of civil rights. But the civil rights of an Indian may be affected and are affected by Dominion legislation by certain sections of the Indian Act and it cannot be said that such sections are *ultra vires* of the Dominion Parliament because, "Property and civil rights" is a subject of legislation reserved to the Provinces. If interference with civil rights alone brings the matter within the jurisdiction of the Province these sections would be *ultra vires*. A division of legislative authority was provided by the B.N.A. Act and under it the civil rights of all may be curtailed by the Dominion Parliament if by exercising them they conflict with the superior rights of the Indians on reserves to have the game thereon preserved for their own use and sustenance. If we had no Game Act and no provincial

legislation to interfere with the natural right of man to hunt at all seasons it would be possible, if this contention prevailed, to hunt on reserves at all times, notwithstanding the prohibitions contained in the Indian Act. If that view prevailed one of the purposes in reserving to the Dominion Parliament questions respecting "Indians and Lands Reserved for Indians" would be defeated. Protection of game on an Indian Reserve is under Dominion control. Incidental to that protection is the necessity of preventing hunting and shooting by any one. It may be faulty or improvident legislation. That would not permit the Province to legislate in respect to the reserves to supplement it or to make it more effective. With some exceptions the Federal Parliament provides for a close season on reserves at all times. If the provincial Act applies shooting would only be prevented for a limited period in each year.

It necessarily follows that if it is illegal to shoot on a reserve by provincial law during the close season it would be permissible to do so outside that period. That, however, is not the case. The Dominion Act prevents any one, except those of a certain class--Indians of the band--or those having authority from the Superintendent to hunt at any time. The appellant herein was within the prohibition of that Act. He could be convicted under it for the offence committed unless he produced authority to hunt from the Superintendent; and Federal legislation pre- venting him from destroying game on a reserve is legislation in respect to Indians in as much as it preserves for them hunting privileges and a means of livelihood.

I would allow the appeal.

Appeal dismissed.

was not hunting.

If the appellant produced authority from the Superintendent General for hunting upon the reserve he would not be guilty of an offence in killing a pheasant thereon. The respondent's contention really is that such authority would be without validity during the close season for game provided by the provincial Game Act. In other words, if one armed with such authority should shoot a pheasant in the close season he could be prosecuted under the provincial Act. That is not so, however... The reservation of Federal jurisdiction in respect to "Indians and lands reserved for the Indians" has a definite object in view, *viz*., safeguarding the rights and privileges of the wards of the Dominion at all times, and one of its main purposes is to protect game on the reserve for the exclusive use of the Indians, subject to minor exceptions. Section 34 does not apply to "an Indian of the band." They do not require authority to hunt. They may hunt on the reserve at any time and a provincial Act cannot curtail that right by attempting to establish a close season applicable to reserves.

If therefore the rights of the Indians are to be preserved in these limited areas known as reserves it is incidentally necessary to prevent appellant and others of the white race from "hunting" and killing game thereon at all times of the year. Such an act is legislation in respect to "Indians," *i.e.*, in respect to the requirements of Indians. If too the provincial Legislature has authority to provide for a close season for shooting game on Indian Reserves it could by the same authority except reserves from the operation of the local Game Act and permit all and sundry to "hunt" thereon throughout the year. The provincial Legislature would have power, if it chose to exercise it, to declare

a close season for certain kinds of game, or for all kinds of game, in all parts of the Province except for example the District of Cariboo. Could it also declare a close season for the shooting of pheasants in all parts of the Province except upon Indian Reserves permitting indiscriminate slaughter in that area: and if so would not the latter part of the Act be *ultra vires* and any one attempting to take advantage of it liable to prosecution under the Indian Act?

When authority was reserved to the Federal authorities to legislate in respect to its wards, the Indians, it means in respect to all matters affecting their welfare and civil rights. If their welfare is to be protected, others besides Indians must be re- strained if they enter reserves. They cannot commit acts--such as shooting game--likely to interfere with their well being, if the Indian Act prevents it. The preservation of game affects their well-being and to preserve it the ordinary civil rights of others must be curtailed.

This contention is presented against the views I have out- lined. Mankind, it is said, have a natural right to pursue and take game at all times and a law interfering with it (such as providing for a close season) is an invasion of that civil right and therefore within provincial authority to enact it. It is said to be a matter affecting "property and civil rights" of a "merely local and private nature:" that the object of the provincial Game Act is the protection of game in this Province and hence an essentially local matter. It is a prohibition pure and simple of the exercise

moment it is within the power of the Dominion Parliament to do so--the provincial Parliament has authority to legislate on the same point (*Madden v. Nelson & Ft. Sheppard R. Co.*, [1899] A.C 626). If that class of legislation is wholly within Federal jurisdiction, whether the field is occupied by Dominion legislation or not, the provincial Parliament will not be permitted to enter it. It follows that if the Dominion Parliament has authority to make it an offence for a white man to enter a reserve and shoot game thereon the local Legislature cannot under its Game Protection Act make a similar act an offence.

However, it is not necessary to go as far as indicated. The Dominion Parliament did legislate in respect to persons, other than Indians, trespassing or "hunting" upon parts of a reserve without authority and have therefore occupied the field. Section 34 provides that:--

"No person, or Indian other than an Indian of the band, shall without the authority of the Superintendent General, reside or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band."

The caption of this section is "Trespassing on Reserves." I cannot agree, however, with respect, with the view of Swanson, Co.Ct.J., in *Rex v. McLeod*, 54 Can. C.C., at p. 114, in giving a restricted meaning to the word "hunt" confining it to a trespass. Hunting may not eventuate in the killing of game but if game is killed on part of a reserve the offender, as a necessary and natural sequel, must have been engaged in hunting. The accused, to kill the pheasant, must necessarily have hunted on part of the reserve, and would be liable to the penalties im- posed under s. 115 of the same Act; and, if so, and these sections are *intra vires* of the Dominion Parliament the local Legislature cannot make the same act an offence by a provincial statute.

Other sections in the Indian Act dealing with game and hunting by white men or Indians indiscriminately are ss. 35, 117, and 156. It follows therefore that the Dominion Parliament having legally occupied the field any legislation of the local Legislature creating the same act an offence is, to the extent that it does so, displaced (*Rex v. Cooper, supra*).

The Dominion Parliament has authority to legislate and did

legislate in respect to birds found on or over a reserve. It is within its rights in making it an offence to "hunt" game of any kind on the reserve and having done so the provincial Legislature cannot make the same act an offence. *Rex v. Cooper, supra*, governs this case unless upon the construction of the relevant sections of the Indian Act is should be held that the offence of "hunting" on a reserve is something different from "killing a pheasant." It is enough to say that one who kills a pheasant while out for game cannot be heard to say that although he did so he

Reserves. The legislation of the Dominion as respects hunting on reserves is one aspect but the other aspect is materially different--it is a prohibition from shooting within the close season--this is an interference with civil rights and clearly within the power of the provincial Legislature, an exclusive power into which domain the Dominion Parliament cannot enter. That being the case Swanson, Co.Ct.J., was right in his affirmance of the conviction. It follows that the appeal in my opinion should be dismissed.

