1928
*Oct. 22.
*Nov. 26.

FRANCIS MAWSON RATTENBURY (PLAINTIFF) ..... APPELLANT;

AND

LAND SETTLEMENT BOARD (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Taxation—Land Settlement and Development Act, R.S.B.C., 1924, c. 128—Proceedings of Land Settlement Board under ss. 46-55—Penalty tax (s. 53)—Direct or indirect taxation—Legislation attacked as ultra vires—Board's capacity to be sued.

Defendant, the body incorporated by the British Columbia *Land Settlement and Development Act,* took proceedings under ss. 46-55 of the Act (R.S.B.C., 1924, c. 128) with respect to lands of which plaintiff was the registered owner, and penalty taxes provided for by s. 53 were imposed. Plaintiff sued defendant, attacking said legislation as *ultra vires,* as providing for indirect taxation, and claimed damages, an injunction, etc.

Held that, as the notice which defendant had given under s. 53 contained no reference to appraisal of "interests" in land or of any interest separate from that of the owner, and said nothing as to persons claiming any estate or interest in the land, or any charge or encumbrance thereon, and as no taxes, charges, etc., other than those imposed upon the land itself, were notified to the owner, and there was nothing in the notice to indicate or suggest any intention or project to impose a tax upon any person, other than the owner, having any estate or interest in the land, the taxation effected could not, on giving the proper interpretation and effect to the provisions of ss. 51 and 53 of the Act, extend beyond the land and the owner thereof; and that the taxation effected upon the land and the owner was direct, and *intra vires* of the legislature.

City of Halifax v. *Fairbanks,* [1928] A.C. 117, at pp. 124-126, cited and applied.

Att. Gen. of Manitoba v. *Att. Gen. of Canada* [1925] A.C. 561, distinguished, having regard to the nature of the statutory provisions in question. In the present case, while the statute provides imperatively for the appraisal of the land, and for the taxation of the land and of the owner, it is left to the Board's discretion (except where the fee is still in the Crown) to appraise interests other than that of the owner; and no taxation is intended, or can be effected, of any estate or interest which is not appraised and described in the notice issued by the Board, by means of which notice the taxation is effected; the legislature itself has, therefore, plainly provided for the "partition" which was lacking in the *Manitoba case,* by confiding a discretion to the Board to tax or not to tax persons, other than the owner, claiming

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

any estate or interest in the lands or any charge or encumbrance thereon. In the present case the defendant Board did not include persons interested other than the owner, and there was no evidence that it had, in any case, ever availed itself of the power; it was unnecessary, therefore, to consider what would be the nature of a tax imposed on other persons. Even assuming that such a tax would be indirect, a good tax is not to be held bad merely because the legislature had mistaken its powers so far as in terms to confer upon the Board an *ultra vires* power which the Board did not exercise.

Ss. 51 (1) and 53 of the Act discussed at length, with regard to their interpretation and effect.

Since persons claiming any charge upon the land are specially provided for in subs. 2 of s. 53 (the provision imposing the tax), that special provision may be regarded as a "requirement of the context" which, in relation to that subsection, excepts the definition of "owner" in the *Land Registry Act* (R.S.B.C., 1924, c. 127, s. 2) from the application to that subsection provided for in subs. 6 (*a*) of said s. 53.

Held further (*per* Mignault, Newcombe and Rinfret JJ.; Anglin C.J.C. and Lamont J. not passing upon the question) that the defendant Board had capacity to be sued in respect of the claim for an injunction with regard to the alleged *ultra vires* proceedings. By reference to its powers and duties provided by the Act and the business in which it is directed or empowered to engage, there is ample evidence of the convenience and necessity of a power to sue and be sued; such a power may be inferred or implied like any other power which is necessary or incidental to the due execution of the powers expressed. (*Graham* v. *Public Wks. Commrs.*, [1901] 2 K.B. 781, at p. 791; *Interpretation Act*, R.S.B.C., 1924, c. 1, s. 23 (13), cited). While it is true that the revenues of the Crown cannot be reached by judicial process to satisfy a demand against an officer or servant of the Crown in any capacity, whether incorporated or not, it is common practice, founded upon general principle, that the court will interfere to restrain *ultra vires* or illegal acts by a statutory body, and, when it is charged, as in this case, that the proceedings in question, though authorized by the letter of the statute, are nevertheless incompetent, by reason of defect in the enacting authority of the legislature, the court has jurisdiction so to declare, and to restrain the *ultra vires* proceedings, although directed by the statute and in strict conformity with the legislative text (*Nireaha Tamaki* v. *Baker*, [1901] A.C., 561, at pp. 575-6, cited).

Judgment of the British Columbia Court of Appeal (39 B.C. Rep. 523) affirmed in the result.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1), which allowed the defendant's appeal, and dismissed the plaintiff's cross-appeal, from the judgment of Morrison J., and dismissed the plaintiff's action.

(1) 39 B.C. Rep. 523; [1928] 2 W.W.R. 475.

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The defendant Board was created under the *Land Settlement and Development Act,* Statutes of British Columbia, 1917, c. 34, which, with amending statutes, was consolidated as c. 128 of R.S.B.C. 1924. The sections of the Act hereinafter referred to are those of c. 128 of R.S.B.C. 1924 (as amended).

