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SAMMARTINO, BRUNO

v.

ATTORNEY GENERAL OF B.C.

Supreme Court of B.C. (1818/69)

Before: MR. JUSTICE R.A. WOOTTON

Vancouver, February 12, 1970

Lawrence Page for the Plaintiff
David Sigler, Q.C. for the Appellant

Reasons for Judgment

In this case the parties had agreed that no evidence should be taken, but that the facts pleaded in the statement of claim and statement of defence should be treated as if there had been made a case stated for the opinion of the Court under Order 34, Marginal Rule 389.

The recital in the statement of claim indicates that the plaintiff, a non-Indian, held occupancy of real property on Okanagan Lake. That occupancy was obtained from one George Parker, an Indian within the meaning of section 2(1)(g) of the *Indian Act*, R.S.C. 1952, chapter 149. In fact, not only was there occupancy, but this was held under a lease in a form recited to be in pursuance of the *Short Form of Leases Act* and dated the 1st day of April 1967. The property concerned was held under that occupancy by the plaintiff, Bruno Sammartino.

The Assessor caused the plaintiff to be assessed for general and school taxes and the plaintiff asks that the following declaration be made, namely:

. . . that:

(a) Section 26(3) of the *Taxation Act*, R.S.B.C. 1960, c. 376, and amendments thereto, is *ultra vires* in so far as it may purport to legislate in respect of the Plaintiff Bruno Sammartino's liability to taxation as an occupier of the said lands.

(b) Sections 198, 199 and 204 of the *Public Schools Act*, R.S.B.C. 1960, c. 310, and amendments thereto, are *ultra vires* in so far as they may purport to legislate in respect of the Plaintiff Bruno Sammartino's liability to taxation as an occupier of the said lands.

(c) Section 26(3) of the *Taxation Act* and sections 198, 199 and 204 of the *Public Schools Act* are *ultra vires* in so far as they may purport to legislate in respect of:

(i) Fields of Indians and lands reserved for Indians, which are fields within the exclusive legislative authority of the Parliament of Canada.

(ii) Liability to taxation of lands belonging to Canada within the meaning of the *British North America Act*, 30 Victoria, c. 3, s. 125.

(d) Section 26(3) of the *Taxation Act* and sections 198, 199 and 204 of the *Public Schools Act* are *ultra vires*, in that the taxes herein imposed under the said Acts constitute indirect taxation, a field within the exclusive legislative authority of the Parliament of Canada.

(e) The Plaintiff Bruno Sammartino is not an occupier of the said lands within the meaning of the *Taxation Act* and the *Public Schools Act*.

The defendant takes the view diametrically opposed to the plaintiff and asks by way of counter claim for a declaration as follows:

. . . that:

1 (a) Section 26(3) of the *Taxation Act*, R.S.B.C. 1960, c. 376, and amendments thereto, is *intra vires* in respect of the Plaintiff Bruno Sammartino's liability to taxation as an occupier of the said lands.

(b) Sections 198, 199 and 204 of the *Public Schools Act*, R.S.B.C. 1960, c. 310, and amendments thereto, are *intra vires* in respect of the Plaintiff Bruno Sammartino's liability to taxation as an occupier of the said lands.

(c) Section 26(3) of the *Taxation Act* and sections 198, 199 and 204 of the *Public Schools Act*, and amendments thereto, are *intra vires* the Legislature of the Province of British Columbia.

(d) The Plaintiff Bruno Sammartino is an occupier of the said lands within the meaning of the *Taxation Act* and the *Public Schools Act*, and amendments thereto.

The plaintiff says in his statement of claim:

. . . that in point of law:

(a) Section 26(3) of the *Taxation Act*, R.S.B.C. 1960, c. 376, and amendments thereto, is *ultra vires* in so far as it may purport to legislate in respect of the Plaintiff Bruno Sammartino's liability to taxation as an occupier of the said lands.

(b) Sections 198, 199 and 204 of the *Public Schools Act*, R.S.B.C. 1960, c. 310, and amendments thereto, are *ultra vires* in so far as they may purport to legislate in respect of the Plaintiff Bruno Sammartino's liability to taxation as an occupier of the said lands.

(c) Section 26(3) of the *Taxation Act* and sections 198, 199 and 204 of the *Public Schools Act* are *ultra vires* in so far as they may purport to legislate in respect of:

(i) Fields of Indians and lands reserved for Indians, which are fields within the exclusive legislative authority of the Parliament of Canada.

(ii) Liability to taxation of lands belonging to Canada within the meaning of the *British North America Act*, 30 Victoria, c. 3, S. 125.

(d) Section 26(3) of the *Taxation Act* and sections 198, 199 and 204 of the *Public Schools Act* are *ultra vires*, in that the taxes herein imposed under the said Acts constitute indirect taxation, a field within the exclusive legislative authority of the Parliament of Canada.

(e) The Plaintiff Bruno Sammartino is not an occupier of the said lands within the meaning of the *Taxation Act* and the *Public Schools Act*.

