ATTORNEY-GENERAL FOR CANADA v. GIROUX

(1916), 30 D.L.R. 123 (also reported: 53 S.C.R. 172)

Supreme Court of Canada, Fitzpatrick C.J., Idington, Duff, Anglin and Brodeur JJ., 2 May 1916

(On appeal from the judgment of Quebec King's Bench, **reported sub nom. Doherty v. Giroux, supra**. p.134)

1. PUBLIC LANDS (§I A--1) --INDIAN RESERVE LANDS--INDIANS AS PURCHASERS

Under the Indian Act (39 Vict. ch. 18, sec. 31, R.S.C. (1886) ch. 43 sec. 42) Indians have the right to become purchasers of public lands which, on surrender to the Crown, have ceased to be a part of an Indian "reserve."

2. CONSTITUTIONAL LAW (§I G--140)--DOMINION OR PROVINCIAL DOMAIN- INDIAN LANDS

Crown lands not surveyed and appropriated to the use of Indians prior to July 1, 1867, are not "lands reserved for the Indians" within the meaning of sec. 91 (24) of the British North America Act, 1867, and consequently are not under Dominion control; the presumption is that they become vested in the Crown in the right of the province (*Per* Idington, J.). On the principle *omnia presumuntur rile esse acta* the order-in-council of 1853 respecting the constitution of the "reserve" being carried out, the surrender thereof by the Indians to the Crown with a trust resulting in their favor has made it subject to Dominion control under sec. 91 (*per* Duff and Anglin, JJ.).

[*St. Catherines Milling and Lumber Co. v. Reg., 14 App. Cas. 46,* distinguished; *Doherty v. Giroux, 24* Que. K.B. 433 affirmed.]

APPEAL from the judgment of the Court of King's Bench appeal side, 24 Que. K.B. 433, *sub. nom. Doherty v. Giroux,* affirming the judgment of Letellier, J., in the Superior Court, District of Chicoutimi, dismissing the action. Affirmed.

G. G. Stuart, K.C., and *L. P. Girard,* for appellant.

L. G. Belley, K.C., for respondent.

FITZPATRICK, C.J.:--The appellant, the Attorney-General for the Dominion of Canada, claims in this suit to have it declared that the Crown is the owner of a certain half-lot of land, being lot No. 3 of the first range, Canton Ouiatchouan, in the Parish of St. Prime and County of Lake St. John.

In the first paragraph of the amended declaration it is stated that the Crown has always been and still is the owner of the lot No. 3. This, however, is only inaccurate drafting of which there is much in the record. There is no doubt that the claim of the Crown only to the south-east half of lot No. 3, and it is not disputed that the respondent has a good title to the north-west half of lot No. 3. The respondent has been in possession of the whole of lot No. 3 for upwards of a quarter of a century during which time the Government has taken no effective steps to question his right to any part of the lot.

By an order-in-council, dated August 9-11, 1853, approval was given to a schedule shewing the distribution of land set apart under the statute 14 & 15 Vict., ch. 106, for the benefit of the Indian tribes in Lower Canada. Included in this schedule was a reservation in favor of the Montagnais of Lake St. John. The half-lot in question was comprised in this reservation.

On June 25,1869, the Montagnais Band of Indians surrendered to the Crown, for sale, a portion of the reservation including lot No. 3. This land so surrendered was put up for sale and it would appear that on June 21, 1873, the north-west half-lot No. 3 was sold to the respondent and, on May 7, 1878, the south-east half-lot sold to one David Philippe.

Under a judgment obtained by the *mis-en-cause*, O. Bouchard, against D. Philippe the latter's half of lot No. 3 was sold at a sheriff's sale to the respondent on March 7, 1889.

The Crown alleges that David Philippe was an Indian, that he was, at the time of the sheriff's sale, in possession of the land on which he had been located by the Crown and that, consequently, the Crown still held the half-lot as "Indian Lands" and as such liable neither to taxation nor to execution.

The fallacy in this argument is in the statement that David Philippe had been located on the land; it involves the proposition that, whilst all the other lots into which the reserve had been divided were sold outright to their purchasers, this particular half-lot was not sold to the purchaser David Philippe, but that, being an Indian, he was only "located" on the land in the meaning of that term in the Indian Act.

To shew the impossibility of supporting such a contention it is only necessary to turn to the sections in point in the statute. The Act in force on May 7, 1878, the date of the sale to David Philippe, was the Indian Act, 1876 (39 Vict., ch. 18). Section 3 is as follows:--

3. The following terms contained in this Act shall be held to have the meaning hereinafter assigned to them unless such meaning be repugnant to the subject or inconsistent with the context.

(3) The term "Indian" means:

First, any male person of Indian blood reputed to belong to a particular band. . .

(6) The term "Reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians of which the legal title is in the Crown, but which is unsurrendered.

...

(8) The term "Indian Lands" means any reserve or portion of a reserve which has been surrendered to the Crown....

(12) The term "person" means an individual other than an Indian, unless the context clearly requires another construction.

By sec. 5, the superintendent-general may authorize that the whole or any portion of a reserve be subdivided into lots.

6. In a *reserve* or *portion of a reserve* subdivided by survey into lots, no Indian shall be deemed to be lawfully in possession of one or more of such lots, or part of a lot unless be or she has been or shall be located for the same by the band, with the approval of the superintendent-general.

7. On the superintendent-general approving of any location as aforesaid he shall issue in triplicate a ticket granting a location to such Indian.

8. The conferring of any such location-title as aforesaid shall not have the effect of rendering the land covered thereby subject to seizure under legal process or transferable except to an Indian of the same band.

The statute, it will be observed, makes provision for the conferring of a location-title *only on a reserve*, that is on unsurrendered lands and then by the band, not by the Crown.

Then after sec. 25 and following, dealing with surrenders of reserves to the Crown, we have secs. 29 and following under the caption, "Management and Sale of Indian Lands." There is no suggestion in these sections, or anywhere else in the Act, that Indian lands may not be sold to an Indian.

