1949

* Mar. 14, 15
* Dec. 5

FRANK MILLER, Chief Councillor of the Six Nations of the Grand River, on behalf of himself and all others, members of the said Six Nations of the Grand River, and the said Six Nations of the Grand River. (SUPPLIANTS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Petition of Right—Whether the Crown in the right of the Dominion of Canada liable for alleged breaches of trust or debts of (a) the government of the Province of Canada, (b) the government of the Province of Upper Canada—s. 111. The British North America Act.

The appellant seeks by Petition of Right to hold the Crown in the right of Canada liable in damages for breaches of trust and contract. The breaches alleged fall under three heads: (1) that in 1824 the Parliament of Upper Canada by statute authorized the flooding by the Welland Canal Co. of some 1800 acres of lands previously granted to the Six Nations Indians, appellant's ancestors, by the Crown and although the statute provided for compensation, the Department of Indian Affairs or its officers as trustees of the said Indians failed to collect it; (2) that in 1836 the Government of Upper Canada authorized a free grant of a further 360 acres of said Indians' lands to the Grand River Navigation Co. and that the said trustees failed to secure compensation therefor; (3) that in 1798 the appellant's ancestors surrendered certain lands to the Crown under an agreement whereby the said lands were to be sold and the purchase moneys held in trust for the said Indians benefit and that in 1836 the said government without the knowledge or consent of the Indians and without authority contracted to purchase stock of the Grand River Navigation Co. for them, and that the said government and, after the Union of 1840, the Government of the Province of Canada, pursuant to such contract paid out $160,000 from the said Indian funds which on the failure of the company was lost. Appellant claims that since by s. 111 of the *British North America Act* the Crown in the right of the Dominion of Canada assumed liability for the debts of the former Province of Canada, the said sum with interest should be restored to the funds held by the present Department of Indian Affairs and the federal government on behalf of the appellants.

* PRESENT:—Kerwin, Taschereau, Rand, Kellock and Locke JJ.

1949

MILLER v. THE KING

Held: that as to heads one and two of the Petition, any breach of trust, if it occured, took place before the Act of Union of 1840 and appellant had not shown any basis of obligation upon the Crown in the right of the Dominion of Canada.

As to head three, the appeal was allowed and the matter referred back to the Court of Exchequer.

The question as to whether the claim was barred by the *Exchequer Court Act* or the *Statute of Limitations* was not dealt with by the trial judge nor by this Court.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J., (1) answering in the negative the first of two questions of law set down for argument, viz: (1) Assuming the allegations of fact contained in the Petition of Right read with the particulars filed by the Suppliants to be true, does a Petition of Right lie against the Respondent for any of the relief sought by the Suppliants in the said Petition? (2) If a Petition of Right would otherwise lie against the Respondent for any of the relief sought by the said Petition, is the said Petition barred by the *Exchequer Court Act* and the *Statute of Limitations* (Ontario)?

Auguste Lemieux, K.C. for the appellants.

W. R. Jackett for the respondent.

The judgment of Kerwin and Rand JJ. was delivered by:—

KERWIN J.:—This is an appeal by the suppliants against a decision of the Exchequer Court (1) answering in the negative a question of law set down for determination prior to the hearing. The question is as follows:—

> Assuming the allegations of fact contained in the Petition of Right read with the particulars filed by the Suppliants on October 21, 1943, and September 5, 1944, pursuant to orders made by the President of this Honourable Court on June 3, 1942, and December 21, 1943, respectively, to be true, does a Petition of Right lie against the Respondent for any of the relief sought by the Suppliants in the said Petition?

The claims in the petition of right may be classified under three headings. 1. Certain lands in what is now the Province of Ontario were, on February 5, 1798, surrendered by the Six Nations Indians to the then reigning Sovereign by a document which concluded:— "and do

(1) [1948] Ex. C.R. 372.

1949

MILLER v. THE KING

Kerwin J.

beseech his said Majesty to grant the same in fee to the Persons in the said Schedule mentioned for the several and respective considerations to the said Lands annexed which are to receive from the said Persons, as an Equivalent for the same." The unsatisfactory nature of the petition has been pointed out in the reasons for judgment in the Exchequer Court but, giving it the most favourable construction that can be suggested on behalf of the suppliants, this claim, which is for the value of part of the lands so surrendered destroyed by flooding, arose before the Act of Union of 1840 and there is no way in which the respondent can be held responsible. The respondent is His Majesty in the right or interest of the Dominion of Canada which, of course, came into existence in 1867. The same consideration is sufficient to dispose of claim 2, which is for the value of lands contained in a free grant to the Grand River Navigation Company in 1836.