MACDONALD, J.A. (dissenting):--This is an appeal from a conviction of one Morley (not an Indian) by a Stipendiary Magistrate, affirmed on appeal by Swanson, Co.Ct.J., of Yale, for unlawfully killing a pheasant in November, 1929 (during

the close season) on the Kamloops Indian Reserve contrary to s. 9 of the provincial Game Act. The point raised is that the Game Act does not extend to Indian Reserves; that the Province has no authority to create the act complained of an offence or to prosecute in respect thereto and that a conviction, if any, could only be made by the Federal authorities under The Indian Act exclusive legislative authority over "Indians and lands reserved for the Indians" being vested only in the Dominion Parliament (B.N.A. Act, s. 91 (24)).

By s. 2 (*e*) of the Indian Act the term " 'Indian lands' means any reserve or portion of a reserve which has been surrendered to the Crown" and by s-s. (*j*):--

" '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, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or there- in."

If an Indian living on the reserve had been convicted of this offence under a provincial statute it would be invalid (*Rex v. Jim* (1915), 26 Can. C.C. 236). What is the situation where, as here, a white man enters a reserve and kills a pheasant contrary to the provisions of the provincial Game Act? Has the Federal Parliament jurisdiction to legislate with respect to a person other than an Indian, who may commit an offence on an Indian Reserve? I think it has but that does not conclude the point. It purports to exercise that right by several sections of the Indian Act. By s. 10(4) any "person" with whom an Indian child resides who fails to cause such child between certain ages to attend the industrial or boarding schools provided as required by that section is liable to a fine. "Person" in that Act means "an individual other than an Indian." Here we have legislation applying to a white man, living off a reserve, in respect to his conduct towards Indians under Dominion supervision.

If Dominion legislation is necessary before a white man living off the reserve can be prosecuted it does not follow that because of failure to make such provision--assuming for the

The appellant in the present case had imposed upon him-- as well as upon all the inhabitants of British Columbia--in- hibition--of not being entitled to shoot pheasants during the close season--I would here again call attention to the language of Killam, J., above quoted: "The prohibition against the kill- ing or taking of wild birds or other animals, and against having them in possession are prohibitions pure and simple of the exercise of civil rights." No matter where the appellant was-- upon an Indian Reserve with or without authority--the Pro- vincial legislation is paramount in respect of "(13) Property and Civil Rights in the Province" (B.N.A. Act). The "Game Act" is legislation in the way of regulation of property and civil rights. In passing for instance fire regulations under the Fire Marshal Act, R.S.B.C. 1924, c. 91, such regulations would have application in Indian Reserves, if not see the peril that would result from a fire upon an Indian Reserve perilous to adjoining territory--would not the provincial legislation extend into the reserve? Assuredly this would be so.

Then we have Lord Watson in *St. Catherine's Milling & Lumber Co. v. The Queen*, 14 App. Cas. 46, at p. 55 saying, "There has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominum whenever that title was surrendered or other- wise extinguished."

I would refer to what Lefroy has said in his work on Canadian Constitutional Law (1918) at p. 141:--"It does not follow that when the Dominion Parliament has drawn an Act into the domain of criminal law the right of the provincial legislatures

to pass laws in regard to such an Act necessarily ceases. They may still in many instances legislate against the same Act in another aspect." (*Reg. v. Boardman* (1871), 30 U.C.Q.B. 553, 556; *Quong Wing v. The King* (1914), 18 D.L.R. 121, 23 Can. C.C. 113; *Reg. v. Boscowitz* (1895), 4 B.C.R. 132.)

The short point really in this appeal is this that the legislation (Game Act) has effect throughout the whole Province--inclusive of Indian Reserves and must be obeyed. I would again make a quotation from Killam, J., in *The Queen v. Robertson* at p. 627:--

"The Provincial Legislature, under its authority to legislate upon the subject of 'Property and Civil Rights,' could undoubtedly limit civil rights, could take away some already existing, could prohibit their exercise as such. If it could do this, it could do it in the interests of the province, and those in the province, at large, as well as in the interests of special individuals or classes of individuals. It must then follow that, the power being expressly given to it by statute, it can en- force it's law by the imposition of punishment, and cannot be considered as thereby enacting a 'criminal law,' or legislating upon the subject of 'criminal law' within the meaning of The British North America Act."

I am therefore clearly of the opinion that the conviction here was a valid one founded upon a provincial statute respecting property and civil rights an exclusive jurisdiction of the Province under the B.N.A. Act and it is idle to contend that the legislation is *ultra vires* as respects Indian

that he had the authority of the Superintendent General to hunt upon the reserve but if he had he still would be subject to the provincial law and could not shoot out of season. This is not the case of the same act as that legislated against by the Dominion. Here even if the appellant had not the authority of the Superintendent General to hunt upon the reserve and would be subject to a penalty--the Act that is covered by the provincial legislation is shooting out of season a very different act--the gist of the decision in *Rex v. Cooper, supra*--as defined by the learned Chief Justice of this Court is found on p. 315 of the report and reads as follows:--

"The assertion of the right by two distinct legislative bodies to make the same act an offence and subject the offender to a double penalty, is, I think, contrary to the accepted principles of our law and contrary to the B.N.A. Act, 1867. No doubt that result may sometimes be brought about indirectly, but there is no case in the books which goes the length of holding that when the Dominion has created a particular act a crime, the Province may for its purpose create the same act a crime."

I would refer to a judgment of Killam, J., (as he then was afterwards Chief Justice of Manitoba--later one of the Justices of the Supreme Court of Canada and later again Chief Rail- way Commissioner for Canada) a most learned judgment of that very eminent and distinguished Canadian jurist in *The Queen v. Robertson*, 3 Man. R. 613--dealing with the Manitoba statute, the Agricultural Statistics and Health Act, 1883 (Man.), c. 19 as amended by 1884 (Man.), c. 10, s. 25 (*g*) regulating the killing and possession of game at certain seasons of the year, and it was held that the legislation was *intra vires* being within the clauses (s. 92(13) (16)) of the B.N.A. Act relating to "Property and Civil Rights" and "Matters of a merely local or private Nature. "

The learned Judge dealt with the object of the Manitoba Act at p. 620:--"The object of the Act, or the portion relating to the protection of game, is essentially local. It is to secure the increase, or to prevent, at any rate as far as possible, the decrease of the supply of game within the province, in order that the people of the province may enjoy the sport of pursuing and killing the birds and other animals mentioned in the

Act, or may have at hand a ready supply of them for food or for profit. All of the enactments against having them in possession or exporting them, are evidently so many accessories to the prohibition upon the killing at certain seasons, and all are plainly directed to the purpose mentioned."

