciables contrairement à, ou en violation de la loi, et le bref de *certiorari* est le remède à adopter contre ces excès de juridiction.

Je suis d'opinion, comme je l'ai déjà décidé à Québec, dans une cause de Hudon de Lorette, que les meubles des sauvages, lorsqu'ils sont sur une Réserve Indienne, sont exempts de saisie, et, dans l'espèce actuelle, le cheval de Hannis, étant gardé par lui à sa demeure au village indien sur leur réserve, ne pouvait être saisi. La

loi me paraît claire à ce sujet, surtout lorsqu'elle dit que les autres biens des sauvages, par exemple, ce qu'un indien récolterait et aurait sur une terre qu'il aurait louée en dehors de la réserve, sont seuls sujets à la saisie. Cette question de l'insaisissabilité des biens des sauvages a été décidée dans le même sens par le savant et regretté juge Wilfred Dorion, le 22 Mai dernier à Montréal, dans une cause de Lepage vs. Watzo & Watzo opposant, rapporté au long dans le *National* du 4 Juillet courant. Le *Certiorari* est maintenu avec dépens.

JUGEMENT :

La Cour, après avoir entendu les parties en cette cause, sur le mérite du *Certiorari* y émané, et les motions tant du Requérant que du Répondant, celle du Requérant tendant à faire casser un jugement rendu le sept Janvier dernier par Thomas Maurault, siégeant à la Cour des Commissaires de St. Thomas de Pierreville, celle du Répondant, tendant à faire casser le dit Bref de *Certiorari* et tous procédés faits sur iceux, examiné la procédure et le dossier.

Considérant que le Requérant a établi sa demande.

A maintenu et maintient le dit Bref de *Certiorari*.

Rejette la motion du dit Répondant et accordant celle du Requérant, casse, annule et met à néant, le jugement rendu par Thomas Maurault, Ecuier, siégeant à la Cour des Commissaires de St. Thomas de Pierreville, le sept Janvier dernier, en une certaine cause où Zoël Turette, Ecuier, de la paroisse de St. Thomas de Pierreville, marchand était demandeur et le dit Louis Hannis, chassenr du village Abénakis de St. François de Salles dit district de Richelieu était Défendeur et le dit Louis Hannis était Opposant et le dit Zoël Turette Contestant sous le No. 8698 ordonne au dit Répondant de casser tous les procédés en vertu du dit jugement.

Et condamne le dit Répondant aux dépens de la présente instance distraits à J. B. Brousseau, Procureur du Requérant.

J. B. BROUSSEAU,

Pour le Requérant.

MATHIEU & GAGNON,

Pour le Répondant.

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de qualification foncière l'élection du défendeur comme échevin de la Cité de Montréal.

Le 2 juillet le défendeur inscrivit ce jugement en révision.

Le 21 septembre, le requérant présenta à l'ouverture de la Cour de Révision une motion demandant le rejet de cette inscription, parce que le dit jugement de la Cour Supérieure, rendu d'après la charte de la Cité de Montréal (37 Vict. ch. 52, s. 25,) était final, et qu'il n'y avait aucun appel de ce jugement.

La Cour de Révision a accordé cette motion dans les termes suivants :—

"The Court, etc..."

"Considering there is no right of review in the present case, doth grant the said motion and dismiss said inscription in review with costs against Rousseau distraits, etc."

Jules Allard, avocat du requérant.

Barnard & Barnard, avocats du défendeur.

(J. J. B.)

December 19, 1887.

Coram DAVIDSON, J.

Ex parte MOISE LEFORT, appellant, and C. A. DUGAS
ET AL., respondents.

*Conviction under the Indian Act, R. S. cap. 43—Appeal—
Procedure—Informer or prosecutor.*

- HELD :—1. That the sections of the Summary Convictions Act, 2 R. S. c. 178, relating to appeals, are applicable to convictions under the Indian Act, 1 R. S. c. 43.
2. That except as to objections upon the face of the record, the respondent ought to begin.
3. That an exception contained in the clause enacting the offence ought to be negatived, but if it be in a subsequent clause or section it is matter for defence and need not be negatived; but this would not necessarily make the conviction illegal (2 R. S. c. 108, sec. 88).
4. That in the circumstances of this case, Montour (the Indian to whom liquor was supplied) was a witness other than the informer or prosecutor.

DAVIDSON, J. :—

This an appeal from a conviction under the Indian Act.

By section 94 every one who supplies to any Indian or non-treaty Indian any intoxicant, shall, on summary conviction before any judge, police magistrate, etc., upon the evidence of one credible witness, other than the informer or prosecutor, be liable as therein provided.

By section 98 it is enacted that no penalty shall be incurred when the intoxicant is made use of in case of sickness, under the sanction of a medical man or under the directions of a minister of religion.

By section 108 no appeal shall lie from any conviction, except to a judge of the Superior Court, etc., and such appeal shall be heard, tried and adjudicated upon by such judge or chairman without the intervention of a jury... No such conviction shall be quashed for want of form, and no warrant of commitment shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted, and if there is good and valid reason to sustain the same.

It was argued at the outset, on behalf of the prosecutor, that the appeal should be limited to a legal argument, and that I was not authorized to re-hear the evidence. My opinion was to the contrary, and further consideration has confirmed me in that belief. The above section imposes upon me the duty, not only of hearing and adjudicating, but of *trying* the appeal as well, and that, too, without the intervention of a jury. Were the reference upon matters of law alone, no specific exclusion of a jury would have been needed. So far as the Indian Act is concerned, all reference to appeals begins and ends with section 108. It affords but little assistance as to procedure. For this, in largest part, we have to turn to the Summary Convictions Act. Here we find the original jurisdiction of the judge declared in emphatic form, and it is expressly enacted that "the Court shall try, and be the absolute "judge, as well of the fact as of the law, in respect to "such conviction or decision; and any of the parties to "the appeal may call witnesses and adduce evidence,

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"whether such witnesses were called or evidence adduced "at the hearing before the justice or not." Once these sections are admitted to be applicable, and I hold they are, there is no longer room for even argument. Evidence must be received. Hence, although as a matter of statute this is styled an "appeal," as a matter of fact and of effect, it is to all intents and purposes a new trial.

I had then to decide which party, appellant or respondent, should begin. The Queen's Bench adopts the practice of calling upon appellant to show cause why the conviction should not be sustained. When Crown counsel, I followed the precedents, but always doubted their correctness. I was not disposed at my first trial of this kind to break away from a practice having so high authority for its existence. There is no evidence upon the record which the appellant can attack by argument or disturb by witnesses. He is forced to call the prosecutor, so that the appellate judge may hear the evidence on which the conviction is based, and then has to attempt the destruction of apparently his own evidence, by counter proof as to facts or credibility. Four or five statutes were required to perfect the legal absurdities which attach to this remedy, in itself desirable and capable of an easy and symmetrical procedure. Seeing that they have been, unfortunately, carried into the Revised Statutes, we have to be the more ready to remove every possible embarrassment.

Under the English practice the respondent begins (Paley Q.S. 370; Saunders, 356; Arch. Q.S. 106), and in any case which may come before me hereafter, I shall adopt this course,—save as to objections on the face of the conviction which appellant may wish to urge.

Objections were taken (*a*) to the information upon which the arrest was made, because it failed to negative the exception contained in section 98, that the liquor was not supplied "in a case of sickness under the sanction of a "medical man, or under the directions of a minister of "religion;" (*b*) to the conviction, because in attempting to set out the exception, it ceased to agree with the infor-

mation ; and (c) because in any event it omitted the essential condition precedent which alone gave authority to minister of religion or doctor.

I held at the trial, and still hold, that an exception contained in the clause enacting the offence ought to be negatived, but if it be in a subsequent clause or section, it is matter for defence and need not be negatived; *R. v. Hall*, 1 T. R. 320; *Steel v. Smith*, 1 B. & Ald. 94; Dwarris on Stat. 119. A statute of last session also deals with this very point, 2 R. S., c. 108, sec. 88. If the exception were pleaded, it might be proper, although not essential, to negative it in the conviction. If the conviction is to stand in the present case, I have authority to and will amend the technical omission which it shows.

We are brought, as a consequence, to a discussion of the evidence. An Indian, named Pierre Montour, swore before me that on the afternoon of the 10th of July a number of men were standing on the eastern side of the station at Caughnawaga. As the bell for vespers rang, all left but the witness and appellant; the latter, so it is asserted, led the way into his office in the station and gave the witness two drinks from a bottle which was taken from a cupboard; then they talked together until it was dark. Before the judge of sessions, Montour swore that it was whiskey which he drank. Lefort was convicted for supplying an intoxicant to an Indian, "to wit, whiskey." Before me Montour swore that he knew whiskey and rye, and that what he received was not either of them. All he can swear is that what he received went to his head and visibly affected him.

In this and in other essential respects I have to consider evidence contradictory to that sworn to before Judge Dugas, or not put before him at all.

Curotte asserts that the crowd did not leave appellant and Montour together, because the latter went direct to Curotte's house. Curotte left for Lachine at 3 o'clock, returned at 4 and found Montour still there. He had not even the appearance of having taken liquor.

Mr. J. B. Jacques, a thoroughly respectable witness,

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swores that he would not believe Montour under oath. He was allowed to step out of the box without being asked even a single question. Montour's brother-in-law, Jacques Montour, swore to a like belief, and gave as his reason the witness' capacity for telling falsehoods.

It is not necessary to deal with other details of the case. Had the same evidence come before me as Judge Dugas heard, I would not quash because of a belief that I might have arrived at a different conclusion as to the facts. It would have needed a violent conviction that the judgment was opposed to law or proof, or both.

I quash the conviction because Montour has denied before me what he swore to before the convicting judge, and because two witnesses, not before heard, declare Montour's reputation to be such that they would not believe him under oath. The only witness who is put forward to support the charge is thus discredited. Evidence like that of Curotte, then, comes in to impress one very strongly. Had proof such as I heard been put before Judge Dugas, he would doubtless have dismissed the complaint.

I may add that I concur with him in the opinion that although the alleged facts came to be known through statements of Montour, his evidence has to be considered as evidence "other than the informer or prosecutor." He has no interest in the result. I should take Jackson to be the informer, informant, and possibly prosecutor.

Conviction quashed without costs up to its date, but with costs of appeal in favor of appellant.

The following order was made:—

"Whereas Moise Lefort, late of Caughnawaga, in the district of Montreal, constable, was, on the 21st of October last past, convicted before C. A. Dugas, Esq., Judge of the Sessions of the Peace in and for the said district, for that within the space of three calendar months before the 10th of August in the year aforesaid, the date of the information in this matter, to wit, on the 10th of July in the year aforesaid (1887), upon the Indian Reserve of Caughnawaga, in this district, the said Moise Lefort did

unlawfully supply to one Peter Onakarakiti *alias* Pierre Montour, an Indian, a certain intoxicant, to wit, whisky, contrary to the provisions of the Indian Act, the said intoxicant not being made use of under the sanction of a medical man, nor under the direction of a minister of religion ; and it was thereby adjudged that the said Moïse Lefort should for such his offence forfeit and pay a fine of \$50 to be applied according to law, and also to pay to Louis Jackson the sum of \$11.30 for his costs, and that, in default of not paying the said sums, the same should be levied by distress and sale of the goods and chattels of the said Moïse Lefort, and if said sale proved to be insufficient, that said Lefort be imprisoned in the house of correction in the said city of Montreal, for the space of one calendar month at hard labour.

" And whereas the said Moïse Lefort appealed to one of the Justices of the said Superior Court against the said conviction or order, in which appeal the said Moïse Lefort was the appellant and the said C. A. Dugas, Esq., and the said Louis Jackson, of Caughnawaga aforesaid, farmer, the informant, were the respondents, and which said appeal came on to be tried and was heard before us :

" We the undersigned Judge of the Superior Court do consider, adjudge and order that the said conviction should be and the same is hereby quashed ; and we further order that the said respondent Louis Jackson shall pay to the said appellant the sum of \$10 as and for his costs incurred by him in the said appeal, which said sum is to be paid to the prothonotary of the said Superior Court forthwith, and to be by the said prothonotary paid over to the said appellant ; and if the said sum for costs be not paid forthwith, then we order that the said sum be levied by distress and sale of the goods and chattels of the said Louis Jackson.

" Given under our hand and seal the day and year first

(¹) The vague language of the statute left me in doubt as to the official into whose hands the costs should be paid. I would in future be disposed to remit the record, and direct the payment to be made to the clerk of the Peace. C.P.D.

1887.
Ex parte
Lefort.

1887.
Ex parte
Lefort.

above mentioned at the city of Montreal, in the district of
Montreal aforesaid."

Conviction quashed.

John S. Hall, Q.C., for appellant.
Tremblay, for the respondents.
(J. K.)

December 28, 1887.

Coram DAVIDSON, J.

LAVOIE v. DRAPEAU ET AL.

*Master and Servant—Accident the result of dangers inherent to
the employment—Responsibility.*

HELD:—That an employer, who is not guilty of negligence, is not responsible for loss suffered by an accident to his workman, which is the result of dangers inherent to the trade or employment, and of which the workman was aware when he voluntarily assumed the employment. And so, it was held that master roofers were not responsible for the death of an apprentice, aged 16, who fell from a platform while engaged in his employment, where it appeared that the apprentice was aware of the danger of the work, was fitted to engage in it, and the employers were wholly free from negligence or fault in respect of the platform, tackle, or method of work.

DAVIDSON, J.:—

On the 29th of October, 1886, the plaintiff's son, then being in the employ of defendants, and while at his work, fell from the roof of a building which the defendants were slating, and within a few days died of the injuries received. Judgment for damages to the extent of \$5,000 is prayed for.

The defendants were contractors for slating the nunnery on the corner of Fullum and St. Catherine streets. From the ground to the platform, presently to be referred to, was about 80 feet. A tackle consisting of a couple of single blocks, worked with a horse, and attached to a spar, projected from the top of one of the roof windows, and was used to hoist up the slates. Out of the same window, also, ran a platform between two and a half and three feet wide and projecting far enough to clear the eaves. Upon

COUR DE CIRCUIT.

MONTRÉAL, 22 MAI 1878.

Coram DORION, J.

No. 11,241.

LEPAGE,**DEMANDEUR,**

vs.

WATZO,**DÉFENDEUR.**

&

WATZO,**OPPOSANT.****LEPAGE****CONTESTANT.**

JUGÉ: 1o. Qu'en vertu de l'Acte des Sauvages de 1876, (39 Vic. ch. 18,) les biens meubles et effets mobiliers des sauvages sont exempts de saisie.

2o. Que le mot PROPRIÉTÉ, employé seul, dans une disposition de la loi, comprend les meubles et les immeubles indistinctement.

Le demandeur ayant obtenu jugement contre le défendeur, pour la somme de \$92, fit émaner contre lui, un bref de *Fieri Facius de bonis*, en vertu duquel ses biens meubles et effets furent saisis, et à l'encontre de cette saisie, le défendeur produisit l'opposition suivante :

Samuel Watzo, chasseur et commerçant, de la tribu, des Abénakis de St. François de Sales, dans le district de Richelieu, faisant, aux fins des présentes, élection de domicile, au bureau de son

procureur soussigné, rue St. Vincent, en la cité de Montréal, par sa présente opposition et moyens d'opposition afin d'annuler, à la saisie pratiquée contre lui en cette cause, dit et allègue :

Qu'il est sauvage, aux termes et conditions des lois et statuts concernant les sauvages, et comme tel, qu'il fait partie de la tribu des Abénakis de St. François de Sales; laquelle est régie par les lois générales et les statuts de la Puissance du Canada, concernant les sauvages.

Que tous les biens saisis en cette cause étaient, lors de la dite saisie et sont encore actuellement, dans les limites des terres spécialement réservées à la dite tribu, et en la possession du dit opposant, sauvage, comme susdit.

Que tant par les termes généraux que par les dispositions spéciales de l'Acte des Sauvages de 1876, les meubles et effets saisis en cette cause, sont exempts de saisie, et que le demandeur ne peut, en aucune façon les rechercher en justice, comme il le fait par sa dite saisie; laquelle est illégale, nulle et comme non avenue.

Pourquoi le dit opposant conclut à ce que la dite saisie soit déclarée illégale et nulle à toutes fins que de droit; et à ce que main levée lui en soit accordée avec dépens.

A l'encontre de cette opposition le demandeur produisit la contestation suivante :

Et le dit contestant pour moyens à l'appui de sa présente contestation, dit :

Que le fait que l'opposant est un sauvage, n'est pas suffisant dans l'esprit de la loi, pour empêcher la saisie et la vente de ses meubles.

Qu'en vertu de la loi, les immeubles seuls, sont réservés.

Que d'ailleurs, l'opposant est un commerçant, faisant des transactions journalières avec les blancs; et que s'il y avait par la loi, une exception quant à la saisie des meubles des indiens, cette exception ne saurait s'appliquer à l'opposant.

Et il concluait au renvoi de l'opposition.

A cette contestation, l'opposant répondit en droit, comme suit :

Que toutes et chacune des allégations de la dite contestation,

sont mal fondées en droit et insuffisantes pour lui en faire obtenir les conclusions, pour entre autres raisons, les suivantes :

Parce que le dit contestant ne démontre pas et ne fait pas voir par sa dite contestation; que les biens meubles et effets mobiliers de l'opposant, qui est un sauvage et comme tel, protégé par la loi, soient saisissables.

Parce qu'il ne démontre pas et ne fait pas voir par sa dite contestation, en quoi, comment et pourquoi, le titre de commerçant de l'opposant et ses transactions journalières avec les blancs, peuvent en loi, rendre ses meubles et effets saisissables.

Parce qu'en vertu des sections 66 et 69 de l'Acte des Sauvages de 1876 (39 Vic. ch. 18), tous et chacun des meubles et effets du dit opposant, saisis en cette cause, étaient et sont exempts de saisie ; et que partant la saisie d'iceux effectuée comme susdit, est entièrement illégale, nulle et comme non avenue. Et l'opposant conclut, pour ces raisons, au renvoi de la dite contestation.

Duhamel, lors de l'audition, prétendit, de la part du contestant, que cette opposition était pour le moins futile et devait être débontée sur le champ.

