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In the Privy Council.

ON APPEAL  
FROM THE SUPREME COURT OF CANADA.

BETWEEN  
THE ST. CATHARINES MILLING AND LUMBER COMPANY,  
*(Defendants) Appellants,*

AND  
THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO,  
*(Plaintiff) Respondent.*

RECORD OF PROCEEDINGS.

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*(Defendants) Appellants,*

AND

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO,  
*(Plaintiff) Respondent.*

10

**RECORD OF PROCEEDINGS.**

**In the Court of Appeal, Ontario.**

**STATEMENT OF CASE FOR THE COURT OF APPEAL, ONTARIO.**

This action was commenced on the 30th day of October, 1884, by the Queen, on the information of the Attorney-General for the Province of Ontario, against the defendants, the St. Catharines Milling and Lumber Company, to have it declared that the defendants have no rights in respect of timber cut by them on a certain timber berth situated in the District of Algoma, in the Province of Ontario, and to procure the delivery of such timber to the plaintiff, and also for an injunction and damages.

1. STATEMENT  
OF CASE FOR  
THE COURT  
OF APPEAL,  
ONTARIO.

The action was tried at the Chancery Sittings at Toronto, on the 18th May, 1885, before the  
20 Honorable the Chancellor, who, on the 10th day of June, 1885, pronounced a judgment in favor of the plaintiff, restraining the defendants in the terms claimed by the Statement of Claim.

The printing of the documents produced at the trial and referred to in the judgment of the Chancellor (other than those set out in this case), all of which are in print in Sessional Papers, The Honorable Alexander Morris' Book of Treaties, and the Boundary Award Papers, has been dispensed with. See Order at page 32 of this case.

# In the High Court of Justice, Chancery Division, Ontario.

## STATEMENT OF CLAIM.

WRIT ISSUED THE 30TH DAY OF OCTOBER, A.D. 1884.

2. STATEMENT  
OF CLAIM.

1. During the season of the year 1883 the defendants, without permission from the Crown or the Province of Ontario, entered upon certain lands situate in, and the property of the Province of Ontario, lying south of Wabigoon Lake, in the District of Algoma, and cut pine timber from the said lands amounting to about 2,000,000 feet.

2. The Canadian Pacific Railway runs immediately north of the said Wabigoon Lake and adjacent thereto, and the said defendants have removed about 500,000 feet of the said logs to the north side of the said lake, and immediately along side of the railway of the Canadian Pacific Railway Company, and they intend to transport the same to a place called Vermillion Bay, a considerable distance west of said lake, with the object of having the same cut into lumber. 10

3. Of the balance of the 2,000,000 feet of pine logs, some lie on the north side and west side of Wabigoon Lake, the remainder being in the streams and small lakes south of and running into the said lake.

4. The said lands upon which the said timber was cut are lands of the Province of Ontario, and the said defendants had no right, or title, or authority whatever, entitling them to enter upon the said lands and cut the said timber as aforesaid.

5. The said defendants threaten to continue to trespass upon the said lands, and to cut and remove more timber, and will, unless restrained by this Honorable Court, continue to so trespass and to cut additional timber from the said lands. 20

6. The defendants also threaten to and intend to remove the timber already cut, and will, unless restrained by this Honorable Court, so do.

1. The plaintiff asks that it may be declared that said defendants had no rights in respect of the timber cut on the said premises, and that the same may be delivered up to the plaintiff.

2. That the said defendants may be restrained, by the order and injunction of this Honorable Court, from further trespassing upon the said lands and premises, and from cutting any timber thereon. 30

3. That the defendants may be restrained from removing the timber already cut from the said lands and premises.

4. That the defendants may be ordered to pay the damages sustained by reason of the wrongful acts aforesaid.

5. That the defendants may be ordered to pay the costs of this action.

The plaintiff proposes that this action should be tried at Toronto.

Delivered the 9th day of January, A.D. 1885, by Blake, Kerr, Lash & Cassels, Dominion Chambers, Toronto, Solicitors for the plaintiff.

## STATEMENT OF DEFENCE.

For a defence to the Statement of Claim filed and delivered herein, the defendants say as follows:—

3. STATEMENT  
OF DEFENCE.

1. The defendants put the plaintiff to proof of all the allegations contained in the Statement of Claim.

2. The defendants say that they are a Company, incorporated under the provisions of the "Canada Joint Stock Company's Act, 1877," for the purpose of prosecuting a general lumber and milling business within the Dominion of Canada, and in the prosecution of such business, and for the purpose of procuring saw-logs to manufacture into lumber, the defendants, during the month of April, 1883, applied to the Government of the Dominion of Canada, and upon payment of a considerable sum of money then and subsequently to wit:—the sum of \$4,125.52, the defendants obtained permission and ample authority from the Government of Canada, to enter upon a certain tract of timber lands situated on the south side of Wabigoon Lake, in that portion of the Canadian territory situated between Lake Superior and Eagle Lake, which is the timber land referred to in the Statement of Claim.

3. Pursuant to the leave and license obtained, as in the last preceding paragraph mentioned, and having fulfilled all conditions imposed by the Government of Canada, the defendants, during the lumbering season of 1883 and 1884, entered upon the said tract of timber lands, and cut a considerable quantity of pine timber thereon, to wit: about 2,000,000 feet board measure, intending to remove the same therefrom for the purposes of their said business, and the said saw-logs were, at the time this action was commenced, situate upon the said tract of timber lands, or in the vicinity thereof, and under the control of the defendants, acting pursuant to the authority conferred upon them by the license and permission granted to them by the Government of the Dominion of Canada.

4. The defendants do not admit, but deny that the said lands, and the timber growing thereon, including the pine timber cut into saw-logs by the defendants are, or that any part thereof is, the property of the Province of Ontario, on the contrary, the defendants say that the said lands and the timber growing thereon, including the pine timber cut into saw-logs by the defendants are (subject always to the defendants' rights therein) the property of the Dominion of Canada, or of the Crown, as represented by the Dominion of Canada.

5. The defendants require the plaintiff to prove that the lands in question and the pine timber cut by the defendants are, or that any part thereof is, the property of the Province of Ontario or of the Crown, as represented by the Government of Ontario.

6. The defendants say that the Government of Canada acted within its power, and in pursuance of its rights, in granting to them, the defendants, the permission and license, as aforesaid, to cut on and remove the said pine timber from the said tract of timber lands, and that the defendants were acting within their strict legal rights in entering upon the said tract of timber lands, and in cutting the said timber into saw-logs, and in attempting to remove the same, pursuant to the leave and license in that behalf, obtained as aforesaid.