Then at p. 622 we have this language:--"The prohibitions against the killing or taking of wild birds or other animals, and against having them in possession are prohibitions pure and simple of the exercise of civil rights. This was disputed upon the argument of the application, but it appears too clear to require any considerable discussion."

We all know of the flight of birds and their moving from one area to another.

To-day numbers of birds may be on an Indian Reserve and in a few days outside that reserve entirely so that as I view it the Provinces are dealing with the protection of the game generally as game and the Dominion was dealing with the subject not so much directly for the protection of the game as for the protection of the Indians on the reserve. In other words, in my view, they were not dealing with the matter in the same aspect as the Provinces have in legislating as to close seasons.

In this view I would uphold the conviction and dismiss the appeal. My brother McPhillips has dealt at length with other

aspects of the case which it is unnecessary for me to enter into but which I think carry weight.

MCPHILLIPS, J.A.:--This appeal is one from the judgment of Swanson, Co.Ct.J., affirming a conviction made by a Stipen- diary Magistrate in the County of Yale whereby the appellant was convicted for that he at Kamloops Indian Reserve in the County of Yale on or about November 2, 1929, being the close season, unlawfully did kill a pheasant contrary to s. 9 of the Game Act, and a fine was imposed of $25 and failing payment imprisonment for the term of 7 days would follow. The appeal is put upon the ground that the Game Act is *ultra vires* of the Province as regards Indian Reserves. This certainly brings up a very important matter but at the outset I venture to say that the contention is wholly fallacious. Further it would be a most astounding result if the contention made had merit. It would in its result have the effect of a serious and disastrous result upon the game of the Province--it would mean that game could be, in the close season, slaughtered upon Indian Reserves--in truth all that would be necessary would be to carry out a drive of game onto the Indian Reserve and there a wholesale slaughter could take place. That this could be is unthinkable and of course it is not difficult to at once call up authority to absolutely controvert any such contention. I may say that this is not a case of an Indian upon the reserve shooting-- although I do not consider that even he would be entitled to disobey the provincial law.

It is pressed that the decision of this Court in the case of *Rex v. Cooper*, 44 Can. C.C. 314 stands in the way of it being held that the conviction in the present case is a valid one. With great respect to all contrary opinion that is not my view--the case there was express Dominion legislation (s. 135, c. 98, R.S.C. 1927) covering the offence--and the holding was that the provincial statute did not apply to a sale of liquor which is within the terms of the Indian Act and the conviction was quashed. We have no such case here. What we have here is provincial legislation imposing a ban on shooting throughout the Province during certain close seasons and it was within a close season that the shooting took place. It was not shown that the appellant came within s. 115 of the Indian Act, *i.e.*,

from other "persons" under the legislation in question, and though several cases have been decided upon that interesting question (the principal ones being *Totten v. Watson* 15 U.C.Q.B. 393; *Reg. v. Gibb* (1870), 5 P.R. (Ont.) 315; *Rex v. Hill* (1907), 15 O.L.R. 406; *Rex v. Beboning* (1908), 13 Can. C.C. 405, 17 O.L.R. 23; *Rex v. Martin* (1917), 39 D.L.R. 635, 41 O.L.R. 79; *Sanderson v. Heap* (1909), 19 Man. R. 122; *Rex v. Rodgers, supra*; *Rex v. Jim, supra*; *Rex v. Chan Lung Toy* (1924), 34 B.C.R. 194; *Rex v. Cooper,* 44 Can. C.C. 314, and *Rex v. McLeod*, 54 Can. C.C. 107) I need only refer to our decision in *Rex v. Cooper* for the sole purpose of saying that it was a case wherein an Indian was personally concerned by the selling of intoxicating liquor to him, and we were of opinion that the Government Liquor Act, R.S.B.C. 1924, c. 146, did not apply to such an offence because there had been "a complete occupation *ad hoc* by the Federal Parliament of this particular field," which I may add is peculiarly one that that Parliament should have the control of so as to protect the Indians as much as possible from the shocking results of inflaming them with intoxicants.

It follows that in my opinion the learned Judge appealed from was right in affirming this conviction, doubtless in pursuance of the views expressed in his prior carefully prepared judgment in *Rex v. McLeod, supra*, with which I am in general accord, and therefore this appeal should be dismissed.

GALLIHER, J.A.:--I agree in the result with my brother Mc-

Phillips. The act-complained of was for shooting a pheasant during the closed season. The offence took place on an Indian Reserve over which the Dominion Government have jurisdiction and the Federal Government under the Indian Act have passed a law making it an offence to shoot birds at any time upon the Indian Reserves without permission and was designed for the preservation of game generally in the interests of the Indians.

The provincial Act is one passed for the protection of game in the Province and a close season is fixed from time to time between certain dates in which it is unlawful to shoot game dealing with certain species of game birds and animals.

The prosecution was under the provincial Game Act and among other objections raised to the conviction is that the Dominion Government having entered the field prosecutions must be under that Act where the offence is committed on an Indian Reserve. It is well known that each Province has its own game laws restricting the shooting of wild game and fixing close seasons.

It is scarcely to be thought that in dealing with the subject in a general way the Dominion would have had in mind that they were covering a subject where owing to climatic and other prevailing conditions the different Provinces would and have different restrictions and different close seasons where they could by permission given to certain persons allow indiscriminate shooting on Indian Reserves regardless of any Provincial laws passed for the preservation of game generally.

their own personal rights in their own reserve that it would undoubtedly be a matter falling within the jurisdiction of Parliament under class 24, and it would be, obviously, in any event, a necessary incident to that jurisdiction that "every person" other than the Indians should be excluded from fishing or shooting in the "leased or granted" area, quite apart from any fish or game laws that might lawfully be enacted by the Province respecting its "property and civil rights:" in other words, the two legislation's do not in reality "meet."

Section 156 is simply in essentials a repetition, for no apparent purpose, of the prohibition contained in said s. 117, and therefore governed by the same observations.

Section 69 provides that:--"69. The Superintendent General may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the province of Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient."

This is an enabling section to authorize the application of Federal and certain provincial game laws in whole or in part, but as it does not extend to this Province it is not relevant to this case. Obviously it has reference to the origin and history (alluded to in *The Queen v. Robertson*, 3 Man. R., at pp. 616-7, 619, and discussed in "The Rise of Law in Rupert's Land," 1 W.L.T. pp. 49, 73, 93) of those 3 Provinces and of the old North-West Territories (under c. 49, 1875 (Can.)), formerly Rupert's Land and the easterly part of the Indian Territories, out of which they were after Confederation partly carved, (as long before was also the Colony of Vancouver Island by 1849 (Imp.), c. 48) the "ordinary Crown lands" of which were, as has been noted, *supra*, till quite recently the property of the Dominion of Canada, and still are in the case of the "Territories" named in said section, which by the interpretation s. 2 (*m*) "means the Northwest Territories and the Yukon Territory;" and in all cases its application is not general as it is only declared to "apply to Indians within the said province or Territories as the case may be."