Il soutenait que l'opposant n'avait fait aucune preuve de la nationalité par lui invoquée ; il le pensait cependant *sauvage sans traité* ; mais comme il faisait journallement des transactions avec les blancs, il n'avait aucun titre à la protection de l'Acte des Sauvages de 1876, il prétendit en outre, comme il avait déjà prétendu par sa contestation, que les immeubles seulement et non les biens mobiliers des sauvages, leur étaient réservés par la loi. Il termina son argumentation, en offrant de prouver que l'opposant était commerçant ; mais la Cour le dispensa de ce soin et prit la cause en délibéré.

D'Amour, de la part de l'opposant, produisit, de consentement, entre les mains du juge, le *factum* suivant :

Par son opposition, l'opposant se déclare sauvage Abénakis du village de St. François de Sales, district de Richelieu, et réclame, comme tel, la protection de l'Acte des Sauvages de 1876, et par sa

réponse en droit, il invoque spécialement les sections 66 et 69 de cet acte.

Le contestant ne lui nie pas sa nationalité de sauvage; au contraire, il l'admet formellement, par sa contestation; mais prétend que d'après l'esprit de la loi, il n'y a que ses immeubles d'exempts de saisie. Il admet donc implicitement, que s'il s'agissait d'immeubles, l'opposition serait bien fondée; mais soutient en même temps, que les meubles de l'opposant ne tombent pas sous l'effet de la loi.

En second lieu, le contestant prétend que parce que l'opposant est commerçant, il n'a pas droit à la protection de la loi.

Cette dernière proposition tombe d'elle-même, la loi ne faisait pas une telle exception.

L'opposant n'avait pas à prouver sa nationalité, ce point étant admis en toute lettre au dossier.

La seule question sur laquelle cette Honorable Cour est appelée à prononcer, est celle de savoir si les meubles comme les immeubles de l'opposant, sont exempts de saisie.

La sec. 69 de l'acte sus-cité dit: "Les présents faits aux sauvages ou sauvages sans traités, ni aucune propriété, etc., ne pourront être pris, saisis ou vendus pour aucune dette, etc."

Toute la difficulté roule donc sur l'interprétation que la Cour doit donner au mot *propriété* qui se trouve dans la section précitée; car le contestant prétend que, *dans l'esprit de la loi*, ce terme ne s'applique qu'aux immeubles seulement et non aux biens mobiliers des sauvages.

Sur l'interprétation que l'on doit donner à ce mot *propriété*, l'opposant citera:

Pothier, Droit de domaine de propriété, vol. 9, p. 102, No. 3. (Ed. de 1845, M. Bignet)

Jacob's Law Dictionary Vo Property, col 2, 6e et 8e, al.

Petersdorf's Abridgment, vol. 14, Vo Property, note au bas de p. 84 où l'on trouve la définition suivante du mot *propriété*: "Property may be defined any thing possessing exchangeable value, "and is either real or personal..... Estate in ordinary discourse,

"is applied only to land; but in law, obtains the same significance as *property*, and may be either *real* or *personal*."

Toutes ces autorités s'accordent à dire que le mot *propriété* s'applique indistinctement aux meubles comme aux immeubles.

Reste maintenant à savoir si l'Acte des Sauvages de 1876, s'applique à l'opposant et s'il a le droit de l'invoquer.

L'opposant n'hésite pas à répondre affirmativement puisque cette loi a été promulguée expressément pour la protection de tous les sauvages de la Puissance du Canada: ce qui est examiné en toute lettre, dans la section 1^{re} du dit acte.

Cette cause fut plaidée le 17 Mai 1878, et le 22 du même mois, la Cour rendit son jugement, par lequel elle déclara bien fondée l'opposition du dit Samuel Watzo et lui en accorda les conclusions avec dépens.

Opposition maintenue.

J. G. D'AMOUR,

Pour l'Opposant.

DUHAMEL, et Associés,

Pour le Contestant.

(J. G. D.)

Au paragraphe 11, le défendeur allègue qu'il conduit des automobiles depuis 15 ans, et qu'il a toujours été un chauffeur prudent, sobre et consciencieux.

Le défendeur peut bien alléguer qu'il est prudent, etc., et le prouver. Cette preuve peut avoir une certaine influence, de même que la preuve de l'inexpérience peut aussi influencer dans une cause d'accident d'automobiles.

On peut toujours à l'enquête de poser aux chauffeurs des questions pertinentes à leur habileté, à leur expérience, etc., ce paragraphe doit rester.

Par ces motifs: Maintient l'inscription, retranche le paragraphe 10 du plaidoyer, avec dépens.

Casgrain et Lizotte, avocats du demandeur,

Chassé et Chassé, avocats du défendeur.

COUR SUPERIEURE

VAL-D'OR, LE 5 MARS 1948

No 7.520

COTE, J.
LEVESQUE v. DUBE

Certiorari. — C.P. 1292. — Juridiction du juge de paix. — S.R.C., c. 97, art. 126a. — Dépôt fait en Cour supérieure.

JUGE:—1. Le propriétaire d'une automobile saisie pour une faute de son préposé, n'a pas le remède de l'appel, et peut se pourvoir par *certiorari*.

2. Sur un *certiorari*, on peut discuter le droit du juge de paix d'ordonner la saisie d'une automobile destinée au transport de boissons chez un Indien.
3. Le dépôt de \$50 exigé avec une requête pour *certiorari*, se fait à la Cour Supérieure.

Jugement sur requête pour émission d'un bref *certiorari*:

La requête:

La requête exprime que le requérant, propriétaire d'une automobile, s'en sert pour un commerce de taxi à Val d'Or.

Il y a environ un mois, il a engagé comme chauffeur un nommé Réal Meloche, à qui il a donné des instructions spéciales de bien observer la loi, et de ne pas se servir de la voiture pour des fins illégales.

A l'encontre de ses devoirs, ledit Réal Meloche, le 2 janvier 1948, au greffe des juges de paix de Val d'Or, dans une cause où un nommé Victor Dubé, de la Gendarmerie Royale était plaignant, a été condamné par Hervé Larivière, agent des Indiens, à \$50 d'amende et le \$11 de frais, pour avoir plaidé coupable à une accusation d'avoir fourni à un Indien une substance enivrante, contrairement à l'art. 126a du chapitre 98, S.R.C. 1927; copie de la conviction produite comme exhibit R-1.

Dans la plainte, il n'était nullement question de transport de boisson par le véhicule du requérant. Le magistrat a ajouté à la condamnation un dispositif qui se lit comme suit:

« ... et ordonne en outre la saisie et la confiscation au profit de la Couronne de l'automobile Pontiac qui a servi au transport de la boisson. »

Le requérant, sans admettre que la boisson a été transportée dans sa voiture, affirme qu'il est innocent de toute complicité dans cette infraction et de toute collusion avec Réal Meloche.

Ledit Meloche ayant payé l'amende et les frais, un homme de la Gendarmerie Royale s'est présenté chez le requérant le 3 janvier 1948, et en vertu de la conviction précitée, s'est emparé de la voiture du requérant.

Le requérant n'est pas partie à la cause No 6.702, *Le Roi v. Réal Meloche*; la plainte ne lui a jamais été signifiée, et au surplus, dans cette plainte, il n'est nullement question de transport de boisson.

Le jugement a été rendu à l'insu et hors de la connaissance du requérant. Aucun procès-verbal de saisie n'a été rédigé.

Le magistrat a outrepassé sa juridiction en plus des irrégularités qu'il a commises. La saisie est illégale, irrégulière et nulle, et faite sans juridiction, comme le jugement d'ailleurs.

Le requérant conclut à ce qu'il émane un ordre du tribunal, autorisant l'émission d'un bref de *certiorari*.

La Cour:

La requête est accompagnée d'un affidavit. L'avis à l'intimé Victor Dubé et à Hervé Larivière, agent des Indiens, a été dûment donné. Au surplus le dépôt de \$50 a été fait.

L'intimé a montré cause lors de l'audition de la requête, et il a objecté à l'émission du bref pour les raisons suivantes:

- a) Vu l'article 1292 C.P., le requérant aurait dû procéder par voie d'appel;
- b) L'article 126a, chapitre 98 S.R.C. (1927), *Loi des Indiens*, confère au juge de paix la juridiction qu'il a exercée;
- c) Le dépôt de \$50 accompagnant la requête aurait dû être fait à la Cour inférieure d'où étaient émanés le jugement et la conviction attaqués, et non au greffe de la Cour supérieure.

Première proposition:

Vu l'article 1292 C.P., le requérant aurait dû procéder par voie d'appel —

Cet argument ne vaut pas.

En effet, le requérant n'étant pas une partie en l'instance qui a provoqué la conviction, il ne peut se porter appelant d'une cause qui lui est étrangère.

Deuxième proposition:

L'article 126a, chapitre 98 S.R.C. (1927), Loi des Indiens, confère au juge de paix la juridiction qu'il a exercée —

L'article 126a, ne comporte nullement la juridiction pour le juge de paix d'ordonner la saisie du moyen de transport, comme en l'instance l'automobile, si la chose a réellement eu lieu.

Troisième proposition:

Le dépôt de \$50 accompagnant la requête aurait dû être fait à la Cour inférieure d'où étaient émanés le jugement et la conviction attaqués, et non au greffe de la Cour supérieure

L'intimé prétend que le dépôt aurait dû être fait au greffe de la Cour inférieure et non à celui de la Cour supérieure.

Il cite comme autorité:

Robitaille v. Lamarre, 30 R.P. 337.

La Cour croit devoir faire remarquer qu'elle partage entièrement l'opinion du juge Stein en cette cause, mais par contre, elle déclare que cette jurisprudence n'a aucune application en la présente instance.

La référence a trait à l'article 199, chapitre 76, S.R.Q., au sujet de la loi des licences.

Dans la requête qui est devant la Cour, le dépôt est requis par l'article 8, chapitre 18, S.R.Q. (1941) qui se lit comme suit:

« 8. — 1. Avant d'intenter une action ou de prendre une procédure contre un juge de paix pour dommages-intérêts à raison des actes faits par lui dans l'exécution de ses fonctions, et avant de présenter une requête pour obtenir un bref de *certiorari* ou de prohibition, le demandeur est tenu de déposer au greffe un montant de cinquante dollars pour garantir les frais qui peuvent résulter de ces procédures. »

La Cour est d'opinion que les mots « au greffe » doivent s'entendre du greffe de la Cour d'où la requête émane, soit la Cour supérieure.

Les objections de l'intimé ne sont donc pas fondées.

La requête est accordée;

Il est ordonné qu'un bref de *certiorari* soit émis contre les intimés Victor Dubé, chef de la Gendarmerie Royale à cheval du Canada, de Val d'Or, district d'Abitibi et Hervé Larivière, agent des Indiens, d'Amos, district d'Abitibi; et il leur est enjoint de transmettre à cette Cour le jugement final et tous et chacun des procédés maintenant en leur possession et sous leur garde, faits dans cette cause, cause dans laquelle Hervé Larivière, juge de paix pour le district d'Abitibi, agent des Indiens, a agi comme tel, soit le no 6702 du greffe des juge de paix, à Val d'Or; ledit jugement portant la date du 2 janvier 1948, dans laquelle Victor Dubé, chef de la Gendarmerie Royale à cheval du Canada, de Val d'Or, était plaignant et Réal Meloche, de Val d'Or était intimé, pour sur le tout être ordonné ce qu'il appartiendra en droit et justice; les procédures sur le jugement du 2 janvier 1948 étant suspendues, suivant la loi; dépens réservés.

Lucien Cliche, avocat du requérant,

Claude Bigué, avocat des intimés.

COUR SUPERIEURE

CHICOUTIMI, LE 15 OCTOBRE 1948

No 10.098

EDGE, J.
LESSARD v. GAGNON

*Saisie--arrêt après jugement. — Contestation. — Exception. —
C. proc., 49.*

JUGE:—Si, après un jugement rendu par la Cour de Magistrat, un tiers-saisi déclare devoir une certaine somme au défendeur, à titre de salaire, et que le dé-

McKINNON v. VAN EVERY.

Contract with Indian—Interpretation of statute—Repealing Acts.

A debt contracted by an Indian while Con. Stat. cap. 9 was in force, cannot now be sued for under 32-33 Vic. cap. 6. Quere, whether a judgment can be obtained against an Indian even under the latter act.

[CHAMBERS, December 10, 1870.—GALT, J.]

This was a summons calling upon the plaintiff and the Judge of the County Court of the County of Haldimand to shew cause why a writ of prohibition should not issue to restrain any further proceedings on a plaint brought in the First Division Court of the County of Haldimand, to recover a debt contracted, while the Con. Stat. Can., cap. 9, was in force, by the defendant, who was admitted to be an Indian, within the provisions of that statute (now repealed), and of 32-33 Vic. ch. 6.

_____ shewed cause, citing *Ellis v. Watt*, 8 C. B. 614; *Zohrab v. Smith*, 5 D. & L. 635.

Harrison, Q. C., supported the summons, and cited 13-14 Vic. ch. 74, sec. 53; Con. Stat. Can., ch. 9; 31 Vic. ch. 42; 32 Vic. ch. 6; *Jacques v. Withy*, 1 H. Bl. 65; *Hitchcock v. Way*, 6 A. & E. 942; *Rex v. McKenzie*, R. & R. C. C. 429.

GALT, J.—It is admitted by the learned Judge in his very clear argument in this case, to which I am much indebted, not only for a statement of the facts, but for a reference to the authorities, that so long as Con. Stat. Can., cap. 9, was in force, this suit could not have been maintained, but he is of opinion that the repeal of that statute has the effect contended for by the plaintiff.

The 2nd section was: "No person shall take any confession of judgment or warrant of attorney from any Indian within Upper Canada, or by means thereof, or otherwise however obtain any judgment for any debt or pretended debt unless," &c., referring to circumstances which it is not pretended

exist in the present case. It is contended that, although when this debt was contracted there was no remedy for its recovery, yet that now a judgment may be obtained by reason of the repealing statute.

The learned Judge, in his argument, says: "As to the objections founded on the statute relative to Indians, the case of *Jacques v. Withy*, 1 H. Bl. 65, cited on behalf of the defendant, decides that a debt declared illegal by a repealed Act, and contracted during its operation, is not legalized by its repeal. *Hitchcock v. Way*, 6 A. & E. 943, also cited, decides that the law as it existed when the action was commenced must decide the right of the parties, unless the legislature express a clear opinion otherwise. If the debt contracted in this case had been prohibited by the statute then in force, it is probable that it would have been within the decision referred to, and that the present cause of action being founded on an illegal consideration might have been avoided on this ground ; but by Con. Stat. Can., ch. 9, the remedy only was prohibited, and not the debt, and the prohibition being removed, as I think it has been for reasons hereinafter stated, the debt remains subject only to the provisions of the statute now in force : *Surtees v. Ellison*, 9 B. & C. 752."

With every respect for the opinion of the learned Judge, I am obliged to say that I differ from him in the construction to be put on the cases of *Hitchcock v. Way* and *Surtees v. Ellison*. The former was an action against the acceptor of a bill of exchange by a *bona fide* holder, *brought to issue before* the passing of Stat. 5-6 Wm. IV., ch. 41, but tried afterwards. It was held that the defendant might avail himself of statute 9 Anne, ch. 14, and was entitled to a non-suit if he proved the bill to have been given for a gaming consideration. When the law is altered by statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the legislature, by the language used, shew a clear intention to vary the mutual relation of such parties. The matter in dispute in that case, it will be observed, was whether an Act

of Parliament passed after a suit had been commenced would, without express words, deprive a defendant of a defence which he was entitled to urge but for the passing of the Act, and it was held it would not.

In the present instance the plaintiff insists, that although when this debt was contracted there was a positive prohibition against his obtaining a judgment against this defendant, the repeal of that enactment enables him to do so now, although there are no words used which would shew that such was the intention of the legislature. I must say that the above case appears to me to establish the contrary doctrine. It is true that Lord Denman, in giving judgment, refers to the commencement of the suit, as determining the rights of the parties, but it must be borne in mind that this was said as regarded pleadings, not as regarded the right of action, and it would be singular if no remedy existed when the debt was contracted, and in fact where such remedy was actually prohibited, that the repeal of such prohibition should have an *ex post facto* operation, and enable the plaintiff to obtain a judgment for a debt contracted during the existence of the prohibition.

It is not necessary for the decision of this case to express an opinion as to what the rights of parties giving credit to Indians are under the present law, but I think it very doubtful whether even now a judgment can be obtained against an Indian.

The case of *Surtees v. Ellison, ubi sup.*, appears to me decisive against the plaintiff. It was an action brought by the assignees of a bankrupt against the sheriff of Durham. At the trial it appeared that before and in the year 1823 the bankrupt had carried on business as a seed merchant, and during that period had contracted a debt of £100 to the petitioning creditor, but he had not actually carried on business after that time. In 1826 the 6 Geo. IV., cap. 16, was passed, repealing the laws previously in force relating to bankrupts. In 1827 the bankrupt committed an act of bankruptcy by keeping house, and a few days afterwards the sheriff made the seizure complained of. For the defendant it

was contended that the commission could not be supported, inasmuch as there was no trading after Geo. IV., was passed. In giving judgment on the rule to enter a nonsuit, Lord Tenterden, C. J., says : "The rule for entering a nonsuit in this case must be made absolute. It has been long established that when an Act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed." The other members of the Court concurred in this view.

Now, apply that case to the present. There had been no trading since the passing of the 6 Geo. IV. in the one case, nor after the passing of the 31 Vic. in the other ; the transactions in both were passed and closed, and could not therefore be affected by any subsequent legislation, unless such an intention was plainly expressed. To give effect to the contention of the plaintiff in this case, I must be prepared to hold that although up to the date of cap. 6 of 32-33 Vic. (1869), no judgment could have been obtained against this defendant, yet that the passing of that statute shall leave not only the present defendant, but every Indian in this Province liable for debts contracted during a course of years during which the Legislature had most distinctly prohibited persons like the plaintiff from obtaining judgments against them. In my opinion the learned Judge had no authority to direct a judgment to be entered in this case, and the prohibition should issue.

Prohibition granted.