I suppose it may well be that it would not be a common occurrence for an Indian to be a purchaser at a sale of Indian Lands, but it is one thing to say the statute did not contemplate this and quite another to say that it intended to forbid it. I can imagine no reason why an Indian should not purchase such Lands; there is no doubt as to his capacity to hold real estate. This is recognized by sec. 64, which provides that:

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

This really disposes of the appellant's case but, out of respect for the Judge of the Court of King's Bench who dissented from the majority of the Court and one of whose points is taken up in the appellants' factum, a few words may be added.

The whole ground of the dissenting opinion is really in the following paragraph:

Les Indiens d'une tribu localisee sur une reserve pourraient se reunir en conseil d'une maniere solennelle et decider (si la majorite de la bande le voulait) de remettre tout ou partie de cette reserve a la Cournonne et alors la Couronne vendrait ou disposerait de ce qu'elle recevrait ainsi, dans l'interet de la tribu indienne et pour son benefice exclusif, mais a la condition--dont la necessite se voit tres bien--de ne jamais vendre une partie quelconque de ces reserves a des sauvages. On a meme pris le soin de dire que toute "per sonne" pourrait devenir acquereur de ces proprietes mais qu'un sauvage ne pourrait pas etre une de ces personnes.

I am myself quite unable to appreciate the necessity or occasion for any such condition as the Judge suggests but it is unnecessary to discuss this because, as far as I have been able to ascertain, it is purely imaginary. The Judge says further on:--

Ce nomme Philippe etait un sauvage, et la loi defendait positivement qu'un sauvage put arquerir cette propriete.

No reference is given and I know of no such prohibition, positive or otherwise.

The point taken in appellant's factum that a "person," as defined by the Indian Act, does not include an Indian has reference to the section dealing with certificates of sale which is sec. 31 of 39 Vict., ch. 18 and sec. 42 of ch. 43, Revised Statutes of Canada. There seems to be some obscurity about this section because the marginal note which has been carried through all the amendments and revisions of the Act is "Effect of *former* certificates of sale or receipts." The section, however, seems to look to future certificates, and, as I apprehend, is designed to meet the inconvenience of delay in the issue of patents. Be that it may, the section does not provide that any "person" may purchase these lands but that an Indian may not be one of these "persons:" all that it does provide is that a certificate of sale or receipt for the money, duly registered as therein mentioned, shall give the purchaser the same rights as he would have under a patent from the Crown.

The definition of terms is, at the commencement of sec. 3, said to apply only when not inconsistent with the context and this is emphasized by its special repetition in the 12th item in which the word "person" is defined. I cannot think that such an accidental use of the word "person" for "purchaser" or any other word to indicate him could possibly be held to involve by inference a positive law against an Indian becoming a purchaser for which prohibition there is no other warrant. I think in such case the context would clearly require another construction.

But this is not all; the appellant has assumed that the case is governed by the Indian Act, ch. 43 of the Revised Statutes of 1886, but this is not so, and when we look at the Indian Act of 1876 we find that the word "person" does not occur at all in the extract quoted by the appellant which sets forth what the certificate of sale receipt for money shall entitle the purchaser to.

The word used is "party" shewing conclusively that the legislature had no intention, even by an inference through the interpretation section, to prevent the acquisition by an Indian of Indian lands put up for sale.

The word " party " is several times used when distinctly intended to include both "persons" and "Indians." See secs. 12 and 14.

This substitution in the revised statute of the word "person" for the word "party" is an instance of the danger attending such changes in the revision of the statutes. Obviously the revisers had no idea of enacting an important law by the change they made but regarded it simply as a linguistic embellishment; it has, however, misled two of the Judges of the Court of King's Bench into finding a positive law against the sale of Indian lands to an Indian.

At the hearing I was considerably impressed with the argument that, even if there had never been a valid sale to David Philippe, the transactions between Euchère Otis, the local agent of the superintendent-general, and the respondent constituted a sale to the latter which was also confirmed by the Department of Indian Affairs. If, however, the views that I have previously expressed are correct, it is unnecessary to consider this point further. If the sale to David Philippe, in 1878, was good, the Crown had nothing left to grant to Giroux in 1889.

Pelletier, J., delivering the dissenting judgment in the Court of King's Bench, says that he has endeavored to find in the record the necessary grounds for confirming the judgment, since such confirmation (if it could be legally given) would seem to him more in accordance with equity. With this view I agree and it is therefore satisfactory to be able to conclude that the judgment is in conformity not only with equity in its most general meaning, but also with the law.

The appeal should be dismissed with costs.

IDINGTON, J.:--The appellant seeks to have the Crown declared the proprietor of part of a lot of land in Quebec and respondent removed therefrom and ordered to account for the fruits thereof for the past 26 years.

The circumstances under which the claim is made are peculiar and some novel questions of law are raised. Much diversity of judicial opinion in the Courts below seems to exist relative to some of these questions.

To put the matter briefly, the appellant claims that the land in question is part of a tract of land known as an " Indian Reserve" which had become vested by virtue of certain legislation in the Crown, in trust for a tribe of Indians; that part of it was thereafter surrendered by the tribe to the Crown for the purposes of sale for the benefit of said tribe; that this part of the lot now in question was in course of time sold to an Indian of said tribe; that he paid five 25/100 dollars on account of the purchase; that thereafter, under a judgment got against him, the land was sold by the sheriff to respondent for $500; that thereupon he paid to the Indian Department $164 as the balance of the purchase-money due the Crown, and procured the receipt therefor, which appears, hereinafter, from the local sales agent of the Indian Department; that he then went into possession and improved the land and has remained so possessed ever since till, according to assessed values, it has risen from being worth only $500 in 1889, when respondent entered, to be worth $3,200 in 1913, when this litigation was pending, that the Indian purchaser was incapacitated by statute from buying lands in a "Reserve;" and that the sheriff's sale was, as part of the result, null and void and hence that respondent got nothing by his purchase.