7. The defendants say that the tract of land in question, together with the growing timber thereon, was with other lands in the said district or territory until recently claimed by the tribes

3. STATEMENT  
OF DEFENCE.

of Indians who inhabited that part of the Dominion of Canada, and that the claims of such tribes of Indians have always been recognized, acknowledged, admitted and acquiesced in by the various Governments of Canada and Ontario, and by the Crown, and that such Indian claims are, as to the lands in question herein, paramount to the claim of the Province of Ontario, or of the Crown as represented by the Government of Ontario, and that the Government of the Dominion of Canada, in consideration of a large expenditure of money made for the benefit of the said Indian tribes, and of payments made to them from time to time, and for divers other considerations, have acquired the said Indian title to large tracts of lands in the said territory, including the lands in question in this action, and the timber thereon, and by reason of the acquisition of the said Indian title, as well as by reason of the inherent right of the Crown, as represented by the Government 10 of Canada, the Dominion of Canada, and not the Province of Ontario, has the right to deal with the said timber lands, and at the time of the granting of the said leave and license, had, and still have full power and authority to confer upon the defendants, the rights, powers and privileges claimed by them, as aforesaid, under which the said pine timber was cut.

8. At the time the defendants purchased from the Government of Canada the rights to enter upon the said timber lands, and cut on, and remove timber therefrom, and when the said timber was cut by the defendants, as aforesaid, the Government of Canada were, and long prior thereto, had been exercising control over the said timber lands, and the defendants made the aforesaid payments and incurred the cost of cutting the said timber in good faith, and the belief that they were acquiring a good and valid title thereto. 20

9. The defendants submit that if this Honorable Court grants to the plaintiff the relief claimed, it should only be upon the condition that payment be made to the defendants of the moneys so expended by them, and that, if necessary, an account of such expenditure may be taken under the direction of this Court.

10. The defendants further submit that this action should be dismissed with costs.

Filed and delivered, this sixteenth day of February, 1885, by Messieurs McCarthy, Osler, Hoskin & Creelman, of the City of Toronto, in the County of York, solicitors for the defendants.

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**JOINER OF ISSUE.**

4. JOINER  
OF ISSUE.

The plaintiff joins issue with the defendants upon their statement of the defence delivered herein. 30

Delivered this 11th day of April, A.D., 1885, by Blake, Kerr, Lash & Cassels, of Toronto, plaintiff's solicitors.

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**ORDER FOR INTERIM INJUNCTION MADE BY THE CHANCELLOR ON  
20th JANUARY, 1885.**

5. INTERIM  
INJUNCTION.

1. Upon motion this day made unto this Court by Mr. Walter Cassels, Q.C., of counsel for the plaintiff in presence of counsel for the defendants upon hearing read the Notice of Motion and the several enlargements thereof, the Writ of Summons and the Affidavits of William Margach,

George Gordon and Alexander John Fraser, and upon hearing what was alleged by counsel afore-<sup>5. INTERIM</sup> said, and the plaintiff by her counsel undertaking to bring on this action for trial at the next <sup>INJUNCTION</sup> Sittings of this Court to be holden at the City of Toronto.

2. This Court doth order that the defendants, their servants, workmen and agents, be and they are hereby restrained from removing or interfering with the logs cut off the lands near Wabigoon Lake, described in the Writ of Summons herein, some of which logs are described in the indorsement on the said writ as being now on the north side of Wabigoon Lake, and others of them as being now on the south and south-west sides of said lake, and in the streams and woods adjacent thereto until the trial or other final disposition of this action or until further order.

10 3. And this Court doth reserve the costs of this motion, until the trial or other final disposition of this action, or until further order, and the defendants are to be at liberty to move to dissolve this injunction if so advised.

(Signed,) GEO. S. HOLMESTED,  
Registrar.

#### ADMISSIONS MADE BY COUNSEL FOR ALL PARTIES AT THE TRIAL.

1. That the lands upon which the timber in question was cut were at the time of granting the permit hereinafter mentioned, and are now in the Province of Ontario, but it is not admitted <sup>6. ADMISSIONS</sup> but denied by the defendants that such lands did or do belong to Ontario, but on the contrary <sup>AT TRIAL.</sup> the defendants contend that the lands and the timber thereon became and were at the time of the granting of such permit the property of the Government of the Dominion of Canada by virtue of the purchase from and the cession by the Indians to the said Government of Canada.

2. That the defendants cut the timber in question.

3. That they did so under the authority of the permit from the Government of the Dominion of Canada, which is to be produced at the hearing, and that the moneys claimed by the Government of Canada for such permit were paid by the defendants to the Government as per receipts and accounts produced under order of production.

4. Treaties made with the Indians as described and set out in the book published by the Honourable Alexander Morris, and such other treaties as may be produced from the proper departments at Ottawa.

30 5. That the Indian tribes have not surrendered their title if any they had or have to the said timber lands except to the Government of Canada and by the treaties which will be produced.

6. Judicial notice may be taken at the hearing of this cause, or on any appeal (and without formal proof) of any documents set out in the Sessional Papers of the Province of Canada or Dominion of Canada or Province of Ontario, and the same shall be admissible *quantum valeant* on any matter or question on which evidence would be admissible in the cause.

6. ADMISSIONS  
AT TRIAL.

7. Judicial notice may be taken herein and on any appeal respectively of any other treaties and of any public documents, and of historical facts bearing on the issues and contained in any printed book heretofore published, and which may be duly authenticated.

(Signed,) BLAKE, KERR, LASH & CASSELS.  
McCARTHY, OSLER, HOSKIN & CREELMAN.

TORONTO, 11th May, 1885.

A. R. CREELMAN, Esq.,  
Barrister,  
Toronto.

QUEEN vs. ST. CATHARINES.

10

7. LETTER,  
WALTER CAS-  
SELS TO A. R.  
CREELMAN, AS  
TO ADMIS-  
SIONS.

DEAR SIR,—I find we have omitted from our admissions one clause which was assented to, which ought to go in, viz., “Sessional Papers of the Province of Canada or Dominion of Canada or Province of Ontario, shall be admissible *quantum valeant*, on any matter or question on which evidence would be admissible in the cause, and the ordinary printed copies of said Sessional Papers will be received in lieu of the originals.”

I think this was intended and may perhaps be covered by the admissions as they are but it is not very clear, kindly let me hear from you.

Yours truly,

(Signed,) WALTER CASSELS.

TORONTO, May 11th, 1885.

20

WALTER CASSELS, Esq., Q.C.,  
Toronto.

QUEEN vs. ST. CATHARINES.

8. LETTER, A.  
R. CREELMAN  
TO WALTER  
CASSELS AS TO  
ADMISSIONS.

MY DEAR CASSELS,—Referring to your letter of this morning the clause referred to therein was struck out and clause six as it now stands inserted in lieu thereof. If you will refer to the Attorney-General’s letter you will see that he objects to the old clause No. 6, and proposed the substitution of the present clause. To this I made no objection because I thought that the meaning of the old clause was that judicial notice should be taken of Sessional Papers, etc., and the two clauses seem to me to mean substantially the same thing.

Yours truly,

(Signed,) A. R. CREELMAN.

30



## EVIDENCE

TAKEN AT THE TRIAL WHICH WAS HELD AT TORONTO.

Before the Honorable Chancellor BOYD, May 18th, 1885.

9. EVIDENCE.

The Attorney-General and Cassels, Q.C., for plaintiff; McCarthy, Q.C., and Creelman for defendants.

Mr. Cassels reads the admissions, which are put in.

