CHURCH v. FENTON

(1878), 28 U.C.C.P. 384 (also reported: 1 Cart. B.N.A. 831)

Ontario Common Pleas, Hagarty C.J., Gwynne and Galt JJ., 4 February 1878

(Appealed to Ontario Court of Appeal, *infra* p. 75)

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

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

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

It was contended that the Ontario Legislature, having repealed the Act of 1866, had, after confederation, no power to levy these taxes, the land having been withdrawn from their jurisdiction; but *Held*, that sec. 91, clause 24, of the B. N. A. Act, applied only to Indian lands not surrendered and reserved for their use; and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

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

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

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

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

The defendant, besides denying the plaintiff's title, claimed title in himself in manner following: excepting as to two acres of the said lot 22, which immediately adjoined lot 23, having a frontage of four chains, and a depth of 5 chains, the defendant claimed title to the lot under and by virtue of a deed bearing date 26th September, 1873, from one David Keltie, who claimed under and by virtue of a tax deed from the Warden and Treasurer of the county of Grey, dated 10th February, 1872. And as to the said two remaining acres of said lot, the defendant claimed title thereto as purchaser at a sale for taxes by the Treasurer of the county of Grey, on the 18th of November,

1873.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The arguments sufficiently appear from the judgment.

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

The question upon which our judgment in this case depends, is, was or not the lot in question, which is a part of a tract of land surrendered by the Indians to the Crown in 1854, ratable for taxes, and liable to be sold for arrears of taxes, at the date of the first sale, of which evidence was given and which took place in the month of November, 1870? If it was, our judgment must be for the defendant.

The British Crown has invariably waived its right by conquest over all the lands in the Province until the extinguishment of what the Crown has been pleased to recognize as the Indian title, by a

treaty of surrender of the nature of that produced in this case; until such extinguishment of that title the Crown has never granted any of such lands.

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

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

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

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

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

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

The 6th section of the Act declared that it should be lawful for the commissioner of Crown lands

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

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

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

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

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

Commissioner of Crown Lands may have and exercise in respect to Crown Lands."

In this Act a distinction is expressly drawn between what are called Crown Lands, which term, as other sections of the Act shew, comprehended Crown Reserves, Clergy Reserves, and School Lands as distinguished from those lands which, although vested in Her Majesty and in that sense Crown Lands, being under the management of the Chief Superintendent of Indian affairs, were called Indian Lands.

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

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

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

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

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

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

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

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

Now we find that in this order sec. 27 is omitted from the enumeration of those sections whose provisions are made applicable to the lands known as Indian Lands, and it is this 27th sec. thus omitted which in express terms renders liable all public lands *leased or appropriated or set apart*

to any person, or for which licenses of occupation should be granted, to the assessed taxes in the townships in which the land should lie from the date of such license or appropriation, although no patent deed should be yet issued.

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

The omission seems singular, however, if it was by design, for we find the 16th, 18th, 19th, 20th, and 21st sections of the Act made applicable, and these sections give to the purchaser or locatee of lands agreed to be sold, full title against all wrongdoers and trespassers as effectually as if Letters Patent had issued, and make the title so vested in such purchaser, locatee, &c., transmissible by deed, devise, or descent, so that upon an agreement being entered into for sale of Indian lands, (which by the application of the above sections made those lands when agreed to be sold, transmissible in like manner) there seems no reason or justice whatever in exempting or continuing exempt from taxation such lands more than there would be in exempting or continuing exempt from taxation. "Public Lands" similarly situated. But whether by inadvertence or design, the fact remains that the section referred to was omitted, and upon its omission is now based the contention that as these Indian lands, the title to which still remains vested in the Crown, although agreed to be sold, seem to come within the exemption clause contained in the Assessment Act in force when this order in Council was passed in August, 1861, the omission of the above section from the order shews an intention to keep those lands exempt from taxation until granted by Letters Patent.

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

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

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

And the 14th section enacted that lands so allotted should be liable to taxes, as also the Indian

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

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

This legislation is, I confess, to my mind very embarrassing, for if it were not for the terms in which these exemption clauses continued from time to time to be framed, and for the express provision made for rendering public lands when agreed to be sold liable to taxation before the patent should issue, I should have thought when the Legislature, by the clauses relating to agreements for sale, gave to a contracting purchaser complete control over the lands agreed to be purchased against all persons whomsoever, saving only the rights of the Crown, and gave to such purchaser the right to transmit such title by deed, devise, or descent, that such an estate and property became vested in such person as should with the utmost propriety have been held liable to taxation, without any special clause providing that it should be; and this is all that for the purpose of the defendant's contention it is necessary to establish, namely, that the land was liable to taxation, but that, until the patent should issue, all that could be sold for arrears of taxes is the estate of the person for the time being entitled in virtue of the agreement for sale; however, it must be confessed that the language of the Acts of Parliament would seem to shew the opinion of the Legislature to be that a special clause subjecting such lands to taxation was necessary in order to make them so.

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

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

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

hereafter be made under the authority of this Act.

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

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

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

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

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

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

The Assessment Act of 1866, while retaining the in- accurately framed exemption clauses of previous Acts, incorporates and re-enacts these provisions of 27 Vic. ch. 19, and therefore I entertain no doubt that the land for which this action is brought, which was patented in June, 1869 in pursuance of a contract of sale entered into in 1858, was liable to taxation as non-

resident land ever since the passing of the Act 27 Vic. ch. 19.