To realize the force and effect of these several allegations we must examine the statutes upon which the rights of the Indians rested, their powers of surrender thereunder, and the effect of the B.N.A. Act under and by virtue of which the claim of the appellant is asserted.

The Parliament of Old Canada, by 14 & 15 Vict. ch.106, enacted:

> That tracts of land in Lower Canada, not exceeding in the whole 230,000 acres, may under orders-in-council to be made in that behalf, be described, surveyed and set out by the Commissioner of Crown Lands, and such tracts of land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada, for which they shall be respectively directed to be set apart in any order-in-council, to be made as aforesaid, and the said tracts of land shall accordingly, by virtue of this Act, and without any price or payment being required therefor, be vested in and managed by the Commissioner of Indian Lands for Lower Canada, under the Act passed in the session held in the thirteenth and fourteenth years of Her Majesty's reign, and intituled, An "*Act for the better protection of the Lands and Property of the Indians in Lower Canada.*"

In the last mentioned Act, ch. 42 of 13 & 14 Vict., there is enacted:

> It shall he lawful for the Governor to appoint from time to time a Commissioner of Indian Lands for Lower Canada in whom and in whose successors by the name aforesaid all the lands or property in Lower Canada which are or shall be set apart, or appropriated to or for the use of any tribe or body of Indians, shall be and are hereby vested in trust for such tribe or body and who shall be held in law to be in the occupation and possession of any lands in Lower Canada actually occupied or possessed by any such tribe or body in common or by any chief or member thereof or other party for the use or benefit of such tribe or body and shall be entitled to receive and recover the rents issues and profits of such lands and property, and shall and may, in and by the name aforesaid, be subject to the provisions hereinafter made, exercise and defend all or any of the rights lawfully appertaining to the proprietor, possessor or occupant of such land or property.

In the evidence in the case there is a certified copy of an order-in-council of August, 1853, which reads as follows--

> On the letter from the Honorable Commissioner of Crown Lands, dated June 8, 1853, submitting for approval a schedule shewing the distribution of the area of land set apart and appropriated under the statute 14 & 15 Vict., ch. 106, for the benefit of the Indian Tribes in Lower Canada.
>
> The Committee humbly advise that the said schedule be approved and that the lands referred to be distributed and appropriated as therein proposed.

This is vouched for by a certificate of the Assistant-Commissioner of Crown Lands, in 1889.

The schedule referred to in the said order-in-council does not appear in evidence. Neither does the letter.

There does, however, appear a schedule in the case, certified by the same Assistant-Commissioner of Crown Lands and of same date as last mentioned certificate. This on its face cannot be the schedule referred to in said order-in-council. It is as follows:

SCHEDULE

Shewing the distribution of the area of land set apart and appropriated under the statute 14th and 15th Vict., ch. 106, for the benefit of Indian Tribes in Lower Canada.

County	Township or Locality	No. of Acres	Description Of Boundaries	Names of The Indian Tribes	Remarks	
	Peribonca River	16, 000	A tract of five miles on the River Peribonca, north of Lake St. John.	Montagnais of Lake St. John and Tadoussac.	Indians having their hunting grounds along the Saquenay and its tributaries.	Surveyed Exchanged for a tract on the west shore of Lake St. John. Surveyed
Saquenay	Metabet-chouan	4, 000	The ranges 1st and C. south of Lake St. John (And other lands)			

Certified a true copy of the original of record in this Department.
(Sgd.) E.E. TACHE, Assist.-Commissioner.
Department of Crown Lands, Quebec, 30th April, 1889.
Crown Lands Department, Toronto, 23rd February, 1858, Ind.
(Sgd) JOSEPH WAUHEBE, P. L.

I may remark that the marginal note

Surveyed. Exchanged for a tract on the west shore of Lake St John. Surveyed.

cannot have formed part of an order-in-council in 1853. That note is something evidently written in after the date of the order-in-council and I infer has been a note made by someone in reference to an exchange proposed on September 4, 1856, to which I am about to refer. Who wrote it? When was it written? By what authority?

The certificate seems as presented in the case to be placed higher up than the note at left hand side and signed by Mr. Wauhebe. It is probable, however, the certificate was intended to present this note as part of the original record purported to be certified to.

What then does the date signify in this note? It is of February, 1858. Who was Mr. Wauhebe? What office did he fill? What was the purpose of the extract as it left his hands? Was the marginal note part of what he seems to be certifying to?

The importance of a definite answer to these queries and all implied therein becomes apparent when we find that the title of the Crown, as represented by appellant, depends upon the effect to be given the most indefinite terms of an order-in-council of September 4, 1856, which is as follows:

On the application of the Montagnais Tribe of Indians of the Saguenay, thro' David E. Price, Esq'r, M. P.P., for the appointment of Mr. Georges McKenzie as interpreter and to distribute all moneys or goods given to the Tribe; and for the grant of a tract of land on Lake St. John, commencing at the River Ouiatchouanish, to form a township of 6 miles square; also that the grant of £50 per annum, may be increased to £100, and continue annually.

The report from the Crown Lands Department dated July 25, 1856, states that the tract of land set apart for the Montagnais Indians, lies in the Township of Metabetchouan, west side of the river of that name and that this land, together with the tract of Peribonca, north side of Lake St. John, are still reserved for those Indians, but that as they appear desirous of obtaining a grant of the land at Pointe Bleue, on the western border of Lake St. John, there appears no objection to an exchange.

The Committee recommended that the exchange be effected and the grant made accordingly. Certified,
(Sgd.) Wm. H. Lee,
C.E.C.

To the Supt.-Gen'l Indian Affairs,
etc., etc., etc.

Certified a true copy.
DUNCAN SCOTT.
Deputy Superintendent-General of Indian Affairs.

There is nothing in the case to explain what was done pursuant to this order, and when, if anything ever was done. There is nothing in the printed case shewing any definite survey ever was made of the lands thus recommended to be given in exchange for the lands which had been allotted to some Indians.