There is more difficulty as to claim 3 as to which it is alleged that in or about the year 1833 the Government of Upper Canada "and subsequently the Government of Canada after the Union of 1840" paid out of the proceeds of the sale of the lands surrendered in 1798, the sum of $160,000 for the purchase of shares of the Grand River Navigation Company. It will be noticed that the only difference so far as dates are concerned between claims 1 and 2, on the one hand, and claim 3, on the other, is that, in the latter, the claim is made that the Government of Canada after the Union of 1840 paid money for the purchase of the shares. The respondent argues that the petition of right shows, at the most, an obligation of His Majesty in the right of the Imperial Government. The allegations are contradictory in many respects but, in disposing of the question of law, they should not be construed too strictly against the suppliants, and I am therefore disposed to leave the matter as the facts to be presented to the trial judge would warrant. Whether or not a trial ensues will depend upon the outcome of the argument of the second question of law set down for determination, viz., as to whether the claims advanced are barred by the *Exchequer Court Act* and the Ontario *Statute of Limitations*. The disposition of the present appeal will

be without prejudice to such question of law being considered and dealt with so far as the third claim is concerned.

The appeal should be allowed and the answer to the question of law should be "No" as to claims 1 and 2, and "Yes" as to claim 3. While the Exchequer Court simply answered the question in the negative, the costs of and incidental to the hearing were made costs in the cause. That direction might well stand. The costs of the appeal should be to the appellants in the cause, subject to this, that, in any event, they should not receive any costs of or in connection with their factum.

The judgment of Taschereau and Kellock JJ. was delivered by:

KELLOCK J.:—In his petition, appellant claims with respect to three separate matters; first, the flooding of approximately 1,800 acres of land on the Six Nations Indian Reserve near Brantford, Ontario, by reason of the execution of works pursuant to the Statute of 1824, 4 Geo. IV, c. 17, and amending Acts, relating to the Welland Canal; second, the taking by Order-in-Council of October 20, 1836, without compensation, of some 368 acres for the purposes of the Grand River Navigation Company; and third, the use made by or at the instance of the Crown, before and after 1840, of certain trust moneys belonging to the said Six Nations Indians in the sum of $160,000.

By his petition and particulars appellant alleges that the lands in claims one and two, and other lands, were the subject of a patent dated the 14th of January, 1793, in favour of "the chiefs, women and people of the said Six Nations and their heirs forever". It is further alleged that on or about the 5th of February, 1798, certain of the said lands were surrendered to the Crown by the Indians for the purpose of being re-granted to certain purchasers, which surrender was accepted by the Crown for the said purpose, the conveyances to the purchasers to be delivered by the Crown upon the production of a certificate from certain trustees authorized by the Indians to receive the mortgages to be given back, certifying that the purchasers

1949

MILLER v. THE KING

Kellock J.

had done everything necessary to secure to the Indians and their posterity the "stipulated annuities and considerations which they agree to give for the same".

The petition then alleges the passing of the Act of 1824 by the Parliament of Upper Canada and the flooding in the year 1826 of 1826 4/5 acres by the execution of the works without any compensation at any time having been made to the Indians, although provision was made by the statute for that purpose. Section 9 of the statute provided that if the canal should pass through any land in possession of any tribe or tribes of Indians, or if any act occasioning damage to their property or possessions should be done under the authority of the Act, compensation should be made to them in the same manner as provided by the statute with respect to the property, possession or rights of other individuals. "The Chief Officer of the Indian Department within this province" was required to name an arbitrator on behalf of the Indians and any amount awarded was to be paid to the said Chief Officer "to the use of the said Indians". It was subsequently provided in 1826 by 7 Geo. IV, c. 19, s. 5, that all matters to be determined by arbitration under section 7 of the earlier statute should be referred as therein provided "so that the award or awards of such arbitrators may be made public and declared on or before the first day of September next (1826) and that all and every sum of money by such an award or awards directed to be paid by the said company shall be paid to the party or parties entitled to receive the same on or before the first day of October next".

The petition further alleges in paragraph 4 that since the year 1784 the Department of Indian Affairs, through its Superintendent-General or other officer or officers charged with its control and management, was an express trustee for the Indians with respect to the control and management of their lands and property, including moneys received on their behalf. Appellant claims that it was the duty of the officer named in the Act of 1824, namely, "the Chief Officer of the Indian Department" to collect the amount to which the Indians were entitled in respect of the flooding of their lands and that he failed to take any steps to that end, whereby they have suffered loss.