We are not informed that the Superintendent General has taken advantage of the power so conferred upon him which might well be usefully exercised in co-operation with the said Legislatures to the mutual benefit of all concerned, though that is purely a matter for them to decide upon their varying conditions (*The Queen v. Robertson*, 3 Man. R., at p. 619) which differ greatly from those on this Pacific Coast, and we must assume, as the Privy Council said in the *Street Ends* case, [1906] A.C., at p. 211, "that all necessary communications between the . . . . governments would always take place."

Pursuant to the "wise course" suggested in *Parsons* case, *supra*, I have refrained from considering more than is absolutely necessary the status or rights of Indians as distinguished

cause the more it is produced outside the more will be found inside them.

During the argument it was submitted that the game on this Indian Reserve is part and parcel of the land itself and the absolute property of the National Government, as pertaining to its ownership of the land, but no authority was cited to support that position, which, though doubtless sound as to nationally- owned "Territories," is as regards the Provinces contrary to the whole ground of the decision in *The Queen v. Robertson, supra*, and to the line of decisions by the Privy Council be- ginning with *St. Catharines Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, and continuing through *On-*

Ontario Mining Co. v. Seybold, [1903] A.C. 73, and the Indian Treaty Case, *Dominion of Canada v. Province of Ontario*, [1910] A.C., at pp. 644-6, and also not overlooking *Burk v. Cormier* (1890), 30 N.B.R. 142, and Lord Herschell's statement in *A.-G. Can. v. Attorneys-General for Ont., Que. and N.S.*, [1898] A.C. 700, at p. 709, that:--

"It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular sub- ject-matter is conferred on the Dominion Legislature, for ex- ample, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it."

The case of *A.-G. Can. v. Giroux, supra*, is instructive though it was one of a special title through a commissioner. In *Quirt v. The Queen* (1891), 19 S.C.R. 510, at p. 519, Strong, J., truly said, "the rights of the Crown as regards Indian lands are of . . . . an anomalous and peculiar nature;" and *cf.* also Mar- tin's H.B. Co. Land Tenures (1898), c. vi on "The Indian Title and Half-Breed Claims."

With respect to the language "of which legal title is in the Crown" in the said definition of "reserve," the word "Crown" is used in the broad sense indicated in the *Dominion of Canada* case, *supra*, at pp. 645-6 as including the Crown Provincial in appropriate circumstances, as had also been held by the same tribunal in the earlier Vancouver *Street Ends* case, *A.-G. B.C. v. C.P.R.*, [1906] A.C. 204, at p. 211.

There remain for consideration ss. 117 and 156 and 69. The first relates only to cases where the Indians of a band have consented to the leasing or granting "to any person" of shooting or fishing privileges over their reserve in whole or in part, and "in such case" there is a general prohibition, with a penalty, against "every person" not entitled under such lease or grant, (which would include the consenting Indians them- selves) from shooting or fishing within such leased or granted area. This is so clearly the special case of active participation by the Indians themselves in the disposition and restriction of

"possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them," as was laid down by the *Parsons* and *John Deere Plow* cases, *supra*, and in the Indian Treaty case, *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637, it was said, at p. 645:--

"The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately in- vested by the Crown with its rights and responsibilities as treaty maker and as owner respectively."

With respect to the effect of the words "without the authority of the Superintendent General reside or hunt upon, occupy or use any land or marsh," said s. 34, it is not necessary for the disposition of this case to consider them because no "authority" was in fact given, and so the question does not arise, therefore I shall content myself by saying that under certain circumstances the Superintendent would unquestionably have the power, in the exercise of general control over the subject-matter of trespassing, to give authority to any Indians to occupy reside or hunt upon any part of any reserve where it would be for the benefit of them or its Indian occupants to do so: it might, *e.g.*, be for the general or particular benefit of the Indians in a Province to allow some of them to occupy tem- porarily the reserve of another band and to hunt and fish thereon in times of scarcity for food, or to cut timber for fuel, and even also to allow other "persons" (defined as aforesaid) to enter the reserve for the benefit of the Indians, but never

otherwise: *e.g.*, to hunt and destroy wolves and cougars as aforesaid, or wild horses under the Animals Act, R.S.B.C. 1924, c. 11, s. 18, or sea lions interfering with other fisheries, or other harmful beasts, birds or insects, etc. But whether that authority could lawfully be extended to allow game to be hunted on re- serves by such "persons" during a close season defined by a provincial Game Act is a question which will require full and care- ful consideration should it ever arise. That it would not be lawful for the Superintendent to get up a shooting party on an Indian Reserve for the benefit of himself or his friends or allow any one else to do so in a close season or at any time, may be conceded, though it is not for a moment to be presumed that he would sanction such improper proceedings.

Illustrations may well be given, as some of my learned brothers have done, of the unexpected, results of pushing these two respective legislation's to an extremity, but then any power, even judicial, may be abused and we must assume that the Governments concerned will act in concert in a reasonable manner in the practical furtherance of the two distinct matters under their control. So far, happily, that wise course has been adopted, and several sections in this provincial Game Act show that the Legislature is alive to the just claim of the Indians for protection, and indeed special consideration, respecting game (*cf.* ss. 6, 9, 22, 40 & 41) which, as my brother Galliher says, is peculiar owing to the mobile habits of birds and animals, and it is just as much, if not more, in the interest of Indians that game should be generally preserved outside their reserves be-

ground, as appears from the judgment, D.L.R. pp. 100,

105-6, Can. C.C. pp. 17, 23-4, particularly at p. 100 D.L.R., p. 17 Can. C.C., wherein is approved the judgment of Lord Sumner in *Rex v. Nat Bell Liquors Ltd.* (1922), 65 D.L.R. 1, 37 Can. C.C. 129, "that there was a part of the criminal law which was within the competence of the Provincial legislature," though by class 27 of said s. 91 the Parliament of Canada is given exclusive jurisdiction over the subject-matter of "The Criminal Law," except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.

These two cases, therefore, are a striking illustration of the way in which in the practical working out of liquor control or prohibition the enactments of two distinct Legislatures may stand side by side and be reasonably enforced without meeting in conflict in the field.

Approaching, then, the present circumstances in the light of all the foregoing principles as a guide I have little difficulty in reaching the conclusion the "lines of demarcation" between these statutes should be drawn to hold that the total prohibition in the said group of sections (34-8) of the Indian Act, en- titled "Trespassing on Reserves," against all kinds of trespassers upon reserves, extending even to Indians not of the band in occupancy thereof, does not meet in conflict the said Game Act of this Province in its practical operation so far as concerns any "person," who comes within the definition in the Indian Act, s. 2, of that word as meaning "an individual other than an Indian," and there is nothing to induce me to think or apprehend that in its "special aspect" and for the attainment of its "particular purpose" (to use the very apt expressions already cited from the *Parsons* case, *supra*) said Act has not been and will not be fully effective, taken in conjunction with other sections, such as 118, to protect the Indians from the encroachments of trespassers of all kinds including hunters and fishermen, and there is no necessity to seek for or resort to other incidental powers which would conflict with those of property and civil rights as asserted by said Game Act for the general benefit of all residents of the Province as aforesaid. In other words a trespassing "person" who violates the special prohibitions of said sections may, as in *Rex v. Nadan, supra,* so act as to find himself open to two distinct prosecutions and

penalties, first, to one under said trespass group of sections and s. 115, and second to the additional one of violating the game laws of the Province.