In any case, it appears to me that a Province is entitled to regulate the use within its own borders of a product made in another Canadian Province. Otherwise, it could be maintained that provincial jurisdiction cannot prevent the sale in Quebec of food unfit for human consumption, if such food is imported from another province.

Finally, it was contended that if the Regulation was, in other respects, *intra vires* of the Province, Parliament had already legislated in respect of the matter of broadcast advertising and, this being so, the federal legislation was paramount.

Section 16 of the *Broadcasting Act*, R.S.C. 1970, c. B-11, defines the powers of the Canadian Radio-Television Commission. Paragraph (b) of s-s. (1) provides that, in furtherance of its objects the Commission, on the recommendation of its Executive Committee, may, *inter alia*,

- (b) make regulations applicable to all persons holding broadcasting licenses . . .
- (ii) respecting the character of advertising and the amount of time that may be devoted to advertising,

In fact the Commission has not exercised this power, and so there is no federal legislation governing the character of broadcasting advertising. Consequently, this is not a case in which it becomes necessary to determine whether a conflict exists between federal and provincial legislation on similar subject-matters.

In my opinion both of the constitutional questions submitted for argument should be answered in the negative. I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment at trial, with costs to the appellant as against the respondent throughout. There should be no costs payable by or to any of the intervenants.

JUDSON, J., concurs with LASKIN, C.J.C.

RITCHIE, J., concurs with MARTLAND, J.

SPENCE, J., concurs with LASKIN, C.J.C.

PIGEON, DICKSON, BEETZ and DE GRANDPRÉ, JJ., concur with MARTLAND, J.

Appeal allowed.

MINTUCK v. VALLEY RIVER BAND NO. 63A et al.

Manitoba Queen's Bench, Darichuk, Co. Ct. J. (L.J.Q.B.). December 12, 1977.

Judgments and orders — Satisfaction — Garnishment — Member of Indian band obtaining judgment against band — Issuing garnishment order attaching bank account of band — Whether Garnishment Act, R.S.M. 1970, c. G20, law of general application in force in Province — Whether inconsistent with Indian Act, R.S.C. 1970, c. I-6, ss. 88, 89(1).

Indians — Member of Indian band obtaining judgment against band — Issuing

garnishment order attaching bank account of band — Whether Garnishment Act, R.S.M. 1970, c. G20, law of general application in force in Province — Whether inconsistent with Indian Act, R.S.C. 1970, c. I-6, ss. 88, 89(1).

Section 88 of the *Indian Act*, R.S.C. 1970, c. I-6, provides that "all laws of general application from time to time in force in any province" apply to Indians in the Province "except to the extent that such are inconsistent with this Act". The *Garnishment Act*, R.S.M. 1970, c. G20, is a law of general application and as a result a garnishment order, issued to satisfy a judgment obtained by a member of an Indian band against, *inter alia*, the band, and attaching a bank account of the band, is valid. The *Garnishment Act* is not inconsistent with the *Indian Act* in the circumstances of this case. While s. 89(1) of the *Indian Act* provides that "the real and personal property of an Indian or a band situated on a reserve is not subject to . . . attachment . . .", there is an exception made for an attachment by an Indian. In addition, the band's interest in the bank account is not personal property situated on a reserve within the meaning of the section.

[*Armstrong Growers' Ass'n v. Harris*, [1924] 1 D.L.R. 1043, [1924] 1 W.W.R. 729, 33 B.C.R. 285; *Feldman v. Jacks* (1936), 74 R.J. Que. 56; *Crepin v. Dolorimier et al.* (1929), 68 Que.S.C. 36; *Royal Bank of Canada v. Scott; Com'r of the Northwest Territories, Garnishee* (1971), 20 D.L.R. (3d) 728, [1971] 4 W.W.R. 491, distd; *Kruger and Manuel v. The King* (1977), 75 D.L.R. (3d) 434, 34 C.C.C. (2d) 377, [1977] 4 W.W.R. 300, 15 N.R. 495; *Cardinal v. A.-G. Alta.* (1973), 40 D.L.R. (3d) 553, 13 C.C.C. (2d) 1, [1974] S.C.R. 695, [1973] 6 W.W.R. 205; *Avery v. Cayuga* (1913), 13 D.L.R. 275, 28 O.L.R. 517; *Geoffries v. Williams (alias Well)* (1958), 16 D.L.R. (2d) 157, 26 W.W.R. 323; *Re Adoption Act* (1974), 44 D.L.R. (3d) 718, [1974] 3 W.W.R. 363 *sub nom. Re Birth Registration No. 67-09-022272, refd to]*]

MOTION by the defendants to set aside a garnishment order issued by the plaintiff.

H. I. Pollock, Q.C., and B. Steinfield, for defendants, applicants.
A. C. Mathews, Q.C., for plaintiff, respondent.

DARICHUK, Co. Ct. J.:—This is an application by the defendants by way of a notice of motion for an order setting aside a garnishment order issued by the plaintiff, and for an order that the moneys paid into Court, pursuant thereto, be paid out to the defendants.

The application is based upon the following grounds:

1. That the said moneys paid into Court were garnished contrary to the law;
2. That the moneys attached from the Bank of Montreal, Roblin, Manitoba, were not moneys which were exigible in law as the said moneys were appropriated by the Parliament of Canada for the use and benefit of the Valley River Indian Band No. 63A; and
3. That the said moneys were moneys from the federal Government held in trust for the use and benefit of the Valley River Indian Band No. 63A and accordingly not capable of being attached.

In support of this motion was filed the Affidavit of Clifford Henry Lynxleg, chief of the Valley River Indian Band No. 63A.

Following *viva voce* evidence called on September 9, 1977, and on October 9, 1977, the motion was adjourned for written argument.

On the 23rd day of April A.D. 1976 the Plaintiff, by virtue of a Judgment of the Honourable Mr. Justice Solomon, was awarded the sum of \$10,000.00 plus costs to be taxed [[1976] 4 W.W.R. 543]. This decision was affirmed by our Court of Appeal on February 10, 1977 [75 D.L.R. (3d) 589, [1977] 2 W.W.R. 309]. The relevant portion of the judgment roll reads as follows:

1. THIS COURT DOETH ORDER AND ADJUDGE that the Plaintiff shall have Judgment against the individual defendants personally and against all other members of the Valley River Band No. 63A except the plaintiff to the extent of their interest in the funds of the Band in the amount of \$10,000.00 plus costs to be taxed.

2. AND THIS COURT DOETH FURTHER ORDER AND ADJUDGE that the property and assets of the Valley River Band No. 63A are liable to satisfy this judgment and for that purpose are subject to execution.

The form and content of the judgment roll, entered on May 18, 1976, was consented to as to form and content by the then solicitors for the defendants.

Pursuant to this judgment, a garnishing order issued out of this Court dated June 1, 1977, for the sum of \$11,780.59, naming the Bank of Montreal, Roblin Branch, as the garnishee. Following service of this garnishing order upon the assistant accountant of the said bank the aforesaid sum was paid into this Court from the Valley River Indian Band No. 63A general account No. 1,000-135. It is from this garnishment order that the defendants make the aforesaid application to this Court.

The moneys deposited to this general account reflected receipts from a number of sources. The bulk thereof were received from the Department of Indian Affairs and represented advances on its approved budget of moneys appropriated by the Parliament of Canada for the benefit and welfare of this band as a whole. Approved items for payment included, *inter alia*, social assistance, education, sanitation, roads, water, housing, recreation and band administration.

Other money deposited to this account included payments received from the Government of Manitoba by way of per capita grants and rental income from the lease of part of its land to members of its band. Moneys received by this band from the operation of a store on its reserve were deposited in one of two other bank accounts. The operation of this band store resulted in a deficit of \$10,000 in its last fiscal year. At some prior time thereto, the operation of this store resulted in a \$3,000 profit, which was used to retire part of a loan from the bank.

The financial statement of the defendant band, as of March 31, 1976, indicated a deficit of \$11,598 and an accumulated deficit of

\$46,480.93. Exhibit 3, the 1977 financial statement, showed a surplus of \$13,282.80 resulting in an accumulated deficit of \$33,198.13.

The defendants contend that although the moneys were deposited in a general account, the moneys were not exigible in law as they were trust moneys, appropriated by Parliament for the use and benefit of the Valley River Indian Band. The money so received from the Department of Indian Affairs could only be disbursed in accordance with circularized directives.

A number of the witnesses called for the defendants testified that any shortage of such moneys in the general account could adversely affect the implementation of a number of approved projects. "As it will result in hardship and deprivation to a group of individuals, namely, the Valley River Indian Band No. 63A and the band should not suffer even at the hands of one member of the very same band as these monies are to the benefit of the band at large", the defendant submits that the garnishment order be set aside.

In determining the applicability of the *Garnishment Act*, R.S.M. 1970, c. G20, and the relevant portion of the Queen's Bench Rules pertaining to the attachment of debts, the following sections of the *Indian Act*, R.S.C. 1970, c. I-6, grouped under the heading of "Legal Rights", are especially germane.

These sections provide 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.

89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress, or execution in favour or at the instance of any person other than an Indian.

(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller, may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

90(1) For the purposes of sections 87 and 89, personal property that was

- (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
- (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

(2) Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.

(3) Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve, is guilty of an offence.

Section 88 of the *Indian Act* and provincial legislation affecting Indians have been the subject of review in a number of recent decisions. Dickson, J., in *Kruger and Manuel v. The Queen* (1977), 75 D.L.R. (3d) 434 at pp. 437-8, 34 C.C.C. 377, [1977] 4 W.W.R. 300 at pp. 303-4, states:

The first thing to notice in this respect is the precise terms of s. 88 itself. It subjects Indians to "all laws of general application from time to time *in force in any province*". There formerly existed a doubt as to whether s. 88 was restricted to provincially enacted laws but that question has been settled in the affirmative by this Court in *R. v. George, supra* [55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, [1966] S.C.R. 267]. Mr. Justice Martland gave this interpretation to the relevant phrase in s. 88, at p. 151 C.C.C., p. 398, D.L.R., 281 S.C.R.:

"In my view the expression refers only to those rules of law in a Province which are provincial in scope, and would include provincial legislation and any laws which were made a part of the law of a Province, as, for example, in the Provinces of Alberta and Saskatchewan, the laws of England as they existed on July 15, 1870."

(The italics are Dickson, J.'s.) At p. 438 D.L.R., p. 304 W.W.R., Dickson, J., states:

There are two *indicia* by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction, the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect impairs the status or capacity of a particular group.

Martland, J., in *Cardinal v. A.-G. Alta.* (1973), 40 D.L.R. (3d) 553 at pp. 559-60, 13 C.C.C. (2d) 1, [1974] S.C.R. 695, states:

A provincial 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 *British North America Act, 1867*, 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.

Since its origin, with the English *Common Law Procedure Act*, garnishment has not been restricted to one class of citizens in ob-

ject or purpose. The provision of the *Garnishment Act* is not a provincial statute enacted in relation to Indians under the *Indian Act* and its provisions do not effect the status, capacity, rights, privileges, disabilities and limitations acquired as an Indian under the *Indian Act*. Its application, and the relevant portion of the Queen's Bench Rules extend uniformly throughout the Province, although its application may have graver consequences to one person than to another. However, "the fact that a law may have graver consequences to one person than to another does not, on that account alone, make the law other than one of general application", as stated by Dickson, J., in *Kruger and Manuel v. The Queen, supra*. This observation is particularly significant in determining the submission of the defendant that the order herein be set aside on the basis that it will result in hardship and deprivation to the members of its band.

It has been judicially recognized, as early as 1913, that garnishment proceedings in certain circumstances may apply to Indians as a law of general application. This is evidenced by the decision of the Ontario Supreme Court (Appellate Division) in *Avery v. Cayuga* (1913), 13 D.L.R. 275, 28 O.L.R. 517. Part of the headnote [D.L.R.] thereof reads:

Money deposited to his own credit in a bank beyond the Indian reserve by an unenfranchised Indian living on a Reserve, is subject to garnishment as personal property outside of the Reserve and not within the prohibition of sec. 102 of that Act as to liens or charges on non-taxable property of Indians.

The most recent reported case appears to be that of *Geaffries v. Williams (alias Well)* (1958), 16 D.L.R. (2d) 157, 26 W.W.R. 323. Swencisky, Co. Ct. J., states at p. 160 D.L.R., p. 326 W.W.R.:

Clearly the provisions of our provincial statute, the *Attachment of Debt Act*, R.S.B.C. 1948, c. 20, apply to Indians and personal property of Indians unless made specifically exempt under any provision in the *Indian Act*. I do not find any such provision."

Although applicable, such laws of general application are trammeled. The limits thereof are specified in s. 88, namely,

- (a) "except to the extent that such laws are inconsistent with this Act or any order, rule, regulation, or by-law made thereunder" and
- (b) "except to the extent that such laws make provision for any matter of which provision is made by or under this Act."

Dealing with the limits of such application, Farris, C.J.B.C., in *Re Adoption Act* (1974), 44 D.L.R. (3d) 718 at p. 720, [1974] 3 W.W.R. 363 (*sub nom. Re Birth Registration No. 67-09-022272*) at p. 364, states:

In 1951, what is now s. 88 of the *Indian Act* was enacted [c. 29, s. 87]. 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 appli-

cation 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.

No provision of the *Garnishment Act* and/or the said Queen's Bench Rules relating to the garnishment order issued herein is "inconsistent with [the provisions of the *Indian Act*] or any rule, regulation or by-law made thereunder". Furthermore, no specific provision or exemption exists in the *Indian Act* which is applicable thereto.

Neither s. 89, nor s. 90 of the said Act protects or exempts the defendants from the garnishment order, as contended by their learned counsel. Section 90 merely amplifies the instances or circumstances where personal property is deemed to be situated on a reserve. While s. 89 specifically deals with the subject of "attachment", it provides that a process issued at the instance of an Indian is excluded. The plaintiff is an Indian within the meaning of the *Indian Act*, and a member of the defendant band.

Section 89(1) specifically gives an Indian the benefit of all provincial laws of general application in respect to the "attachment, levy, seizure, distress or execution" of the personal property of another Indian or a band. To assign any other meaning to the words "any person other than an Indian" would simply render the exception meaningless. Since the plaintiff squarely falls within this exception, the property and assets of the defendants are liable to satisfy the judgment, as provided in s. 89 of the *Indian Act* and in para. 2 of the judgment roll.

Even assuming that the Parliament of Canada, in enacting s. 89(1) did not intend to confer upon an Indian any special status, right, power and/or benefit vis-à-vis the process of attachment, levy, seizure, distress or execution, the garnishment order herein is not in conflict with this section. The real and personal property of an Indian or a band *situated on a reserve* is not subject to attachment, levy, seizure, etc. The moneys received by the defendant band were not "situated on a reserve" within the meaning of this section, having been deposited to the credit of its account at the Bank of Montreal, Roblin, Manitoba.

The defendants contend that this is an "accident situs" outside the reserve. The moneys should be deemed to be situate on the Valley River Band Reserve No. 63A where their principal establishment, domicile and residence is located in accordance with the maxim *mobilia sequuntur personam*. Being then situate on a reserve, and not liable to taxation, they rely on the remarks of McPhillips, J.A., in *Armstrong Growers' Ass'n v. Harris*, [1924] 1 D.L.R. 1043 at p. 1046, [1924] 1 W.W.R. 729 at p. 732, 33 B.C.R. 285, where he states: "It is clear that the property of an Indian is not subject to any form of attachment if it be not taxable . . ."

Other cases referred to in support of this submission included reference *Feldman v. Jacks* (1936), 74 R.J. Que. 56, and *Crepin v. Delorimier et al.* (1929), 68 Que.S.C. 36.

With the amendments to the *Indian Act* in 1951, these decisions are readily distinguishable (and no longer applicable) in that the subject of taxation, as the criteria for attachment of debts, was removed.

This latter contention fails for a second reason. While the ordinary meaning of "personal property" could include "money or moneys appropriated by the Parliament of Canada", a scrutiny of the provisions of ss. 89 and 90 suggests the meaning thereof to be otherwise. Such an interpretation would result in an absurdity, as held by my brother Judge P.D. Ferg in the unreported decision, dated October 28, 1976, of *Kuhn v. Starr et al.* I agree with his reasons for judgment and note that an appeal therefrom was dismissed by Deniset, J., on April 5, 1977.

Neither does the evidence support the contention of the defendants that the moneys deposited to the credit of its account No. 1000-35 constituted "trust moneys" in law with this account being the "trust property" and the defendant band being the *cestui que trust*. There is no question but that the bulk of the moneys so deposited to the credit of this account were moneys appropriated by the Parliament of Canada for the use and benefit of members of the defendant band. However, the moneys so received were deposited to a general account together with deposits from other sources. Part of the history of this account revealed over-expenditures in some years with under-expenditure in others. If the defendant band agreed to disburse these moneys only in accordance with such circularized directives, a deficit of \$11,598 for the year ending November 31, 1976, and accumulated deficit, as of this date of \$46,480.93 remain unexplained. For the year ending March 21, 1977, its financial statements revealed a surplus of \$13,282.80. Neither such a deficit, nor such a surplus endorses a finding that the moneys received from the Department of Indian Affairs were "trust moneys" in law and not liable to attachment.

The final contention of the defendants is "that it is against public policy to garnish funds of Her Majesty the Queen, which funds are not liable to attachment". In support thereof, the defendants cite the decision of *Royal Bank of Canada v. Scott; Com'r of the Northwest Territories, Garnishee* (1971), 20 D.L.R. (3d) 728, [1971] 4 W.W.R. 491.

In this case, a garnishee summons was served on the Commissioner of the Northwest Territories. This summons was challenged on a number of grounds, including the fact that the judgment debtor was a servant of the Crown, that the moneys gar-

nished were Crown moneys, were not attachable and the process was contrary to law.

Morrow, J., on reviewing the difficulty of attaching moneys payable by the Crown to a third party, states, at pp. 740-41 D.L.R., p. 503 W.W.R.:

The basic principle is well stated by Duff, J., at p. 1140 in *C.N.R. Co. v. Croreau and Cliche*, [1925] 3 D.L.R. 1136, [1925] S.C.R. 384, 30 C.R.C. 350, where he says: "The real difficulty in attaching monies payable by the Crown to a third person lies in the inability of the Courts to make an order against the Crown." Again, in *The King v. Central Railway Signal Co., Inc.*, [1933] 4 D.L.R. 737, [1933] S.C.R. 555, the same Judge (at that time Chief Justice) at p. 745 says, "the rule is absolute that no proceeding having for its purpose the issue of any process against His Majesty himself or against of any of His Majesty's property is competent in any of His Majesty's Courts". See also the remarks of Sir Barnes Peacock at p. 626 in *Palmer v. Hutchinson* (1881), 6 App. Cas. 619.