But it is further contended that by the British North America Act, 1867, "Indians and lands reserved for Indians" being one of the subjects retained under the exclusive control of the Dominion Government, the local Legislature had no power by the Assessment Act of 1869 to subject land of the nature of the land in question to taxation for municipal purposes. The point of this argument, as I understand, is, that these lands being retained under the management of the Dominion Government, and the local Legislature having repealed the Act of 1866, by which they may have been subjected to taxation, deprived itself of all power to levy such taxation, inasmuch as it had not, as is contended, any authority to re-enact clauses, although similar to those repealed, so as to affect lands which were, as it is said, withdrawn from their jurisdiction.

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

But the 92nd section places under the exclusive control of the Provincial Legislature Municipal institutions, Property and civil rights, and all matters of a merely local and private nature in the Province. It is only under these heads that the jurisdiction to assess or pass an assessment law for municipal purposes arises. At the time of the passing of the British North America Act, the land sought to be recovered in this action was agreed to be sold; the agreement for sale vested in the contracting purchaser an estate and property in the land; incident to this estate and property arose certain civil rights which were placed under the exclusive control of the Provincial Legislature. Assessment is but a mode of exercising that control. The purchaser's estate in that land was as much liable to the maintenance of municipal institutions, which are also placed under the exclusive control of the Provincial Legislature, as the estate of any other person in the Province holding real estate. It is only such estate that the assessment law really affects. The estate of the Crown is not sought to be prejudiced at all. Rating the land is but the *modus operandi*. If no contract for sale has been entered into, nothing can be sold. If a contract has been entered into and Letters Patent have not yet issued, the estate of the person for the time being entitled by virtue of the contract may be sold, and by the law in force at the time of confederation the Crown was obliged to recognize the title so acquired by a purchaser at the sale for the arrears of taxes. So soon as the land is granted by letters patent to the purchaser, or to his assignee by deed *inter vivos* or by will, or to his heir, the land itself might be absolutely sold.

Now when the British North America Act passed this particular piece of land was and had been

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

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

If at the time of the sale, in 1870, for arrears of taxes no patent had yet issued, a difficulty might possibly have arisen, notwithstanding that the Crown had no beneficial interest after the final payment on 29th July, 1867, if the deed, executed to the purchaser at the sale for taxes, had not correctly stated the title which was purported to be conveyed; but there is no place for such a difficulty here, for the land being patented since June, 1869, and having been liable for taxes assessed is and since 1864, it was the land itself which at the time of the sale was liable to be sold, as in all cases of patented lands sold for arrears for taxes.

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

The 128th section of the Assessment Act of 1869 enacts that whenever a portion of the tax on any land has been due for and in the third year, or for more than three years preceding the current year, the treasurer of the county shall, unless otherwise directed by a by-law of the county council, submit to the warden of such county a list in duplicate of all the lands liable to be sold for taxes, with the amount of arrears against each lot set opposite to the same, and the warden shall authenticate each of such lists by affixing thereto the seal of the corporation and his signature, and one of such lists shall be deposited with the clerk of the county, and the other shall be returned to the treasurer with *a warrant thereto annexed*, under the hand of the warden and the seal of the county, commanding him to levy upon the land for the arrears due thereon with his costs. The treasurer did submit these lists to the warden, but upon the warrants being produced there did not appear to be such lists annexed to it. The treasurer produced one duplicate of the respective lists, signed by the treasurer, but not having the signature of the warden, nor the seal of the county thereto. The warrants, however, which were respectively executed under the signature of the warden and the seal of the country, had expressed in the body of them respectively the lists of the lands and the respective amounts of arrears in the form directed by the 128th section to be inserted in the lists. It was contended that this mode of authenticating the lists of lands to be sold was insufficient, not being in compliance with the special form directed by the 128th section, by which, as was contended, the lists signed and sealed must be *attached to*, not *embodied* in, the warrants, although the warrants be, as they were, authenticated by the signature of the wardens and the seal of the county. This mode of authenticating the lands in the warrant instead of in a separate list attached thereto, has been always the practice in the county where the land sold lies.

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

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

As to the first sale, namely, that of 1870, this judgment is sufficient, for a much longer period than two years from the execution of the deed given to carry into effect the sale elapsed before the bringing of this action. As to the ninety-eight acres therefore described in the deed of the 10th day of February, 1872, the defendant is entitled to recover; but as to the two acres sold in 1873, but for which a deed was given only upon the 26th of September, 1877, after the commencement of this action, section 155 cannot set up as against the plaintiff's right to recover as to the two acres.

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

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

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

We think, however, that to hold the objection in this case fatal would be to adhere to the letter rejecting the substance. The object of annexing an authenticated list to the warrant is to provide that there shall be an authority given under the hand of the warden and the seal of the county authorizing the sale. Authentication of the land to be sold is the substance. Now if the list be set out and embodied in the warrant instead of being merely attached to it, in which case it might become detached and lost, it does seem that evidence is better secured for the authenticity and propriety of the sale, than by *annexing* the list to the warrant, not setting out the lands in the warrant but referring in it simply to the list attached; and there does not seem any necessity for both setting them out in a warrant and also in a list attached.

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

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

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

Rule discharged.