The Act of 14 & 15 Vict., ch. 106, makes it clear by the above quotation therefrom that orders-in-council setting apart land for the use of Indians should be described, surveyed and set out by the Commissioner of Crown Lands, and that only in such event can such tracts of land be considered as set apart and appropriated for the use of the Indians.

Again, it is clearly intended by the earlier enactment of 13 & 14 Vict. that the lands intended to be vested in the Commissioner of Indian Lands are such as have been set apart or appropriated to the use of Indians. When we consider that the lands to be so vested by virtue of those Acts are to be only lands which have been surveyed and set apart by the Commissioner of Crown Lands, it is very clear that something more than an order-in-council, such as that produced, merely approving of the proposed scheme of exchange, was needed to vest lands at Pointe Bleue in the Commissioner of Indian Lands.

Yet, strange to say, there is nothing of the kind in the case or anything from which it can be fairly inferred that the necessary steps ever had been taken.

Counsel for the appellant referred to a blue print in the record; and I understood him to suggest it was made in 1866. Examining it, I can find no date upon it; but I do find another plan purporting to be a survey made by one Dumais, P.L.S., in 1866. Probably it is by reference thereto he fixed the date of the blue print, if I understood him correctly. This latter plan has stamped upon it the words "Department of Indian Affairs, Ottawa, Canada;" and inside these, set in a circle, are the words "Survey Branch, True, Reduced Copy, W. A. Austin, 18.6.00." I infer that probably the latter plan is but a reduced copy of the former and that both refer to some survey made in 1866.

So far as I can find from the case, or the record from which the case is taken, the foregoing presents all there is entitling appellant to assert a title in the Crown on behalf of the Dominion. Clearly the order-in-council recommending an exchange, without more, furnishes no evidence of title.

It might be said with some force, but for the constitutional history of Canada involved in the inquiry, that what we do find later on furnishes something from which after such lapse of years some inferences might be drawn. There are two difficulties in the way. All that transpired after July l, 1867, when the B.N.A. Act came into force, can be no effect unless and until we have established a state of facts, preceding that date, which would enable the B.N.A. Act by its operation to give control of the said lands to the Crown on behalf of the Dominion.

By sec. 91, sub-sec. 24 of said Act, one of the subject matters over which the Dominion Parliament was given exclusive legislative authority was "Indians and Lands reserved for Indians."

The question is thus raised whether or not the lands in question herein fall definitely within the terms "Lands reserved for Indians."

The Dominion Parliament, immediately after Confederation, by 31 Vict., ch. 42, asserted its legislative authority over such lands as reserved for Indians. All that took place afterwards relative to the lands in question can be of no effect in law unless the alleged reserve had been duly constituted on or before July 1, 1867.

It seems impossible on such evidence as thus presented to find anything bringing the lands in question within the scope of and under the operation of the B.N.A. Act.

But there is another difficulty created by the enactment, in 1860, by the Parliament of Old Canada of 23 Vict., ch. 151, sec. 4, which provides as follows:--

> 4. No release or surrender of lands reserved for the use of Indians, or of any tribe or band of Indians, shall be valid or binding except on the following conditions.

This is followed by two sub-sections which specify the steps which must be taken to enable a surrender to be made. It is to be observed that this was passed within 3 years and 10 months from the order-in-council recommending the exchange made of the lands on the Peribonca and Metabetchouan rivers held as reserves for the Indians in question.

If the survey and setting apart contemplated by the proposed exchange was not made and fully completed by June 30, 1860, when the bill, which had been reserved by the Governor in May, was assented to, the completion of that exchange would require the due observance by the Indians of the form of surrender imperatively required by the last mentioned Act.

There is nothing to indicate this ever was complied with. Hence, surveys made in 1866, or at any time after June 30, 1860, cannot help without evidence of such compliance. There is no evidence of any Indians in fact having been found on the Pointe Bleue reservation before the year 1869. If one had to speculate he might infer something took place between 1866 and 1869. But we are not at liberty to do so, or found a judgment herein for appellant, without evidence or only upon the merest scintilla thereof .

The appeal, therefore, fails, in my opinion. I think the distinction claimed by Mr. Stewart to exist between reserves duly constituted under the Acts above referred to, whereby the land became vested in commissioners in trust, and such reserves as involved in the case of *St. Catherine's Milling and Lumber Co. v. The Queen*, 14 App. Cas. 46, and some other cases referred to, was well taken.

But, as this case stands, there being no evidence of the land having been duly vested before July 1, 1867, in commissioners in trust, or otherwise falling within the operation of the B.N.A. Act, sec. 91, sub-sec. 24, the presumption is in favor of the land being vested in the Crown on behalf of Quebec.

Assuming, for argument's sake, that there is any evidence upon which to find the land vested in the Crown on behalf of the Dominion and that there is evidence of a sale by the Crown to David Philippe, upon which he paid only five 25/100 dollars, how does that help the appellant?

Admitting the invalidity of the sale and nullity of the sheriff's sale, and discarding both as null, there is evidence which goes far to establish the recognition by the Crown of the respondent as the purchaser. The local agent gave respondent the following receipt:--

Roberval, Pointe Bleue,
$164.32. 22 juin, 1889.

Recu de M. Pierre Giroux la somme de cent soixant et quatre piastres et 32 cents, en payment du 1/2 lot S. E. No. Rang 1er, du Township Ouiatchouan suivant instruction de Dep. et avec contrat de Vente pour le dit 1/2 lot.

L.E. OTIS, A.S.

And the Department of Indian Affairs, at Ottawa, set down in its books a recognition of respondent as purchaser.

It would have been, I incline to think, quite competent for the Crown under all the circumstances, and without any detriment either to the trust or anything else, to have taken the position in 1889, as may be inferred was done, that the said receipt and entry in the books should stand forever as a final disposition of the affair.

The reasons against such a course of action being taken by the Crown were of rather a technical character; even assuming Philippe was debarred from buying, upon which I pass no opinion.