Some preliminary conversation takes place, in the course of which Mr. McCarthy states that it will not be necessary to authenticate certain public documents proposed to be used for the plaintiff; that while he does not admit their relevancy, it will not be necessary to authenticate  
10 them; they may be produced and used.

ALEXANDER MORRIS, sworn.

*By McCarthy, Q.C.*

Q.—You were concerned, I think, in making treaties with various tribes of Indians? A.—Yes.

Q.—How many different treaties had you to do with—more than one? A.—Oh yes; I was an Associate Commissioner and Chairman of the Commission in making the North-West Angle Treaty Number Three, Treaty Number Four, at Qu'Appelle, Treaty Number Five in the Winnipeg Lake region, and Treaty Number Six, which included the Carleton and Pitt Districts that are now so prominently before the country. My associates in the treaty just now before the Court were Mr. Simpson and Mr. Simon J. Dawson, acting under commission from the Crown.

20 Q.—The North-West Angle Treaty is called Treaty Number Three? A.—Number Three.

Q.—Speaking generally, what tract of country did that treaty cover? A.—I see you have my book in your hands.

Q.—We can refer to that afterwards. Perhaps you can give us the data in a few words—

*The Attorney-General.*—I admit that that Treaty does cover this—

*Mr. McCarthy.*—I want it for another purpose.

*Witness.*—The Treaty abutted on the Robinson Treaty.

Q.—The Robinson Treaty had been made in 1850; is that in your book? A.—It is there; I cannot pretend to speak from memory as to these dates.

Q.—September, 1850? A.—September, 1850, was the Robinson Lake Superior Treaty.

30 Q.—That went to the height of land? A.—There were two treaties made at some time in the same year, 1850, and they were supposed to go to the height of land.

Q.—Then Treaty Number Three goes from the height of land? A.—The boundaries were so shaped as to fit on the boundaries created by Mr. Robinson's Treaty.

Q.—It would be upon the west of Robinson's Treaty? A.—Yes; going down east to meet it, and running down to the international boundary. The definition will be found in the book; it embraced a very large tract of land.

Q.—That was made in 1873. How far west did that treaty go? A.—That treaty was in the fall of 1873.

## 9. EVIDENCE.

Q.—How far west did that treaty go? A.—I think it would be very advisable for the Court to have before them one of the maps published by the Dominion Government, on which the boundaries of the whole of the treaties are defined. It embraces fifty thousand square miles of land. I cannot explain without reading the description, my lord, which is somewhat long; it is at page 322; it covered the entire disputed territory.

Q.—Had there been a treaty made prior to that with Indians to the west? A.—Yes; a treaty had been made by Mr. Simpson, assisted by Governor Archibald, which is Treaty Number Two.

*Mr. McCarthy* reads an extract in relation to Treaty Number One.

*Witness*.—That is Treaty Number one, which was made at the Stone Fort.

10

Q.—That was made by Governor Archibald? A.—It was made by Mr. Simpson. Governor Archibald, although not a Commissioner, assisted him.

Q.—These treaties, Numbers One, Two, and Three, take in a portion of what is now known as Manitoba and the country to the east of it? A.—Yes.

Q.—They don't go all the way to the north? A.—Oh no; there is a very large tract there, inhabited by Esquimaux and others, that was never dealt with.

Q.—How far do treaties five and six go?

*The Attorney-General*.—Here is a map showing the whole thing.

*Witness*.—I would like to have that before me, because when you are dealing with immense tracts of country, it is very difficult to speak from memory. Treaties five and six were made to 20  
abut on to treaties one and two, and run on to the Blackfoot country.

(A map is shown to his Lordship, and the witness points out certain territory on it.)  
*Witness*.—This treaty fitted into number one. Three was the first treaty that I helped to make; and the next year I went west with Mr. Laird, and we carefully fitted on the boundaries and took in this. The next year I went and made this treaty, which I then made to dovetail in with the existing treaties, (pointing to the map.) Then came treaty six, covering the region where the difficulties exist now. The Blackfeet district was dealt with, so that the whole of that country except the northern part is covered with treaties. They strike the boundaries of British Columbia—six and seven.

Q. These treaties were all made by the Dominion Government? A.—Under their authority. 30

Q. And the lands were surrendered by the Indians, as appears in the treaties, for a consideration? A.—Yes; for a fixed payment of money down, and for annuities. It appears from the treaties.

Q.—These were the result of bargain with the Indians? A.—Yes. At the north-west angle there had been two attempts to make a treaty before, which had failed; and it was at least fourteen days before we were able to. There was a very large number of Indians collected, and there was distrust amongst themselves, and they had never been associated together, and it was fourteen days before I was able to complete this treaty three.

Q.—Was there more than one tribe inhabiting this country? A.—No; there was only one tribe there, variously known as the Saulteaux, Ojibbeways and Chippewas. 40

Q.—What larger race are they a tribe of? A.—They are Ojibbeways.

Q.—Do you know whether they were a different tribe from those who surrendered their land under treaty number one. A.—Oh, yes. The Indians of Manitoba were partly Ojibbeways and partly Swampy Crees; they were called so from their inhabiting the regions round the lakes.

Q.—You had to do with the treaties four, five and six? A.—Yes; and I may add that I also revised treaties one and two, owing to misapprehensions that had arisen.

Q.—What do you mean by revising them? A.—There was dissatisfaction with the terms, and I was authorized by the Government to meet them at different points and reconcile the difficulties that had arisen, and obtain a fresh instrument, which was done.

Q.—This all appears here in your book on treaties? A.—Yes.

10 *Mr. McCarthy.*—That book will be considered as put in. We will not cumber the record with it any more than referring to it as Mr. Morris' book. I put in a certified map of the *locus in quo*, and permit dated May 1st, 1883, to defendants, from the Crown Timber Agent; it is a license to cut, made under the authority of the Minister of the Interior, by the Crown Timber Agent of that department; also two receipts for the payment of the dues. There is a Sessional Paper published which shows the earlier treaties with the Indians; it is part of Appendix "T" in the Sessional Papers of 1847.

The evidence of Mr. Dawson is to be put in if necessary. Argument. Judgment reserved.

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EXHIBIT "A."

*Original for Depositor.*

20 No.  
\$1625 00

La Banque Nationale.

OTTAWA, 26th October, 1883.

Received from James Murray, on account of timber dues, the sum of sixteen hundred and twenty-five dollars, which amount will appear at the Receiver General's credit with this bank.

Signed in Triplicate,

10. EXHIBIT  
"A," RECEIPT  
FOR PAYMENT  
OF TIMBER  
DUES.

Ent'd P. Vezina,  
Pro Acct.

CHAS H. CARRIERE,  
Mgr.

---

EXHIBIT "Y."

30 *Permit to cut Timber on Dominion Lands.*

I, E. F. Stephenson, Crown Timber Agent, by virtue of power granted to me by the Minister of the Interior, and in consideration of the dues hereinafter set forth, do hereby permit The St. Catharines Lumber Company, W. Chevrier, Mangr., Winnipeg, to cut, and take, and have for their

11. EXHIBIT  
"Y," PERMIT  
TO DEFEN-  
DANTS.

11. EXHIBIT  
"Y" PERMIT  
TO DEFEN-  
DANTS.

own use, or for the purposes of barter or sale, from the following described Dominion Lands, as described on the tracing attached *marked "Blue,"* the following quantities of timber—one million feet B. M. of lumber and no more.