The truth is, that in order to secure the practical working out of Parliamentary powers relating to such a special and personal subject-matter as Indians not only the Courts but the respective Legislatures must "in performing a difficult duty" work in harmony to find a way to make it

purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the provincial legislatures in the case of *The Union Collieries v. Bryden*, [1899] A.C. 580."

Mr. Justice Duff said (D.L.R. p. 138, Can. C.C. p. 130):--

"The enactment is not necessarily brought within the category of 'criminal law,' as that phrase is used in sec. 91 of the B.N.A. Act, 1867, by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions....

"The authority of the legislature of Saskatchewan to enact this statute now before us is disputed upon the ground that the Act is really and truly legislation in relation to a matter

which falls within the subject assigned exclusively to the Do- minion by sec. 91(25), 'aliens and naturalization,' and to which, therefore, the jurisdiction of the province does not extend."

And he proceeds to dispose of that submission, basing his convincing opinion largely upon *Tomey Homma's* case, which re- moved (D.L.R. pp. 141 *et seq.*, Can. C.C. pp. 133 *et seq.*) the obstacle raised by Lord Watson's observations in *Bryden's* case.

Finally(1) NOTE--To these cases should now be added the later and con- firmatory decision of the Privy Council in *Lymburn v. Mayland*, [1932] 2 D.L.R. 6, at pp. 9-10, 57 Can. C.C. 311, at pp. 315-6; and *cf.* also *Re Silver Bros. Ltd., A.-G. Que. v. A.-G. Can.*, [1932] 2 D.L.R. 673, at pp. 676-7. I refer to the first case cited herein, *Chung Chuck v. The King, supra*, which followed *Rex v. Nadan*, [1926] 2 D.L.R. 177, 45 Can. C.C. 221, wherein it was held that each of the two distinct appeals from the Appellate Court of Alberta affirming separate convictions, was a "criminal case" within s. 1025 of the Criminal Code, even though one of the convictions was under the Alberta Liquor Control Act 1924, (c. 14) for unlawfully having liquor in possession, and the other was under the Canada Temperance Act, R.S.C. 1906, (c. 152) for unlawfully transporting liquor through that Province: on the first charge the appellant was fined $200 and costs and the liquor and his motor car forfeited, and on the second he was fined $500 and costs, and in default of payment to be, in each case, imprisoned.

Both the appeals were dismissed even though it was desired to question the validity of the respective provincial and Do- minion statutes on which the separate convictions were based, their Lordships saying in conclusion, (D.L.R. p. 185, Can. C.C. p. 230):--"It is of the utmost importance that a decision on a criminal charge so reached should take immediate effect without a long-drawn out process of appeal, and it is undesirable that appeals upon such decisions should be encouraged by the Board. "

In *Chung Chuck's* case, *supra*, which was a conviction for shipping vegetables contrary to the Produce Marketing Act, 1927 (B.C.), c. 54, leave to appeal was also refused upon the same

either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality."

This decision was followed in another case from this Province --*Brooks-Bidlake v. A.-G. B.C.*, [1923] 2 D.L.R. 450, wherein it was stated (p. 192):--

"It is said that, as sec. 91 (25) of the B.N.A. Act reserves to the Dominion Parliament the exclusive right to legislate on the subject of 'naturalization and aliens,' the Provincial Legislature is not competent to impose regulations restricting the employment of Chinese or Japanese on Crown property held in right of the Province. Their Lordships are unable to agree with this contention. Section 91 reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalized persons; but the Dominion is not empowered by that section to regulate the management of the public property of the Province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race. These functions are assigned by sec. 92(5) and sec. 109 of the Act to the Legislature of the Province; and there is nothing in sec. 91 which conflicts with that view."

Then there is the important decision of the Supreme Court of Canada in *Quong Wing v. The King* (1914), 18 D.L.R. 121, 23 Can. C.C. 113, wherein it was held that a general prohibition, to be enforced by penalties after conviction, in a Saskatchewan statute, against the employment by any person, of white women or girls in "any restaurant, laundry or other place of business or amusement owned kept or managed by any China-

man" was *intra vires* even though the Chinese appellant convicted thereunder was a naturalized alien, and *Tomey Homma's* case, *supra*, was relied upon, and the submission was again rejected that under said class 25 Parliament had exclusive authority over all matters which directly concern the rights privileges and disabilities of naturalized aliens. Davies, J., said (D.L.R. p. 127, Can. C.C. p. 119)-:--

"While it [class 25] exclusively reserves these subjects to the jurisdiction of the Dominion in so far as to determine what shall constitute either alienage or naturalization, it does not touch the question of what consequences shall follow from either, I am relieved from the difficulty I would otherwise feel.

"The legislation under review does not, in this view, trespass upon the exclusive power of the Dominion legislature. It does deal with the subject-matter of 'property and civil rights' within the province, exclusively assigned to the provincial legislatures, and so dealing cannot be held *ultra vires*, however harshly it may bear upon Chinamen, naturalized or not, residing in the province."

And at p. 128 D.L.R., p. 120 Can. C.C.:--

"I think the pith and substance of the legislation now before us is entirely different. Its object and

[1899] A.C. 626 wherein it was found (p. 628) that the provincial Legislature had attempted to "enter into such a field .... which is wholly withdrawn from them and is, there-

fore, manifestly *ultra vires*. " But in so holding the Privy Council referred to a case which was on the line, *viz.*, their own very recent decision in *C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C. 367, and which is relied upon by the present respondent, and it undoubtedly does assist his submission that even a great railway corporation, created by special Act of Parliament for exceptional National purposes, may still be under provincial obligations (there to keep its own authorized ditches clean) delegated to municipalities, even though, as Lord Watson said (p. 371):--

"It is not matter of dispute that, by virtue of these enactment's, the Parliament of Canada had and have the sole right of legislating with reference to the matter of the appellants ' railway. "

On the other hand we have a later decision of the same tribunal, also with regard to a Dominion Railway, *G.T.R. v. A.-G. Can.*, [1907] A.C. 65, that it was "truly railway legislation" on the part of the company to enter into contracts with its employees which were prohibited by Parliament even though (p. 68) "it is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable."