The matters in question in this action arose under sections 46 to 55, inclusive, of the said Act. The plaintiff complained of proceedings taken by the defendant in respect of lands in and to which the plaintiff claimed an estate or interest as registered owner and as an unpaid vendor. It complained that the defendant had taken proceedings under the provisions of s. 53 of the Act and had claimed against the plaintiff penalty taxes and works and performance of obligations in respect of such lands, and that the defendant had certified to the provincial collector of taxes amounts of penalty tax alleged to be payable, and that thereby, and by proceedings consequent thereon, and by defendant's acts generally, which resulted, as alleged, in the breaking up of the plaintiff's colonization business, the destroying of land values, and the breaking of contracts and abandoning of holdings by purchasers from the plaintiff, the plaintiff had suffered loss, injury and damages.

By par. 7 of the statement of claim, the plaintiff alleged that the defendant's acts and proceedings under s. 53 of said Act were illegal, invalid, unlawful and void, for the reason that (a) the said Act was *ultra vires;* (b) in the alternative, ss. 46 to 55, both inclusive, were *ultra vires;* (c) the Acts, c. 42 of 1918, c. 41 of 1919, c. 41 of 1920, and c. 23 of 1925 (said Acts enacting amendments to the *Land Settlement and Development Act*) were *ultra vires.*

In par. 12 of the statement of claim the plaintiff alleged that subs. 2 of s. 53 of said Act was *ultra vires,* by reason of the fact that the liabilities, charges, taxes and duties thereby created and imposed were indirect, being created against and imposed upon the miscellaneous group comprising and including the owner and all persons claiming any estate or interest in any land affected by the subsection and all persons having any estate or interest in such land or any charge or encumbrance thereon, so that there was no direct tax imposed upon the person who it was intended or desired should pay it.

The plaintiff claimed a declaration that sections 46 to 55, both inclusive, of the Act were *ultra vires*, and that the defendant's acts and proceedings against the lands and against the plaintiff were illegal, and it claimed damages, an injunction, an account, and a decree adjudging the plaintiff and its lands absolutely freed from all past and pending proceedings of the defendant.

The defendant, in its defence, set out that it was a branch of part of the Department of Agriculture of the Government of the Province and was a servant or agent of the Crown, and as the Land Settlement Board it possessed no other capacity, and its every act and proceeding as alleged was its act and proceeding in said capacity as servant and agent of the Crown and not otherwise, and submitted that it was not liable to be sued in respect of said acts and proceedings, and that the plaintiff's remedy (if any) was by petition of right; that defendant was not liable, in its capacity as Land Settlement Board or as servant or agent of the Crown or otherwise in its official capacity, to be sued in respect of any of the matters complained of; it denied plaintiff's allegations; and alleged that all its acts and proceedings were done and carried out under the provisions of the said Act, and not otherwise, and without malice.

By on order of D. A. Macdonald J., the following points of law raised by the pleadings were directed to be set down for hearing before the trial, namely

1. Whether the defendant is liable to be sued in respect of any of the matters complained of in this action.

2. Whether the plaintiff's claim discloses any cause of action.

3. Whether the *Land Settlement and Development Act*, and in particular the provisions thereof referred to in par. 7 of the plaintiff's statement of claim, are *ultra vires* the legislature of the province.

The said points of law came on for hearing before Morrison J., who ordered that points (1) and (2) be answered in the affirmative, and that point (3) stand to be considered and determined by the judge trying the action.

The defendant appealed to the Court of Appeal, and moved for an order or judgment setting aside the whole of the judgment of Morrison J., and for judgment for the defendant. The plaintiff cross-appealed as to the failure of

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Morrison J. to decide question no. (3), and moved for an order or judgment setting aside the said part of his judgment and for judgment on the said part for the plaintiff. The Court of Appeal (1) held that questions (1) and (2) should be answered in the negative, and that question (3) should also be answered in the negative, as the said Act was wholly *intra vires* of the legislature; it accordingly allowed the defendant's appeal, and dismissed the plaintiff's cross-appeal, and dismissed the action. The plaintiff appealed to this Court.

W. N. Tilley K.C. for the appellant.

E. Lafleur K.C. for the respondent.

The judgment of Anglin C. J. C. and Lamont J. was delivered by

ANGLIN C. J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Newcombe.

I concur in what I understand to be the ground on which he maintains the judgment *a quo*—namely, that the only tax here imposed is on the land and its owner, that that tax is, on the authority of the Judicial Committee in the recent *Fairbanks case* (2), a direct tax, and that the provision in the statute authorizing it is distinct and severable from the provisions for the taxing of other interests.

This makes it unnecessary to consider whether the defendant is liable to be sued in the British Columbia Courts —a question of some nicety, to which I should require to devote more time and attention than I am at present in a position to give before concluding that the considered judgment of the Court of Appeal for British Columbia upon it was erroneous.

The judgment of Mignault, Newcombe and Rinfret JJ., was delivered by

NEWCOMBE J.—The writ was issued on 18th May, 1927, and the plaintiff has pleaded his statement of claim, in which he complains of the imposition of taxes against his lands in the Province of British Columbia, and against him-

(1) 39 B.C. Rep. 523; [1928] 2 W.W.R. 475.

(2) *City of Halifax* v. *Fairbanks* [1928] A.C. 117.

self as the registered owner and unpaid vendor of the lands, under the *Land Settlement and Development Act,* c. 128, R.S.B.C., 1924, alleging that sections 46 to 55, upon which the defendant, the Land Settlement Board, relies, are *ultra vires* of the Legislature; and he claims a declaration, damages, an injunction, an account, and such further and other relief as the case may require.