The dues on which amount to the sum of twenty-five hundred dollars, and I hereby acknowledge the receipt of five hundred dollars on account.


The affidavit printed on the back of this Permit, shewing the quantity cut, to be sworn, and the balance due thereon to be paid at Winnipeg, on or before the first day of May, 1884.

This Permit is liable to be forfeited for non-fulfillment of any of the conditions set forth in the Order in Council of 10 October, 1881, or of this Permit, and the holder of this Permit, should they not fulfil such conditions, will be subject to the penalties of the Dominion Lands Act, 1879, for 10 cutting without authority.

Granted under my hand this first day of May, 1883.

(Signed), E. F. STEPHENSON,  
Crown Timber Agent.

Office fee 50 cents.

 This Permit expires on May 1st, 1884.

I accept this Permit and agree to all the terms and conditions thereof.

ST. CATHARINES LUMBER CO.,

Witness—James M. Fleming.

(Signed), N. CHEVRIER, Mgr.  
Per S. J. McLaren. 20

EXHIBIT "Z."

*Original for Depositor.*

No.  
\$250 <sup>00</sup>/<sub>100</sub>

OTTAWA, 20th December, 1883.

12 EXHIBIT  
"Z," RECEIPT  
FOR PAYMENT  
OF TIMBER  
DUES.

Received from J. O. B. Latour on account of Crown Lands, the sum of two hundred and fifty <sup>00</sup>/<sub>100</sub> which will appear at the Receiver General's credit with this Bank.

Signed in triplicate,

Ent'd P. VEZINA,  
Pro. acct.

CHAS. H. CARRIERE,  
Mgr.

## THE CHANCELLOR'S JUDGMENT DELIVERED ON 10TH JUNE, 1885.

The Province of Ontario seeks the intervention of this Court, in order that the St. Catharines Milling and Lumber Company may be restrained from trespassing and cutting timber on lands claimed by the Province.

13. JUDGMENT  
OF THE CHAN-  
CELLOR OF  
ONTARIO.

The defendants justify under license obtained from the Government of Canada in April, 1883, by virtue of which they assert the right to cut over timber limits on the south side of Wabigoon or Wabigon Lake, in that portion of Canada situated between Lake Superior and Eagle Lake. The defendants further plead specially that the place in question forms part of a district till recently claimed by tribes of Indians who inhabited that part of the Dominion, and that such claims have always been recognized by the various Governments of Canada and Ontario, and by the Crown: that such Indian claims are paramount to the claim of the Province of Ontario, and that the Dominion have by purchase acquired the said Indian Title, and by reason thereof, as well as by inherent right, the Dominion and not the Province is alone entitled to deal with the said timber limits.

It is admitted that these timber limits are within the territorial limits of Ontario as determined by the recent decision of the Privy Council. That decision finally ascertained the boundaries assigned to the old Province of Quebec, by the I. S. 14 Geo. III., c. 83, commonly called "The Quebec Act." By that Act passed in 1774, it was intended to provide for the permanent government of the newly acquired domain, and to supersede the provisional system introduced by the Royal Proclamation of 1763. By the 4th Article of the Treaty of Paris (10th February, 1763) France ceded Canada with all its dependencies to the Crown of Great Britain. In October of the same year the King's Proclamation erected within part of the ceded territories the new Government of Quebec, the western extension of which was placed at the end of Lake Nipissing. It was speedily found that this boundary excluded a large extent of settled country which was left without Civil Government, as appears by the preamble to the Quebec Act, and this was cured by fixing the interior boundaries on the lines now established as the western limit of Ontario.

The legal and constitutional effect of the Conquest of Quebec and the Cession of Canada was to vest the soil and ownership of the public land in the Crown, and to subject the same to the Royal Prerogative. The French and Indian populations that remained in the country became by the terms of capitulation the subjects of the King. So far as the latter were concerned it was stipulated in the articles of capitulation concluded at Montreal (on 8th September, 1760) between Major-General Amherst and the Marquis de Vaudreuil as follows: "Article XL.—The Savages or Indian allies of his most Christian Majesty shall be maintained in the lands they inhabit if they choose to remain there; they shall not be molested on any pretence whatsoever, for having carried arms and served his most Christian Majesty; they shall have as well as the French liberty of religion and shall keep their missionaries.—"Granted."

In 1791 the old Province of Quebec was divided into Upper Canada and Lower Canada, by Imperial Statute 31 George III., C. 31, which while enlarging the rights of self-government made provision in section 43 for the reservation of all Acts "which shall in any manner relate to or affect the King's prerogative touching the granting the waste lands of the Crown within the said Provinces," in order that they might be submitted to the British Parliament before receiving the King's assent.

The custody control and ownership of all public lands in Upper Canada was transferred to the Provincial Government in 1837, by the Act 7 William IV., Cap. 118, to which after being duly reserved the royal assent was given.

In 1840 the Imperial Parliament re-united the Provinces of Upper and Lower Canada as one Province by the name of Canada, (Sec. 3, 4, Vict. Cap. 35) a union which subsisted till superseded by the larger union accomplished by the British North America Act.

There being a like reservation as to waste land in Sec. 42 of the Union Act, it was by 4 and 5 Vict. cap. 100 of Canada declared that it was expedient to provide a law applicable to all parts of the Province, for the disposal of public lands therein. Such a law was embodied in this enactment which received her Majesty's assent on the 30 May, 1842. The comprehensiveness of this Act is manifested by 12 Vict. Cap. 31, which applies it to all lands of which the legal estate is in the Crown whether held by her Majesty for the public uses of the Province, or in the nature of a trust for some charitable or other purpose (sections 1 and 2); section 4 shows that it covers "lands purchased from the Indians," e.g. the "Huron Tract." By another act of the same year (12 Vict. Cap. 30) provision is made for granting licenses to cut timber on the ungranted lands of the Province elsewhere referred to as growing on "the public lands of the Province," and by section 7 these are enumerated as "Crown, Clergy, School or other Public lands of the Province." This is consolidated in the Consolidated Statutes of Canada, Cap. 23. 10

Such is a brief sketch of the history of the public lands of Ontario from the time of their acquisition by the Crown till they became subject to Provincial legislative control. 20

The Colonial policy of Great Britain, as it regards the claims and treatment of the Aboriginal populations in America, has been from the first uniform and well defined. Indian peoples were found scattered wide cast over the Continent, having as a characteristic no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians, it was not thought that they had any proprietary title to the soil, nor any such claims thereto as to interfere with the establishment of plantations, and the general prosecution of colonization. They were treated "justly and graciously" as Lord Bacon advised, but no legal ownership of the land was ever attributed to them.