The petition also alleges that on the 20th of October, 1836, an Order-in-Council was passed in Upper Canada declaring 368 7/10 acres of the Indian lands to be a free grant to the Grand River Navigation Company which had been incorporated in 1832 by 2 Wm. IV, c. 13. It is alleged that a patent of the said lands was issued to the company pursuant to this Order-in-Council and that the Indians at no time received any compensation for the lands so taken and that the Crown as their express trustee committed a breach of trust in failing to see that such compensation moneys were paid.

With respect to these first two heads of claim the appellant is in the difficulty that any breach of trust, if it occurred, took place before the Act of Union of 1840, and the appellant has not shown any basis of obligation resting upon His Majesty in the Right of the Dominion of Canada in respect of such a liability, although with respect to liabilities arising after that date section 111 of the *British North America Act* is relevant. I think therefore that the appeal cannot succeed with respect to these two heads of claim.

Coming to the third head of claim, it is alleged by the petition that as a result of the surrender and its acceptance a definite contractual agreement arose under which the Government of Upper Canada undertook to take charge of and sell the surrendered lands, receive the purchase moneys and hold the same intact "for the benefit of the suppliants' ancestors separate and distinct from the public money of the province, for the purpose of providing a certain sure revenue for the support of the suppliants or their ancestors". It is further alleged that in or about the year 1833 the Government of Upper Canada, depository and in control of the funds arising from the sale of the Six Nations lands, of which a very considerable amount was then in the custody and control of the Receiver General of the said province, contracted to purchase in the name of the Six Nations, but without their knowledge or consent, 6,121 shares of the par value of $25 each of the Grand River Navigation Company, and that the Government of Upper Canada, through the said Receiver-General, and subsequently the Government of Canada after the Union of 1840, paid, without further authority, out of collections

1949

MILLER v. THE KING

Kellock J.

made and arising from sales of lands, the sum of $160,000. It is alleged that these payments were in breach of the contractual agreement referred to. The suppliants claim that the said sum of $160,000 with interest should be restored to the funds held by the Department of Indian Affairs and the present government, on behalf of the Indians, the whole of this money having been illegally paid away for the said purpose and lost.

It is further alleged that by an Act of the Parliament of Canada of the 30th of August, 1851, c. 151, the Navigation Company was empowered to raise 40,000 pounds on debentures of the then town of Brantford by reason of which there was created in favour of the said town a mortgage upon all the assets of the said company as a result of which the said assets were ultimately foreclosed by the said town and lost to the Indians.

As already pointed out, it is also alleged by the petition that the Department of Indian Affairs from its formation in 1784 to the present time is an express trustee of the lands and property of the Indians, including all Indian money paid to it. It is also alleged that, in addition to the relief claimed on the basis of the "Statutes, Ordinances and Orders-in-Council" particularized above, the suppliants are "entitled to succeed on equitable grounds" and the specific claim with respect to the $160,000 is for "repayment of cash paid on stock of the Grand River Navigation Company from *trust* funds of suppliants".

On behalf of the respondent it is first contended that the allegations of fact in the petition and particulars do not show any agreement by His Majesty or anything held by His Majesty in trust. It is said that reference to the Crown (presumably in documents or statutes) as trustee for the Indians and to the Indians as wards of His Majesty is not a technical use of such terms but such references are merely descriptive of the general political relationship between His Majesty and the Indians. It is also contended that the only fact relied upon to show a trust or agreement is the acceptance by the Governor-in-Council in 1798 of the surrender of the Indian lands. In addition to the particular allegation of trust arising out of the surrender and acceptance in 1798 there is, however, the further allegation in the petition that the Crown, through the Indian

Department and its officers, was always a trustee for the Indians with respect to lands or moneys of the Indians.

In *Civilian War Claimants Association* v. *The King* (1), Lord Atkin said:

> There is nothing so far as I know, to prevent the Crown acting as agent or trustee if it chooses deliberately to do so.

In *Kinloch* v. *Secretary of State for India* (2), Lord Selborne, L.C., at 623 said:

> Still it would not be altogether satisfactory to proceed on that ground alone * * * if it really appeared that the intention of the Crown, in the Order in Council and the Warrant which passed from the Crown upon this subject, was to constitute the person who for the time being might fill that office of state a trustee in the ordinary sense of the word, liable to account in a Court of Equity to private persons.

