By virtue of The B.N.A. Act, 1867, c. 3, s. 129, and The Alberta Act, 1905, c. 3, ss. 3 and 16, the above enactment has been incorporated into the laws of Canada and Alberta.

The right to preach and teach the gospel, as well as to hear it preached and taught, is recognized in a free society. It is also clearly inferred from the last-mentioned enactment of 14-15 Victoria. In my opinion this includes the right of one who preaches or teaches to accept an invitation for this purpose from a person or persons, who desire to hear and learn, to visit him or them in their residences, and to enter upon the land occupied

by their residences in order to do so. It is understood, of course, that the regularly used means of ingress and egress to the dwelling be used, as was done here, by the person who is responding to the invitation. One need go no further in deciding this case.

It is, however, of interest to note that The Indian Act provides for the establishment, operation and maintenance of schools for Indian children on a reserve, and every Indian child who has attained the age of seven years is required to attend school with certain exceptions. Although the Minister may make regulations *inter alia* with respect to teaching, education, inspection and discipline in connection with schools, there are no provisions with respect to the right of a teacher or inspector, or other official of the school, to enter upon the reserve to carry out his duties as such. Could it be said that without permit of the council of the band he would be a trespasser when doing so? In my opinion the provisions in respect of the operation of schools throw considerable light on how to interpret The Indian Act as to who would or would not be a trespasser on the reserve.

I do not think it necessary to add any further reasons in support of the judgment quashing the conviction.

Conviction quashed.

justification at all.

It was said in argument by counsel for the respondent that the land constituting the reserve is held by the Crown for the use and benefit of the band in common, and that an individual member or members of the band had no right to invite the appellant to visit her or them in their homes on the reserve for any purpose, however lawful or necessary it might be; as, for example, in the case of medical services that might be necessary. Probably the question is more accurately put by stating that if the Crown is right, no person would be justified in entering upon the reserve in response to an invitation unless he held the permit of the council to do so. As I understood the argument, it was incumbent on the Crown to go that far in order to maintain its position.

On the other hand it was argued on behalf of the appellant that an Indian, although living on the reserve, is a British subject, and subject to curtailment by statute, has all the rights of a British subject and Canadian citizen. Authority for this was cited: See *Sanderson v. Heap* (1909), 11 W.L.R. 238, 19 Man. R. 122, 22 Can. Abr. 483; and *Prince v. Tracey* (1913), 25 W.L.R. 412, 13 D.L.R. 818, 22 Can. Abr. 482. Indeed, this view of the law is accepted by counsel for the Crown in his factum,

but he goes on to say that The Indian Act restricts in a variety of ways rights and privileges which those who are not subject to its jurisdiction ordinarily enjoy, and that this is particularly true of rights relating to land. He illustrates this by pointing out that an Indian on a reserve cannot deal with his land by alienation, charge or mortgage, except as provided by ss. 87-89 of The Indian Act. But that is not the question here.

It may help if s. 87 dealing with the legal rights of Indians on the reserve be referred to. This section expressly states that all laws *of general application from time to time in force in any province are applicable to and in respect of Indians in the province* subject to the terms of any treaty and any other Act of the Parliament of Canada and the other exceptions therein stated. The italicizing is mine. This supports the view that the rights of an Indian on a reserve are those of a resident of Alberta, except where curtailed by treaty or Act of Parliament, or regulations made thereunder.

One of these rights is that of religious freedom with the qualifications or restrictions attendant on the exercise thereof. That an Indian on a reserve may exercise this right is further secured by 14-15 Victoria (Statutes of the Province of Canada) c. 175, proclaimed 9th June 1852 [See The Rectories Act, C.S.C. 1859, c. 74, s. 1] which in referring to the then provinces of Canada enacted:

"that the free exercise and enjoyment of religious profession and worship without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the province, is by the constitution and laws of this province allowed to all Her Majesty's subjects within the same."