Then the leading case from this Province of *Cunningham & A.-G. B.C. v. Tomey Homma & A.-G. Can.*, [1903] A.C. 151 is noteworthy and very instructive on the present question be- cause it was one of an alien, and only two classes of persons as such are specifically enumerated in said ss. 91 or 92, *viz.*, "25. Naturalization and Aliens," and "24. Indians, etc." It was sought in that case to expend the personal rights of naturalized aliens, and the power of Parliament over that exclusive subject matter, to such an extent that they had the right to have their names placed upon the provincial register of voters, and it was submitted (p. 155) that under said class 25 "the whole subject of naturalization is reserved to the exclusive jurisdiction of the Dominion" and that by the Naturalization Act, R.S.C. 1927, c. 138 a naturalized alien is within Canada entitled to all political and other rights powers and privileges to which a natural-born British subject is entitled in Canada.

But this submission was rejected, their Lordships saying (pp. 156-7):--

"The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion--that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from

On p. 197 four "propositions" were stated on the question of legislative conflict of which the 3rd and 4th are of special relevancy *viz.*:--

"(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legis- lative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91 (see *A.-G. Ont. v. A.-G. Can.* (the Assignments & Preferences Case), [1894] A.C. 189, and *A.-G. Ont. v. A.-G. Dom.*, [1896] A.C. 348).

"(4) There can be a domain in which provincial and Domin- ion legislation may overlap in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislation's meet the Dominion legislation must prevail (see *G.T.R. v. A.-G. Can.*, [1907] A.C. 65)."

Still more recent is the decision of the same tribunal in

Proprietary Articles Trade Ass'n v. A.-G. Can., [1931] 2 D.L.R., at p. 3, 55 Can. C.C., at p. 243 wherein the principles herein- before cited from the *Parsons* and *John Deere* cases were approved with the additional observation:--"The object is as far as possible to prevent too rigid declarations of the Courts from interfering with such elasticity as is given in the written constitution. With these two principles in mind the present task must be approached.-'

And it was held that the "pith and substance" of the impugned Federal statute was under the circumstances, not "in substance" (p. 10 D.L.R., p. 250 Can. C.C.) an encroachment on the exclusive power of the Provinces to legislate on property and civil rights, though in *A.-G. Can. v. A.-G. Alta., Re Bd. of Commerce Act* (1921), 60 D.L.R. 513 (which was much relied upon by the Provinces concerned, but was now distinguished on the facts) it was held by the same tribunal that there had been on the part of the Dominion "attempts to interfere with provincial rights," sought to be justified under the head of criminal law, but which had been made "colourably and merely in aid of what is in substance an encroachment."

And at p. 4 D.L.R., p. 244, Can. C.C., it was said:--"Their Lorships entertain no doubt that time alone will not validate an Act which when challenged is found to be *ultra vires*: nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value."

In the attempt to determine the vexed question as to whether the two legislations really "meet" (which must mean meet in conflict) in a field which is not clear, great difficulty is often encountered in drawing the "lines of demarcation" on the ever varying facts before the Court. Upon rare occasion there is little difficulty, *e.g.*, in *Madden v. Nelson & Ft. Sheppard R. Co.*,

"It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co. v. Parsons*, [*supra*] to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words 'civil rights' in particular cases. An abstract logical definition of their scope is not only, having regard to the context of the 91st and 92nd sections of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in sub- stance and in reality. This may not be difficult to determine in actual and concrete cases."

And again on p. 362:--"Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of which individually the Courts have to determine on which side of a particular line the facts place them."

In *A.-G. Man. v. A.-G. Can.*, [1929] 1 D.L.R. 369, the Privy

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Council said, after a consideration of the leading cases (p. 374) :--

"As a matter of construction it is now well settled that, in the case of a company incorporated by Dominion authority with power to carry on its affairs in the Provinces generally, it is not competent to the legislature of those Provinces so to legislate as to impair the status and essential capacities of the company in a substantial degree." And went on to hold that "the statutes now under consideration do so impair the status and powers of such a company...."

In the British Columbia Fisheries Reference Case, *Re Fisheries Act*, 1914, [1930] 1 D.L.R. 194, it was contended by the National Government that certain sections of the National Fisheries Act of 1914 (authorizing the Minister of Fisheries to withhold licences to fish) were valid on the ground (p. 198) that they were necessarily incidental to effective legislation upon an enumerated subject" (s. 91 (12) B.N.A. Act, "Sea Coast and Inland Fisheries") though otherwise the matter admittedly fell within the exclusive jurisdiction of the Province as "Property and Civil Rights" (s. 92(13)), but it was held (pp. 199-200) that they were not so incidental and consequently " the impugned sections .... cannot be supported. "

Legislatures may think best under their widely varying conditions, in the due exercise of their said powers under the B.N.A. Act.

It is clearly established by repeated decisions of the Privy Council that the incidental occupation by the Dominion in the exercise of its exclusive powers of an otherwise exclusive provincial area can only be justified by and must be restricted to the reasonable necessity of the case, which becomes a question of degree under the circumstances "trenching to any extent," as Lord Watson put it in *Tennant v. Union Bk.*, [1894] A.C. 31, at p. 45. Thus in *Citizens Ins. Co. v. Parsons* (1881), 7 App. Cas. 96, it was said at p. 108, in a passage cited by Killam, J., in the *Robertson* case, *supra*, at p. 626:--

"Notwithstanding this endeavour to give pre-eminence to the dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament. "

And again, (p. 109):--

"In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, author- ity to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where neces- sary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand."

This view was later re-affirmed and adopted by the same tribunal in *John Deere Plow Co. v. Wharton* (1915), 18 D.L.R. 353, wherein at pp. 358-9, while considering said ss. 91 and 92 "..and the degree to which the connotation of the expressions used overlaps " their Lordships first said it was "unwise on this

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or any other occasion, to attempt exhaustive definitions of the meaning and scope of these expressions" because this "must almost certainly miscarry," and then went on to say:--

kind, even though the thing, be it furred or feathered or sealed, "hunted" is not "game" in the ordinary sporting sense (*cf.* Article "Game Laws," 6 Enc. L.E., 2nd ed., at p. 336), or as defined in the Game Act, ss. 2 & 9, now under consideration, which deals not only with the "hunting, trapping, taking, wounding or killing" of ordinary "game" and "game birds" but with "fur bearing animals as defined in this Act" (which definition is constantly changing to meet new conditions, *e.g.*, the introduction of wild turkeys--s. 9 (v), as amended by 1931, c. 25, s. 5) and a variety of cognate subjects, and authorizes and even offers bounties (s. 41 (e.)) for the destruction of certain predatory birds and animals (*e.g.*, ss. 8 (*d*), 13) which are beyond the pale of the Act as being either enemies of game or dangerous and destructive to domestic stock and otherwise, *e.g.*, eagles, timber wolves and cougars.

Ever since the British conquest of Quebec at least it has been the declared policy of the Government, by the Royal Pro- clamation of October 7, 1763, "that the several nations or tribes of Indians with whom we are connected, and who live

under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to us, are reserved to them, or any of them, as their hunting-grounds....

"And we do further declare it to be our Royal will and pleasure, for the present as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company; as also the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and licence for that purpose first obtained.

"And we do further strictly enjoin and require all persons whatsoever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to or purchased by us, are still reserved to the said Indians as afore- said, forthwith to remove themselves from such settlement ...."