Under the law as it has long existed there was the possibility of recognizing any Indian qualified to be enfranchised and thereby beyond doubt entitled to become a buyer. It may be inferred even at this distance of time that if the questions now raised had, at the time when respondent was set down in the books of the department as purchaser of the lands in question, been viewed in light thereof and the foregoing circumstances and especially having regard to the fact that, in any event, Philippe alone was to blame, and had no more substantial grievance at least none worth more than $5.25 to set up, and seeing respondent had contributed $500 to pay his debts and paid practically the whole purchase money to the Crown, no harm would have been done by letting the recognition of respondent stand.

I must not be understood as holding that there cannot be discovered abundant evidence to cover the very palpable defects I point out in the proof of title adduced herein. This is not one of the many cases wherein probabilities must be weighed. It is upon the record as it presents the title to the lot in question that we must pass. Fortunately the result does justice herein even if the result of blunders in failing to produce evidence which may exist.

The appeal must be dismissed with costs.

DUFF, J.:--The action out of which this appeal arises was brought in the Superior Court for the District of Chicoutimi, in the Province of Quebec, by the Attorney-General of the Dominion on behalf of the Crown claiming a declaration that a certain lot of land was the property of the Crown and possession of the same.

The three questions which it will be necessary to discuss are:--

1st.--Was the lot in question within the limits of an Indian Reserve constituted under the authority of 14 & 15 Vict., ch. 106? 2nd.--If so, is the title vested in His Majesty in right of the Dominion of Canada or has the Attorney-General of Canada, on other grounds, a title to maintain the action? 3rd---Was a professed sale of the lot made in 1878 to one David Philippe, member of the Montagnais tribe, by an agent of the Department of Indian Affairs, a valid sale?

I shall first state the facts bearing upon the 1st and 2nd of these questions. On August 9, 1853, an order-in-council was passed by which certain tracts of land were severally appropriated for the benefit of the Indian tribes in Lower Canada under the authority of the statute above mentioned. Two tracts were set apart for the benefit of the Montagnais Band, one on the Metabetchouan and one on the Peribonca river in the Saguenay district. A few years afterwards, on the request of the tribe, the Governor-in-Council sanctioned an exchange of the Peribonca tract for a tract at Pointe Bleue, Ouiatchouan, on the western border of Lake St. John. In August, 1869, the Governor-General in Council, by order, accepted what professed to be a surrender by the Montagnais Indians of the reserve constituting the Township of Ouiatchouan which admittedly is the tract of land that the order-in-council of 1851 authorized to be substituted for the Peribonca Reserve. In view of the contention that the exchange was never effected, it is desirable to set out this order-in-council and the surrender in full. They are, as follows:--

Copy of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor-General in Council on August 17, 1869.

The Committee have had under consideration a memorandum dated August 3, 1869, from the Hon. the Secretary of State submitting for acceptance by Your Excellency in Council under the provisions of the 8th section of the Act, 31 Vict. ch. 42, a surrender bearing date June 25, 1869, executed at Metabetchouan, in the District of Chicoutimi, by Basil Usisorina, Luke Usisorina, Mark Pise Thewamerin and others, parties thereto as chiefs and principal men of the Band of Montagnais Indians, claiming to be those for whose benefit the reserve at Lake St. John, known as the Township of Ouiatchouan, was set apart, executed in the presence of Rev'd Dominique Racine, authorized by the Hon. the Secretary of State to receive said surrender and in that of the Hon. Mr. Justice Roy, Judge of the Superior Court in the District of Chicoutimi, such surrender conveying their interest and right in certain lands on the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th ranges of the said Township of Ouiatchouan, indicated on the copy of a map by provincial surveyor P.

H. Dumais, dated A.D. 1866, attached to the said surrender and vesting the lands so surrendered in the Crown in trust to sell and convey the same for the benefit of the said Indians, and their descendants, and on condition that the moneys received in payment for the same shall be placed at interest in order to such interest being periodically divided among the said Montagnais Indians.

The Committee advise that the surrender be accepted and enrolled in the usual manner in the office of the Registrar-General. Certified,

Certified a true copy. (Sgd.) Wm. H. LE, Clk. P.C.

DUNCAN SCOTT,

Deputy Superintendent-General of Indian Affairs.

Surrender by the Band of Montagais Indians for whom was set apart the Reserve of the Township of Ouiatchouan, in the Province of Quebec, to Her Majesty Queen Victoria, of their Iands in the Indian Reserve there, as described below, to be sold for their benefit.

Known all men that the undersigned Chief and Principal Men of the above mentioned band living on the above mentioned reserve, for and acting on behalf of our people, do hereby remise, release, surrender, quit-claim and yield up to our Sovereign Lady the Queen, Her Heirs and Successors forever, all and singular those certain parcels or tracts of land situated in the Dominion of Canada and in that part of the said Province of Quebec, being composed of concessions one, two, three, parts of four, five, six and the whole of seven and eight, in the said Township of Ouiatchouan, as described and set forth in the map or plan hereunto annexed.

To have and to hold the same unto Her said Majesty the Queen, Her Heirs and Successors forever, in trust, to sell and convey the same to such person or persons and upon such terms as the Government of the said Dominion of Canada shall or may deem most conducive to the interest of us, the said Chief and Principal men and our people in all the time to come and upon the further condition that the moneys received from the sale thereof shall, after deducting the usual proportion for expense of management, be placed at interest, and that the interest money so accruing from such investment shall be paid annually, or semi-annually to us and our descendants. And we the said Chiefs and principal men of the band aforesaid do, on behalf of our people and for ourselves, hereby ratify and confirm and promise to ratify and confirm whatever the Government of this Dominion of Canada may do or cause to be lawfully done in connection with the disposal and sale of the said lands.

In witness thereof, the said Chiefs and principal men have set our hands and affixed our seal unto this instrument in the said Province of Quebec, at Post Metabetchouan. Done at our Council-House this twenty-fifth day of June in the year of our Lord one thousand eight hundred and sixty-nine.