At page 625 the Lord Chancellor further said:

> Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust—a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not. What their sense is here, is the question to be determined, looking at the whole instrument and at its nature and effect.

I think the law is correctly stated in *Lewin on Trusts*, 14th Ed. p. 25:

> The Sovereign may sustain the character of a trustee, so far as regards the capacity to take the estate, and to execute the trust.

The authors go on to state that doubts have been entertained whether, the subject can by any legal process, enforce the performance of the trust. They add at p. 26:

> The subject may, undoubtedly, appeal to the Sovereign by presenting a petition of right, and it cannot be supposed that the fountain of justice would not do justice.

In *Pawlett* v. *Attorney-General* (3), the plaintiff had executed a mortgage in favour of a mortgagee who had died and his heir being attainted of high treason the King had seized the lands. The plaintiff thereupon exhibited a bill against the King and the executor, seeking redemption of the mortgage, and the question that arose was whether he could have any remedy against the King for

(1) [1932] A.C. 14 at 27.
(2) (1882) 7 A.C. 619.
(3) (1668) Hardres, 465.

1949

MILLER v. THE KING

Kellock J.

redemption. It was decided by Lord Hale and Baron Atkyns that the proceedings would lie. In *Esquimalt and Nanaimo Rly.* v. *Wilson* (1), the Judicial Committee in referring to the judgment of Baron Atkyns, said:

> It was stated in the report that he was strongly of opinion that the party ought in this case to be relieved against the King, because the King was the fountain and head of justice and equity, and it was not to be presumed that he would be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him.

It is provided by section 18 of the *Exchequer Court Act*, R.S.C. 1927, c. 34:

> The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown * * *

The effect of this section is to clothe the Exchequer Court with jurisdiction with respect to claims maintainable against the Crown whether under the former practice they were maintainable only by petition of right or otherwise.

With respect to a contention that there was no jurisdiction in the ordinary courts as to claims against the Crown where a petition of right would not lie, their Lordships in the *Esquimalt* case said at page 365:

> But there are many cases in which petition of right is not applicable in which the Crown was brought before the Court of Chancery, and the Attorney-General, as representing the interests of the Crown, made defendant to an action in which the interests of the Crown were concerned * * *

At page 367 their Lordships referred to what was said by Lord Lyndhurst in *Deare* v. *Attorney-General* (2), namely:

> I apprehend that the Crown always appears by the Attorney-General in a Court of Justice, especially in a Court of Equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned.

Their Lordships proceeded:

> This statement, though made on the equity side of the Court of Exchequer, is certainly not limited to the Chancery proceedings that were instituted in that Court; it is of wide and general application. It is in entire agreement with the principles enunciated by Baron Atkyns in the earlier authority, and it is recognized as being the existing practice in the Courts today.

(1) [1920] A.C. 358. (2) (1835) 1 Y. & C. 197, 208.

With respect to the procedure by petition of right their Lordships said at 364:

> That procedure is adopted for the recovery from the Crown of property to which the applicant has a legal or *equitable* right, as, for example, by proceedings equivalent to an action of ejectment or the payment of money.

Section 7, subsection 1, of the *Petition of Right Act*, R.S.C. 1927, c. 158, is as follows:

> If the petition is presented for the recovery of any real or personal property, or any right in or to the same, which has been granted away or disposed of by or on behalf of His Majesty, *or his predecessors*, a copy of the petition and fiat, endorsed with a notice to the effect of the Form C in the schedule to this Act, shall be served upon or left at the last or usual or last known place of abode of the person in possession or occupation of such property or right.

Their Lordships in the *Esquimalt* case at page 364 said in relation to the very similar section of the British Columbia legislation:

> Sect. 7 shows that where a petition of right is presented to recover real or personal estate or any right granted away or disposed of on behalf of His Majesty, a copy is to be left at the house of the person last in possession, *showing that the main claim is against the Crown*, that the person last in possession is not necessarily a proper party to the suit, but that, in order that he may be affected with knowledge, provision is made that he should be served in the manner indicated.

In *Hodge* v. *Attorney-General* (1), the title-deeds of a leasehold estate had been deposited with bankers, by way of equitable mortgage. The depositor was subsequently convicted of felony and a bill was filed by the mortgagees against the Attorney-General for a sale of the property. Alderson B., sitting in equity, held that the court could declare that the plaintiffs were equitable mortgagees and directed the Master to take an account of what was due to the plaintiffs and decreed that the plaintiffs should hold possession of the property until their lien was satisfied. He held that he did not have any jurisdiction to order a sale or to order the Crown to reconvey.