The defendant, by its defence, denies the plaintiff's allegations; sets up that the alleged acts and proceedings of the defendant were done and carried out by the defendant under the provisions of the *Land Settlement and Development Act,* and amending Acts, and not otherwise, and without malice; avers that the defendant is a branch of the provincial Department of Agriculture, and a servant and agent of the Crown, and possesses no other capacity, and that the acts and proceedings of the defendant alleged were done and executed in that capacity, and submits that it is not liable to be sued in respect thereof, and that it cannot be sued; and the defendant, moreover, alleges that the statement of claim discloses no cause of action.

The plaintiff, by his reply, joined issue.

In this state of the case, D. A. MacDonald, J., made an order in chambers on 6th September, 1927, setting down, for hearing and disposal before the trial, three points of law, namely:

1. Whether the defendant is liable to be sued in respect of any of the matters complained of in this action.
2. Whether the plaintiff's claim discloses any cause of action.
3. Whether the *Land Settlement and Development Act,* and, in particular, the provisions thereof referred to in paragraph 7 of the plaintiff's statement of claim, are *ultra vires* the Legislature of the province of British Columbia.

The learned judge, by his order, also directed that notice of the hearing should be given to the Attorney-General of Canada and to the Attorney-General of the Province, as required by the *Constitutional Questions Determination Act.* The hearing of these questions took place before Morrison J.; notice was given to the Attorneys-General, but it does not appear that either of them was represented. The

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parties were heard, however, and the learned judge, in his judgment of 10th November, 1927, answered the first two questions in the affirmative, and directed that the third question should stand to be determined at the trial. There was an appeal, and a cross-appeal, to the Court of Appeal, and, in the result, by order of the Court of Appeal of 6th March, 1928, the first two findings were reversed, and it was held that the third question should be answered also in the negative, as it was considered that the *Land Settlement and Development Act* was wholly *intra vires;* the defendant's appeal was allowed, and the plaintiff's cross-appeal and action were dismissed (1).

The plaintiff now appeals to this Court, and there are, in the view which I take, two questions of substance: first, whether the defendant has capacity to be sued in relation to the matters alleged; and, if so, secondly, whether the statutory provisions in question are in excess of provincial legislative power, as intended to authorize taxation within the province which is not direct.

I think it advisable, if not necessary, to consider both questions, because the corporate capacity of the defendant Board was very fully discussed at the hearing, and in the provincial courts there was a difference of opinion between the trial judge and the Court of Appeal. It will be convenient to consider these questions in the order stated.

The Land Settlement Board, the defendant and respondent in this action, is the body incorporated by the *Land Settlement and Development Act.* It is upon the interpretation of this Act that the questions in dispute principally depend. Several of its sections have been amended by c. 23 of 1925. The amendments are not, I think, material for present purposes, but, as they were introduced before the action, I shall refer to the Act as amended. The Act provides that, for the purpose of administering and carrying out its provisions,

there shall be in the Department of Agriculture or in the Department of Lands, as may be determined from time to time by the Lieutenant-Governor in Council, a Board, to be called the "Land Settlement Board," which shall consist of one or more members, who shall be appointed by and receive such remuneration as may be determined by the Lieutenant-Governor in Council, and such Board shall be a body politic and corporate.

(1) 39 B.C. Rep. 523; [1928] 2 W.W.R. 475.

Each member of the Board is to hold office during pleasure and to devote the whole of his time to the performance of his duties under the Act; and, with the approval of the Lieutenant-Governor in Council, the Board may from time to time appoint and employ such appraisers, inspectors, officers and clerks as may be required for carrying out the provisions of the Act, and may prescribe their duties and determine their remuneration. The Board is to have an official seal, inscribed with the words "Land Settlement Board of British Columbia," of which the courts shall take judicial notice.

The Minister of Finance is to advance to the Board, out of the Consolidated Revenue Fund, such moneys, appropriated by authority of the Legislature, as the Governor in Council may direct, and salaries and other expenses, incurred by the Board for the purposes of the Act, are, in the absence of any special appropriation available for the purpose, to be paid from the Consolidated Revenue Fund. All moneys collected or received by the Board are to be paid into a chartered bank for credit of the account of the Board, and, unless directed by the Minister of Finance to be refunded, may be expended by the Board from time to time for any of the purposes authorized by the Act. It is provided that all moneys in the hands of, or payable to, the Board, and all property whatsoever held by the Board or to which the Board is entitled, are to be "the property of the Crown in the right of the Province, represented by and acting through the Board," and all moneys so payable or owing to the Board shall be recoverable accordingly as from debtors to the Crown.

The Board is authorized, subject to the provisions of the Act and the regulations, among other powers, to advance money by way of loan for any purpose which, in its opinion, will maintain or increase agricultural or pastoral production, and for carrying out the objects of any association which, in its opinion, will maintain or increase agricultural or pastoral production, subject to approval of the Governor in Council; and, in addition to all other powers conferred by the Act, the Board may do and perform all acts necessary and incidental to the business of lending money at interest, taking mortgages therefor and realizing on the same. The Board is empowered to take as security for loans, first

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mortgages upon agricultural land in the Province, but before granting any loan, it must ascertain that the loan is justified upon grounds which are specified by the statute, including the value of the security offered, estimated on the basis of agricultural productiveness; and no loan is to be made except upon appraisal and upon the approval of two members of the Board, or of one member with the concurrence of the Minister of Agriculture. Every mortgage is to contain a personal covenant on the part of the borrower for the repayment of the loan, in accordance with the terms of the mortgage. In case of the mortgagor's default, the Board is empowered to enter upon, to seize and take possession, in whole or in part, of the security for the loan, and to dispose thereof at public auction or public tender, and upon such terms and conditions as, under all the circumstances, it deems to be just; and the Board may transfer the land or other security to any purchaser it sees fit, " and give a good and valid title thereto, notwithstanding any encumbrances which may have been placed thereon in favour of any other person."