The Attorney General in his argument, called my attention to a joint opinion given by a "multitude of counsellors" about 1675, touching land in New York, while yet a Province under English rule. I think it accurately states the constitutional law in these words: "Though it hath been and still is the usual practice of all proprietors to give their Indians some recompense for their lands, and so seem to purchase it of them, yet that is not done for want of sufficient title from the King or Prince who hath the right of discovery, but out of prudence and Christian charity, least otherwise the Indians might have destroyed the first planters, (who were usually too few to defend themselves,) or refuse all commerce and conversation with the planters, and thereby all hopes of converting them to the Christian faith would be lost. In this the Common Law of England and the Civil law doth agree. \* \* \* Though some planters have purchased from the Indians, yet having done so without the consent of the proprietors, for the time being, the title is good against the Indians, but not against the proprietors without a confirmation from them upon the usual terms of other plantations." Vol. xiii "Documents relating to Colonial history of the State of New York" p. 486. Of the six counsel who sign this opinion, one (Richard Wallop) became Cursitor Baron of the Exchequer, another, (Henry Pollexfen) became Chief Justice of the Common Pleas, and a third, (Holt) was afterwards Chief Justice of England. 30 40

In a classical judgment, Marshall, C. J., has concisely stated the same law of the Mother Country, which the United States inherited, and applied with such modifications as were necessitated by the change of government to their dealings with the Indians. I quote passages from *Johnson v McIntosh*, 8 Wheat, p. 595, etc. "According to the theory of the British Constitution all vacant lands are vested in the Crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative. \* \* \* This principle was as fully recognized in America, as in the Island of Great Britain. So far as respected the authority of the Crown, no distinction was taken between vacant lands and lands occupied by the Indians. \* \* \* The title, subject to the right of occupancy by the Indians, was admitted to be in the King, as was his right to grant that title." At p. 588: "All our institutions recognize the absolute right of the Crown, subject only to the Indian right of occupancy, and recognize the absolute right of the Crown to extinguish that right."

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This right of occupancy attached to the Indians in their tribal character. They were incapacitated from transferring it to any stranger, though it was susceptible of being extinguished. The exclusive power to procure its extinguishment was vested in the Crown—a power which as a rule was exercised only on just and equitable terms. If this title was sought to be acquired by others than the Crown, the attempted transfer passed nothing, and could operate only as an extinguishment of the Indian right for the benefit of the title paramount. (See judgment of Burns, J., in *Doe d. Sheldon v. Ramsay*, 9 U. C. Q. B. 133.)

20 Many parliamentary recognitions of these principles might be cited, but let one or two suffice. There is to be found an affirmation of the established doctrine that the ungranted and waste lands of the country are vested in the Crown for the public, subject to the Indian title, which is capable of being dealt with by way of extinguishment only, and not by way of transfer, in the Dominion Statutes 23 Vic. Cap. 3 secs. 30, 31 and 32. There is also a very emphatic declaration of the customary Indian lands policy to be found in the address to Her Majesty from the Senate and House of Commons of Canada, in December, 1867, praying for the extension of the Dominion to the shores of the Pacific, in which it is represented, that upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement, will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealing with the aborigines. Following this up the same legislative bodies in May, 1869, resolved that upon the transference above mentioned, "it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being were involved in the transfer." This being embodied in the address subsequently presented to the Queen, the transfer was consummated by Imperial Order in Council of 23rd June, 1870, Art. 1+ of which stipulated that any claims of Indians to compensation for lands required for purposes of settlement, shall be disposed of by the Canadian Government, in communication with the Imperial Government.

40 At the time of this conquest the Indian population of Lower Canada was as a body Christianized and in possession of villages and settlements known as the "Indian Country." By the terms of capitulation they were guaranteed the enjoyment of their territorial rights in such lands which in course of time became distinctly and technically called "Reserves." By a Quebec Ordinance of Guy Carleton of 1777 (17 Geo. III., c. 7, s. 3) it was declared unlawful for any person to settle in the Indian Country within that Province, without a written license from the Governor, and no person was allowed to trade without license in any part of the Province upon lands not granted by His Majesty.

But in Upper Canada the native tribes were in an untaught and uncivilized condition, and it became necessary to work out a scheme of settlement which would promote immigration, and protect both red and white subjects, so that their contact in the interior might not become collision. A *modus vivendi* had to be adjusted. The course of civilized colonization in the North-West at this day presents in its essential features a counterpart of what was going on in the now thickly populated parts of Upper Canada, at the beginning of this century. And the manner of dealing with the rude red men of the North-West, in the way of negotiating treaties for the surrender of their lands, and conciliating them in the presence of an ever-advancing tide of European and Canadian civilization, is but a reproduction or rather a continuation and an expansion of the system which had comended itself as the most efficient in Old Canada. 10

The inevitable problem, in view of the necessary territorial constriction of the Indian occupants of those vast expanses over which they and their forefathers have fished and hunted and trapped from time immemorial, was and is this: how best to subserve the welfare of the whole community and the state, how best to protect and encourage the individual settler, and how best to train and restrain the Indian, so that being delivered by degrees from dependency and pupilage he may be deemed worthy to possess all the rights and immunities and responsibilities of complete citizenship. These three considerations mainly, have shaped the policy of the Government in the past as in the present. For an admirable *résumé* of what has been done in the earlier history of Canada, I will avail myself of some passages to be found in a joint report of Messrs. Rawson, Davidson and Hepburn, on Indian affairs, prepared in 1844, and printed among the Parliamentary Papers of Canada, as Appendix E E E, of the Session of 1844-45, and Appendix T, of the Session of 1847. I may at this point also mention how greatly I have been indebted to another joint report of Vice-Chancellor Jameson, Mr. Justice Macaulay, and this same Mr. Hepburn, of 1840, which is printed as a supplement to the later report of 1844. These two papers form a compendium of valuable knowledge and research not readily accessible elsewhere. 20

"Since 1763 the Government, adhering to the Royal Proclamation of that year, have not considered themselves entitled to dispossess the Indians without entering into an agreement with them and rendering them some compensation. For a considerable time after the conquest, the whole of the western part of the Upper Province, with the exception of a few military posts on the frontier, and a great extent of the eastern part were in their occupation. As the settlement of the country advanced, and the land was required for new occupants, or the predatory and revengeful habits of the Indians rendered their removal desirable, the British Government made successive agreements with them for the surrender of portions of their lands." 30

"If the Government had not made such arrangements for the valuable surrender of their lands, the white settlers would gradually have taken possession of them, without offering any compensation whatever. It would at that time have been as impossible to resist the natural laws of society, and to guard Indian Territory against encroachment of whites, as it would have been impolitic to have attempted to check the tide of immigration. The Government therefore adopted the most humane and most just course in inducing the Indians by offers of compensation, to remove quietly to more distant hunting grounds, or to confine themselves within more limited Reserves, instead of leaving them and the white settlers exposed to the horrors of a protracted struggle for ownership. In every case the Indians had either the opportunity of retreating to more distant hunting grounds, or they were left on part of their old possession with a Reserve, supposed at the time to be adequate to all their wants and greatly exceeding their requirements as cultivators of the soil at the present day, to which were added the range of their old haunts 40



“ till they became actually occupied by settlers, and in many cases an annuity to themselves and their descendants forever, which was equivalent at least to any benefit they derived from the possession of the lands. In Upper Canada, where at the time of the conquest the Indians were the chief occupants of the territory, where they were all pagans and uncivilized, it became necessary as the settlement of the country advanced to make successive agreements with them for the peaceable surrender of portions of their hunting grounds. The terms were sometimes for a certain quantity of presents once delivered, or for an annual payment in perpetuity. These agreements sometimes contain reservations of a part of the land surrendered for the future occupation of the tribe. In other cases separate agreements for such reservations have been made, or the reservations have been established by their being omitted from the surrender, and in those instances consequently, the Indians hold upon their original title of occupancy.” I may just notice in passing, that this last clause is not expressed with sufficient fulness or precision: when the Reserve is omitted from the surrender, the title (so-called) by occupancy to that no doubt continues: but coupled with the exclusive and legally recognized rights thereto, which attach to a Reserve. Some of these rights, the report proceeds to point out, in these words: “ Among the consequences of the peculiar title under which the Indians hold their lands, are their exclusion from the political franchise, and their immunity from statutory labor, the exemption of their lands from taxation, from seizure for debt, and the exclusion of the white settlers from their reserves.”