I see no more difficulty in the present instance, should the facts warrant, in making a declaration that the moneys in the hands of the Crown are trust moneys and that the appellant and those upon whose behalf he sues are cestuis que trust, even although the court could not direct the Crown to pay. In this latter event it is inconceivable that at this date, any more than in the time of Baron Atkyns,

(1) (1838) 3 Y. & C. 342.

1949

MILLER v. THE KING

Kellock J.

the Crown, as the fountain of Justice, would not do justice. I think, however, no such difficulty lies in the way of an order for payment.

In *Feather* v. *The Queen* (1), at 294, Coburn C.J., delivering the judgment of the court said:

> We concur with that court in thinking that the only cases in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money * * *

If this is so with respect to moneys of the subject as to which no trust exists, it cannot be any the less so because the moneys coming to the hands of the Crown are impressed with a trust in favour of the suppliant and there can be no objection, as urged by Mr. Jackett, that the Crown has paid away the moneys. This situation is expressly recognized in section 7 of the *Petition of Right Act*, already cited, and in *In re Gosman* (2) it was held that moneys transferred to the Crown by the trustees and executors of the will of a deceased person where no next-of-kin had been discovered were recoverable by the next-of-kin, although in the meantime the moneys had been paid away by the Crown.

As to the moneys received in respect of the sale of the lands, O'Connor J. construed the petition to allege that they had been received by the trustees for the Six Nations. In this he has, I think, been misled by a seeming ambiguity. In a letter of February 20, 1798, to the Duke of Portland, it is stated that the trustees were "to receive for *their* use mortgages and other securities for the payment to *them* of the several and respective considerations stipulated". This, in my opinion, means that the trustees were merely to hold the securities, not collect them; the words "for the payment to them" describe the obligations for which the securities were given; "their" and "them" signify the Indians. This is confirmed by the minute of council of February 5, 1798, "to secure to the Five Nations and their posterity the stipulated annuities and considerations which they agree to give for the same". The same minute speaks of the trustees as "authorized to receive" mortgages of the said lands. Paragraphs 14 and 15 of the

(1) (1865) 6 B. & S. 257.

(2) (1880) 15 Ch. D. 67; 17 Ch. D. 771.

petition distinctly allege that the Crown was to and did receive the money. The reason for putting the mortgages into trustees would seem to be the obvious one of enabling suit or action to be taken without the difficulty or inconvenience that would attend them in the name of the Crown.

I take the allegations, therefore, to be: that in consideration of the surrender, the Crown, whether acting with Imperial or Colonial advisers, undertook to convey the property to the purchasers named and to others thereafter to be named, to receive the purchase moneys and to maintain them as a converted form of the lands sold for the purposes of a tribal enjoyment equivalent to that to which the Six Nations were entitled under the grant; and that by transmission this obligation has become assumed by the Crown in right of the Dominion. Although the matters present relations of the nature of a trust, they contain likewise the ordinary elements of a contract.

Under the arrangements of 1798 the persons nominated by the Six Nations to receive the securities were the Acting Surveyor General, the Superintendent of Indian Affairs, both officers of the Crown, and one, Alexander Stewart, a barrister. The petition does not show how long these persons acted or how it came about that the Department of Indian Affairs became substituted. Some further light may be obtained from subsequent legislation.

After Union by the Act of 1841, 4 and 5 Victoria, c. 74, it is recited that:

> Whereas three-quarters of the stock of the Grand River Navigation Company is held *in trust* and for the benefit of the Six Nations Indians; and whereas by the provision of the Act incorporating the said Company, *the persons in whose name such Stock is so subscribed and held for the said Six Nations Indians,* have no adequate influence in the appointment of the Directors by whom the affairs of the said Company are regulated and managed * * *

The statute proceeds to enact that it should be lawful for the Governor of the province by and with the advice and consent of the Executive Council to nominate and appoint two directors at every election so long as the proportion of three-quarters of the capital stock should continue to be held for the use and benefit of the said Six Nations Indians. The reason for this enactment was that

1949

MILLER v. THE KING

Kellock J.

it had been provided by section 22 of the Act incorporating the company that no one person should have more than fifteen votes regardless of the number of shares held.