Signed, sealed, and delivered in the presence of:

D. ROY,

Judge of the Superior Court and of the District of Chicoutimi. Signed by the Chief and thirty-six other Indians, members of the Band.

Since the acceptance of this surrender the lands have been dealt with by the Department of Indian Affairs as lands surrendered under provisions of the Indian Act and held by the Crown under that Act.

First, then, of the contention that the Ouiatchouan Reserve was never lawfully constituted. The order-in-council and the surrender registered pursuant to the order-in-council constitute, in my judgment, together, a public document within the meaning of the rule stated in Taylor on Evidence, 1769*a*, and the recitals in this document are, therefore, *prima facie* evidence of the facts stated. (See *Sturla v. Freccia*, *et al*, 5 App. Cas. 623, at 643-4). Evidence is thereby afforded that the Montagnais Band of Indians did occupy this tract of land as a reserve and the principle *omnia proesumuntur rite esse acta* is sufficient to justify, *prima facie*, the conclusion that the order-in-council was carried out and that their occupation was a legal one.

The second question depends upon the character of the Indian title to this reserve at the time the B.N.A. Act came into force. If at that time there was vested in the Crown in right of the Province of Canada an interest in these lands which properly falls within the description "land," as that word is used in sec. 109 of the B.N.A. Act, or within the word "property" within the meaning of sec. 117, then that interest (as it is not suggested that sec. 108 has any application), passed to the Province of Quebec. It is necessary, therefore, to consider the nature of the Indian title and, as that depends upon the meaning and effect of certain parts of ch. 14, C.S.L.C., it will be convenient to set out these provisions in full. They are, as follows:--

7. Le gouverneur pourra nommer, au besoin, un commissaire des terres des Sauvages pour le Bas-Canada, qui, ainsi que ses successeurs, sous le nom susdit, sera mis en possession, pour et au nom de toute tribu ou peuplade de sauvages, de toutes les terres ou proprietes dans le Bas-Canada, affectees a l'usage d'aucune tribu ou peuplade de sauvages, et sera cense en loi occuper et posseder aucune des terres dans le Bas-Canada, actuellement possedees ou occupees par toute telle tribu ou peuplade, ou par tout chef ou membre d'icelle, ou autre personne, pour l'usage ou profit de tells tribu ou peuplade; et il aura droit de recevoir et recouvrer les rentes, redevances et profits, provenant de telles terres et proprietes, et sous le nom susdit; mais eu egard aux dispositions ci-dessous etablies, il exercera et maintiendra tous et chacun les droits qui appartiennent legitimement aux proprietaires, possesseurs ou occupants de telle terres ou proprietes.

8. Toutes les poursuites, actions ou procedures portees par ou contre le dit commissaire, seront intentees et conduites par ou contre lui, sous le nom susdit seulement, et ne seront pas perimees or discontinuees par son deces, sa destitution ou sa resignation, mais seront continuees par ou contre son successeur en office.

2. Tel commissaire aura, dans chaque district civil du Bas-Canada, un bureau qui sera son domicile legal, et ou tout ordre, avis ou autre procedure pourra lui etre legalement signifie; et il pourra nommer des deputes, et leur deleguer tels pouvoir qu'il jugera expedient de leur deleguer de temps a autre, ou qu'il recevra ordre du gouverneur de leur deleguer. 13 & 14 V., c. 42, s. 2, moins le proviso.

9. Le dit commissaire pourra conceder ou louer, ou grever toute telle terre ou propriete, comme susdit, et recevoir ou recouvrer les rentes, redevances et profits en provenant, de meme que tout proprietaire, possesseur ou occupant legitime de telle terre pourrait le faire; mais il sera soumis, en toute chose, aux instructions qu'il pourra recevoir de temps a autre du gouverneur, et il sera personnellement responsable a la couronne de tous ses actes et plus particulierement de tout acte fait contrairement a ces instructions, et il rendra compte de tous les deniers par lui recus

et les emploiera de telle maniere, en tel temps, et les paiera a telle personne ou officier qui pourra etre nomme par le gouverneur, et il fera rapport de temps a autre, de toutes les matieres relatives a sa charge, en telle manière et forme, et donnera tel cautionnement que le gouverneur prescrira et exigera; et tous les deniers et effets mobiliers qu'il recevra ou qui viendront en sa possession, en sa qualite de commissaire, s'il n'en a pas rendu compte, et s'ils ne sont pas employes et payes comme susdit, ou s'ils ne sont pas remis par toute personne qui aura ete commissaire a son successeur en charge, pourront etre recouvres de toute personne qui aura ete commissaire, et de ses cautions, conjointement et solidairement, par la couronne, ou par tel successeur en charge dans aucune cour ayant juridiction civile, jusqu'a concurrence du montant ou de la valeur, 13 & 14 V., c.42,s.3.

12. Des etendues de terre, dans le Bas-Canada, n'excedant pas en totalite deux cent trente mille acres, pourront (en autant que la chose n'a pas encore ete faite sous l'autorie de l'acte 14 & 15 V., c.106), en vertu des ordres-en-conseil emanes a cet egard, etre designees, arpentees et reservees par le commissaire des terres de la couronne; et ces etendues de terre seront respectivement reservees et affectees a l'usage des diverses tribus sauvages du Bas-Canada, pour lesquelles, respectivement, il est ordonne qu'elles soient rervees par tout ordre-en-conseil emané comme susdit; et les dites tendues de terre seront, en consequence, en vertu du present acte, et san de prix ni de paiement, transferées au Commissaire des terres des Sauvages pour le Bas-Canada, et par lui administrees conformement au present acte. 14 & 15 V., c. 106, s. 1.

The tract in question was set apart under the authority of sec. 12. Our inquiry concerns the effect of secs. 7, 8, and 9 as touching the nature of the Indian interest.