On the subject of public policy, he notes at p. 743 D.L.R., p. 506 W.W.R.:

"Public policy" as a guide to a legal decision has been referred to as an "unruly horse, and when once you get astride of it you never know where it will carry you": *per* Donovan, J., in *Hibczuk v. Minuk*, [1933] 2 W.W.R. 20 at p. 23 [quoting Burrough, J., in *Richardson v. Mellisk* (1824), 2 Bing. 229 at p. 252, 130 E.R. 294].

Duff, C.J.C., in *Re Millar*, [1938] 1 D.L.R. 65, [1938] S.C.R. 1, makes a careful analysis of the cases on "public policy". At 66 he states "there is some lack of unanimity upon the point of jurisdiction of the Courts to proceed under some new head of public policy, that is to say, some principle of public policy not already recognized by judicial decision . . ." He goes on to suggest [citing Lord Wright in *Fender v. Mildmay*, [1937] 3 All E.R. 402 at p. 426], although he does not so decide, that it is not likely that at this day any new head of public policy could be discovered.

It is clear, also, from the above case and the legal decisions reviewed, that Courts should be discouraged from extending "public policy" for fear they may be substituting their opinions or morality for the wishes of the Legislature or Parliament.

Unless and until the moneys were advanced by the Department of Indian Affairs and were deposited to the credit of the account of the defendant band, they were not subject to garnishment by the plaintiff or anyone else. To this point in time lies the inability of the Court to make an order against the Crown. However, once deposited to the credit of their account, such moneys lost their identity and characteristic of being public funds or of "The Royal Purse" and were subject to attachment. The anticipated use or contemplated disbursal of such funds by the Parliament of Canada and/or the Band Council, for the benefit and use of the members of the defendant band as a whole did not preclude the issuing of garnishment order and the attachment of such moneys.

Since Courts should be discouraged from extending "public policy" for the reasons advanced by Morrow, J., and as it appears that Parliament intended, in enacting said s. 89(1), to specifically

provide that attachment was available at the instance of an Indian against the personal property of another Indian or a band, there is no justification to adjudge that the garnishment order herein be set aside on the basis of being contrary to public policy.

In the result, the motion is dismissed with costs, which are hereby fixed at \$375 and disbursements.

Motion dismissed.

ABOUNA v. FOOTHILLS PROVINCIAL GENERAL HOSPITAL BOARD (No. 2)

Alberta Supreme Court, Appellate Division, McGillivray, C.J.A., Lieberman and Prowse, J.J.A. January 27, 1978.

Administrative law — Boards and tribunals — Powers — Hospital board given power to make administrative decisions after obtaining advice of medical advisory committee — Board empowered to terminate appointment of physician after hearing and prescribed procedure — Board terminating programme and limiting privileges of former physician on programme — Board then considering reinstating programme and terminating employment of physician because of disruptive influence — Termination not administrative decision but disciplinary procedure for which hearing and prescribed procedure to be followed — Alberta Hospitals Act, R.S.A. 1970, c. 174, ss. 29, 30(1), 31(1)(a), 38(1)(f) — Alberta Hospitals Regulations, Alta. Reg. 146/71, s. 31(3).

Physicians and surgeons — Discipline — Board of hospital given power to make administrative decisions after obtaining advice of medical advisory committee — Board empowered to terminate appointment of physician after hearing and prescribed procedure — Board terminating programme and limiting privileges of former physician on programme — Board then considering reinstating programme and terminating employment of physician because of disruptive influence — Termination not administrative decision but disciplinary procedure for which hearing and prescribed procedure to be followed — Alberta Hospitals Act, R.S.A. 1970, c. 174, ss. 29, 30(1), 31(1)(a), 38(1)(f) — Alberta Hospitals Regulations, Alta. Reg. 146/71, s. 31(3).

[*Corporation de L'Hopital Bellechasse v. Pillote* (1974), 56 D.L.R. (3d) 702, [1975] 2 S.C.R. 454; *Ridge v. Baldwin*, [1963] 2 All E.R. 66; *Durayappah v. Fernando*, [1967] 2 All E.R. 152, refd to]

Physicians and surgeons — Dismissal — Damages — Physician's annual appointment terminated through incorrect procedure — Whether loss of reputation and consequential losses compensable — Assessment of damages.

Where a physician's appointment at a hospital is terminated through incorrect procedures, a legal right has been infringed which is compensable in damages, and it matters not that the decision to terminate would probably have been the same if the proper procedure had been followed. However, where it is apparent that the physician would not have been reappointed in the following year, the damages are restricted to his expected loss of earnings in the year of dismissal and should further be reduced by the amount he expected to earn but could not by reason of an earlier properly conducted procedure in which his privileges were reduced. Moreover, the loss of reputation as a result of partially incorrect publicity is not compensable where the errors are not the result of vindictiveness or malice on the part of the hospital board. Similarly, consequential losses, such as the loss of a professor-

Commissioner of
Indian Lands
vs.
Payant.

Onge did not by reason of the agreement dated the eighteenth day of December
one thousand eight hundred and fifty-four and by him in the said cause filed as
his exhibit number one, acquire any right to cut the said wood and to remove
thence the same in manner and form as in and by the said agreement and by
the exception of the said Defendant *en garantie* is set forth, dismissing the said
exception and adjudging upon the merits of the said principal demand; doth
declare the attachment or *saisie revendication* made in this cause of about twelve
cords of fire wood good and valid and doth declare the same to be the property
of the said Plaintiff in his said capacity, and it is ordered that the said twelve cords
of fire wood be delivered up and restored to the said Plaintiff in his said capacity
and the Court doth condemn the defendant Louis Payant dit St. Onge to pay
the costs of this action and as to any other or further conclusions by the Plaintiff
in and by his said declaration taken the same is hence dismissed; and the Court
adjudging upon the *demande en garantie* in this cause: it is considered and
adjudged that the said Defendant *en garantie* Saro Onsanoron do guarantee
indemnify and hold harmless the said principal Defendant and Plaintiff *en*
garantie Louis Payant dit St. Onge from the condemnation herein pronounced
against him."

Dunlop, Attorney for principal Plaintiff.

Loranger et Pominville, Attorneys for principal Defendant and Plaintiff *en*
garantie.

Coursol, Attorney for Defendant *en garantie*.

P. B. L.)

COURT OF QUEEN'S BENCH.

IN APPEAL.

FROM THE DISTRICT OF MONTREAL.

MONTREAL, 9TH JUNE, 1859.

Coram SIR L. H. LAFONTAINE, Bart., C. J., AVLWIN, J., DUVAL, J., MEREDITH, J.
C. MONDELET, J.

No. 51.

NIANENTSIASA,

Appellant.

AND

AKWIRENTE ET AL.,

Respondents.

Held.—That the security bond given in appeal by Indians is valid, inasmuch as in the present case, the
Indians who became securities were, as appeared by the affidavits, in possession as proprietors
according to the Indian customary law, of certain real estate situated and lying within the tract of
land appropriated to the uses of the tribe to which they belonged.

The Respondents having made a motion to set aside the security given by the
Appellant, (which security consisted of two Indians, Ignace Kaneratahere and
Thomas Tabantison), a rule was issued returnable on the 30th April, 1859, and
which rule is in the following words:

"It is moved on the part of the said Respondents inasmuch as the Appellant has not given good and sufficient security in the manner required by law to entitle him to the present appeal, and inasmuch as the security by the appellant in this cause given is insufficient, the sureties in the security bond mentioned being valueless and not worth the amount in which they justified as will more fully appear by the affidavits herewith filed, that the security given by the appellant upon the present appeal be declared insufficient and null and void, and this appeal dismissed with costs, unless cause to the contrary be shown on the 30th April instant:—"

It is ordered that the appellant do shew cause to the contrary on Saturday the thirtieth day of April instant, sitting the Court.

The Respondents filed in support of their rule four affidavits to establish the insolvency of the securities. On the part of the appellant, four counter affidavits were produced in which it is stated : que le dit Thomas Tabantison est propriétaire et en possession de l'immeuble décrit en l'acte de donation en date du 31 Mars 1859, Mtre Lepailleur, N.P., et depuis environ cinq ans et qu'il a continué à l'être jusqu'à ce jour sans interruption. Il arrive souvent que les Sauvages, dans l'étendue de la Seigneurie du Sault St. Louis, possèdent des terres et eu sont réputés et en sont réellement propriétaires sans avoir de titre devant notaires, ni par écrit sous scing-privé. La moitié indivise de l'immeuble décrir à l'acte de donation susmentionné vaudrait pour des blances, au moins quatre cent piastres. Sur la dite moitié indivise de l'immeuble appartenant au dit Thomas Tabantison, il y a une maison neuve qu'il a construite l'automne dernier, et une écurie. C'est une maison de vingt pieds carrés couverte en bardeaux. L'écurie est couverte en planches et bien bonne. Je sais que Ignace Kaneratahere possède un emplacement situé au Village du Sault St. Louis, sur lequel il y a une maison en pierre à deux étages, dans laquelle il réside et qui vaut au moins huit cents piastres. Il possède cet emplacement depuis que j'ai l'âge de connaissance comme propriétaire, une terre d'apeu près quatrevingts arpents en superficie, dans la Seigneurie du Sault St. Louis, près de la paroisse St. Isidore, valant à peu près six cents piastres ; je sais qu'il possède aussi comme propriétaire trois Isles sur lesquelles il cultive du foin, dans les limites de la dite Seigneurie, et cela depuis plus de dix ans—ces trois Isles peuvent valoir cent piastres. Le dit Ignace Kaneratahere tient maison comme susdit, avec sa famille, et possède un ménage aussi bien qu'en ont les Sauvages à l'aise ; je ne lui connais pas de dettes, et je n'ai pas connaissance qu'il ait été poursuivi en justice.

The appeal bond had been given in December 1858. The deed of gift filed by the Appellant with his affidavits was made and passed on the 31st March, 1859.

Carter, for the Respondents contended that Indians could not hold in their own name immoveable property situated within the limits of such tracts of land as were occupied by them in this Province, and cited the following authorities :

13 & 14 Vic. ch. 42.—Sect. 1.—Indian lands vested in a commissioner.

Sect. 2.—All suits to be brought by or against commissioner.

Sect. 3.—Commissioner has power to concede, lease or charge any such lands.

Sect. 4.—Rights of individual Indians as possessor or occupant preserved.

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 Nianentsiaasa
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No. 997. The Commissioner of Indian lands for Lower Canada *vs.* Louis Payant dit St. Ouge, and Onganoron defendant *en garantie*. Under this statute,

Justices Day, Smith, and Mondelet, on 23rd March 1855, rendered judgment sustaining a *revendication* of wood cut in the seigniory in question. Referred to 7th head of admissions filed, establishing that ten cords of the wood had been cut on land *in the occupation* of Defendant *en garantie*.

The judgment declares he had no right or title by virtue whereof he could sell the wood and *Carter*, for Respondent contended that it sustains the proposition that the lands in Sault St. Louis and the right of property are vested in the commissioner.

Rev. Statute p. 573.

17 Geo. 3, ch. 7 S. 3.—Prohibits persons living in any Indian village without a license.

Rev. Statute, p. 574.

3 & 4 Vic. ch. 44, sec. 2. Governor may order any person resident in Indian village to remove therefrom under a penalty and imprisonment.

The rule taken by the Respondents was discharged with costs.

The judgment was as follows :

La cour après avoir entendu l'Intimé sur sa motion du trente Avril dernier, ainsi que l'Appellant, par leurs avocats, examiné le dossier en cour de première instance et les pièces justificatives à l'appui de la dite motion ainsi que celles à l'encontre et sur le tout maturement délibéré; rejette la dite motion avec dépens,

Doutre & Daoust, Attorneys for Appellant.

Carter, Attorney for Respondent.

(P. R. L.)

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 6TH JUNE, 1859.

Coram SIR L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., MEREDITH, J.

WHITNEY, (*Plaintiff in the Court below.*)
 Appellant.
 AND

CLARK, (*Defendant in the Court below.*)
 Respondent.

CLERK—COMPETENT TO CONTRADICT HIS OWN RECEIPT.

Held. 1o. That a clerk is competent to prove that a receipt given by him for his employer to a customer for a sum of money was given by error, and that he did not actually receive the money acknowledged by the receipt.

2o. That the weight to be given to the testimony of the clerk is a question as to his credibility which depends upon the circumstances of the case.

The facts of this case fully appear from the report of the judgment of the Court below, 3 L. C. Jurist, p. 89-93.

LES

RAPPORTS JUDICIAIRES DE QUÉBEC

PETERSEN v. CREE and CANADIAN PACIFIC EXPRESS CO., Montreal
Tierce Saisie. 1940

Indians — Seizure of salary — Moveable property outside the reserve October 31.
Situs of salary — Stare decisis — Indian Act (R. S. C. 1927, ch. 98),
arts. 102, 105 as replaced by (1930) 20-21 Geo. V, ch. 25, art. 10 — C. P.,
art. 677.

A member of the Oka band of Indians, who is domiciled at the Indian Reservation at Oka but who works in Montreal, cannot contend that his wages are situated in the Reservation and are in consequence unseizable if it appears that the wages were earned in Montreal and were payable there.

CONTESTATION of a seizure by garnishment after judgment.
(\$580.)

Judgment: On the 24th of December, 1939, plaintiff obtained judgment against the defendant for an amount of \$580.48 and costs and on the 15th of January, 1940, served on the Canadian Pacific Express Company a writ of saisie-arrêt after judgment calling on it to declare what sums of money it owed the defendant and what it would have to pay him in the future.

The Canadian Pacific Express Co., through its duly qualified officer, appeared and declared, that the defendant appeared on the Canadian Pacific Express Company's list of employees as warehouseman and that defendant's rate of earnings per full working month was \$125 plus \$5 bonus plus \$5 for night duty, less 3% for pension, wages payable twice a month.

Defendant contested the saisie-arrêt on the grounds that the defendant is a member of the Oka band of Indians, that he has never renounced his right as such and has never taken advantage of the rights and privileges granted under the white man's law. Defendant maintains that he has a right to claim all the rights accruing to him

Mr. Justice C. G. Mackinnon. — No. 181,014. — Magee, Nicholson, and O'Donnell, for plaintiff contestant. — Calder and Lafontaine, for the defendant.

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under the Indian Act and that accordingly his moveable effects are exempt from seizure and execution.

It has been admitted by the parties that the defendant is a member of the Oka band of Indians, that he has always claimed and still claims his right to such and has never renounced the same. Also that he has never taken advantage of the rights and privileges granted him under the white man's law outside of those granted him by the Indian Act. It was further admitted that defendant is the owner of a tract of land and a house at the Indian Reservation at Oka, that he spends the summer at the said property and for the winter moves into Montreal where he maintains a year-round establishment. It is also admitted that defendant is working in Montreal for the Canadian Pacific Express Co.

Defendant relies on s. 105 of the Indian Act R. S. C. 1927, ch. 98 as replaced by 20-21 Geo. V., ch. 25, s. 10 which is as follows:

No one other than an Indian or non-treaty Indian shall take any security or otherwise obtain any lien or charge whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three preceding sections; provided that any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid.

"The last three preceding sections" referred to in s. 105 are ss. 102, 103 and 104 which are grouped together in the Act under the heading of "taxation". Of these sections, only s. 102 concerns the present case, and it reads as follows:

No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds, in his individual right, real estate under a lease or in fee simple or personal property outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate.

Defendant never having renounced his membership in the Oka band of Indians is entitled to all the benefits accruing to him under the Indian Act and it must also be considered that he is domiciled at the reservation at Oka. He owns a tract of land and a house in the reserve where he spends the summer — he also spends the winter in the City of Montreal where he maintains an all-year-round establishment.

Section 105 of the Indian Act has been before our Courts in the two recent cases of *Crépin v. de Lorimier* (1) and *Feldman v. Jocks* (2). In the *Crépin* case it was held that s. 105 permitted the seizure of property which was subject to taxation under existing

(1) (1930) 68 S. C. 36.

(2) (1936) 74 S. C. 54.

laws and not that subject to taxation under a law which might be adopted. However in *Avery v. Cayuga* (1), the Ontario Court of Appeal held that "subject to taxation" in s. 105 meant property which might be subject to taxation and not property which is taxed under some existent law. Chief Justice Greenshields in the *Feldman* case stated that he did not agree with this holding.

With all due deference to the learned Judges who presided in the *Crépin* and *Feldman* cases, the Court considers that it is more or less bound by the holding in the *Avery* case as the issue before it is the question of the interpretation of a federal statute. I consider that s. 102 refers to property liable to taxation and that it does not refer only to property which has been taxed by some taxing authority.

In *ex parte Tenasse* (2), Mr. Justice Grimmer in delivering the judgment of the Appellate Division of the New Brunswick Supreme Court said:

The three preceding sections referred to, being ss. 102-4 of the Act, refer to the liability of Indians to be taxed. Of these sections, s. 102 makes it perfectly clear that Indians holding real estate under lease or in fee simple or personal estate outside of the reserve or special reserve shall be liable to be taxed for such real or personal property at the same rate as other persons in the localities in which it is situate.

It was evidently the intention of Parliament by this enactment to place the real and personal property of Indians outside of the reserve upon the same basis as property of persons who are not Indians, and it would thus become possible that security might be taken thereon, and that a lien or charge by mortgage, judgment or otherwise might be obtained on any property of an Indian that was liable to taxation under s. 102 — that is to say, real estate held by an Indian in his individual right under a lease or in fee simple or personal property outside of the reserve or special reserve.

The Court considers that defendant's wages were earned in Montreal, they are primarily payable there and are so situated (*The King v. Lovitt* (3), *Avery v. Cayuga* *supra*).

I can find no legal basis for holding that the defendant's wages are situated on the reserve.