There is a group of sections, 40 to 45 inclusive, under the sub-title *Land Development and Land Settlement,* which authorizes the Lieutenant-Governor in Council, from time to time, to select and grant to the Board Crown lands within the province suitable for agricultural and pastoral purposes. By section 41, the powers of the Board, to be exercised with the sanction of the Lieutenant-Governor in Council, are defined. They include powers to take over from the Crown, to purchase from or to obtain by exchange with private owners, or to acquire by compulsory purchase, lands within the province for agricultural or pastoral purposes; to survey, cultivate, improve and use the lands so acquired; to erect buildings; to farm the lands when necessary or desirable; to build roads and bridges for the improvement of the lands; to sell, lease or exchange the lands upon such terms as may be agreed; to buy, sell or exchange all kinds of live stock, and every kind of merchandise which may be of use or benefit to the Board in any of its undertakings; to manufacture explosives, and to construct, execute, operate and maintain any work or undertaking necessary or incidental to the exercise by the Board of any of its powers under this section.

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It has been shewn, in the preceding review of the legislation, that the defendant Board, which is, by the statute, made part of one of the departments of the provincial government, consists of one or more members appointed by the Crown, that each member holds office during pleasure, and that the Board is declared to be a body corporate and politic. It is not expressly enacted by the *Land Settlement and Development Act* that the Board may sue and be sued; but, by reference to its powers and duties, and the business in which it is directed or empowered to engage, as already briefly described, and as more fully disclosed in the text of the statute, there is, I think, ample evidence of the convenience and necessity of such a power. To reiterate specifically some of these provisions: the Board is to collect and receive moneys of the Crown; moneys payable or owing to the Board are recoverable by and through the Board as from debtors to the Crown; mortgages are to be taken in the name of the Board, and every mortgage is to contain a personal covenant by the borrower for due payment; the borrower is also to insure against fire, if required, and the loss is to be payable to the Board; the Board is authorized to engage in trade, to sell goods and merchandise at retail, to manufacture explosives and to construct works. A power to sue and be sued may, I have no doubt, be inferred or implied, like any other power which is necessary or incidental to the due execution of the powers expressed. Phillimore J., in *Graham* v. *Public Works Commissioners* (1), after referring to the convenience of the practice by which the Crown, with the consent of Parliament, establishes officials or corporations who may sue and be sued in respect of business engagements, without the formalities of the procedure necessary when a subject is seeking redress from his sovereign, said:

> Now, the only question for us is whether the Commissioners of Public Works and Buildings are not of the class of persons well described by Lindley L.J., in *Dixon* v. *Farrer* (2), as "a nominal defendant sued as representing one of the departments of the State." There is no reason in principle why they should not be. As I have pointed out, there is nothing derogatory to the Crown, and there is very great convenience, in the establishment of such bodies. The mere fact of their being incorporated without reservation confers, it seems to me, the privilege of suing and the liability to be sued.

(1) [1901] 2 K.B. 781, at pp. 791.

(2) (1886) 17 Q.B.D. 658; 18 Q.B.D. 43.

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But, moreover, it has become a fashion to rely upon the general interpretation Acts as sources of the express authority which a corporation exercises to sue and be sued, and, in the case of British Columbia, the enactment is to be found in R.S.B.C., 1924, c. 1, s. 23 (13), which provides that,

> In construing this or any Act of the Legislature, unless it is otherwise provided, or there is something in the context or other provisions thereof indicating a different meaning, or calling for a different construction:—
>
> * * * * *
>
> (13) Words making any association or number of persons a corporation or body politic and corporate shall vest in such corporation:—
>
> (*a*) Power to sue and be sued, contract and be contracted with, by its corporate name, to have a common seal, and to alter or change the same at its pleasure, and to have perpetual succession.
>
> * * * * *

I find nothing in the legislation "otherwise provided," or "indicating a different meaning," and it follows that the defendant body has capacity to sue and be sued.

But the question as stated is: "Whether the defendant is liable to be sued in respect of any of the matters complained of in this action;" and it is in substance suggested, although the suggestion is not put in this precise form, that the defendant corporation is "an emanation from the Crown * * * a delegation by the Crown of its own authority to particular individuals," *Gilbert* v. *Corporation of Trinity House* (1); and that, if it may be sued at all, it is only in its official and representative capacity; and that, as a body corporate, it furnishes no resort for relief in respect of the claims put forward in this action.

For myself, I see no reason to doubt that the defendant Board is sued in its official capacity. It is described and identified in the action not otherwise than by its corporate name; it is thus the corporation, and not its individual members, which is the party defendant; and as a statutory body, it has no capacity other than that which it derives from its constituting Act. I do not question the general truth involved in the proposition expressed by Bankes L.J., in *Mackenzie-Kennedy* v. *Air Council* (2):

> In the absence of distinct statutory authority enabling an action for tort to be brought against the Air Council, I am of opinion, both on

(1) (1886) 17 Q.B.D., 795, at p. 801.

(2) [1927] 2 K.B. 517, at p. 523.

principle and upon authority, that no such action is maintainable. The Air Council are not a corporation, and even if it were to be treated as one the respondent's position would not be improved.