20 The reserves were held and occupied in common by the tribe as general property, but any member or family, by arrangement with the chief, could mark off and cultivate a particular plot. These Indian lands could not be alienated or dealt with in the way of transfer, except by being surrendered to the Crown. This was frequently done for the purpose of having parts they did not desire to retain sold for the benefit of the tribes concerned. Such reserves and the proceeds of such reserves when surrendered and sold were held by the Crown as a Royal Trustee for the Indians. (*Bastien v. Hoffman*, 17 L. C. Rep. 238, Drummond, J.) On this footing there have been negotiated all the treaties between Commissioners for the Government and the respective tribes or nations of Indians found existing upon the different tracts covered by the treaties.

30 As characteristic of all, the particular treaty which embraces the land now in dispute may be epitomized. It is called the “ North-West Angle Treaty No. 3,” from having been entered into at a meeting convened at the north-west angle of the Lake of the Woods (which is a notable point on the International Boundary between Canada and the States) and because of the series of treaties affecting lands between the great lakes and the Rocky Mountains, made since Confederation, it is third in chronological order. It purports to be between Her Most Gracious Majesty, by her Commissioner, the Hon. Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-West Territories, Joseph Albert Norbert Provencher, and Simon James Dawson, of the one part, and the Saulteaux tribe of the Ojibbeway Indians inhabiting the country, defined in the body of the treaty by their chiefs, of the other part.

40 It recites that it is the desire of Her Majesty to open up for settlement immigration and such other purposes as to her may seem meet, the tract of country described, and to obtain the consent thereto of her Indian subjects inhabiting the said tract, and to make a treaty, and to arrange with them so that there may be peace and good-will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty’s bounty and benevolence.

By the operative part the Saulteaux tribe do thereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty, etc., all their rights, titles and privileges whatsoever to the lands included in the limits there described.

The Queen then agrees and undertakes to lay aside reserves for farming lands (due respect being had to lands then cultivated by the Indians), and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by the Government of the Dominion of Canada, other reserves of land in the ceded territory, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous to each band or bands of Indians, by the officers of the Government, after conference had with the Indians: Provided that such reserve, whether for farming or other purposes, shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, it being understood, however, that if there were any settlers within the bounds of the lands reserved by any band, Her Majesty reserves the right to deal with such settlers as she shall deem just, so as not to diminish the extent of land allotted to Indians; and provided, also, that the said reserves of lands, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by said Government for the use and benefit of the said Indians, with their consent first had and obtained.

Her Majesty then agrees to maintain schools for instruction on the reserves when desired by the Indians.

Next is a prohibition of the sale of intoxicating liquors within the boundary of the reserves. 20

The Queen then agrees that the Indians shall have the right to pursue their avocations of hunting and fishing throughout the tract so surrendered, saving and excepting such tracts as may be from time to time required or taken up for settlement, mining, lumbering, or other purposes by the Government of the Dominion, or by any of her subjects duly authorized therefor by the said Government.

If any portion of the reserves is required for public works, due compensation is to be made therefor. Provision is then made for a taking of the census of the Indians inhabiting the tract, and an agreement to pay to each Indian the sum of five dollars per head yearly. Then follow further agreements that \$1,500 yearly shall be expended by the Queen for the purchase of twine and nets for the Indians, and for the supply of tools and agricultural implements, cattle and seed, etc., etc., the particulars of which need not now be given. 30

The liberal treatment of the Indians, and the solicitude for their well-being, everywhere manifested throughout this treaty, are the outgrowth of that benevolent policy, which before Confederation attained its highest excellence in Upper Canada.

In Nova Scotia and New Brunswick, the Micmacs and other tribes appear to have been comparatively neglected, so that we find the Hon. Joseph Howe, (a competent witness,) in submitting the report for Indian affairs in 1873, when referring to the manner of dealing with the Indians in the Maritime Provinces, gives a decided preference to the system pursued in Ontario and Quebec, and proceeds enthusiastically to declare that "The crowning glory of Canadian policy in all times, and under all administrations, has been the treatment of Indians." In the report of Hon. D. Laird for 1876, he thus adverts to this point. "In some of the provinces the Indian policy may have been partially shaped before they came under the British Crown, but as there was sufficient opportunity after the cession to have adopted a more liberal policy, it is not very apparent why the Indians were more liberally treated in Upper Canada than in any of the other 40

“old provinces. It is a matter of gratification that a policy so liberal as that adopted in Ontario, 13. JUDGMENT  
 “is being pursued in the North-West Territories, and that the Indians there, provided they turn OF THE CHAN-  
 “to the cultivation of their extensive reserves, or the raising of stock, may become prosperous CELLOR OF  
 “and contented.” ONTARIO.

I have adverted to this aspect of the matter in order to show that the characteristic Canadian policy upon Indian questions, both before and after Confederation, is to be sought and studied in the records of Upper Canada affairs, and this affords assistance, (if assistance on this head be required) in order to the construction and interpretation of the provisions of the British North America Act applicable to the present controversy.

10 In 1801, an Act was passed in Upper Canada, 41 Geo. iii, c. 8, making it unlawful to sell liquors to Moravian Indians, inhabiting a tract of land on each side of the River Thames.

In 1829, the Upper Canada Act, 10 Geo. iv. c. 3, recited the sale and surrender by the Mississauga Indians to his Majesty, of large tracts of land, reserving for themselves and posterity, a certain parcel on the River Credit, containing 4,000 acres, and restrained anyone from hunting or fishing thereon, without the consent of the Indians. By Sec. 2, it was declared that nothing therein contained should diminish their common law rights of having their lands protected from trespass or waste, in the same manner as other subjects of His Majesty.