The power of the Province of British Columbia to tax is derived from section 92, subsection (2), of the *British North America Act, 1867*. By that power the Province may impose "direct taxation within the Province in order to the raising of a revenue for Provincial purposes."

The phrase "direct taxation" is commented upon and explained in Kennedy and Wells *The Law of the Taxing Power in Canada*, page 49, and there it is said, in quoting a definition by John Stuart Mill:

A direct tax is one which is demanded from the very person who it is intended or desired should pay it.

I have no difficulty in determining that the tax levied here is a tax levied directly upon Mr. Sammartino, the plaintiff, and is demanded from him, and that it is intended or desired that he should pay the tax.

The Legislature of the Province of British Columbia has passed the *Taxation Act*, R.S.B.C. 1960, chapter 376 as amended. It has also passed the *Public Schools Act*, R.S.B.C. 1960, chapter 319, as amended. Section 4(1)(c) of the *Taxation Act* provides:

(3) Where land belonging to the Crown in right of the Province or in right of Canada is held under any homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application for purchase, easement, or otherwise, or where land is held in trust for a tribe or body of Indians and occupied by a person not an Indian in other than an official capacity, the land, together with the improvements thereon, shall be assessed, and the occupier thereof shall be taxed as if he were the owner of the land and improvements; but no assessment or taxation in respect of land so held or occupied shall in any way affect the rights of Her Majesty in the land.

In the foregoing is found legislation affecting Mr. Sammartino directly. He is an occupant or occupier of land "held in trust for a tribe or body of Indians and occupied by" himself, he being "a person not an Indian in other than an official capacity." Therefore, he as occupier "shall be taxed as if he were the owner of the land and improvements." The Assessor has seen fit to assess him for those taxes and he invokes in addition to section 26, subsection (3), which makes clear the levy for the general taxes, sections 198, 199, and 204 of the *Public Schools Act (supra)*, and amendments thereto, in order to affect a levy of school taxes. Section 204 reads as follows:

204. (1) Subject to the provisions of this Act, all the provisions of the *Taxation Act* apply to the assessment, levy, collection, and recovery of all taxes imposed under this Act in a rural area of a school district, and to the addition of interest to such taxes when delinquent, in like manner as to taxes imposed under the *Taxation Act*, and all such taxes when levied shall, for all purposes of the *Taxation Act*, be deemed to be Provincial taxes imposed and assessed under that Act, and upon collection or recovery shall be accounted for as such.

(2) Every person liable to assessment and taxation for school purposes in respect of land and improvements situate in a rural area of a school district shall, within twenty-one days after receipt by him of a request from the Provincial Assessor, make and file a return in the form approved by the Provincial Assessor, detailing the nature, amount, and value of all land and improvements in respect of which the person is so liable to assessment.

It is quite clear from section 204 (*supra*), that "all the provisions of the *Taxation Act* apply to the assessment, levy, collection, and recovery of all taxes imposed under" the *Public Schools Act*. Under the *Taxation Act* it is clear that there may be the levy for general tax purposes and by reason of section 204 (*supra*), it is equally clear that school taxes may be similarly imposed "in a rural area of a school district." The lands here are within a rural area.

As to the lease entered into and exhibited in these proceedings, the plaintiff has said in paragraph 4 of the statement of claim:

The said Lease entered into between the said George Parker, acting on behalf of the said Christie Parker, as Lessor and the Plaintiff Bruno Sammartino as Lessee, is not in compliance with the provisions of the *Indian Act*, R.S.C. 1951, c. 149, and amendments thereto and specifically sections 37 and 28 and 58(3) thereof.

As to that allegation, I am of the opinion that the formal irregularity of the lease does not deny the fact that the plaintiff has occupancy of lands held by the Crown in trust as referred to specifically in section 26(3) of the *Taxation Act (supra)*, and that irregularity cannot prevent the assessment of the plaintiff for both general and school taxes, because he is in fact and was at the date of assessment an occupier of the lands. He is not assessed by reason of any ownership in the lands, but on account of his occupancy. "Occupier" is referred to in section 26(3) of the *Taxation Act (supra)*, and is defined in section 2 as follows:

"occupier" means the person in possession of land of the Crown which is held by him under any homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement, or other record from the Crown, or which is simply occupied.

By section 2 of the *Public Schools Act Amendment Act, 1962*, the same definition of "occupier" is incorporated into the *Public Schools Act*.

The facts here are almost identical with those related in *The City of Vancouver v. Chow Chee* (1941) 57 B.C.R. 104. The report in that case refers to *Smith v. Rural Municipality of Vermilion Hills* (1914) 49 S.C.R. 563, at page 575.

I follow the reasoning in those cases and find for the defendant here. The only difference between the *City of Vancouver* case (*supra*), and the present one is that the lease held by Chow Chee, the defendant in that case, was one that was authorized. Those circumstances do not alter the fact of occupancy and it is the occupancy that is the subject of the taxation.

Mr. Page was profuse in his use of the words "*ultra vires*". His arguments received my most careful consideration.

The claim of the plaintiff is dismissed with costs and the claim of the defendant is allowed with costs.