The salient facts are that the appellant, who is a missionary, and has during the period from 1952 to 1957 been permitted to go on the reserve to minister to members of the tribe, was refused a permit to do so by the council of the band after it had set up a system of permits in the autumn of 1957. He twice requested a permit but it was declined, and he was duly advised by the superintendent of each refusal. Members of the tribe or band continued to invite him to visit their homes situated on the reserve, and on the Sunday in question he was invited to the home of one Margaret Davis on the reserve, for the purpose of holding a service for various members of the band congregated there. Shortly after his arrival he was arrested, and charged as above.

The authority or powers of the council of the band, in so far as the question under consideration on this appeal is concerned, are to be found in s. 80 of The Indian Act. Among the express powers to make by-laws, not inconsistent with the Act, or any regulation made by the Governor in Council, or the Minister, is that contained in subs. (*p*) which reads:

"The removal and punishment of persons trespassing upon the reserve or frequenting the reserve for prescribed purposes."

No other subsection of s. 80 affects the question, except as it may help to interpret this particular subsection. That is also true of several other sections of the Act, which have been considered, and which will be referred to so far only as they are of assistance in determining the question in issue.

It will be seen at once that as the Act does not define "trespassing" one must look to the common law for a definition of the term, as it is quite clear that the powers of the council are not to decide what constitutes trespassing, but are limited to removing and punishing persons who are found trespassing upon the

reserve. In other words the council cannot by establishing a system of permits to be given to individual persons to go on the reserve, create the offence of trespass by those who enter the reserve without such a permit. There must first be a trespass before the power of the council to remove and punish can be exercised.

The definition of common-law trespass varies as stated by different authorities, but it clearly involves the entering upon another's land without lawful justification. See Salmond on Torts, 11th ed., at p. 227:

"The wrong of trespass to land consists in the entering upon land in possession of the plaintiff without lawful justification."

Other writers of authority define it in different terms but with the same content.

The appellant in this appeal entered upon the reserve for the purpose of holding a religious meeting at the invitation of the Indian woman, a member of the band, but without the permit of the council, and the question resolves itself into one of justification that was lawful, or no

REGINA v. GINGRICH (sub nom. GINGRICH v. THE QUEEN)

(1958), 31 C.R. 306 (also reported: 29 W.W.R. 471, 122 C.C.C. 279)

Alberta Supreme Court, Appellate Division, Ford C.J.A., Macdonald, McBride, Porter and Johnson JJ.A., 28 November 1958

Indians--Rights the same as other Alberta residents unless curtailed by treaty or statute--The Indian Act, R.S.C. 1952, c. 149, s. 87-- Right of religious freedom--14-15 Vict., c. 175 (Province of Canada)--Powers of council of band--Right of Indian to invite persons on reserve--Right to preach and teach and hear gospel preached and taught.

A missionary (invited by a reserve Indian to come into her home on said reserve for the purpose of holding a religious service) appealed his conviction under s. 30 of The Indian Act, for trespassing on said reserve. The council of the band had set up a permit system for entry on the reserve and had refused appellant a permit.

Held, the conviction should be quashed because s. 80 of the said Act does not give the power to the council to decide what constitutes trespassing, and the council, by establishing a system of permits, cannot create the offence of trespass by those who enter the reserve without permit.

1. The rights of an Indian on a reserve are those of a resident of Alberta, except where curtailed by treaty or Act of Parliament, or regulations made thereunder. The Indian Act, s. 87, considered. One of such rights is that of religious freedom with the qualifications or restrictions attendant on the exercise thereof. Statutes of Province of Canada, 14-15 Vict., c. 175, referred to.

2. The right to preach and teach the gospel, as well as to hear it preached and taught, is recognized in a free society. This includes the right of one who preaches or teaches to accept an invitation for this purpose from a person, who desires to hear and learn, to visit the latter in his residence, and to enter upon the land occupied by the latter in order to do so.

APPEAL from a conviction for trespassing on an Indian reserve.

K. G. Pippet, for accused.

M. Bancroft, for the Crown.

28th November 1958. The judgment of the Court was delivered by

FORD C.J.A.:--This appeal is from a conviction under s. 30 of The Indian Act, R.S.C. 1952, c. 149, for trespassing on the Blood Indian reserve on Sunday 16th March 1958, and comes to this division by way of a stated case from the magistrate. The appeal was allowed and the conviction quashed at the conclusion of the hearing. Our reasons for judgment follow.