A further development with respect to the holding of these shares is evidenced by the Act of 1853, 16 Victoria, c. 256. By section 1 the holding of a special meeting of stockholders of the company was authorized and by section 2 it was provided that the question to be put at the meeting was whether the company and all works connected therewith should or should not be placed under the control and management of the government of the province. The proviso to the section reads:

> Provided always that inasmuch as three-fourths of the Stock of the Company is held *in trust* for the benefit of the Six Nation Indians, the decision so come to by the said shareholders, if in the affirmative, shall not be valid or binding until ratified and confirmed by the *Governor as Trustee for the said Six Nation Indians.*

In 1860 by 23 Victoria, c. 151, section 3, it was provided:

> All moneys or securities of any kind applicable to the support or benefit of the Indians or any tribe or band of Indians and all moneys accrued, or hereafter to accrue, from the sale of any lands reserved or held in trust as aforesaid, shall, subject to the provisions of this Act, be applicable to the same purposes and be dealt with in the same manner as they might have been applied to or dealt with before the passing of this Act.

And by section 8 it is provided:

> The Governor-in-Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom, the moneys arising from sales of Indian lands and from the property held or to be held in trust for the Indians, shall be invested from time to time, and how the payments to which the Indians may be entitled shall be made, and shall provide for the general management of such lands, moneys, and property
> * * *

It does not appear who in 1841 were "the persons in whose name such stock is so subscribed and held for the said Six Nation Indians." When the history of the dealings from time to time with the Indian moneys subsequent to their receipt is disclosed from the official records, the court will be in a position to say what was and is the position and obligations in law of the Crown with respect to the moneys in question. For that purpose the matter must go to trial.

It is also contended on behalf of the respondent that if the allegations in the petition show any legal obligation on the part of His Majesty, it is an obligation of His

Majesty in right of the Imperial Government. It is said that until 1855, or later, the Imperial Government retained control of the administration of Indian Affairs in Canada and reference is made to *Rex* v. *Hill* (1); *St. Catherine's Milling and Lumber* v. *The Queen* (2); and *Easterbrook* v. *The King* (3). The statements in these judgments are all, of course, statements of fact and their applicability to the case at bar will depend upon the evidence to be adduced. It would at present appear however, from the Act of 1841 and the Act of 1853, already referred to, that, whatever may have been the general situation, nevertheless, with respect at least to the moneys here in question, the local government was purporting to exercise some measure of control. It is sufficient for the present purposes to say that the Crown's contention cannot be given effect to at this stage and will depend ulimately for whatever force it may have upon the evidence.

It is next contended on behalf of the Crown that any legal claim which might be shown by the allegations of fact in the petition arose prior to 1840, and therefore, the appellants cannot rely upon the provisions of section 111 of the *British North America Act*. I do not read the petition as thus restricted but as alleging payments out of the moneys in question after the Union of 1840. It may be that these payments were all made in pursuance of one contract to buy the shares alleged to have been made in 1833, in which event it may be contended on the part of the appellant that payments made after the Union of 1840 cannot be justified on that ground if the contract was illegal when made. It may be however, that the payments after Union were independent transactions. That again is a matter for the evidence.

The respondent in its factum, although the point was not mentioned in argument, contends that the appellant and those on whose behalf he sues, have not shown that they, as distinct from the original members of the Six Nations living in 1798, are entitled to any interest in the subject matter of the petition. No difficulty was felt on this score in *Henry* v. *The King* (4). Without approving or disapproving of anything decided in that case I do not think this is an objection which can or should be dealt with at

(1) (1907) 15 O.L.R. 406 at 411.
(2) (1888) 14 A.C. 46 at 54.
(3) [1931] S.C.R. 210 at 214.
(4) (1905) 9 Ex. C.R. 417.

1949

MILLER v. THE KING

Kellock J.

this stage. When the evidence is fully developed the point may or may not be of importance. I would leave it to be dealt with at the trial.

I would allow the appeal with respect to the claim for $160,000 and refer the same back to the Exchequer Court. The learned trial judge below did not, by reason of the conclusion to which he came on the first question, deal with the *Statute of Limitations* which was the subject of the second question, and the reference back will be subject to the determination of that question. This will raise the interesting question as to whether persons with the limited civil rights of the Indians can be barred by the statute. The matter was not argued before us and I do not deal with it.

As to costs, I agree with the order proposed by my brother Kerwin.

LOCKE J.:—The question set down for argument by an order made under the provisions of Rule 149 of the Exchequer Court states the matter to be determined as being whether, assuming the allegations of fact contained in the Petition of Right and the particulars delivered by the suppliant to be true, a petition of right lies against the respondent for any of the relief sought. This has been treated properly, in my opinion, as raising also the question as to whether the Petition of Right discloses any cause of action, and the matter has been disposed of by the learned trial judge upon this footing.