The learned Lord Justice mentions the case of *Roper* v. *Public Works Commissioners* (1); and he quotes from an Irish case, *Wheeler* v. *Public Works Commissioners* (2), a passage from the judgment of Palles C.B., as follows:

> Now, if a corporation be constituted for the sole purpose of doing acts for the Crown, it is *prima facie* outside its powers to do anything except for the Crown, and, as in law a wrongful act cannot be done for the Crown, such a corporation is not capable of doing such wrongful act in its corporate capacity. In such a case, therefore, the wrongful act cannot be deemed that of the corporation, but must be deemed the personal act of those who committed it.

With these observations, however, are to be contrasted what was said by Atkin L.J., at p. 533 of the *Air Council case* (3). But whatever may be said about the Air Council, and while it is certainly true that the revenues of the Crown cannot be reached by judicial process to satisfy a demand against an officer or servant of the Crown in any capacity, whether incorporated or not, it is common practice, founded upon general principle, that the court will interfere to restrain *ultra vires* or illegal acts by a statutory body, and, when it is charged, as in this case, that the proceedings in question, though authorized by the letter of the statute, are nevertheless incompetent, by reason of defect in the enacting authority of the legislature, the court must, I should think, have jurisdiction so to declare, and to restrain the *ultra vires* proceedings, although directed by the statute and in strict conformity with the legislative text. To this extent, in my view, the action is properly constituted; indeed, upon this point the authority is conclusive. In *Nireaha Tamaki* v. *Baker,* in the Judicial Committee of the Privy Council (4), Lord Davey, prouncing the judgment, said:

> In the case of *Tobin* v. *Reg.* (5), a naval officer, purporting to act in pursuance of a statutory authority, wrongly seized a ship of the suppliant. It was held on demurrer to a petition of right that the statement of the suppliant shewed a wrong for which an action might lie against the officer, but did not shew a complaint in respect of which a petition of right could be maintained against the Queen, on the ground, amongst others, that the officer in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty

(1) [1915] 1 K.B. 45.
(2) [1903] 2 Ir. Rep. 202.
(3) [1927] 2 K.B. 517.
(4) [1901] A.C. 561, at pp. 575-576.
(5) (1864) 16 C.B. (N.S.) 310.

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imposed upon him by Act of Parliament, and in such a case the maxim "*Respondeat superior*" did not apply. On the same general principle it was held in *Musgrave* v. *Pulido* (1), that a Governor of a Colony cannot defend himself in an action of trespass for wrongly seizing the plaintiff's goods merely by averring that the acts complained of were done by him as "Governor," or as "acts of State." It is unnecessary to multiply authorities for so plain a proposition, and one so necessary to the protection of the subject. Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority.

It is not necessary for me to consider the position of the individual members of the Board, because I hold that, as such, they are not before the Court; but, upon the authorities, it seems to be established that the doer of a wrongful act cannot escape liability by setting up the authority of the Crown, unless in proceedings by a foreigner against a British subject, in which case an exception is introduced, as appears by *Feather* v. *The Queen* (2), in which Baron Parke's charge in *Buron* v. *Denman* (3), was explained. It seems to be only in such a case that it is of any use to justify upon the authority of an act of State. *Walker* v. *Baird* (4).

Now we come to the main point, which gives rise to the action. It is put by the third stated question, and it is maintained by the appellant that the provisions of the *Land Settlement and Development Act* with respect to select areas are *ultra vires* of the Legislature as sanctioning taxation which is not direct.

Following the provisions of the *Land Settlement and Development Act,* to which I have already referred, there is another fascicle of clauses, entitled *Settlement Areas,* embracing sections 46 to 55 inclusive, by which the Board is empowered, when, in its opinion, agricultural production is being retarded by reason of lands remaining undeveloped, from time to time, with the approval of the Governor in Council, to establish a settlement area in any part of the province, and to limit that area. Notice of the establishment of any such settlement area is to be published in the *Gazette* and notified to the Land Registry Office of the district within which the area is established. The Board

(1) (1879) 5 App. Cas. 102.
(2) (1865) 6 B. & S. 257, at pp. 279, 295, 296.
(3) (1848) 2 Exch. 167.
(4) [1892] A.C. 491.

may make regulations, with the approval of the Lieutenant-Governor in Council, for carrying into effect the provisions of the Act with respect to any settlement area, and may enter into agreements with any person for the colonization of the settlement area, or any portion thereof. The Registrar of Titles is to file the notice and to make the prescribed notations, and this is declared to constitute notice to every person proposing to deal with, or to acquire any estate or interest in, or any charge upon, any land within the settlement area that the land is subject to the provisions of the Act, and shall put such person upon enquiry as to the proceedings which may have been taken by the Board; all subsequent registrations in respect of any parcel of land affected by such notice shall be subject to the rights, options and privileges of the Board; and the person claiming under such registration shall take the land subject to all charges and liabilities which have been imposed, or to which the land may be liable to be subjected under the Act.

Then follows section 51, the first subsection of which should be quoted. It is as follows:

51. (1) The Board shall, from information obtained, appraise all lands within a settlement area at such value as the Board considers the property would be taken in payment of a just debt from a solvent debtor, and each parcel the subject of separate ownership shall be separately appraised either as a unit or in such sections or divisions as the Board deems advisable. The Board may from time to time, as it deems advisable, again appraise the whole or any portion of the lands within a settlement area. The Board may, if it deems it advisable, for the purposes of this Act, appraise interests in land, and it shall, in the case of land whereof the fee is still in the Crown, make a separate appraisal of the interest which has been parted with by the Crown. The latest value so established is hereinafter called the "appraised value."