Defendant contends that his wages constitute a *chose* in action until paid over and as such are not personal property. "Personal property" means all property not immoveable and includes *choses* in action.

Considering for the reasons stated defendant has failed to establish the essential allegations of his contestation of the seizure in the hands of the Canadian Pacific Express Co. the *Tierce Saisie*.

The Court doth dismiss defendant's contestation with costs.

(1) (1913) 13 D. L. R. 275.
(2) (1931) 1 D. L. R. 806.

(3) (1910) 43 S. C. R. 106 re-
versed by (1911) 28 T. L. R. 41.

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BRITISH COLUMBIA

COUNTY COURT

ELLIS, C.C.J.

Pope v. Paul

Indians — Liability of Property of to Execution — Indian Act, Ss. 102, 105 — "Personal Property Outside of the Reserve" — Gasoline Boat.

A gasoline boat of which the defendant, an unenfranchised Indian, was a part owner, held under the circumstances not to be property of an Indian on a reserve and not property which sees. 102 and 105 of the Indian Act, R.S.C., 1927, ch. 98, prevented from being seized under execution. *Avery v. Cayuga* (1913) 28 O.L.R. 517; *Atty.-Gen. v. Giroux* (1916) 53 S.C.R. 172, at 199; *Armstrong Growers' Assn. v. Harris* [1924] 1 W.W.R. 729, at 730, 33 B.C.R. 285, at 287, applied.

[Note up with 4 C.E.D., *Exemptions*, sec. 5; 5 C.E.D., *Indians*, sec. 10.]

E. A. Dickie, for plaintiff.

H. Castillou, for defendant.

May 14, 1937.

Ellis,
C.C.J.

ELLIS, C.C.J. — This is an application in Chambers by the defendant to set aside a warrant of execution on the following grounds:

"(a) The defendant is an Indian and his personal property, not subject to taxation, is not liable to execution under the *Indian Act*, otherwise known as Chapter 98, Revised Statutes of Canada and amendments thereto.

"(b) That if he is liable to execution that he claims exemption under the *Execution Act*, being Chapter 83 of the Revised Statutes of British Columbia, 1924, as his interest is only worth \$200.00."

The point under (a) is an important one, not only to the general public, but to the Indians residing in the province.

The plaintiff sued the defendant for the balance due on the purchase-price of a boat purchased from him by the defendant, and for small amount due for groceries, and obtained judgment by default for \$479.82. Subsequently execution was issued and a gas boat, in which the defendant, an unenfranchised Indian, was a part owner, was seized under execution. The boat in fact is owned jointly by the defendant, his father, mother and wife, each of them having advanced out of their own moneys part of the purchase-price.

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The evidence disclosed that the boat was bought off the reserve from a Japanese, one S. Shimono at Goose Bay, Rivers Inlet, British Columbia.

Gertrude Paul, wife of the defendant, swore that she, the defendant and the defendant's father and mother owned little patches of land on different reserves, and that the boat was used to get to these different reserves. It was also used in fishing to enable the family to get their winter supply of fish "and also for getting money by catching fish and selling them to get food and clothing for our families to live on the reserve."

On the cross-examination of the defendant on his affidavit he admitted the purchase of the boat off the reserve and that he used the boat for fishing around their home at Porpoise Bay and Narrows Arm, Jervis Inlet, and sold the fish he caught to the buyers.

It is abundantly clear that the boat was never on a reserve excepting to be hauled up on the beach, and on one occasion when a new mast was put into it, and cannot therefore be classed as property of an Indian on a reserve. That being so, is the boat under the law property that can be seized in execution?

Sec. 102 of the *Indian Act*, R.S.C., 1927, ch. 98, reads:

"No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds, in his individual right, real estate under a lease or in fee simple, or personal property outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate."

Sec. 105 of the Act as amended by sec. 10, ch. 25, 1930, reads:

"105. No one other than an Indian or non-treaty Indian shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property, subject to taxation under the last three preceding sections: Provided that any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid."

On the general law as to the legal rights and liabilities of Indians, Martin, J.A. (now C.J.B.C.) dissenting, in *Armstrong Growers' Assn. v. Harris* [1924] 1 W.W.R. 729, at 730, 33 B.C.R. 285, at 287, says:

"This appeal should, I think, with all deference to contrary opinions, be allowed, on the short ground that upon the evidence before us the only inference to be drawn is that this was a matter of business transacted outside the Indian reserve, and so the money due to the Indian arising therefrom was a debt owing to him outside the reserve, and therefore could be attached within the general principle to be extracted from the cases cited as to Indian property outside such reserves."

In *Atty.-Gen. for Can. v. Giroux* (1916) 53 S.C.R. 172, Duff, J. (now C.J.C.) in referring to secs. 77 and 78 of the *Indian Act*, R.S.C., 1886, ch. 43, which then contained the law relating to taxation of Indians, and which do not differ from our present secs. 102 and 105, says (p. 199):

"The scheme of these sections appears to be that real estate held by an Indian within the reserve where he resides shall not be subject to taxation, or be charged by mortgage or judgment, but it does not appear to be within the scheme to exempt property purchased by an Indian as purchaser outside of the reserves on which he is living."

Mr. Castillou for the Indian defendant argued very strenuously that as the boat was used by the defendant and his family as a vehicle to go from one reserve to another, and only in a business sense for the sole purpose of catching enough fish to subsist on it was, in principle, property on the reserve and therefore within the meaning of the statute exempt.

Mr. Dickie for the plaintiff, on the question of the interpretation that should be put on the taxing clauses of the *Indian Act*, cited the case of *Avery v. Cayuga* (1913) 28 O.I.R. 517. I have read that case very carefully. Meredith, C.J.O., who gave the judgment of the Court, which was the Appellate Division, discusses sec. 99, now sec. 102, and sec. 102, now sec. 105, of the *Indian Act*. As this judgment is very pertinent to the question raised before me I quote from his judgment at length. He says, dealing with sec. 102, now sec. 105:

"Are the words 'subject to taxation under the last three preceding sections' to be read as meaning, 'may be sub-

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jected to taxation under the authority of these sections,' or as meaning 'are subjected to taxation under that authority?'

"If the latter is the proper construction, the judgment appealed from is wrong, because personal property is no longer subjected to taxation by the *Assessment Act* of this Province.

"I am, however, of opinion that what the exception means is, that property which secs. 99, 100, and 101 have rendered liable to be taxed, is not to be within the prohibitory enactment of the section; or, in other words, that security may be taken and a lien, or charge, by mortgage, judgment, or otherwise, may be obtained on any property of an Indian which, under the earlier sections, may be taxed, that is to say, applying the exception to sec. 99, real estate held by an Indian in his individual right under a lease or in fee simple or personal property outside of the reserve or special reserve.

"The intention of Parliament was manifestly, I think, to exclude from the prohibition as to taxing the property of Indians, and from the prohibition contained in sec. 102, as to their dealing with their property, or its being made liable to satisfy judgments against them, real estate held by an Indian in his individual right under a lease or in fee simple, or personal property outside of the reserve or special reserve; and, as to these matters, to put Indians in the same position as persons who are not Indians; and I can see no reason, if that was the intention of Parliament, why the exclusion of the property of an Indian from the prohibition contained in sec. 102 should be made to depend upon whether or not the taxing body had exercised the power conferred upon it of taxing the property.

"It is the ownership of the property which gives the right to tax, and at the same time excludes the property from the prohibition contained in sec. 102.

"It is also to be observed that secs. 99, 100, and 101 are headed 'Taxation,' and the group of sections of which sec. 102 is the first is headed 'Legal Rights of Indians.'

"In short, my view is, that the exception in sec. 102 is the equivalent of the expression 'except on real and per-

sonal property which by the last three preceding sections is made liable to taxation."

The situation, in so far as taxation on personal property is concerned, when this judgment was pronounced, is the same as exists in British Columbia today. I am of the opinion, therefore, that the principles therein enunciated must be followed by me.

The second ground (*b*) raised by Mr. Castillou, as to exemption, is not a question for this Court but rather for another authority to deal with.

The application is dismissed with costs.

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SASKATCHEWAN

KING'S BENCH

EMBURY, J.

Lang v. Metropolitan Life Insurance Company

Insurance (Accident and Sickness)—“Permanent Disability”
— *Provision for Proof of Continuance of Disability —*
Insured Suffering From Tuberculosis — Inability to Perform Any But Certain Very Light Work.

In view of the provisions of the accident and sickness insurance policy herein requiring the insured to furnish on demand proof of the continuance of his disability, although proof of this disability had been previously accepted by the insurer, held that the word "permanent" in the phrase "total and permanent disability" was not intended to be given full effect.

The insured, a trainman, was suffering from tuberculosis. The medical testimony was that his disability prevented him from performing the work on which he had been formerly employed and rendered him unfit for any but certain very light work.

Held that the fact that the insured could earn a living if he could obtain an improbable position involving the doing of practically no work should not exclude him from the benefit of the policy.

[Note up with 5 C.E.D., *Insurance*, sec. 27.]

H. Rees, for plaintiff.

C. E. Hollinrake, K.C., for defendant.

June 14, 1937.

Embury, J.

EMBURY, J. — In order that the plaintiff may become entitled to an income under the policy of insurance sued on herein it is necessary that he shall "become totally and per-

Dame ROUSSEAU et vir v. NOLETTE.

Montréal

1920

28 fév.

Vente avec condition suspensive—Propriété—Sauvage—Confiscation—Garantie—C. civ., art. 1506—S. rev. [1906], ch. 81, art. 102.

1. Est légale la vente avec condition suspensive et rétention, de la part du vendeur, du droit de propriété et avec confiscation, en cas d'arrérages de paiement, des montants antérieurement payés.

2. Cette condition peut être stipulée, même dans un contrat avec un sauvage; elle équivaut à la garantie que l'article 102 de la loi des sauvages (S. rev. [1906], ch. 81) autorise le vendeur à prendre pour toute partie du prix de vente qui n'a pas été payée.

Le jugement de la Cour supérieure, qui est confirmé, a été prononcé par M. le juge Bruneau, le 5 février 1919.

La demanderesse a lancé une saisie-revendication entre les mains de la défenderesse fondée sur les faits suivants: Le 9 octobre 1916, elle lui a vendu un piano de \$200 payable \$5 par mois. Elle en a retenu le droit de propriété aussi longtemps que le piano ne serait pas payé, stipulant que, dans ce dernier cas, les paiements faits seraient confisqués à titre de loyer. Il lui est dû un solde de \$84.

La défenderesse plaide qu'elle est une sauvagesse dans le sens de l'art. 102 de la loi des sauvages (S. rev. [1906], ch. 81). La demanderesse ne pouvait en vertu de cette loi stipuler au contrat qu'une garantie sur le piano. Or, le contrat en question équivalait, au cas de non-paiement d'une partie du prix de vente, à une confiscation des sommes payées jusque là. Il s'ensuit que ce contrat est nul et contraire à l'ordre public.

La Cour supérieure a maintenu la saisie-revendication par les motifs suivants:

Statuant au fond: Considérant que c'est un point maintenant constant et certain, d'après la jurisprudence des arrêts, que des ventes de

M.M. les juges Demers, Tellier et de Lorimier.—Cour de révision.—No 6110.—L.-J.-G. Wartelle, C. R., avocat de la demanderesse —J.-B. Brousseau, C. R. avocat de la défenderesse.

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la nature et aux conditions de celles faites à la défenderesse sont parfaitement légales;

Vu la loi des sauvages (S. rev. [1908], ch. 81);

Considérant qu'aucune disposition de ladite loi ne défend à un sauvage de passer un contrat ou souscrire des obligations de la nature et aux conditions de l'écrit signé par la défenderesse, le 9 octobre 1916;

Considérant, de plus, que rien n'empêche un sauvage, d'après ladite loi, de poursuivre ou d'être poursuivi en vertu d'un contrat semblable;

Vu l'art. 102 de ladite loi, spécialement invoquée par la défenderesse;

Considérant que le cinquième paragraphe du plaidoyer de la défenderesse n'est que la reproduction de la première partie des dispositions de l'article 102 précité, et partant qu'aucun privilège ni aucune garantie ne peuvent être pris sur les biens mobiliers ou immobiliers des sauvages, excepté sur ceux sujets aux taxes en vertu de l'article 101;

Considérant que la dernière partie du susdit article 102 ajoute cependant:—«Mais toute personne qui vend quelque article à un sauvage, ou à un sauvage non compris dans les traités, peut prendre une garantie sur cet article pour toute partie du prix de vente qui n'a pas été payé»;

Considérant que le contrat du 9 octobre 1916 n'est qu'une vente suspensive, soumise à des conditions équivalentes à une véritable garantie sur le piano en litige, pour toute partie du prix de vente qui n'aurait pas été payée;

Considérant que si les prétentions juridiques de la défenderesse étaient bien fondées, le législateur aurait fait des sauvages une classe privilégiée entre toutes les autres, en leur permettant d'acheter et de garder des pianos sans les payer, ou de demander la nullité du contrat, après avoir fait usage desdits pianos pendant longtemps, sans remplir les conditions dudit contrat;

Considérant que la dernière partie du susdit article 102 de la loi des sauvages contredit formellement les prétentions de la défenderesse;

Considérant que le contrat du 9 octobre 1916 est valable et fait loi, par conséquent, entre les parties;

Considérant que la défenderesse n'a pas rempli les conditions dudit contrat;

Considérant que la demanderesse a prouvé les allégations essentielles de sa déclaration;

Considérant que le plaidoyer de la défenderesse est mal fondé;

Par ces motifs rejette le plaidoyer de ladite défenderesse, déclare la demanderesse la seule et vraie propriétaire dudit piano, déclare bonne et valable la saisie-revendication dudit piano faite en vertu du bref

1. Bertrand v. Gaudreau
[1882] Mathieu J. 12 R. L. 154;
—Lucas v. Bernard [1894] Ci-

mon J.5 C.S. 529;—Waterous
Engine Works Co. v. Hochelaga
Bank [1896] 5 B. R., 125.

émis en cette cause, remet la possession dudit piano à la demanderesse; condamne la défenderesse à le remettre à la demanderesse dans les quinze jours du présent jugement et, faute par la telle défenderesse de ce faire la condamne à payer à la demanderesse la susdite somme de \$115, le tout avec dépens contre la défendresse.

Confirmé en révision.

LETANG et AUTRE v. HOMIER et AUTRES.

Monttréal

*Continuation de communauté—Demande—C. civ., art. 1323
(ancien).*

1920
23 fév.

1. Il n'est pas nécessaire que la continuation de communauté soit demandée du vivant de la mère survivante.

2. Il est inutile de la part des enfants de faire cette demande lorsque leur mère a reconnu qu'elle existait et leur a toujours donné l'assurance que tout ce qui provenait de la succession de leur père et les profits qu'elle en retirait leur seraient rendus à sa mort.

Le jugement de la Cour supérieure du district d'Ottawa, qui est confirmé, a été rendu par M. le juge Chauvin, le 21 février 1919.

Le 3 septembre 1883, Jean Séguin, père des demandeurs et des défendeurs, marié en communauté de biens avec dame Clarisse Delorme, leur mère, est décédé intestat. Dame Clarisse Delorme accepta la communauté des biens et continua les affaires de la communauté, sans procéder à faire aucun inventaire. La communauté a été ainsi continuée¹ jusqu'à la mort de dame Clarisse Delorme, qui arriva le 20 juillet 1917; par son testament du 10 mars 1914, ladite dame Clarisse Delorme a laissé tous ses biens à sa fille Clarisse Séguin, et une somme de \$200 à chacun de ses autres enfants. Les demandeurs réclament la part d'héritage provenant de la succession de leur père Jean Séguin, et ceux provenant de la contin-

M.M. les juges Demers, Panneton et de Lorimier.—Cour de révision.—No 4612.—J.-A. Parent, C. R., avocat des demandeurs.—L. Coussineau, C. R., avocat des défendeurs.

1. La continuation de communauté de biens a été abolie par la loi 60 Vict. [1897].

ch. 52 et remplacée par l'usufruit légal du conjoint survivant, art. 1323 et s.

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that the jury was fully justified in drawing the inference that the contact of the limbs of the trees with the wire caused it to break.

As an authority for the application of the maxim *res ipsa loquitur* I refer to *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652, and what Fletcher Moulton, L.J., said at p. 663:

"In my opinion the mere occurrence of such an accident is not in itself evidence of negligence. Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened."

The defendant has not objected to the finding as to contributory negligence, or that the amount of the damages awarded is too large, and for the reasons I have given I would dismiss this appeal with costs.

Appeal dismissed.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. November 14, 1930.

Indians—Civil action—Jurisdiction of Courts—Execution against property—Attachment of body.

The effect of R.S.C. 1927, c. 98, ss. 102-5, is to place Indian property outside reserves on the same footing as property of other persons but as the Indian is a ward of the Dominion Government his body cannot be taken in attachment under Provincial law relating to civil actions.

The Legislature of N.B. in passing the Towns Incorporation Act, R.S.N.B. 1927, c. 179, s. 127, did not intend to confer upon any Civil Court any power directly or indirectly to interfere with Indians.

Courts II A—Provincial Courts—Jurisdiction over Indians—Civil actions.

APPLICATION by way of *certiorari* to set aside an order on review of the Judge of the Northumberland County Court, affirming the judgment entered in the Town of Newcastle Civil Court.

P. J. Hughes, K.C., for applicant.

J. J. F. Winslow, K.C., contra.

The judgment of the Court was delivered by

GRIMMER, J.:—The appellant, Michael Tenasse, an unenfranchised Indian living upon an Indian Reservation, was sued in the Town of Newcastle Civil Court by one A. Ramsay for the sum of \$14.62, for goods sold by him to the said Tenasse, and on December 5, 1929, judgment was entered against the defendant for the sum of \$33.81. An order on review was obtained from the Judge of the Northumberland County Court, which was dismissed by the said Court, and the Civil Court judgment confirmed on February 20 last. On May 7 last a writ of *certiorari* was issued out of this Court upon the application of the defendant upon the following grounds:

(1) The Town of Newcastle Civil Court had no jurisdiction in this matter, and the Magistrate has no jurisdiction to issue an attachment against the defendant in this matter or to enter a judgment against the defendant herein, the said defendant being an Indian.