In so far as the claim of the suppliants is to recover damages in respect of the lands flooded by the works of the Welland Canal in the year 1826 and for payment of the value of the lands said to have been granted to the Grand River Navigation Company in 1832 are concerned, I agree that the appeal fails. Apart from the unfortunate amendment to the petition made on April 9, 1943 which, if taken literally, would be fatal to the claim in respect of the lands submerged, it is disclosed upon the face of the petition that the acts complained of took place when the administration of Indian Affairs was in the hands of the Province of Upper Canada. While by section 111 of the *British North America Act* the Dominion of Canada assumed liability for the debts of the Province of Canada, it is neither suggested in the pleadings nor contended in argument before

us that by the Act of Union of 1840 the Province of Canada became liable for liabilities of the Province of Upper Canada of the nature suggested.

As to the claim advanced in respect of the amount of $160,000 or part of it, said to have been expended out of the funds of the Six Nations Indians by the Province of Canada for the purchase of Grand River Navigation Company stock, and the claim for interest, I think there is error in the judgment appealed from.

By paragraph 13 of the Petition of Right, it is alleged that on February 5, 1798, Captain Joseph Brant, acting under a Power of Attorney from certain chiefs of what were then the Five Nations Indians, in pursuance of arrangements made with the Government of Upper Canada, executed a formal surrender to the Crown of "the lands to be sold." When asked for particulars as to the nature of the deed of surrender, the suppliants delivered a copy of the grant which disclosed that the request advanced on behalf of the Five Nations Indians was that the surrender of 352,707 acres of land be accepted for the sole purpose of enabling His Majesty to grant the lands to certain named purchasers for the consideration stated in a schedule to the document. The consideration for the purchase which aggregated an amount in excess of £42,000 was not to be paid to the Crown but to the Acting Surveyor-General, the Superintendent of Indian Affairs for the District, and Alexander Stewart, Esq., described in a letter from the Honourable Peter Russell, President of the Executive Council of Upper Canada to the Duke of Portland, Secretary for the Colonies dated February 20, 1798, as the persons named by the Five Nations as "their trustees to receive for their use mortgages and other securities for the payment to them of the several and respective considerations stipulated." By paragraph 14 the suppliants alleged that as a result of the negotiations between Brant and the Provincial Government of Upper Canada an agreement was entered into whereby the Government was to take charge of and sell the lands and receive the purchase money and hold the same intact for the benefit of the suppliants' ancestors separate and distinct from the public money of the Province for the purpose of providing revenue for the support of the Five Nations.

1949

MILLER v. THE KING

Locke J.

By paragraph 15 it is alleged that:—

> In or about the year 1833 the Government of Upper Canada, depositary and in control of the funds arising from the sale of Six Nation lands, of which a very considerable amount was then in the custody and control of the Receiver-General in said Government charged with the duty of selling lands belonging to Suppliants, and receiving the funds arising from such sales and disbursing the same under the contractual agreement made between Joseph Brant aforesaid and the Government of the Province of Upper Canada under which said Government was to hold the proceeds of such lands for the purpose of assuring to your Suppliants and their posterity an annuity for their future support, in despite of the terms of said contractual agreement aforesaid, contracted to purchase in the name of your Suppliants, but without their knowledge or consent, 6,121 shares of $25 each of the stock of the Grand River Navigation Company, and said Government of Upper Canada, through the said Receiver General of its Government and subsequently the Government of Canada after the Union of 1841, paid without further authority out of collections made and arising from said sales of lands authorized and directed to be made by the terms of said contractual agreement with said Brant, the sum of $160,000 from the proceeds of such sales so illegally contracted for without authority to be purchased by him in the name of your Suppliants to complete the payment for such shares, and Suppliants charge that said payment was made in breach of the contractual agreement to hold the whole of said proceeds of sales for the support of your Suppliants or their ancestors as occasion might arise.

and by paragraph 16 the suppliants asked that the said sum should be restored with interest to the funds held by the Department of Indian Affairs and the present Government of Canada "on which is binding and effective the contract founded (sic) by said Brant in 1798." When asked for particulars as to the identity of the person or persons who made the various payments out of the various funds upon the purchase of the stock, the suppliants replied that the information was in the possession of the Indian Affairs Branch of the Department of Mines and Natural Resources.