Section 53 is a long one, but it is the important section, and it seems necessary to quote it. I therefore set out its provisions in full:

53. (1) After every such appraisal the Board shall forthwith send notice thereof by registered mail to each owner of land in the settlement area, addressed to him at his last known place of residence. The notice shall contain:

(*a*) A short description of the land and, if all interests are not appraised, of the estate or interest appraised;

(*b*) A statement of the appraised value;

(*c*) A statement that unless the owner, within thirty days from the date of the notice if the notice is addressed to a place within the Dominion or the United States of America, or within sixty days from such date if the notice is addressed to any other place, or within such further time

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in any case as the Board may determine, irrevocably agrees that the Board may, in its discretion, buy from him or negotiate on his behalf a sale of the land at its appraised value at any time within two years from the date of the notice, and thereafter until the Board has been notified in writing by the owner of his election to withdraw the land from sale, he shall during each year after the date of the notice be required to make and execute improvements on the land in such manner and to such extent as the Board may by regulations prescribe;

(*d*) A statement that, in the event of the neglect or refusal of the owner to agree that the Board may, in its discretion, buy from him or negotiate on his behalf a sale of the land at the appraised value, and, failing such agreement, to improve the land according to the regulations of the Board, and to furnish to the Board a verified statement of such improvements as required by this section within one year from the expiration of the notice, the land shall immediately at the expiration of such year become subject in respect of that year to a penalty tax, payable to His Majesty, of five per cent. of the appraised value in addition to all other taxes imposed on the land; such tax to be payable in full in respect of that year, and thereafter to be payable in full in like manner in respect of such (*sic*) succeeding year so long as such neglect or refusal continues;

(*e*) A statement that each owner of land within a settlement area who decides to exercise the option of improving the land in the manner prescribed by the regulations of the Board is required to furnish to the Board before the end of each year following the expiration of the notice a detailed statement, satisfactory to the Board, of the improvements made by him in respect of that year, verified by statutory declaration;

(*f*) A statement that, in the event of the owner of lands within a settlement area having improved the same in accordance with the regulations of the Board for one or more years, he shall during the currency of the said regulations be required to maintain such improvements to the satisfaction of the Board, in addition to the improvements required to be made in the succeeding years;

(*g*) The date of the notice, which shall be the date on which it is mailed.

(2) Every notice mailed by the Board pursuant to this section shall have the effect of imposing upon the land described therein and upon the owner thereof, and all persons claiming any estate or interest therein or any charge or encumbrance thereon, the liabilities, charges, taxes and duties of which such owner is thereby notified, and shall be binding upon the land and upon the owner and upon all persons having any estate or interest in the land described in the notice in every respect in accordance with its terms, and every Provincial Assessor and Collector of Taxes shall, upon receipt of the certificate of the Board furnished pursuant to subsection (3), do all things necessary to assess and collect the penalty tax imposed in any case under this section. All the provisions of the "Taxation Act" as to the collection and recovery of taxes and all powers and proceedings which may be exercised or taken under that Act in default of payment of taxes shall, *mutatis mutandis*, apply to every tax imposed under this section.

(3) The Board shall from time to time certify to the Provincial Collector of Taxes the amount of penalty tax payable in respect of any lands under the provisions of this section. The certificate shall be conclusive

evidence of the amount of tax payable in each case, and all taxes so certified shall thereupon be deemed to be delinquent taxes within the meaning of the "Taxation Act."

(4) The Board shall file a copy of the form of notice sent with a schedule showing the persons to whom sent and the lands affected and the appraised value in the Land Registry Office, and the Registrar of Titles shall file the same under the same filing number as the notice of the establishment of the settlement area.

(5) The regulations of the Board as to improvements and the required extent thereof shall, in case of lands held by pre-emption, be, in so far as their effect extends, in addition to the requirements of the "Land Act."

(6) "Owner", for the purposes of this section and of sections 55, 56, 57, and 62, shall have the following meanings:—

(*a*) Where the title to the land is registered, the registered owner as defined by section 2 of the "Land Registry Act";

(*b*) Where the land is held as a pre-emption, the pre-emptor;

(*c*) Where the land has been granted by the Crown but the Crown grant has not been registered, the Crown grantee;

(*d*) Where the owner as defined in clauses (*a*), (*b*), and (*c*) is ascertained by the Board to be dead, the person upon whom the land has devolved.

The only other provision to which it may be desirable to refer is s. 55, which enacts that every agreement that the Board may buy from the owner, or negotiate a sale on his behalf of, the land at its appraised value, shall be in writing, and, when made with the Board by the owner, shall bind all persons having any estate or interest in the land.

Particular attention is directed to the provisions of s. 53 that, if all interests are not appraised, the notice to the owner of the land *shall* contain a short description of the estate or interest appraised; that the notice is directed to the owner of the land; that, by subsection 2, the effect of the notice is to impose upon the land described therein, and upon the owner thereof, and all persons claiming any estate or interest therein, or any charge or encumbrance thereon, the liabilities, charges, taxes and duties *of which such owner is thereby notified*, and that the notice shall be binding upon the land, and upon the owner, and upon all persons having any estate or interest in the land described in the notice, *in every respect in accordance with its terms;* from which I think one may be justified to infer that it is only such estates or interests as are appraised that are affected by the section; and that, in addition to the owner, it is only the persons claiming any estate or interest in the land, or any charge or encumbrance thereon, who are iden-

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tified by the notice sent out by the Board that are subject to the imposition of liabilities, charges and duties, or are bound by the declared statutory effect of the notice. It is thus the notice, which the Board is directed to frame, and the substance of which is to depend upon the facts of the case, that determines whether any interest other than that of the owner is taxed.