(2) The order of the Judge of the Northumberland County Court made on review was without jurisdiction because the defendant was an Indian.

The question, therefore, for decision before the County Court Judge and before this Court is: Did the Town of Newcastle Civil Court have jurisdiction to enter a judgment against the defendant Tenasse, he being an Indian?

It was contended on behalf of the defendant that under the Indian Act, R.S.C. 1927, c. 98, s. 105, it did not have such jurisdiction. This section is as follows:—"No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three preceding sections: Provided that any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid" [re-enacted by 1930 (Can.), c. 25, s. 10].

The three preceding sections referred to, being ss. 102-4 of the Act, refer to the liability of Indians to be taxed. Of these sections, s. 102 makes it perfectly clear that Indians holding real estate under lease or in fee simple or personal estate outside of the reserve or special reserve shall be liable to be taxed for such real or personal property at the same rate as other persons in the localities in which it is situate.

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TENASSE.
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Grimmer, J.

It was evidently the intention of Parliament by this enactment to place the real and personal property of Indians outside of the reserve upon the same basis as property of persons who are not Indians, and it would thus become possible that security might be taken thereon, and that a lien or charge by mortgage, judgment or otherwise might be obtained on any property of an Indian that was liable to taxation under s. 102—that is to say, real estate held by an Indian in his individual right under a lease or in fee simple or personal property outside of the reserve or special reserve.

If, then, the property of Indians outside of the reserve is liable as stated, it naturally follows that the Civil Court of Newcastle would have the necessary jurisdiction to entertain a claim against an Indian and to enter up judgment or as it may be against him, but what can be done with or upon that judgment is quite another matter, and one that does not arise in the present case. Incidentally, it may be mentioned that the Indian Act does not give the right to take the person of an Indian in execution, though certain of his property may be taken. The Indian is a ward of the Dominion Government and cannot be taken under the laws of this Province. The Towns Incorporation Act, R.S.N.B. 1927, c. 179, ss. 127 *et seq.* was referred to in support of the rule, but I cannot and do not think that the Province intended thereby to confer upon any Civil Court any power directly or indirectly to interfere with Indians. The learned County Court Judge in disposing of the matter very clearly stated that in his opinion the Civil Court judgment was perfectly good, but he added the following very significant words:—"What the plaintiff can do with it is not now before me."

For the reasons herein shortly stated, I concur in the judgment of the learned County Court Judge, and the rule will be discharged.

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JACKSON v. PENFOLD.

Ontario Supreme Court, Appellate Division, Latchford, C.J., Riddell, Masten, Orde and Fisher, J.J.A. December 5 and 16, 1930.

Chattel Mortgages and Bills of Sale I—In general—What constitutes—“Sale.”

A contract for the sale of crops to be grown is "a sale" within the Bills of Sale and Chattel Mortgage Act, R.S.O. 1927, c. 164, s. 20, and to be effective against creditors must be filed under s. 7.

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For the reasons herein shortly stated, I concur in the judgment of the learned County Court Judge, and the rule will be discharged.

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A contract for the sale of crops to be grown is “a sale” within the Bills of Sale and Chattel Mortgage Act, R.S.O. 1927, c. 164, s. 20, and to be effective against creditors must be filed under s. 7.

BRITISH COLUMBIA COUNTY COURT

Cashman Co. Ct. J.

Williams v. Joe

Executions — Order for delivery of chattel — Application of M.R. 647 to County Court proceedings.

In an action for the return of a stump puller and parts plaintiff obtained interlocutory judgment; he now sought an order that execution be issued for the delivery of these items; alternatively, if the property could not be found, for an order that the Sheriff distrain upon defendant's property. The motion was brought under M.R. 647.

Held, M.R. 647 was applicable to proceedings in the County Court and plaintiff was entitled to the order sought, whether or not there had been an assessment of value: *Hymas v. Ogden*, [1905] 1 K.B. 246 applied.

[Note up with 11 C.E.D. (2nd ed.) *Executions*, s. 2.]

J. C. Davie, for plaintiff.

No one, contra.

25th April 1973.. CASHMAN Co. Ct. J.:—This is an action for the return of a stump puller and parts taken by the defendant in the month of February 1972. No appearance has been filed and interlocutory judgment was entered on 31st January 1973.

The plaintiff now seeks an order that execution be issued for the delivery of the stump puller and parts and further, and in the alternative, if the property cannot be found, for an order that the Sheriff distrain upon the defendant's property.

The motion is supported by an affidavit, which states that the stump puller and parts are believed to be somewhere in the Cowichan Indian Reserve No. 1 and that furthermore both the plaintiff and the defendant are Indians within the meaning of the Indian Act, R.S.C. 1970, c. I-6.

This motion was brought pursuant to O. 48, R. 1, M.R. 647, which reads as follows:

"1. Where it is sought to enforce a judgment or order for the recovery of any property other than land or money by writ of delivery, the Court or a Judge may, upon the application of the plaintiff, order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property, upon paying the value assessed (if any), and that if the property cannot be found, and unless the Court or a Judge shall otherwise order, the Sheriff

shall distrain the defendant by all his lands and chattels in the Sheriff's bailiwick, till the defendant deliver the property; or, at the option of the plaintiff, that the Sheriff cause to be made of the defendant's goods the assessed value (if any) of the property."

At the conclusion of the hearing of the motion I asked learned counsel for the plaintiff to obtain some authority for making such order, which material is now in hand.

Upon being satisfied that the order should be made, I directed that the order issue in the terms set forth in the notice of motion.

I now assess reasons for so doing, as there do not appear to be any cases decided in British Columbia under this Rule.

The first question is whether the Rule applies to proceedings in the County Court. The County Court Rules, 1968, make the Supreme Court Rules applicable to causes and matters in the County Court, save and except for certain Supreme Court Rules which are specifically excluded by R. 2 of the County Court Rules. Marginal Rule 647 does not appear to be one of those specifically excluded. Rule 3 of the County Court Rules provides as follows:

"3. In the event of a conflict between these Rules and the Rules of Court of the Supreme Court of British Columbia, these Rules shall govern."

I am unable to find any County Court Rule that appears to conflict with M.R. 647.

As previously mentioned, there do not appear to be any cases decided in British Columbia under this Rule. However, counsel for the plaintiff has referred me to the English case of *Hymas v. Ogden*, [1905] 1 K.B. 246, a decision of the English Court of Appeal. That case decided that a County Court judge had jurisdiction to order a warrant of attachment, under the English Rules. At p. 250 Collins M.R. sets out the meaning of the applicable English Rule which, except for some words not found in the British Columbia Rule, appears to me to be identical in words and in substance to the British Columbia Rule. The learned Judge says as follows:

"It was, however, contended that by obtaining a warrant of delivery the plaintiff lost the remedy by attachment to enforce the order to deliver up the dog. I do not think that the obtaining the warrant of delivery had that effect. The judgment in the action was not an alternative judgment, but

the very essence of the matter was the obligation to hand over the dog, and that obligation was not affected by the issue of the warrant of delivery. It was further said that cases shewed that it was a condition precedent to the making of an order for delivery of a chattel that its value should be appraised. If that was ever the law it was a highly technical matter which has been cured by Order XLVIII., r. 1, of the Rules of the Supreme Court. The reason for the rule in its final form is explained in a note to the rule in the Annual Practice, where it is said that the addition of the words 'if any' after the words 'upon paying the value assessed,' appears to make the rule applicable whether the value of the property has been assessed or not. The rule, therefore, gets rid of any difficulty as to the assessment of value that might have existed previously in cases where there was no desire to take money in lieu of the chattel which was detained from the owner."

The words added to the English Rule are not in my opinion such as to give cause why this reasoning should not be adopted in construing M.R. 647.

The Indian Act appears to allow an order such as this to issue as between Indians. If the action were between a non-Indian and an Indian, I might be inclined to have some doubts as to whether such an order could be made, which would have the effect of authorizing a trespasser upon an Indian reserve by the Sheriff.

However, I am satisfied that, in the circumstances of this case, such an order can be made.

ALBERTA SUPREME COURT

[APPELLATE DIVISION]

Allen, Clement and Prowse JJ.A.

Irving Industries (Irving Wire Products Division) Ltd. and
Irving Industries (Foothills Steel Foundry Division) Ltd.
v. Sadim Oil & Gas Co. Ltd. and Canadian Long Island
Petroleums Ltd.

Mines and minerals — Joint operating agreement — Right of first refusal — Whether conferring an interest in land — Rule against perpetuities.

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Jun. 27.
1934
Apr. 7.

BETWEEN:

WILLIAM CHIPMAN..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Jurisdiction—Exchequer Court Act—Rideau Canal Act—British North America Act—Crown as Trustee—Statute of Limitation—Non-Assignability of claim against the Crown.

Held: That the Exchequer Court has jurisdiction to entertain an action arising out of the taking of lands under the Rideau Canal Act, 8 Geo. IV, c. 1.

2. That the Crown can only be constituted a trustee by express statutory provisions or a contract to which the Crown is a party.
3. That a claim against the Crown, in the absence of acquiescence, is not assignable.

PETITION OF RIGHT by the suppliant claiming compensation for lands taken by the Crown under the provisions of the Rideau Canal Act.

The action was heard before the Honourable Mr. Justice Angers, at Ottawa.

R. V. Sinclair, K.C., for suppliant.

F. P. Varcoe, K.C., for respondent.

The facts are stated in the reasons for judgment.

ANGERS J. now (April 7, 1934) delivered the following judgment:

This is a petition of right by which the suppliant seeks to recover from the Crown the sum of \$5,600 in the following circumstances.

The Canada Company, assignor to the suppliant, in virtue of an assignment filed as exhibit K, of the right, title, claim and demand it might have against the Crown for compensation under the Rideau Canal Act or otherwise, was incorporated by charter issued under the Great Seal of the United Kingdom of Great Britain and Ireland on the 19th day of August, 1826. A copy of the charter appears in the Appendix to the Journal of the House of Assembly of Upper Canada (1835), filed as exhibit E.

This charter was granted in pursuance and under the authority of an Act which came into force on the 27th day of June, 1825, entitled "An Act to enable His Majesty

to grant to a Company, to be incorporated by charter, to be called 'The Canada Company', certain lands in the Province of Upper Canada, and to invest the said Company with certain powers and privileges and for other purposes relating thereto" (6 Geo. IV (Imp.), ch. 75): see exhibit E.

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The Canada Company was thus incorporated for the purpose of acquiring from the Crown, in right of the Province of Upper Canada, the whole of the Crown reserves and one half of the Clergy reserves in those townships which, on or before the 1st of March, 1824, were actually laid out in the several districts of Upper Canada, except such portions of the Crown and Clergy reserves granted or demised on lease, or occupied on the licence or promise of the Government, or appropriated to public or clerical purposes, or occupied without disturbance for ten years, or which might be peculiarly convenient or necessary for the public service or for ecclesiastical objects such as the erection of churches, school houses or parsonage houses, with small pieces of land to be used as burying grounds, yards or gardens.

Previous to the issuing of the charter, namely, on the 26th of November, 1824, an agreement had been made between the Earl of Bathurst, His Majesty's Secretary of State for the department of the Colonies, and a Committee of subscribers to the company to be incorporated for the sale of the aforesaid lands to the company, providing *inter alia* for the appointment of Commissioners to ascertain the quantity of lands to be purchased by the company, the price to be paid therefor and the mode of payment: see exhibit E.

Another agreement was made between The Earl of Bathurst, on behalf of His Majesty's Government, and subscribers of the company to be incorporated, on the 23rd of May, 1826, by which a block of land in the territory purchased by the Crown from the Indians was substituted to and in lieu of the lands which, under the first agreement, were to be taken from the Clergy reserves and by which the terms of payment were modified and certain conditions, immaterial herein, were added; this new agreement is also to be found in exhibit E.

Among the lands alleged to have been purchased by The Canada Company from the Crown, pursuant to the afore-

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said agreements and for which it received a patent, was a lot described as lot number five (5) in the Sixth concession of the Township of South Crosby, in the County of Leeds, containing two hundred acres, as appears by a copy of the patent dated the 2nd of November, 1832, filed as exhibit D.

The grant and the description of the property in the patent read as follows:

We have given and granted and by these Presents do give and grant unto the said Canada Company and their Successors forever all those certain parcels or tracts of land situate in Our said Province and containing by admeasurement One Hundred and Ten Thousand six hundred and thirty-eight acres be the same more or less Being amongst other lands lot Number five in the Sixth concession of the Township of South Crosby in the County of Leeds containing Two hundred acres To Have and To Hold the said several parcels or tracts of land hereby given and granted to the said Canada Company and their assigns forever Saving reserving and excepting to Us Our Heirs and successors to and for the use as well of Us Our Heirs and successors as of All Our loving subjects all navigable streams waters and watercourses with the beds and banks thereof running flowing or passing in over upon by through or along any of the said parcels or tracts of land hereinbefore given and granted to the said Canada Company and their assigns and also saving and reserving to Us Our Heirs and Successors all mines of gold and silver that shall or may hereafter be found on any part of the said parcels or tracts of land hereby given and granted as aforesaid.

Then the patent contains a proviso regarding lots or parts of lots, among the lands granted, which may be required by the Crown for canals, roads, forts or other public purposes; this proviso is in the folowing terms:

Provided also if any of the said several lots or pieces of land hereby granted by Us to the said Canada Company their successors or assigns or any part thereof shall be required for canals roads the erection of forts hospitals arsenals or any other purpose connected with the defence or security of the said Province then all and every the said lands which may be so required for any or either of the purposes aforesaid shall revert to and become vested in Us Our Heirs and Successors upon a requisition for the same being made either by an act of the Legislature of Our said Province or by the Governor, Lieutenant Governor or person administering the Government of Our said Province or by his direction and this Our grant of such lands which shall be so required shall upon and after such requisition for the same being made be null and void and of non effect so far as respects such lands any thing herein contained to the contrary in anywise notwithstanding And We do hereby declare that in any such event We Our Heirs and Successors will name one arbitrator who shall in concurrence with an arbitrator to be appointed by Canada Company or their grantees or lessees and a third arbitrator to be chosen by such arbitrators determine what price it is reasonable should be paid by Us Our Heirs and Successor's to the said Canada Company their grantees or lessees for any lands that may be so resumed by Us Our Heirs or Successors which determination shall be made by the voice of the majority of the said arbitrators.

An Act concerning the Rideau Canal was passed on the 17th of February, 1827 (8 Geo. IV, ch. 1), which provided, among other things, that the officer employed to superintend the construction of the canal should have full power and authority to enter into and upon the lands or grounds of or belonging to any person or persons, bodies politic or corporate, and to survey and take levels of the same or any part thereof and to set out and ascertain such parts thereof as he should think necessary for the proper making of the canal.

The said act also provided that the price or compensation to be paid for lands taken for the purposes of the canal should be determined by agreement with the owners or, if no agreement could be made, by arbitration.

[The learned Judge referred to the pleadings and then continued.]

At the trial admissions were filed by the parties reading as follows:

THE PARTIES HERETO, in addition to the admissions in the Pleadings herein, make the following admissions for the purposes of this suit, only:

(1)—The Officer employed by Her Majesty to superintend the construction of the Rideau Canal, entered upon Lot (5), in the 6th Concession of the Township of Crosby, in the County of Leeds, in the new Province of Ontario, and surveyed the lands comprising 60 acres, 1 rood and 33 perches, referred to in paragraph 7 of the petition of right, being the part thereof which he deemed necessary for the making of the said Canal, and the boundaries were marked first by pickets, as shown on Burroughs' plan dated 1839 (Exhibit A) and later by boundary stones in the same positions as the pickets, as shown on Snow's plan 1850 (Exhibit B). Chewett's plan 1829 (Extract therefrom Exhibit C) shows the lands coloured red but does not show any boundary pickets or stones, although in the cases of some other lots taken boundary stones are shown on this plan.

(2)—The Rideau Canal was finished and opened for navigation in May, 1832. The patent to the Canada Company (Exhibit D), being one of a number of patents granted by the Crown to the Canada Company, covering the lands in question, was dated November 2nd, 1832. This patent was issued pursuant to an arrangement which is disclosed by the following instruments contained in Exhibit E, being Appendix to Journal of the House of Assembly of Upper Canada, 1835, Vol. 2, No. 39: (a) the minutes of arrangement between Lord Bathurst, Colonial Secretary, and the promoters of the company, dated 26th November, 1824; (b) amending arrangement dated 23rd May, 1826; (c) charter of the Canada Company dated 19th August, 1826. In addition reference should be made to the statute authorizing the charter, being (1825) 6 Geo. IV, chap. 75 (Imp.) (Exhibit E).

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(3)—Pursuant to the arrangement, commissioners were appointed to value the lands. The commission and instructions are contained in Exhibit E. The valuation was duly made.

(4)—A certain book of the Canada Company called "Register of Lands" contains the following entry:

| | | Number of Acres |
|------------|-----|-----------------|
| Concession | Lot | Crown Reserve |
| 6 | 5 | 200 |

This Register was dated 30th September, 1826. This admission however implies no admission by the Attorney-General as to the nature or purpose of such Register, or as to the effect of the entry therein.

(5)—Payments to the Government were made by the Canada Company as follows: 1827, £20,000; 1828, £15,000; 1829, £15,000; 1830, £15,000; 1831, £16,000; 1832, £17,000; 1833, £18,000; 1834, £19,000; 1835, £20,000; and in each of the seven succeeding years the sum of £20,000.

(6)—No voluntary agreement was ever made for the payment of compensation in respect of the 60 acres, 1 rood, 33 perches in question nor was any arbitratice had to award compensation nor has any compensation been paid in respect of the said lands. But pursuant to a certain statute, 2 Vict., chap. 19, a proclamation was issued dated 7th September, 1839, requiring claims to be filed before 1st April, 1841 (Exhibit F). Following this proclamation and notice a claim for compensation was made by the company (Exhibit G). The company was notified that the claim did not comply with the requirements of the Public notice as appears by Exhibit H. Other correspondence relating to this claim is contained in Exhibit I.

(7)—The Canada Company never entered into possession of the said lands. The purchasers of the lots comprising the 27 acres, 3 roods and 24 perches referred to in paragraph 7 of the petition of right, and their heirs, successors and assigns have been in exclusive, adverse and open possession since the respective dates when the lots were sold.