1st. It may be observed that the Commissioner is to hold the Indian lands "pur et au nom" of the tribe or band and that deemed in law to occupy and to possess them "pour l'usage et au profit de telle tribu ou peuplade." These appear to be the dominating provisions, and they express the intention that any ownership, possession or right vested in the Commissioner is vested in him for the benefit of the Indians. Therefore, the rights which are expressly given him are rights which are to be exercised by him for them as by tutor for pupil.

Looking at the *ensemble* of the rights and powers expressly given I can entertain no doubt that in the sum they amount to ownership. By par. 7 he is given a right to receive and to recover the rents and profits

et il exercera et maintiendra tous et chacun les droits qui appariennent legitimement aux proprietaires.

By Sec.9:--

Le dit commissaire pourra conceder ou louer, ou grever toute telle terre ou propriete, comme susdit, et recevoir et recouvrer les rentes redevances et profits en provenant, de meme que tout proprietaire, possesseur ou occupant legitime de telle terre pourra le faire.

This in the sum, I repeat, is ownership; and none the less so that in the administration of the property the Commissioner is accountable to the Governor. The Governor in this respect does not represent the Crown as proprietor but as *parens patriae.*

It seems to follow that, on the passing of the B.N.A. Act, this ownership passed under the legislative jurisdiction of the Dominion as falling within the subject Indian Lands, and I see no reason to doubt that the provisions of the Act of 1868 (sec. 26, ch. 42) by which the Secretary of State, as Superintendent-General of Indian Affairs, was substituted for the Commissioner provided for by the enactments just cited as the trustee of the Indian title were well within the authority of the Parliament of Canada; nor can I see on what ground it could be contended that the provisions of the Indian Act (ch. 43, R.S.C.), providing for the surrender of Indian lands or the provisions relating to the sale of the same after the surrender are not within the ambit of that authority.

But it is argued that, on the surrender being made, the lands, under the authority of *St.. Catherine's Milling and Lumber Co. v. The Queen*, 14 App. Cas. 46, became vested in the Crown and fell under the control of the province. There are two answers. First: The Indian interest being, as I have pointed out, ownership is by the terms of the surrender a surrender to Her Majesty in trust to be dealt with in a certain manner for the benefit of the Indians. The Dominion Parliament, having plenary authority to deal with the subject of Indian Lands and having authorized such a transfer of the Indian title, it is difficult to see on what ground the transfer could be held not to take effect according to its terms or on what grounds the trusts, upon which the transfer was accepted, can be treated as non-operative.

2nd. If I am right in my view as to the character of the Indian title, it is obvious that any interest of the Crown was a contingent interest to become vested only in the event of the disappearance of the Indians while the lands remained unsold. If that event had taken place, it may be that there would have been a resulting trust in favor of the Crown and if the lands in such an eventuality remained unsold in the hands of the Dominion the question might arise whether as a "royalty" the Crown in the right of the province would not be entitled to the benefit of them. But all this has no application here. So long as the band exists the band is the beneficial owner of the land in question or of the moneys arising out of the sale of them.

The distinction between this case and the case of *St. Catherine's Milling Company*, 14 App. Cas. 46, is not difficult to perceive. The Privy Council held in that case that the right of the Indians resting on the proclamation of 1873, was a "personal and usufructuary right" depending entirely upon the bounty of the Crown. The Crown had a paramount and substantial interest at the time of Confederation, which interest remained within the province. The surrender of the Indian right to the Crown (which was not, it may be observed, a surrender to the Dominion Government), left the interest of the province unencumbered. There is no analogy between that case and this, if I am right in my view that the Indian interest amounted to beneficial ownership, the rights of ownership, in some respects, being exercisable not by the Indians but by their statutory tutor, the

Commissioner. The surrender of that ownership in trust under the terms of the instrument of 1868 cannot be held, without entirely defeating the intention of it, to have the effect of destroying the beneficial interest of the Indians.

The third question arises in this way. Professing to act under the authority of the Indian Act (ch. 18 of 1876), the Indian agent, in May, 1878, sold the lot in question to one David Philippe, a member of the Montagnais Band. On March 7, 1889, this land was sold by the sheriff under a judgment against Philippe, and adjudged to the respondent Giroux. The appellant alleged that Philippe was not a competent purchaser and that, by certain provisions of the statutes relating to Indians, the sale to Philippe was forbidden and that the sale was contrary to law.

Two distinct points are made by Mr. Stuart. First, he says that the effect of sec. 42 of the Indian Act (ch. 43, R.S.C., 1886), taken with sec. 2, subsecs. *c* and *h*, precludes an Indian, within the meaning of the Act, from becoming the purchaser of any part of a surrendered reserve. Sec. 42, on the literal construction of it might, no doubt, be held to confine the benefits of the certificate of the sale or receipt for the money received on the sale of Indian lands to a "person" within the meaning of sec. 2 (c), that is, to some individual other than an Indian. But the conclusive objection to this line of argument is to be found in the Act of 1876 (ch. 18) which was in force when Philippe purchased. Sec. 31 of that Act dealt with the effect of a certificate of sale or a receipt for money received on the sale of Indian lands. It is to the "party to whom the same was or shall be made or granted" that the section refers and the definition of "person" in the interpretation section is without effect.

The second point made rests upon sub-sec. 3 of sec. 77 of the Act, R.S.C. 1886, ch. 43, as amended by 51 Vict., ch. 22, sec. 3. It will be convenient to set out sections 77 and 78 incorporating that amendment. They are as follows--

Sec. 77. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds, in his individual right, real estate under a lease or in fee simple, or personal property outside of the reserve or special reserve in which case he shall be liable to be taxed for such real or property at the same rate as other persons in the locality in which it is situate:

2. No taxes shall be levied on the real property of any Indian, acquired under the enfranchisement clauses of this Act, until the same has been declared liable to taxation by proclamation of the Governor in Council, published in the *Canada Gazette*:

3. All land vested in the Crown or in any person, in trust for or for the use of any Indian or non-treaty Indian or any band or irregular band of Indians or non-treaty Indians, shall be exempt from taxation, except those lands which, having been surrendered by the bands owning them, though unpatented, have been located by or sold or agreed to be sold to any person; and, except as against the Crown and any Indian located on the land, the same shall be liable to taxation in like manner as other lands in the same locality; but nothing herein contained shall interfere with the right of the superintendent-general to cancel the original sale or location of any land, or shall render such land liable to taxation until it is again sold or located.