Though this Proclamation did not extend to what is now this Province, which had not then been visited even by the two later Royal Naval expeditions of the King of Spain, which pre- ceded by several years the arrival of Capt. Cook, R.N., on this Pacific Coast in 1778, yet it is a striking indication of the initial policy of excluding trespassers in general from Indian Reserves which is preserved till today by the group of sections above quoted.

There is to my mind no practical obstacle in the continuation of that historical Imperial policy in favour of the Indians and also in the later inauguration of the wider provincial policy, since Confederation at least, of the preservation and regulation of wild life at large for the general benefit of all the "resi- dents" (s. 2) including the Indians of the Provinces as the local

other than an Indian of the band, without the license of the Superintendent General,

"(*a*) settles, resides or hunts upon, occupies, uses, or causes or permits any cattle or other animals owned by him, or in his charge, to trespass on any such land or marsh;

"(*b*) fishes in any marsh, river, stream or creek on or running through a reserve; or

"(*c*) settles, resides upon or occupies any road, or allowance for road, on such reserve; the Superintendent General or such other officer or person as he thereunto deputes and authorizes, shall, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant, signed and sealed, directed to any literate person willing to act in the premises, commanding him forthwith as the case may be,

"(*a*) to remove from the said land, marsh or road, or allowance for road, every such person or Indian and his family, so settled, or who is residing or hunting upon, or occupying, or is illegally in possession of the same...."

And it goes on to deal similarly with the other classes of trespassers and to empower the Indian agent to deal with trespassers in certain cases. Section 36 provides for the punishment of "any person or Indian" who returns to the reserve for said prohibited purposes after being removed therefrom, by arrest under warrant of the Superintendent General and imprisonment on summary conviction by certain specified Magistrates. Section 37 directs the sheriff to deliver the convict to the proper gaoler and the final s. 38 directs and declares that:--"38. The Superintendent General, or such officer or person aforesaid, shall cause the judgment or order against the offender to be drawn up and filed in his office.

"2. Such judgment shall not be appealed from, or removed by *certiorari* or otherwise, but shall be final."

Therefore we find in this group of "Trespass" sections a special and final tribunal created for the purpose of preventing trespassing of all kinds upon Indian Reserves and for summarily punishing offenders of that class. Power is also given by s. 115 to impose the additional penalty of a fine and costs, "half of which penalty shall belong to the informer."

With the greatest respect for other opinions I find myself unable to perceive any real conflict of jurisdiction between the National Parliament and the provincial Legislature in the said special provisions of general prohibition against encroachments of any kind upon an Indian Reserve not only, be it noted, by "any person" but also by those Indians who are not "of the band" occupying the reserve in question. Even were there no game laws in existence such legislation would be necessary to protect the welfare of these aboriginal wards of the Crown, from the incursions of trespassers in general (as has been done "from the earliest period"--*Totten v. Watson* (1858), 15 U.C.Q.B. 393, *in banco*) and the matter is not dealt with in the said Indian Act *qua* game but as a general prohibition against "hunting" (*i.e.*, pursuing to capture or kill, Game Act, s. 2) of any

between the personal right of each individual to pursue and take or kill animals *ferae naturae* and the right to do so upon particular land, and this serves to show that although in this province as claimed in argument, the right to enter upon and pursue game over ordinary public lands can, as against the Crown, be conferred only by the officers of the Crown for the Dominion, yet the right to do so in a particular manner or at a particular season or even to do so at all is not necessarily on that account subject to the control of the Dominion Parliament."

It is to be remembered that at the time the learned Judge was speaking the "ordinary public lands" of the Crown in Manitoba belonged to the Dominion and therefore his observations are of particular force in this Province which has always owned such lands.

At p. 625 he says:--"I must, however, cite one sentence from the remarks of Chief Justice Ritchie in the same case [*Citizens' Ins. Co. v. Parsons*], 4 S.C.R. 243, 'I think the power of the Dominion Parliament to regulate trade and commerce ought not to be held to be necessarily inconsistent with those of the Local Legislatures to regulate property and civil rights in respect to all matters of a merely local and private nature, such as matters connected with the *enjoyment and preservation of property* in the province, or matters of contract between parties in relation to their property or dealings, *although the exercise by the Local Legislatures of such powers may be said remotely to affect matters connected with trade and commerce*, unless, indeed, the laws of the Provincial Legislatures should conflict with those of the Dominion Parliament passed for the general regulation of trade and commerce.' "

But a "conflict" is suggested to arise herein from s. 34 of said Indian Act as follows in the group of six sections under the heading,

Trespassing on Reserves.

"34. No person, or Indian other than an Indian of the band, shall without the authority of the Superintendent General, re- side or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band.

"2. All deeds, leases, contracts, agreements or instruments of

whatsoever kind made, entered into, or consented to by any Indian, purporting to permit persons or Indians other than Indians of the band to reside or hunt upon such reserve, or to occupy or use any portion thereof, shall be void."

Section 35 follows to provide for the "removal or notification" of such trespassers and others in general, *viz.*:--

"35. If any Indian is illegally in possession of any land on a reserve, or if any person, or Indian

the admission by counsel of the bare fact that it is a "reserve," within the meaning of the Indian Act, s. 2, though under other circumstances full information on the history of the reserve would be essential to define the rights of particular Indians as many reported cases show, *e.g., A.-G: Can. v. Giroux* (1916), 30 D.L.R. 123.

In support of said ground it is submitted that the National Parliament has under the "exclusive authority" over "Indians,

and Lands reserved for the Indians," conferred upon it by s. 91(24) of the B.N.A. Act, occupied the field in question to the entire exclusion of the exclusive right of the provincial Legislature to make "laws in relation to Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province" as conferred by classes 13 and 16 respectively of s. 92 of said Act.

On legislation respecting animals *ferae naturae* we are fortunate in having for our assistance the leading and convincing judgment of the Manitoba Appellate Court in *The Queen v. Robertson* (1886), 3 Man. R. 613, delivered by Killam, J., where- in it was decided that the Game Protection clauses of the Agri- cultural Statistics & Health Act, 1883 (Man.), c. 19, of the Manitoba Legislature were *intra vires* under both of said classes 13 and 16, and so a conviction of the appellant for having a moose in his possession during the "protected season" was affirmed. The whole judgment merits careful perusal but as it does not relate primarily to Indian Reserves and as its conclusions are not indeed attacked but sought to be avoided I shall make only three citations therefrom which throw light upon the present question, *viz*., at p. 622:--

"The prohibitions against the killing or taking of wild birds or other animals, and against having them in possession are prohibitions pure and simple of the exercise of civil rights. This was disputed upon the argument of the application, but it ap- pears too clear to require any considerable discussion.