In 1839, an Act was introduced by Hagerman, A. G. (2 Vic. cap. 15), which contained this recital, “whereas the lands appropriated for the residence of certain Indian tribes in this Province,  
 20 “as well the unsurveyed lands and lands of the Crown ungranted and not under location,” have been trespassed upon from time to time. It then directs the appointment of commissioners to inquire into complaints against any person who illegally possesses himself of any of the aforesaid lands “for the cession of which to Her Majesty no agreement hath been made with the tribes “occupying the same, and who may claim title thereto.” This Statute is referred to in the report of 1840 (the joint production of Vice-Chancellor Jameson, Mr. Justice Macaulay, and Mr. Robert Hepburn) as “An Act for the protection of the Indian reserves.” I have not noticed an earlier employment of this term in the Public Acts and Documents of Upper Canada, though it must have been long in colloquial use. As thus used, ‘reserves’ meant lands appropriated for the residence of Indian tribes, for the cession of which to the Crown no agreement had been made  
 30 with the Indians who occupied the same.

This Statute was amended so as to be of more comprehensive scope in pursuance of a suggestion to that effect in the subsequent report by Messrs. Rawson, Davidson and Hepburn already mentioned. The amended Statute is 12 Vic. chap. 9, (1849) and extends the Act of 1839 to all lands in that part of the Province called Upper Canada, whether such lands be surveyed or unsurveyed, for which no patent, etc., has been issued from the proper department of the Provincial Government, and whether such land be part of those usually known as Crown Reserves, Clergy Reserves, School lands, or Indian lands, or by or under any other denomination whatsoever, and whether the same be held in trust, or in the nature of a trust for the use of the Indians, or of any other parties whomsoever. (These two Acts were consolidated in C. S. U. C. chap. 81.)  
 40 At this time Upper and Lower Canada had been re-united, and the control of the public and waste lands of the Crown had passed to the Provincial Government. The Act of 12 Vic. read in connection with the report on which it was based, shews that the expression “Indian lands” is used as synonymous with “Indian Reserves,” and that the Act was intended to deal with and protect such reserves whether held by the tribes, or by them surrendered to the Crown, for sale or other purposes.

A further outcome of the elaborate report published in 1847, was an Act for the "protection of Indians in Upper Canada, from imposition, and the property occupied or enjoyed by them from trespass or injury." 13 and 14 Vic. chap. 74, (1850). In that report the term Indian lands is uniformly employed to signify tracts of land appropriated for the exclusive use of the Indians, and is used interchangeably with the term "Indian Reserves." Such is its meaning throughout this Act. By Sec. 1 any purchase or contract for the sale of lands made with the Indians, or any of them, is not valid without the consent of the Crown. By sec. 4, no taxes are to be assessed upon Indian lands, nor upon any Indian, so long as he resides on the Indian lands not ceded to the Crown, or which having been so ceded, may have been again set apart by the Crown for the occupation of Indians. By sec. 10, for the purpose of affording better protection to the Indians 10 in the unmolested possession and enjoyment of their lands, it is enacted, that none but Indians shall settle, reside upon, or occupy any lands belonging to, or occupied by any portion or tribe of Indians within Upper Canada.

Sec. 1 of this Act was no doubt suggested by a case of *Bown v. West*, which came before Jameson, V. C. in 1845, 1 O. S. 288. That was a bill to rescind a contract for the sale of Indian lands. The Court dismissed the bill, because among other reasons, the whole title, legal and equitable, was in the Crown. This decision was affirmed in appeal, the judgment of the Court being pronounced by Robinson, C. J., 1 E. & A. 117. The Vice-Chancellor stated that the bill presented this state of facts only; that one party sells, and the other purchases the right to the possession of Indian, that is of the Crown lands, such right of possession never having been out of 20 the Crown, but specially appropriated to the use of the Six Nation Indians, under the proclamation of Governor Haldimand. The nature of this tenure, he says, by the Indians and their incapacity, either collectively or individually, to alienate or confer title to any portion of such lands, might have been sufficiently plain, even though not decided, in *Doe Jackson v. Wilkes*, 4 O. S. 142, (E. T. Wm. iv.) The whole tenor of this decision shows that 'Indian lands' or 'the Indian title' were expressions used with reference to Crown lands which had been specifically set apart and reserved for the exclusive use of the Indians, such, indeed, is the express language of the Chief Justice in appeal, 1 E. and Ap. at p. 118.

The term 'Indian lands,' with like meaning, is next found in 16 Vic. chap. 159, sec. 15, (1853,) which refers to that class of lands as being under the management of the Chief Superintendent of 30 Indian affairs.

The next advance in legislation was by 20 Vic. chap. 26, (1857,) an Act to encourage the gradual civilization of Indian tribes of Canada, the preamble of which declared, that it was desirable to encourage the progress of civilization among the Indian tribes, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian subjects, and to facilitate the acquisition of property, and of the rights accompanying it by such individual members of the said tribes as shall be found to desire such encouragement, and to have deserved it.

That and the other Acts are consolidated in C. S. Can. chap. 9, sec. 1 of which defines "Indian" to mean only Indians or persons of Indian blood or intermarried with Indians, acknowledged as members of Indian tribes or bands residing upon lands which have never been surrendered to the 40 Crown, or which, having been so surrendered, have been set apart, or are then reserved for the use of any tribe or band of Indians in common, and who themselves reside upon such land; sec. 18 of the Consolidated Act, borrowing from 20 Vic. chap. 26, sec. 15, provides that Indian reserves may be attached by any Municipal Council, on application of the Superintendent General of Indian affairs, to a neighboring school section.

In the Act of 1860, 23 Vic. chap. 2, respecting sale and management of public lands, it is declared by sec. 38 that the term public lands, shall be held to apply to lands theretofore designated as Crown lands, School lands, Clergy lands and Ordnance lands, and by sec. 9 it is provided, that the Governor in Council, may declare the provisions of that Act to apply to "Indian lands," under the management of the Chief Superintendent of Indian affairs. To all ungranted lands, the title to which is in the Crown, this Act applies the designation Public lands, with the sole exception of Indian lands, which are unique, and subject to the special supervision of an officer who represents the guardianship of the Crown.

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The Legislature of Canada, in the Statute 27 & 28 Vic. chap. 68 have interpreted 'Indian  
10 lands' to mean an 'Indian Reservation.'

Act 69 of the same session, refers to the reserve of the Huron Indians, at Lorette, commonly known as the "*Quarante Arpents*."

As a deduction from all this legislation I am induced to believe that the expression Indian reserves, or lands reserved for Indians, had a well recognized conventional and perhaps technical meaning before and at the date of confederation.

"Lands reserved for the Indians," is used in the British North America Act, as a well understood term, and that it was so is further demonstrated when we look at the results of previous legislation in the various confederated Provinces other than Upper Canada, as to which sufficient has been quoted and said.

20 Cap. x of the Revised Statutes of Prince Edward Island (1856), is an Act relating to the Indians in which it is declared that it is found necessary and expedient to protect the Indians in the possession of any lands now belonging to them, or which may be hereafter granted or given to them; sec. 3 provides that Commissioners shall take the supervision and management of all lands that have been, or now are, or may hereafter be set apart as Indian Reservations, or for the use of Indians, and shall protect such lands from encroachment and alienation, and shall preserve them for the use of the Indians. From the Sessional Papers I learn that nearly all the reserves in this Island have been provided for the Indians by the liberality of private persons, and through the medium of the Aborigines Protection Society, of London.