As pleading, the language of these paragraphs leaves much to be desired. Paragraph 15 speaks of the Government of Upper Canada being "charged with the duty of selling lands belonging to suppliants" and refers to the funds paid for the Grand River Navigation Company stock as being paid "out of collections made and arising from said sales of lands" but without further explanation I think this must be taken to refer to the lands conveyed to the nominees of the Five Nations Indians under the directions given by Brant in 1798, and not to the proceeds of the sale of other lands. While the reference to the

Power of Attorney given to Brant by the Five Nations Indians referred to in paragraph 13 shows that the lands in question were surrendered simply for the purpose of permitting grants to be made to the persons to whom the Indians desired the lands to be sold and the particulars of the deed of surrender show that the consideration for the purchase was to be paid over to the individuals named by the Indians as trustees and these persons are referred to in the communication from Peter Russell to the Secretary for the Colonies as the "trustees to receive for their use mortgages and other securities for the payment to them of the several and respective considerations stipulated" and the pleading does not allege that these trustees thereafter paid over the consideration to the Crown to be held on behalf of the Indians, I think when these paragraphs are read together it is made sufficiently clear that the suppliants claim that the funds realized from the sale came into the possession of the Crown and were held on behalf of the Indians. The identity of the trustees, named, two of whom were the Honourable David William Smith, His Majesty's Acting Surveyor General, and Captain William Claus, His Majesty's Deputy Superintendent of Indian Affairs, and the fact that by c. 74 of the Statutes of the First Parliament of the Province of Canada (4 & 5 Vict.) it was recited that three-quarters of the stock of the Grand River Navigation Company were held in trust for the benefit of the Six Nations Indians (presumably by the Crown) and it was provided that the Governor of the Province, by and with the advice and consent of the Executive Council, might nominate two of the directors of the company, would at least indicate either that possession of the funds by the trustees had been treated from the outset as possession by the Crown or that possession of the funds had thereafter been taken. These are facts which undoubtedly should have been more clearly pleaded but that this is what the suppliants really contend is, in my opinion, evident. It is alleged in paragraph 15 that the Government of Upper Canada contracted to purchase the shares in the Grand River Navigation Company and that the said Government prior to 1841 and the Government of the Province of Canada thereafter paid in the aggregate $160,000 out of the moneys held in trust for the Indians

1949

MILLER v. THE KING

Locke J.

upon the purchase of the stock, without saying what amounts were paid by the respective Governments. It is further in the same paragraph alleged that the Government of Upper Canada was to hold the proceeds of the sale of the lands for the purpose of assuring to the suppliants and their posterity an annuity for their future support and that the moneys paid out for the Grand River Navigation Company stock were so paid without authority from the Indians in breach of the agreement between them and the Crown, and in so far as this relates to the moneys disbursed by the Government of the Province of Canada I am of the opinion that a cause of action against that Province is disclosed. While again the pleading is defective, I think the statement in paragraph 22 (*g*) that the suppliants rely upon the *British North America Act* should here be construed as meaning that it is claimed that by virtue of section 111 of that Act His Majesty in right of the Dominion of Canada is liable for the claim as being a debt of the former Province of Canada, liability for which was imposed upon the Dominion by the Statute, and that a cause of action in respect of this part of the claim as against the respondents is shown. Section 111 reads that "Canada shall be liable for the debts and liabilities of each province existing at the Union." The question as to whether this gave a right of action directly against the Dominion in respect of the liability of the province was not raised before us and is not, in my opinion, one of the questions set down for argument and I accordingly express no opinion upon the point.

As to the second branch of the question, I am of opinion that a petition of right lies for the above mentioned part of the relief claimed and that there is jurisdiction in the Exchequer Court for the reasons stated by my brother Kellock.

The question as to whether the claim is barred by the *Exchequer Court Act* and the *Statute of Limitations* was not dealt with by the learned trial judge and was not argued before us and I do not deal with it.

The appeal should be allowed as to the claim advanced in regard to moneys said to have been paid out by the Province of Canada after the date of the Union and as

to the interest upon these moneys, but as to the remainder of the claims should be dismissed. I agree with the order as to costs proposed by my brother Kerwin.

Appeal allowed as to the claim advanced in respect of moneys alleged to have been paid by the old Province of Canada for the purchase of shares of the Grand River Navigation Co. out of the proceeds of the sale of lands surrendered in 1798. The costs of an incidental to the hearing before the Exchequer Court of the question of law shall be costs in the cause. The costs of this appeal shall be to the appellants in the cause except in any event they shall not receive any costs of or in connection with their factums.

Solicitor for the appellants, *Auguste Lemieux.*

Solicitor for the respondent, *F. P. Varcoe.*