It may be useful to observe that it is enacted, for the purposes of section 53, and some later sections which it is not necessary now to mention, that the word "owner" shall mean, where the title to the land is registered, the registered owner as defined by s. 2 of the *Land Registry Act,* R.S.B.C., 1924, c. 127, and, referring to the latter provision, it is thereby enacted that

> In this Act, unless the context otherwise requires: * * * "owner" and "registered owner" mean any person registered in the book of any Land Registry Office as owner of land or of any charge on land, whether entitled thereto in his own right or in a representative capacity or otherwise.

The word "owner" occurs in several places in s. 53 of the *Land Settlement and Development Act,* and it will be perceived that in subs. 2 of that section, which is the provision that imposes the tax, it is the owner of the land, "and all persons claiming any estate or interest therein, or any charge or encumbrance thereon," who are expressly subjected to the imposition of "the liabilities, charges, taxes and duties," which are declared to be binding "upon the land, and upon the owner, and upon all persons having any estate or interest in the land." And, since persons claiming any charge upon the land are specially provided for in subs. 2 of s. 53, that special provision may, I think, be regarded as a requirement of the context which, in relation to that subsection, excepts the definition of owner in the *Land Registry Act* from the application to subs. 2 of s. 53 of the *Land Settlement and Development Act* provided for in subs. 6 (*a*) of s. 53. Therefore it would seem that subs. 2 of s. 53 of the latter Act may be interpreted as self contained, and as not controlled or to be interpreted by the definition of "owner" in the *Land Registry Act.*

Now the tax is five per cent. on the appraised value of the land, and we know that it is the duty of the Board to appraise all lands within the settlement area, and that the Board *may,* "if it deems it advisable," appraise interests in

land, and *shall*, if the fee be still in the Crown, make a separate appraisal of the interest which has been parted with by the Crown. We know also that the notice to be given by the Board upon the appraisal must contain a description of the estate or interest appraised; that the taxes are imposed by the statutory operation of the notice mailed by the Board; that the taxes imposed are those of which the owner of the land is notified, and that the taxes so notified are to be

> binding upon the land and upon the owner and upon all persons having any estate or interest in the land described in the notice, in every respect in accordance with its terms.

The Legislature cannot reasonably have meant that a person claiming a small charge or encumbrance upon land of considerable value should therefore become liable for a tax of five per cent. upon the value of the land; also it seems strange that, for the purpose of imposing a tax upon a person interested, other than the owner, it should be the owner of the land, and not of the separate interest, who is to be notified under subsection 2 of section 53.

The notice is set out in paragraph 10 of the statement of claim. According to the allegations, several of these notices were given, but they are each in the same terms, except as to the lot number and price per acre. It is not suggested that the notice is defective for lack of compliance with the statutory requirements; what is pleaded, and what was urged at the hearing, is stated in paragraph 12 of the statement of claim, which says that subsection 2 of section 53 of the *Land Settlement and Development Act* is *ultra vires* of the Legislature, because

> the liabilities, charges, taxes and duties by the said subsection created and imposed are indirect, being created against and imposed upon the miscellaneous group, comprising and including the owner and all persons claiming any estate or interest in any land affected by the subsection and all persons having any estate or interest in such land or any charge or encumbrance thereon; so that there is no direct tax imposed upon the person who it is intended or desired should pay it.

It may be assumed, therefore, that the notice is valid, except for the objection so stated, and that the notice complies with the statutory requirements. Then, by reference to the notice as alleged, it provides, by paragraph (*d*), after stating the appraised value of the land per acre, and specifying the improvements which the owner is required to make,

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That, in the event of your neglect or refusal to either enter into the agreement referred to, or to make and execute the improvements on the land specified in clause (*c*) of this notice, and to furnish the Board with a verified statement of such improvements, within one year from the date hereof, as the case may be, the said lands shall immediately after expiration of such year become subject, in respect of that year, to a penalty tax, payable to His Majesty, of five (5) per cent. of the appraised value, in addition to all other taxes imposed on the said land; the said tax to be payable in full in respect to that year, and thereafter to be payable in full in like manner in respect to each succeeding year, so long as such neglect or refusal continues.

There is no reference anywhere in the notice to the appraisal of interests in land, or of any interest separate from that of the owner, and nothing is said as to persons claiming any estate or interest in the land, or any charge or encumbrance thereon. No liabilities, charges, taxes or duties, other than those imposed upon the land itself, are notified to the owner, and nothing can be derived from the terms of the notice to indicate, or to suggest, any intention or project to impose a tax upon any person, other than the owner, having any estate or interest in the land described in the notice. In these circumstances, the taxation effected by the mailing of the notice cannot, I should think, extend beyond the land and the owner of the land.

The case upon which the appellant relies with relation to the quality of the taxation is *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1). The question there was as to the validity of taxes imposed by a statute of Manitoba upon contracts of sale of grain for future delivery. The seller was required to pay a tax proportionate to the quantity sold, and the liability extended not only to brokers and mere agents, but to factors, such as elevator companies, to whom the possession of the grain had been entrusted for sale. Lord Haldane, in pronouncing the judgment, pointed out that, by successive decisions of the Judicial Committee, the principle as laid down by John Stuart Mill, and other political economists, had been judicially adopted as the test for determining whether a tax was or was not direct within the meaning of the *British North America Act;* he reaffirmed the view that a direct tax is one that is demanded from the very person who is intended or desired to pay it; and he referred to the fact that the grain business had many ramifications, saying that, in view of the cases to which the liability would extend,

(1) [1925] A.C. 561.