(8)—The lands in question herein were not at any time resumed by the Crown under the proviso in that behalf contained in the patent issued in November of 1832.

(9)—The Canada Company executed the instruments in favour of the suppliant, William Chipman, mentioned in the petition of right, viz., a deed dated 31st January, 1910 (Exhibit J), and an assignment dated 29th December, 1922 (Exhibit K).

The first question to examine is whether this Court is competent to entertain an action arising out of the taking of lands under the Rideau Canal Act; the Crown denies the jurisdiction.

The Rideau Canal Act, passed as aforesaid on February 17, 1827, was, by section 27 thereof, declared to be a public act. When the British North America Act came into force on March 29, 1867, the Rideau Canal Act was still in force.

Section 3 of the Rideau Canal Act enacts that "such parts and portions of land or lands, covered with water, as may be so ascertained and set out by the officer employed by His Majesty as necessary to be occupied for the purposes of the said canal * * * shall be forever thereafter vested in His Majesty, His Heirs and Successors."

In virtue of the statute 7 Vict., ch. 11, intituled "An Act for vesting in the Principal Officers of Her Majesty's Ordnance the estates and property therein described, etc.", the Rideau Canal became vested in the Principal Officers of Her Majesty's Ordnance in Great Britain.

By the statute 19-20 Vict., ch. 45, the Rideau Canal was revested in Her Majesty for the benefit, use and purposes of the Province of Canada: see section VI and the second schedule.

Under section 108 of the British North America Act and the third schedule thereto the Rideau Canal became the property of the Dominion of Canada.

In virtue of sections 129 and 91 of the British North America Act the Rideau Canal Act, not being repealed by the Parliament of Canada, became a law of Canada. It being so, I think that under section 19, subsection (d), of the Exchequer Court Act (R.S.C. 1927, ch. 34) this Court has jurisdiction to take cognizance of the present case: see *Henry et al v. The King* (1); *The Queen v. Yule* (2); see also *The Qu'Appelle Long Lake and Saskatchewan Railroad & Steamboat Co. et al v. The King* (3); *Consolidated Distilleries Ltd v. The King* (4).

The next question to determine is whether the south half of lot 5 taken for the canal, a part whereof was later laid out in town lots and sold by the Crown, ever became vested in the Canada Company.

To say the least the proof is most unsatisfactory; it could hardly be otherwise after a century and more.

[The learned Judge here considered the evidence on this point and continued.]

I think that so far as the portion of lot 5 which had been taken or reserved for the canal was concerned, the patent was ineffective and *pro tanto* null and void. This alone would suffice to dispose of the action as brought. If the Canada Company paid for land which it did not get, it may have had a recourse against the Crown for the recovery of the price it paid therefor; I would feel inclined however to believe that this recourse, if it existed, would now be prescribed. But, as I am not concerned with a claim of this nature, I do not think I should express an opinion on the question and will refrain from doing it.

(1) (1905) 9 Ex. C.R. 417. (3) (1901) 7 Ex. C.R. 105.
 (2) (1899) 30 S.C.R. 24 at p. 35. (4) (1933) A.C. 508.

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But, if we assume that the grant was only null and void with respect to the portion of the lot which had actually been taken and used for the canal and that it was valid as regards the portion thereof which was later found to be unnecessary and was laid out into lots and as such sold by the Crown (with the exception of six lots) between the years 1873 and 1892, which is apparently the view taken by the suppliant (see para. 9 of the petition), has the suppliant got a claim against the respondent for the several purchase prices obtained by the Crown for the lots so sold? This is the question which I now propose to examine.

The question, in my opinion, must be answered in the negative. I do not think that the company ever had any right to claim and recover from the respondent the sums which the latter receivd in payment of the lots sold; needless to say, the respondent has no more right than the Canada Company, his assignor, had. If the Crown were not in a position to give to the purchasers of the lots a good and valid title thereto, the purchasers would, in my opinion, be the only ones entitled to recover from the Crown the sums disbursed for the purchase of these lots. If the company had a recourse against the Crown in consequence of the sale by the latter of lands belonging to the company, its recourse could only have been for the reimbursement of what it had paid fo the Crown for the lands in question, with perhaps, in addition, interest and damages, or for compensation. But the suppliant, assignee of the company's rights, is suing for the prices received by the Crown and his claim is for the aforesaid reasons unfounded.

Even if I arrived at the conclusion that the company had in due time a claim against the Crown for the prices derived by the latter from the sale of the lots as equivalent to or in lieu of the consideration it had given to the Crown for the said lots or as equivalent to and in lieu of compensation for the taking of the lands, I think that the claim was at the time of the commencement of the proceedings herein and had been for a long time previous barred by the Statutes of Limitation: Imperial Statute 3-4 Wm. IV, chap. 42; 2 Vict., chap. 19, and R.S.O. 1927, chap. 106; R.S.C. 1927, chap. 34, s. 32; see *McQueen v. The Queen* (1).

(1) (1886) 16 S.C.R. 1, at 4.

It was argued on behalf of the suppliant that the Crown in collecting the purchase prices of lots which belonged to the Canada Company became trustee for the company. This contention, to my mind, is ill-founded. The Crown may perhaps have become a trustee of these moneys for the purchasers to whom no good and valid title in the lands passed; but there was no relation of trustee as between the Crown and the Canada Company. I see no privity between the Crown and the company or its assign, the suppliant herein, on the action as brought.

I do not think that the Crown can be placed in the position of a trustee by implication; the Crown can only be constituted a trustee by the express provisions of an Act of Parliament or a contract to which the Crown is a party: *McQueen v. The Queen* (1); *The Hereford Railway Co. v. The Queen* (2); *Rustomjee v. The Queen* (3); see also *Henry et al v. The King* (4); *Kinloch v. Secretary of State for India* (5).

Reverting for a moment to the question of compensation, it is admitted that no agreement was ever made in this respect and that no arbitration was ever had to fix and award compensation for the taking of the lands in question: see paragraph 6 of the admissions. But the Canada Company apparently considered at one time that its recourse against the Crown was one for compensation in consequence of the expropriation of the south half of lot 5. Pursuant to an Act intituled "An Act to limit the period for owners of lands making claims for damages already occasioned by the construction of the Rideau Canal and for other purposes therein mentioned" (2 Vict., chap. 19) a proclamation dated the 7th of September, 1839, was issued enjoining all persons having claims for damages sustained in consequence of the canal, locks, etc., being constructed in or upon the lands of any of them to prefer and prosecute such claims in due course of law on or before the 1st of April, 1841, and notifying them that upon their failure so to do such claims would forever afterwards be barred and precluded; a copy of this proclamation was filed

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| (1) (1886) 16 S.C.R., 1. | (3) (1876) 1 Q.B.D., 487; |
| (2) (1894) 24 S.C.R., 1. | '1876) 2 Q.B.D., 69. |
| (5) (1882) L.R. 7 App. Cas. 619. | (4) (1905) 9 Ex. C.R., 417. |

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as exhibit F. Annexed to the copy of the proclamation is a copy of a notice, containing information about the preparation of the claims, and a list of the newspapers in which it was published.

A claim, in the form of a letter, was addressed by the Canada Company to Major Bolton, superintendent of the Rideau Canal, in accordance with the directions contained in the notice aforesaid, bearing date the 9th of March, 1841: see exhibit G. Obviously the claim does not conform with the requirements of the notice.

On the 27th of March, 1841, the Government arbitrator wrote to the Commissioners of the Canada Company notifying them that the company's claim was unaccompanied by a diagram and a certificate of a surveyor as to the extent and nature of the damage, as required by the notice, and that it was doubtful if the claim could be entertained; a copy of the letter was produced as exhibit H. Two copies of letters, both dated April 3, 1841, from the Government arbitrator, to Major Bolton, were filed as exhibit I; to one of them is annexed an abstract of the claims received between March 1 and April 1, 1841, included in which is the claim of the Canada Company. The letters show that the Government arbitrator wanted advice concerning the company's claim. At the bottom of the first letter is a note stating that the matter was referred to the Commanding Royal Engineer, with a recommendation that it be submitted for legal opinion to the Attorney-General at Toronto. What happened, we do not know. Apparently the company did not press its claim. It is quite possible that it expected another letter from the Government arbitrator, seeing that his letter of March 27 (exhibit H) did not state positively that the claim could not be entertained, but merely said that it was doubtful if it could be. Be that as it may, I think it was up to the company to file a claim complying with the requirements of the notice published in pursuance of the proclamation aforesaid. By failing so to do, I am afraid that the company lost its recourse against the Crown for compensation, if ever it had one.

It was further urged on behalf of the respondent that the assignment by the Canada Company to the suppliant is not effective against the Crown and that the only person

who could sue on the present claim was the company itself; this contention appears to me well founded; on grounds of public policy a claim against the Crown, in the absence of acquiescence, is not assignable; the Crown cannot be expected to seek out the assignees of claims against it: see *Powell v. The King* (1); Audette, Practice of the Exchequer Court, 2nd Ed., 112, no. 27; *Arbuckle v. Cowtan* (2); see also *The Queen v. McCurdy* (3).

Other questions have been raised which I do not deem expedient to discuss, seeing that the action, for the reasons above set forth, fails.

The suppliant is not entitled to the relief sought by his petition and the latter is accordingly dismissed with costs.

Judgment accordingly.

BETWEEN:

JEANNE TOMAN.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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1933
Dec. 18.
1934
May 14.

*Crown—Responsibility—Negligence—Public Work—Chantier Public—
Jurisdiction—Exchequer Court Act.*

One G.C., a constable of the Royal Canadian Mounted Police, was driving an automobile belonging to the Force, in the City of Montreal. Whilst attempting to pass a street car, which had stopped to allow its passengers to alight, the automobile struck the Suppliant, causing considerable injury to her person.

Held: That the automobile in question was not a public work within the meaning of s. 19 of ss. (c) of the Exchequer Court Act, R.S.C. 1927 c. 34, nor was such automobile used in connection with a public work to bring it within the decision in the case of *Schrobounst v. The King* (1925) Ex. C.R. 167 and (1925) S.C.R. 458.

2. That the Court was without jurisdiction to entertain the action. The French version of a public work in said Act "chantier public" discussed.

PETITION OF RIGHT by the Suppliant claiming damages for personal injuries suffered by her through the negligence of a servant of the Crown.

The action was heard before the Honourable Mr. Justice Angers, at Montreal.

(1) (1905) 9 Ex. C.R., 364. (2) (1803) 3 B. & P., 321, at 328.
(3) (1891) 2 Ex. C.R., 311, at 319.

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NOVEMBER 19TH, 1908.

DIVISIONAL COURT.

RE HILL v. TELFORD.

County Courts—Order of Judge in County Court Action—Jurisdiction—Security for Costs—R. S. O. 1897 ch. 89—Indian Plaintiff—Liability to Give Security—Privilege—Indian Act—Constitutional Law.

Appeal by the plaintiff in an action in the County Court of Brant from an order of ANGLIN, J., in Chambers (30th October, 1908), dismissing an application by the plaintiff for an order of prohibition to the Judge and clerk of the County Court to prevent proceedings upon an order for security for costs made by the Judge, upon the grounds indicated in the judgment, infra.

J. B. Mackenzie, for plaintiff.

C. A. Moss, for defendants.

The judgment of the Court (BOYD, C., MAGEE, J., LATCHFORD, J.), was delivered by

BOYD, C.:—Upon the materials before the County Court Judge, including affidavits and pleadings in the action, he had jurisdiction to make an order for security for costs under R. S. O. 1897 ch. 89. The manner in which he exercised that jurisdiction is not a subject for prohibition, but for his own sound discretion, as the requisites under sec. 2 have to be made to appear to his satisfaction.

There would be an absence of jurisdiction if the provisions of R. S. C. 1906 ch. 81, sec. 103, as to Indians, had the meaning contended for by the appellant. That section gives to Indians the right to sue in respect of torts or wrongs, but does not, in my opinion, confer any privilege as to the manner of litigation which would distinguish them from other litigants. They take action subject to the ordinary rules of procedure, whether framed by the Judges or the legislature of the province wherein the action is prosecuted. The Ontario Act, ch. 89, as to providing for security for costs in certain actions against justices of the peace and other public officers, is not, quoad the Indian litigants, in my judgment, ultra vires as being in any wise at variance with the Indian Act of the Dominion. The two may well

stand together, for I do not read the section in question of the Canada Act, sec. 103, as meaning by implication that the Indian can sue without giving security for costs in proper cases as determined by the rules and practice of local procedure.

When the Indian leaves his reserve, and comes into the Courts of the province for relief, he submits himself to the jurisdiction and procedure of the Court, and there is nothing in the Dominion law antagonistic to this reasonable and obvious conclusion.

The appeal should be dismissed with costs.

NOVEMBER 20TH, 1908.

DIVISIONAL COURT.

RE MCGRATH AND TOWN OF DURHAM.

Municipal Corporations—Local Option By-law—Motion to Quash — Voting on By-law—Persons Voting who were not Entitled—Voters' Lists Act, 1907—Finality of Lists — Scrutiny.

Appeal by Daniel McGrath from order of TEETZEL, J., ante 149, refusing to quash a local option by-law of the town of Durham.

The appeal was heard by FALCONBRIDGE, C.J., ANGLIN, J., RIDDELL, J.

W. H. Wright, Owen Scund, for the appellant.

W. H. Kingston, K.C., for the town corporation.

ANGLIN, J.:— . . . The applicant, having allowed the time for appealing to expire, sought the leave of the Court. He obtained leave to appeal upon the sole ground that the by-law had not been approved of by the necessary statutory majority of legally qualified electors of the town.

At the election 497 ballots were cast. Of these 20 were blank ballots, and of the remaining 477, 297 were in favour of and 180 against the by-law. In order to succeed upon this appeal, both parties agree that the appellant must shew that at least 28 unqualified persons voted. He attacks the right to vote of 67 voters. Of these 48 are persons whose names were in fact upon the voters' lists, and the ground upon which the applicant challenges their right to vote is that, as

[McTAGUE J.]

RE NELSON.

1935.

Dec. 20.

Certiorari—Order confiscating automobile made by Magistrate under sec. 132 of The Indian Act, R.S.C. 1927, ch. 98—No plea by accused—No evidence offered—No depositions made—Entire absence of judicial proceeding before Magistrate—Whether certiorari lies.

A Police Magistrate purported to make an order under sec. 132 of The Indian Act, R.S.C. 1927, ch. 98, for confiscation of a motor car. On a motion by way of certiorari the record disclosed that the accused had not pleaded, that no evidence of any description had been offered, and that there were no depositions.

Held, that there had been no judicial proceeding before the Magistrate in any sense of the word, that the Magistrate acted without jurisdiction and that therefore the case was a proper one for certiorari.

Rex v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128, distinguished, on the ground that therein some evidence had been offered at the trial although none of the evidence so offered justified the conviction.

A motion by Antonia Nelson by way of certiorari for an order quashing an order for confiscation of a motor car purporting to have been made by the Police Magistrate for the District of Rainy River pursuant to sec. 132 of The Indian Act, R.S.C. 1927, ch. 98.

The motion was heard by McTAGUE J. in Weekly Court at Toronto.

A. A. Macdonald, K.C., for Antonia Nelson, applicant.

J. C. McRuer, K.C., for the Police Magistrate.

December 20th, 1935. McTAGUE J.:—The information and complaint herein was dated the 25th day of October, 1935. The matter came before the Magistrate on the 28th day of October and was adjourned from time to time until finally disposed of on the 16th day of November, 1935. The record of the proceedings had on that day is very meagre. It consists of a pencilled memorandum, purporting to be signed by the Magistrate, in the following terms:

“Ft. Frances, November 16, 1935.

Antonia Nelson case, sec. 132 Indian Act.

Plea:—

H. A. Tibbetts, pros.; Lawrence McLennan, defence.

(Mrs.) May Tichbourne, sworn as stenographer.

McTague J. Aug. Linklater and Martin Perrault did not appear
1935. as witnesses, no defence.

Re NELSON. It has been proved before me that a gray coloured Ford motor car operated by Mrs. Helen Olsen on September 27th, 1935, was employed in conveying intoxicants to be supplied to Indians or non-treaty Indians and I hereby order confiscation of the above car".

It was contended in argument that, under the provisions of The Indian Act, R.S.C. 1927, ch. 98, the formality of any trial at all was not required and that the Magistrate had jurisdiction to act so long as he was satisfied that an offence had been committed, even if the evidence of the offence were obtained outside of judicial proceedings entirely. I can not agree with this contention. The Act itself does not so provide, and one cannot imply something contrary to all the traditions of justice and the rights of accused persons under The Criminal Code, R.S.C. 1927, ch. 36.

Rex v. Nat Bell Liquors, Ltd., [1922] 2 A.C. 128, was strongly urged as a complete answer to proceedings by way of certiorari. Part of the headnote therein reads thus: "A conviction by a magistrate for a non-indictable offence cannot be quashed on certiorari on the ground that the depositions show that there was no evidence to support the conviction, or that the magistrate has misdirected himself in considering the evidence; absence of evidence does not affect the jurisdiction of the magistrate to try the charge." This would at first blush seem to indicate that the case did furnish a complete answer, as argued by Mr. McRuer. However, in that case and all the numerous cases cited therein, the Privy Council did not have to deal with or discuss a situation such as is disclosed in the case at bar. In the judgment their Lordships said, at p. 151:

"It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to

convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that his conviction is void, and may be disregarded as a nullity, or that the whole proceeding was *coram non judice*. To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all."

The expressions used are obviously very strong, but a reading of the whole case convinces me that the expression "a justice who convicts without evidence is doing something that he ought not to do", applies to cases where there was evidence offered at a trial but where none of the evidence so offered could justify a conviction. If that were the case here, the decision of the Privy Council would be binding.

But the present case is entirely different and quite distinguishable. Here the record, such as it is, discloses that the accused did not plead; that there was no evidence offered of any description; that there were no depositions; that there was no judicial proceeding in any sense of the word. To hold that in such circumstances the Magistrate had jurisdiction would offend all the principles of natural justice. There was no exercise of any powers by a judicial officer in his judicial capacity at all in the proper sense. The case therefore seems a very proper one for certiorari.