Sec. 78. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the next preceding section; but any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid. 43 V., ch. 28, sec. 77.

The argument is that "any Indian located on the land" excludes an Indian purchaser under sec. 31 of the Act of 1876. I think that argument fails. The meaning of "located Indian," I think, is made sufficiently clear by reference to secs. 16, 17, 18 and 20 of the Act of 1886 and, in my judgment, clearly refers to an Indian located under those provisions, that is to say, an Indian who has been permitted to occupy part of the reserve in respect of which he has a location ticket and continues to occupy it notwithstanding the surrender of the reserve. The scheme of these sections appears to be that real estate held by an Indian within the reserve where he resides shall not be subject to taxation or to be charged by mortgage or judgment, but it does not appear to be within the scheme to exempt property purchased by an Indian as purchaser outside of the reserve on which he is living. "Reserve," it may be observed, by reference to the interpretation clause, does not apply to a surrendered reserve.

I may add that the Act does not appear to contemplate the disabling of the Indians from acquiring property and engaging transactions outside the reserve. See sec. 67, for example, in addition to secs. 64, 65, and 66.

ANGLIN, J., concurred with DUFF, J.

BRODEUR, J.:--This is a petitory action by the Attorney- General of Canada praying that the Crown be declared the owner of the south-eastern half of lot No. 3 in the first range of the township of Ouiatchouan.

The facts that gave rise to the present case are as follows:--The land in question formed part of an Indian reserve established by virtue of the Act 14 & 15 Vict. ch. 106. In 1869, the band of Montagnais Indians owning the reserve decided to cede and abandon, among others, the first range of the township of Ouiatchouan. Later, on May 7, 1878, the Superintendent of Indian Affairs sold to a man named David Philippe, for the sum of $26.25, the property in question in this case, which originally formed part of the Indian reserve but had become part of the public domain following the cession made by the band.

David Philippe having incurred some debts, judgment was rendered against him and the property was sold by the sheriff. The land was adjudged to the defendant--respondent, Giroux, who took possession of it, entirely cleared it and made of it a property having a good value.

Some doubts having been raised by the Crown on the validity of the decree, the acquirer Giroux, so as to avoid a lawsuit with the government, chose to take a title from the latter and got from the agent a receipt which reads, as follows:--

$164.32. Roberval, Pointe-Bleue, June 22, 1889.

Received from Mr. Pierre Giroux the sum of one hundred and sixty-four dollars and 32 cents, in payment for 1/2 lot s.e. range 1st of the Township of Ouiatchouan according to instructions from the department and with deed of sale for said 1/2 lot. L.E. OTIS, A.S.

This new sale was confirmed and approved of by the Department of Indian Affairs; it was also approved of by the Department of Justice. Later on, however, we see by the correspondence on file that the Department of Indian Affairs having asked for the opinion of the Department of Justice concerning the validity of the sale, alleging that the so-called Philippe was an Indian located on the reserve and that it might properly be asked if that fact did not affect the validity of the judicial sale, the Department of Justice answered that under the circumstances, by virtue of sec. 79 of the Indian Act as amended by 51 Vict. ch. 12, sec. 75, the land could not be legally mortgaged and that the property could not be sold under authority of justice.

In spite of that opinion of the Department of Justice, no action seems to have been taken by the Department for 22 years after the judicial sale.

The first question which presents itself is whether an Indian can buy from the Government a land which was originally in a reserve but has been abandoned.

When the reserves are so abandoned by the Indians, the Crown sees to it that those lands are administered, sold or rented for the benefit and advantage of the Indians. By virtue of the law, the Crown is bound to sell those lands to the first persons that apply and according to the prices that it determines.

There was some doubt as to the said David Philippe being an Indian or not. Some doubt has even been expressed as to the band to which he might belong. Some claim he was an Abenakis, others a Montagnais.

But, even supposing that he was a Montagnais Indian, that as such he was entitled to live on the Indian Reserve at Pointe Bleue, it remains none the less true that from the moment such reserve or part of such reserve was abandoned to the Crown nothing prevented an Indian from buying one of the lands so abandoned.

Indians have, concerning the reserves, restricted rights and obligations, but when those reserves have been abandoned to the Crown it seems to me that an Indian could have the right to buy one of those lands, to cultivate it, to make the products his own and to enjoy in that connection the same rights and privileges as the white people. To assert the contrary would be, in my opinion, to deny to those Indians the rights to develop and to become part of a more advanced civilization.

The appellant, however, alleges that only the white people can buy those lands from the Crown. There is no doubt, I think, that an Indian could, like any other settler, buy lands from the Crown; and, in my opinion, a text would be required much more explicit than sec. 42, which was quoted to us, to claim that in the case of a reserve which formerly belonged to the Indians the latter would be prevented from being able to take their abode there as settlers.

Sec. 42 of the Indian Act of 1886, quoted by Mr. Stuart, could not be interpreted as excluding the Indians from the right of being able to buy.

I therefore consider that Philippe had the right to buy that land from the Crown and that the judicial sale which took place is valid and that Giroux became through a good title the acquirer of the land claimed by the appellant.

But there is something more. Supposing that the Crown had no right to sell the property to Philippe, there is no doubt that it could and should sell it to Giroux. Then, in 1889, the Crown itself had a sum of $164.32 paid to it by Giroux as purchase price of the property in question and the Department itself confirmed such sale made through its agent.

I therefore consider that, under the circumstances, there can be no doubt as to Giroux's right of property in the land in question and consequently the judgment of the Courts below which dismissed the action must be confirmed with costs. *Appeal dismissed.*