"Sir Wm. Blackstone, in his *Commentaries on the Laws of England*, Vol. 2, c. 26, p. 403, lays down the principle, 'With regard, likewise, to animals *ferae naturae* all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field; and this natural right still continues in every individual unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or if dead, are *absolutely* his own.' "

And, at p. 623, after an informing citation from Brown & Hadley's Commentaries on the Laws of England he proceeds:-- "This last citation exhibits the plain distinction which exists

outside the reserve but within it and I think must be dealt with under the Indian Act, the field being occupied by that Act. Section 69 of the Indian Act enables the Superintendent General to give public notice that the provincial laws of "Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said Province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient." This section does not apply and in any case has not been applied in this Province.

The appeal must therefore be allowed with costs.

MARTIN, J.A.:--On April 9, 1930, the following conviction of the appellant was made by the Stipendiary Magistrate at Kam- loops, B.C., *viz.*:--

"For that he, the said Henry L. Morley of the City of Kam- loops in the County of Yale, Solicitor, at Kamloops Indian Re- serve in the County of Yale aforesaid on or about the second day of November 1929 being the close season unlawfully did kill a pheasant contrary to section 9 of the 'Game Act' being R.S.B.C. 1924, chapter 98, and I adjudge the said Henry L.

Morley for his said offence to forfeit and pay the sum of twenty five dollars to be paid and applied according to law; and also to pay to the prosecutor the sum of six dollars and twenty-five cents, for his costs in this behalf .... (and to imprisonment upon default of such payment)."

An appeal was taken from this conviction to Swanson, Co. Ct. J., and it was dismissed by him, whereupon a further appeal was taken to this Court.

I pause here to note that by some strange error and oversight this criminal appeal (*cf. Chung Chuck v. The King*, [1930] 2 D.L.R. 97, at pp. 100, 102, 105-6, 53 Can. C.C. 14, at pp. 17, 20, 23-4) was not lodged or entered upon the list in the usual way under the proper title or heading pertaining thereto (as in *e.g., Rex v. Jim* (1915), 26 Can. C.C. 236, 22 B.C.R. 106; *Rex v. Cooper* (1925), 44 Can. C.C. 314, 35 B.C.R. 457; *Rex v. McLeod* (1930), 54 Can. C.C. 107; and *Rex v. Rodgers*, [1923] 3 D.L.R. 414, 40 Can. C.C. 51, 33 Man. R. 139), but was wrongly entered as if it were an ordinary civil appeal, which error gives a misleading complexion to the whole matter and is of importance in view of certain decisions hereinafter to be cited; there- fore I give the proper title herein, *viz., Rex v. Morley*.

From the outset it is to be borne in mind that this case is not one of the conviction of an Indian but of a white man who trespassed upon an Indian Reserve and therein committed the offence complained of, and the ground of his appeal is that the said "Game Act .... is *ultra vires* of the Province as regards Indian Reserves."

It becomes unnecessary therefore to consider what is the application of the said Game Acts to Indians in general or those of the particular band living upon the reserve in question, in regard to which it is to be observed that we have no evidence in the record and no other information than

The Province under the said provincial Act fixed certain seasons as closed seasons, that is to say seasons in which game might not be shot and the offence in question was committed on the Indian Reserve during one of these closed seasons and hence the prosecution. The Indian Act, R.S.C. 1927, c. 98, s. 34, enacts that:--

" No person, or Indian other than an Indian of the band, shall without the authority of the Superintendent General, re- side or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band."

Sections 35 and 36 provide punishment for breach of this section. It is, therefore, clear that the Dominion, by its legislation, occupies the field in question. The contention of the Province is that the question is one falling within s. 92 (13) namely property and civil rights, the right to legislate thereon being assigned by the said section to the Province. It may be conceded at once for the purpose of this case, that each had power to so legislate but the legislation, I think, must be confined to its respective field of operation. While there has been much dispute concerning the property rights of the Indians in Indian Reserves or more correctly of the Dominion Government, there has been no such dispute concerning the Dominion legislation in respect of Indians and the management of their lands. The pheasants on the reserve belong to the reserve and the Indian Act was passed *inter alia* to protect the interest of the Indians in these pheasants and to prohibit the hunting of them on Indian Reserves. In *G.T.R. v. A.-G. Can.*, [1907] A.C. 65, at p. 68, the Privy Council said:--

"But a comparison of two cases decided in the year 1894-- viz., *Attorney-General of Ontario v. Attorney-General of Canada*, [1894] A.C. 189, and *Tennant v. Union Bank of Canada*, [1894] A.C. 31, seems to establish these two propositions: First,

that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

That statement of the law is peculiarly applicable to the present case.

In the recent decision of the Privy Council in *Re Proprietary Articles Trade Ass'n v. A.-G. Can.*, [1931] 2 D.L.R. 1, at pp. 11-12, 55 Can. C.C. 241, at p. 252, the law is stated thus:--"If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces." And see the saving clause at the end of s. 91.

In *Rex v. Rodgers*, [1923] 3 D.L.R. 414, 40 Can. C.C. 51, 33 Man. R. 139, it was held that where the offence against the provincial Act occurred beyond the limits of the Indian Reserve the Indian offender must be punished under the provincial Act; here the offence was committed not

REX v. MORLEY

(1931), 58 C.C.C. 166 (also reported: [1932] 4 D.L.R. 483, 46 B.C.R. 28, [1932] 2 W.W.R. 193)

British Columbia Court of Appeal, Macdonald C.J.B.C., Martin, Galliher, McPhillips and Macdonald JJ.A., 6 October 1931

Constitutional law I A--Provincial game laws--Shooting game in closed season on Indian Reserve--Indian Act (Can.)--Object of legislation--Different aspects.

Defendant, a white man, having appealed from a conviction for having killed a pheasant during a close season contrary to a provincial Game Act (R.S.B.C. 1924, c. 98) on the ground that as the act was committed on an Indian Reserve and there being Dominion Legislation (Indian Act, R.S.C. 1927, c. 98) dealing with killing of game on Indian Reserves the Provincial Act could not apply being *ultra vires* as regards killing game on Indian Reserves,

Held, that the provincial Act is *intra vires* being legislation for the protection of game generally as such, a subject falling within provincial jurisdiction as to "Property and Civil Rights in the Province" while the Dominion Act dealt with the subject in an entirely different aspect, namely for the protection of the Indians.

APPEAL by accused from the judgment of Swanson, Co.Ct.J., affirming a conviction for shooting a pheasant contrary to the Game Act. Affirmed.

W. E. Burns, K.C., for appellant.

F. D. Pratt, for respondent.

MACDONALD, C.J.B.C. (dissenting):--The appellant a white man was convicted under the Game Act, R.S.B.C. 1924, c. 98, of shooting a pheasant on an Indian Reserve and this appeal is from his conviction for such offence under that Act.

Shortly after the Treaty of Paris, 1763, the Crown showed

its interest in protecting the Indians in their hunting fields and throughout the various changes which have since occurred in the management of the Indians and their lands that interest has been maintained. Section 91(24) of the B.N.A. Act assigns exclusively to the Dominion Parliament the right to legislate concerning Indians and the management of their lands.