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McTag.e J. The order will be granted. On a perusal of some of
1935. the material, otherwise irrelevant, there should be no
 order as to costs; the Magistrate will have the usual pro-
 tection.
RE
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Order made as asked.

acting to uphold the dignity of the Courts. Still, it is but reasonable that such counsel should receive some nominal honorarium to compensate him for his loss of time.

In view of the complexity of the technical objections presented by appellant, I might have been disposed to award more than \$500, but Hugessen, A.C.J., had counsel before him and was in a better position than I am to estimate a reasonable fee. One point has, however, been overlooked. Because of appellant's technical objections to the jurisdiction of the Courts of this Province, the prosecution had a survey plan prepared (ex. P-11), and Hugessen, A.C.J., appears (at p. 495) to have found this useful. It may be reasonable to expect a member of the Bar to offer his services in a case such as this for a purely nominal fee, but the same cannot be said of a land surveyor. Someone must pay him, and it seems to me only fair that this should be appellant. With all respect for the contrary opinion, I would not condemn appellant to pay a fine but would add to the condemnation already pronounced one to pay the cost of the prosecution's exhibits.

In summary, I would dismiss the appeal against conviction but would maintain the appeal against sentence and vary the sentence by quashing that part of it relating to further excuses and adding a condemnation to pay the cost of the prosecution's exhibits.

BERNIER, J.A. (translation):—I share the opinion of my brothers that the appeal against conviction should be dismissed. I would dispose of the sentence as suggested by the Chief Justice, but adding however the obligation by the appellant to pay for the costs of the land surveyor J. F. Goltz for the reasons expressed by my brother Montgomery.

*Appeal against conviction dismissed;
appeal against sentence allowed.*

SUNDAY et al. v. ST. LAWRENCE SEAWAY AUTHORITY et al.

Federal Court, Trial Division, Marceau, J. November 5, 1976.

Courts — Jurisdiction — Federal Court — Indians claiming compensation in Federal Court in respect of lands transferred to provincial power authority pursuant to agreement between federal Government and provincial Government — Whether Federal Court has jurisdiction over provincial power authority — Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), ss. 17, 19, 22(1), 23, 25.

To determine whether the Federal Court has jurisdiction over any party it must be determined whether it would have such jurisdiction if the claim advanced against that party stood alone and was not joined in an action against other parties. The mere fact that the federal Government is also a party to the action does not give the Court jurisdiction under s. 17 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), over the other party. Section 19 of the *Federal Court Act*, which gives the Court jurisdiction in respect of controversies between the federal Government

and the Provinces does not give the Court jurisdiction over an agency of the Province where there is no existing controversy. Nor does the Court have jurisdiction in respect of a claim for compensation for the taking of lands by the provincial agency for hydro-electric power purposes under ss. 22(1) and 23 of the Act which confers jurisdiction on the Court in matters concerning navigation and shipping. The provincial Courts have jurisdiction in respect of a claim to compensation for the expropriation of Indian lands and thus the Federal Court does not have jurisdiction under s. 25 of the Act as against an agency of the provincial Government.

[*Anglophoto Ltd. v. The Ship "Ikaros" et al.* (1973), 39 D.L.R. (3d) 446, [1973] F.C. 483; revd 50 D.L.R. (3d) 539, [1974] 1 F.C. 327, 2 N.R. 509; *Desbiens et al. v. The Queen*, [1974] 2 F.C. 20, apid; *Sumitomo Shoji Canada Ltd. v. The Ship "Juzan Maru" et al.* (1974), 49 D.L.R. (3d) 277, [1974] 2 F.C. 488; *Quebec North Shore Paper Co. et al. v. Canadian Pacific Ltd. et al.* (1976), 71 D.L.R. (3d) 111, 9 N.R. 471; *Union Oil Co. of Canada Ltd. v. The Queen in right of Canada et al.*, ante p. 81, [1976] 1 F.C. 74, refd to]

Courts — Federal Court — Jurisdiction — Federal statute permitting Governor in Council to transfer Indian lands to provincial Government — Making provisions of Power Commission Act, R.S.O. 1970, c. 354, applicable to taking of lands — Provincial statute authorizing power authority to construct works on lands and establishing procedure for fixing compensation — Lands transferred to Province by Order in Council pursuant to Indian Act — Federal Court has no jurisdiction in action against power authority — Indian Act, R.S.C. 1970, c. I-6, s. 35 — International Rapids Power Development Act, R.S.C. 1952, c. 157, ss. 3, 4(b) — St. Lawrence Development Act, 1952 (No. 2), 1952 (Ont.) (2nd Sess.), c. 3, ss. 3, 15, 23.

APPLICATION to strike out a party to an action.

J. A. O'Reilly and W. Grodinsky, for plaintiffs.

P. J. Evraire, for St. Lawrence Seaway Authority, Her Majesty the Queen in right of Canada and Receiver General for Canada.

R. F. Wilson, Q.C., and *E. R. Finn*, for Hydro Electric Power Commission of Ontario.

J. Polika, for Her Majesty the Queen in right of Ontario.

MARCEAU, J.:—This is a motion to strike out Hydro-Electric Power Commission of Ontario (Ontario Hydro) as a party defendant in the action on the ground that there is no jurisdiction in this Court to entertain the claim advanced therein against it.

The plaintiffs are all registered Indians within the meaning of the *Indian Act*, R.S.C. 1970, c. I-6, members of the Iroquois of St. Regis Indian Band and elected members of the St. Regis Band Council. They act, in the proceedings, personally as well as in a representative capacity, on behalf of the band and of all its members, and their action is launched against four defendants: Her Majesty the Queen in right of Canada (hereafter referred to as the Federal Crown); the St. Lawrence Seaway Authority; Her Majesty the Queen in right of Ontario (hereafter referred to as the Ontario Crown); and Ontario Hydro.

As against the two last-mentioned defendants, the subject-matter of the action can be very briefly summarized as follows.

To carry out works in relation to an electric power development in the St. Lawrence River at the International Rapids Section near the St. Regis and Cornwall Island Indian Reserves, the Ontario Crown and Ontario Hydro "appropriated" many years ago, pursuant to various Orders in Council, certain lands over which the plaintiffs had personal and usufructuary rights. The works were carried out and as a result damage was caused to lands which were to remain within the band's reserves. The plaintiffs allege that to date they have been paid only part of the compensation and damages to which they are entitled for the loss of the lands expropriated and that they have received no compensation for the damage caused to their reserves in carrying out the power project works. They also allege that the Ontario Crown and Ontario Hydro were under an obligation to return to the band all unflooded portions of the lands "appropriated" after construction of the works for which they were needed, an obligation which has not as yet been fulfilled. The relief sought is then expressed in two subparagraphs of the declaration, which pray that:

(f) Defendants Her Majesty the Queen in right of Ontario and the Hydro-Electric Power Commission of Ontario (Ontario Hydro) be jointly and severally condemned to pay plaintiffs or to the mis-en-cause on behalf of plaintiff band the amount of \$1,000,000.00 with interest at the legal rate for the respective dates of expropriation;

(g) Defendants Her Majesty the Queen in right of Ontario and the Hydro-Electric Power Commission of Ontario (Ontario Hydro) be ordered to convey to or for the benefit of plaintiff the Iroquois of St. Regis Indian Band all unflooded portions of the islands mentioned in paragraph 17 hereof.

Ontario Hydro contends that this Court has no jurisdiction to entertain the claim advanced against it. It relies mainly on the *St. Lawrence Development Act, 1952 (No. 2), 1952 (Ont.) (2nd Sess.), c. 3*, as amended, according to which the lands concerned were vested in it and the works referred to were carried out. This Act, in effect, provides as follows:

3. Upon the transfer of the administration of the lands belonging to Canada provided for in Article V of the Canada-Ontario agreement, such lands vest in the Commission.

15(1) Where the Commission and the owner cannot agree upon the amount of compensation, either party may give notice in writing to the other and to the Board requiring that the amount of compensation be determined by the Board, and thereupon the Board shall be seized of the matter, which shall be proceeded with in accordance with the practice and procedure of the Board.

23. All claims and proceedings in respect of compensation or damages for any land or property acquired, taken or used in or injuriously affected in the carrying out of the purposes of this Act shall be brought under and in accordance with this Act and not otherwise, and subsection 8 of section 24 of *The Power Commission Act* applies *mutatis mutandis* to every act and proceeding of the Commission under this Act.

The plaintiffs deny that the *St. Lawrence Development Act, 1952* (No. 2) applies. They contend that basically their claims relate to unfulfilled conditions in respect of the transfers of federal lands, compensation for the taking of federal reserve lands and damage to their rights and interests in their reserve lands in general. Their claims, they say, arise from the *Indian Act* and the *St. Regis Islands Act, 1926-27* (Can.), c. 37, the latter being an Act which had the effect of placing some of the islands in question under the power of the Superintendent-General of Indian Affairs.

To understand the plaintiffs' contentions, a brief examination of the legislation relating to the lands involved is necessary.

The general authority for the construction of the aforesaid hydro-electric project was the federal *International Rapids Power Development Act*, R.S.C. 1952, c. 157, which approved an agreement of the previous year between the Government of Canada and the Government of Ontario providing for the development of the power resources in the International Rapids section of the St. Lawrence River. Sections 3 and 4 of that Act provided as follows:

3. The Governor in Council may transfer to the Government of Ontario the administration of lands or property belonging to Canada that in the opinion of the Governor in Council are necessary for the construction, operation or maintenance of the works to be constructed pursuant to the agreement set out in the Schedule.

4. For the purpose of constructing, operating and maintaining the works to be undertaken pursuant to the agreement set out in the Schedule,

- (a) the Hydro-Electric Power Commission of Ontario shall have the powers and capacities of a natural person as if it were incorporated by Letters Patent under the Great Seal for that purpose; and
- (b) the provisions of the *Power Commission Act* of the Province of Ontario with respect to the expropriation or taking of lands or property apply *mutatis mutandis* to the expropriation or taking of lands or properties for the works, and have effect as if enacted in this Act in relation thereto.

To give effect to the agreement, Ontario, for its part, first enacted the *International Rapids Power Development Agreement Act, 1952* (Ont.), c. 42, then it passed a second Act, the *St. Lawrence Development Act, 1952* (No. 2), already referred to, which basically provided that Ontario Hydro was to undertake and perform the obligations of the Government of Ontario under the Canada-Ontario agreement and was authorized to proceed with the construction, maintenance and operation of the works contemplated.

By Orders in Council passed in 1955 and 1956 (ex. P-2) the lands which were needed for the works contemplated and which are the subject of this action were transferred to the Province of Ontario. The Orders in Council were all drawn up the same way, so it will be sufficient to reproduce one of them:

WHEREAS Her Majesty in right of the Province of Ontario is empowered to take or to use lands or any interest therein without the consent of the owner

and Her Majesty in right of the said Province has applied to exercise this power in relation to lands forming part of the St. Regis Indian Reserve known as *Sheek Island*;

AND WHEREAS Her Majesty in right of the said Province advises that as part of the works to develop the power resources of the International Rapids section of the St. Lawrence River to be undertaken by Ontario, it is necessary to take or acquire the said lands;

AND WHEREAS section 35 of the Indian Act provides that an expropriating authority may take lands in an Indian reserve with the consent of the Governor in Council and that the Governor in Council may when he has so consented, authorize the transfer or grant of such lands to the expropriating authority, subject to any terms that he may prescribe.

THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration and pursuant to section 35 of the Indian Act, is pleased, hereby, to consent to Her Majesty in right of the Province of Ontario taking the lands described in the schedule hereto, and is pleased to transfer and doth hereby transfer the said lands to Her Majesty in right of the said Province, subject to payment within ninety days of the date hereof of such amount in full compensation therefor as may be agreed upon by the Band of Indians concerned, the Minister of Citizenship and Immigration and Her Majesty in right of the said Province, such amount to be exclusive of any claim for encumbrances such as leases but including all encumbrances for which the Indians have a direct claim and subject to such other terms as may be agreed upon between the persons aforesaid.

The plaintiffs first contend that the provisions of s. 4 of the federal *International Rapids Power Development Act* do not apply since these provisions have reference only to the expropriation or taking of lands, an effect the Orders in Council did not have; the provincial *St. Lawrence Development Act, 1952* (No. 2), can have no application either since the lands were not acquired through the procedure there provided; it follows that primarily the issue of jurisdiction should be resolved with reference only to the *Indian Act*, the Orders in Council made thereunder and the *St. Regis Islands Act*. The plaintiffs then submit that this Court has jurisdiction under various sections and subsections of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), namely: ss. 17(1), (2), 19, 22(1), 23 and 25.

I do not agree with the contention that the provisions of para. 4(b) of the federal *International Rapids Power Development Act* do not apply. In my view, the expression "taking of lands" used by Parliament in that paragraph was meant to cover the eventual "transfers of lands" by the Governor in Council as contemplated by the preceding s. 3. The Orders in Council were made — as they had to be — under s. 35 of the *Indian Act* but nevertheless they were made to give effect to and within the limits of the *International Rapids Power Development Act*. It is to be remembered that the relief sought by this action is not the annulment of the Orders in Council but rather, at least in a sense, their enforcement.

Even if I were to accept the contention that the provisions of para. 4(b) of the federal *International Rapids Power Development*

Act and those of s. 3 of the provincial *St. Lawrence Development Act, 1952* (No. 2) do not apply, I fail to see how any of the sections of the *Federal Court Act* relied upon by the plaintiffs are applicable to the action as it is framed.

As to s. 17 of the *Federal Court Act*, counsel for the plaintiffs contends that as long as the federal Crown is a defendant, this suffices to give the Court jurisdiction, regardless of the identity or character of the other defendants. In my view, the contention is wrong. The fact that a defendant has been joined with other defendants who are properly before the Court does not operate as to give the Court jurisdiction over him. I agree with the comments of Collier, J., in the case of *Anglophoto Ltd. v. The Ship "Ikaros" et al.* (1973), 39 D.L.R. (3d) 446 at p. 459, [1973] F.C. 483, to which Heald, J., referred with approval in the case of *Desbiens et al. v. The Queen*, [1974] 2 F.C. 20, where he said:

I suggest a proper test to apply in approaching the question of jurisdiction is to see whether this Court would have jurisdiction if the claim advanced against one particular defendant stood alone and were not joined in an action against other defendants over whom there properly was jurisdiction.¹

The result may be that for the plaintiffs to obtain complete relief an action will have to be brought both in this Court and the applicable provincial Court. Nevertheless, Parliament must be taken to have been well aware of the difficulty and the situation must be accepted as it is: see also *Sumitomo Shoji Canada Ltd. v. The Ship "Juzan Maru" et al.* (1974), 49 D.L.R. (3d) 277, [1974] 2 F.C. 488.

As to s. 19 of the *Federal Court Act*, counsel for the plaintiffs argues that the issues in the action raise controversies between Canada and Ontario, having in mind the special clause in the Canada-Ontario agreement of 1951 by which Ontario is pledged to save Canada harmless for any claim "arising out of the construction, maintenance or operation of the works". There is no such existing controversy between the two Governments and the mere fact that there might eventually be one is not sufficient to give the Court jurisdiction. This action does not have the effect of raising such a controversy and in any case the plaintiffs, being third parties, would have no status to raise it themselves. The clause referred to may give a right to the federal Crown, but it is a right which may be invoked on behalf of the federal Crown only, and would not be accruing to the plaintiffs.

As to ss. 22(1) and 23 of the *Federal Court Act*, counsel for the plaintiffs contends that the issues here deal with "navigation and shipping" to the extent that the *International Rapids Power Devel-*

¹The above judgment of Collier, J., was reversed on appeal [50 D.L.R. (3d) 539, [1974] 1 F.C. 327, 2 N.R. 509] but the portion of his judgment quoted here was not affected by the appeal judgment.

opment Act is concerned; and they involve at the same time works and undertakings connecting a Province with another, the St. Lawrence Seaway being a waterway between Lake Erie and the Port of Montreal. But, to my mind, the claim is essentially one for compensation for the taking of and causing damage to lands wholly situate in the Province of Ontario. It is a claim partly in tort and partly for the enforcement of an undertaking. I fail to see how this falls within "navigation and shipping" or "interprovincial" matters: see *Quebec North Shore Paper Co. et al. v. Canadian Pacific Ltd. et al.*, judgment of June 29, 1976 [71 D.L.R. (3d) 111, 9 N.R. 471].

Finally as to s. 25 of the *Federal Court Act*, counsel for the plaintiffs submits that the Supreme Court of Ontario does not have jurisdiction to deal with Indian reserve land questions. Again, the action must be taken as it stands and I think that the Supreme Court of Ontario undoubtedly has jurisdiction to enforce a claim against Ontario Hydro which is one partly in tort and partly for the enforcement of an agreement, praying for compensation for the taking of and causing damage to lands wholly situate within the Province.

It is clear that this Court is a statutory Court and its jurisdiction with respect to a specific suit must be found in the *Federal Court Act* or in some other statute or law meant to confer jurisdiction. I do not think any of the statutory provisions I was referred to or any others which I am aware of authorize this Court to entertain or hear the claim advanced in this suit against Ontario Hydro: see also *Union Oil Co. of Canada Ltd. v. The Queen in right of Canada et al.*, ante p. 81, [1976] 1 F.C. 74.

The motion will therefore be acceded to. There will be an order striking out Ontario Hydro as a defendant in this case. Ontario Hydro is entitled to its costs, from the plaintiffs, of entering a conditional appearance, and of this motion.

Application granted.

MacDONALD v. HAUER et al.; MacDONALD, Third Party

Saskatchewan Court of Appeal, Woods, Brownridge and Bayda, J.J.A.
November 25, 1976.

Trusts and trustees — Constructive trusts — Breach — Stranger to trust knowingly handling trust assets under power of attorney and selling assets — Whether trustee de son tort — Whether constructive trustee because of knowing assistance in fraudulent breach of trust — Test to be applied.

Trusts and trustees — Breach of trust — Indemnity against passive trustees — One of three trustees liable for breach of trust — Stranger liable as constructive trustee for same breach — No action brought against two passive co-trustees — Whether passive trustees guilty of breach of trust — Whether stranger entitled to indemnity from passive trustees.

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