If, therefore, the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases (*sic*) of such persons and corporations from others in which there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a court of law to make the exhaustive partition required. In other words, if the statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires* altogether.

And he therefore considered it impossible to uphold the legislation. The appellant relies upon this case as establishing in principle that the taxation authorized by the *Land Settlement and Development Act* is not direct, so far as it affects persons claiming any estate or interest in the land appraised, or any charge or encumbrance thereon; and that, having regard to the variety and diversity of the estates or interests, charges or encumbrances, which may exist or come upon the land, it is, he says, obvious, in respect of some of them at least, that the tax must be imposed upon or demanded from one person in the expectation, and with the legislative intention, that he shall indemnify himself at the expense of another, and that so far at least, the legislation is *ultra vires*. Moreover, he contends that it is a matter of complication, and impracticable, as it was in the *Manitoba case* (1), for the court to make an exhaustive partition; and that the court cannot safely affirm that any part of the Act which, standing alone, might be sustained, can, in view of the context in which it was enacted, be upheld as expressive of the legislative intention, when it is ascertained that the Legislature had no power to give effect to the provisions of that context. But, in my view, that argument does not apply to this case.

I have already shewn that, while the statute provides imperatively for the appraisal of the land, and for the taxation of the land and of the owner, it is left to the discretion of the Board, except where the fee is still in the Crown, to appraise interests other than that of the owner; and that no taxation is intended, or can be effected, of any estate or interest which is not appraised and described in the notice issued by the Board, by means of which notice the taxation is effected. The Legislature itself has therefore plainly provided for the partition, which was lacking in the *Manitoba case* (2), by confiding a discretion to the

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Board to tax or not to tax persons, other than the owner, claiming any estate or interest in the lands, or any charge or encumbrance thereon.

The position, as I see it, is this: the Board is required, when the statutory conditions occur and exist, to give effect to the statutory imposition as against the land and the owner, and it is empowered, "if it deems it advisable," also to tax all estates, interests, charges or encumbrances, because I hold that the expression "interests in land," within the meaning of subsection 1 of section 51, must be intended to comprise what is described in subsection 2 of section 53 as "any estate or interest therein or any charge or encumbrance thereon." Some question might arise as to how the taxation should be worked out, if the Board had desired to tax these interests; but, in the present case, the Board did not think it advisable to include persons interested other than the owner, and there is no evidence that the Board has, in any case, ever availed itself of the power. It is clearly within the contemplation of the statute that the Board might validly tax the land, and the owner, without introducing the holders of other estates, interests, charges or encumbrances; therefore, if the tax upon the land and the owner be direct, it is unnecessary to consider what would be the nature of a tax which might have been imposed upon other persons; and I express no opinion upon that hypothetical case.

Now it is laid down by the Judicial Committee, in the most recent case of *City of Halifax* v. *Fairbanks* (1), notwithstanding what was said in the earlier cases, including that of *Cotton* v. *The King* (2), which is said to depend upon its own facts, that taxes upon property or income were, at the time of the Union, everywhere treated as direct taxes; and that,

> When the Act of Union allocated the power of direct taxation for provincial purposes to the province, it must surely have intended that the taxation, for those purposes, of property and income should belong exclusively to the provincial legislatures, and that without regard to any theory as the ultimate incidence of such taxation.

The Lord Chancellor proceeds to say, referring to Mill's formula, that

(1) [1928] A.C. 117, at pp. 124-126.

(2) [1914] A.C. 176 at p. 193.

No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining, as to any new or unfamiliar tax which may be imposed, in which of the two categories it is to be placed; but it cannot have the effect of disturbing the established classification of the old and well-known species of taxation, and making it necessary to apply a new test to every particular member of those species * * * . It may be true to say of a particular tax upon property, such as that imposed on owners by section 394 of the *Halifax Charter*, that the taxpayer would very probably seek to pass it on to others; but it may none the less be a tax on property and remain within the category of direct taxes.

Therefore, within the authority of the *Fairbanks case* (1), as I interpret it, taxation upon land and upon the owner of the land is within the category of direct taxation, and there is no attempt in the case with which we are now concerned to impose or to levy any tax, except upon the land and the owner of the land, even assuming that other taxes which the Board has a statutory power to impose might, if imposed, be regarded as falling within the opposing classification. It cannot be, I should think, that a good tax is to be held bad merely because the legislature had mistaken its powers so far as in terms to confer upon the Board an *ultra vires* power which the Board, for one reason or another, deemed it advisable not to exercise.

It is urged in effect for the respondent that estates and interests in, and charges and encumbrances upon, lands might be taxed upon the footing of appraised value without introducing any new or unfamiliar principle; and that, even if the Board had executed to the limit its powers as expressed by the Act, none of the taxes thus imposed ought to be held otherwise than direct, within the interpretation of the *Fairbanks case* (1). But I am reluctant to enter upon the enquiry unnecessarily, and I shall therefore follow the wise counsel of Sir Montague Smith in the famous *Parsons case* (2), where he cautions those upon whom is cast the duty of interpreting judicially the meaning of the British North America Acts, to decide each case that arises as best they can, without entering more fully into the interpretation of the statute than is necessary for the decision of the particular question in hand.

(1) [1928] A.C. 117.

(2) (1881) 7 App. Cas. 96, at p. 109.

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For these reasons, in the result, the appeal should be dismissed, and the costs, I think, should follow.

Appeal dismissed with costs.

Solicitors for the appellant: *Elliott, Maclean & Shandley.*

Solicitor for the respondent: *J. W. Dixie.*