In the Revised Statutes of Nova Scotia, (1851,) chap. 28 relates to Crown lands, of which  
30 s 5, reads: "The Governor may reserve for the use of the Indians of this Province such portions  
"of the lands as may be deemed advisable, and make a free grant thereof for the purposes for which  
"they were reserved." Opposite this the marginal compendium is "Indian Reserves" and "Free Grants."

Cap. 58 is entitled, "Of Indians," and sec. 3 provides that the Commissioners shall take the supervision and management of all lands that are now or may hereafter be set apart as Indian Reservations for the use of Indians, they shall ascertain and define their boundaries, and report to the Governor all cases of intrusion, or of the transfer or sale of such lands, or of the use or possession thereof by the Indians, and generally shall protect such lands from encroachment and alienation, and shall preserve them for the use of the Indians. Sec. 5 provides for prosecution,  
40 by information, in the name of Her Majesty, in case of encroachment, notwithstanding the legal title may not be vested in the Crown.

In the Revised Statutes of New Brunswick, (1854,) title xiii, relates to "Indian Reserves." Sec. 1 authorizes surveys of these reserves; sec. 3 is as to the appointment of Commissioners to protect the interests of the Indians; sec. 7 provides that proceeds of all sales and leases of the

Reserves shall be applied for the exclusive benefit of the Indians; sec. 10 provides for laying off any tract of such Reserves into Villages or Town plots for the exclusive benefit of the Indians of that country.

In the Consolidated Statutes of Lower Canada, (1861.) cap. xiv. is headed "*An Act respecting Indians and Indian Lands.*" Sec. 3: "No person shall settle in any Indian village or in any Indian county in Lower Canada without a license in writing from the Governor." Sec. 7—"Governor may appoint a Commissioner of Indian Lands, in whom all lands or property in Lower Canada appropriated for the use of any tribe or body of Indians shall be vested in trust for such tribe or body, etc., etc."

Sec. 7 extends to any lands in Lower Canada held by the Crown in trust for, or for the benefit of any such tribe or body of Indians, but shall not extend to any lands vested in any corporation or community legally established, etc., though held in trust for such Indians.

By sec. 12, tracts of land in Lower Canada, not exceeding in the whole 230,000 acres, may be described, surveyed, and set out by the Commissioner of Crown Lands, and such tracts of land shall be respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada, as directed by Order in Council—[this provision is taken from *14 and 15 Vic. c. 106, s. 1*, and was probably intended as a compensation for many tribes whose occupation of lands had been disturbed, and to provide them a means of living in return for what they had been so deprived of without compensation being made originally.]—

C. S. L. C., cap. 24, sec. 54, is headed "*Roads through Indian Reserves,*" and provides that Municipal Councils may cause roads to be opened through any part of an Indian Reserve, and the compensation therefor shall be paid to the Superintendent General of Indian Affairs for the use of the tribe of Indians for which such land is held in trust.

The legislation of Canada, since Confederation, also reflects very clear light upon what was understood by the Indian Reserves. For instance, in 1868 it is declared "that all lands reserved for Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before this Act, and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown." (See sec. 6 of *31 Vic. cap. 42.*) By sec. 10 no release or surrender of any such lands reserved for the use of the Indians to any party, other than the Crown, shall be valid. Section 15 refers to land appropriated to the use of the Indians in which the Indians are interested. Section 37 provides for protecting and management of Indian lands in Canada, whether surrendered for sale, or reserved, or set apart for the Indians.

Again, in 1869, *32 and 33 Vic. cap. 6*, provides for the locating of lots to Indians on Reserves which have been sub-divided by survey with a view to their ultimate proprietorship and consequent enfranchisement of the owner.

And in 1876, *39 Vic. cap. 18, sec. 3*, we find a valuable set of definitions, in which occurs for the first time a differentiation in meaning between the theretofore equivalent terms "Indian Reserves" and "Indian Lands." See *Totten v. Watson, 15 Q.B.—395*. By that Act "Reserve" is declared to mean any tract or tracts of land set apart by treaty or otherwise for the use or benefit of, or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered and includes all the trees, etc., whereas "Indian Lands" is to mean any Reserve or portion of a Reserve which has been surrendered to the Crown. "*Special Reserve*" includes lands set apart for the Indians, the legal estate to which is notwithstanding in trustees other than the Crown [as *e. g.* in Prince Edward Island and Quebec].

These definitions are all repeated in the last statute of 1880, 43 Vic. cap. 28.

The words "land reserved for the Indians" in the British North America Act have been the subject of judicial consideration, in *Church v. Fenton*, 28 C. P. 384, in which the judgment of the Court was delivered by Mr. Justice Gwynne. It is on this account of special value because he was charged with the duty of reporting upon various matters of difficulty and importance in connection with the Indian Department at the time of the Union of the Provinces in 1840. A reference to his name and services frequently appears in the reports of the Commissioners from which I have so largely drawn. To understand some expressions in his judgment it is essential to remember that the land there in dispute formed part of an original Indian Reserve, situate in the Saugeen Peninsula, which had been surrendered in 1854 for the purposes of sale in the usual way, out of which larger Reserve surrendered, the Indians retained three smaller Reserves for their special occupation. That decision was in 1878, and the learned Judge adopts the definitions given in the Act of 1876, whereby "Indian Lands" were distinguished as well from "Public Lands" as from "Indian Reserves." Referring to the 24th item of the 91st sec. of the Constitutional Act for Canada "Lands reserved for the Indians," he thus proceeds: "That is an expression appropriate to the unsurrendered lands reserved for the use of the Indians described in different Acts of Parliament as 'Indian Reserves,' and not to lands in which, as here, the Indian title has been wholly extinguished." *Church v. Fenton* was affirmed in Appeal, 4 App. R., Ont. 159, and by the Supreme Court, 5 S. C. R. 239, though not on this precise point. If "Lands reserved for Indians" and "Indian Reserves" are of co-extensive import, it is plain that the place now in dispute cannot be called "Land reserved for Indians."

But it is argued for the defendants that the key to unlock the meaning of the Act of 1867 must be sought in the Royal Proclamation of 1763. The scope and object of that instrument, therefore, require to be considered.

The primary intent of that proclamation was to provide temporarily for the orderly conduct of affairs in the settled parts of all the territory newly acquired in America, which was, for that purpose, sub-divided into the four Governments of Quebec, East Florida, West Florida, and Grenada, and to encourage further settlement by the promise of the immediate enjoyment of English law.

Power was conferred upon the Governors and Councils of the three colonies on this continent to grant such laws as was then or thereafter should be in the power of the Crown to dispose of on such terms and conditions as might be necessary and expedient for the advantage of the grantees and the improvement and settlement of the colonies. So far as lands lay without the limits of these colonies the Governors were forbidden to grant patents or to deal with them, and this chiefly on account of the several nations or tribes of Indians who were living under British protection. That prohibition was to last only for the present, and till the King's further pleasure should be known. and it is preceded by a recital that it is just and reasonable and essential to our interest and the securities of our colonies that such Indians, with whom we are connected, and also live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as not having been ceded to or purchased by us, are reserved for them, or any of them, as their hunting grounds. The proclamation next proceeds to deal with that part of the country which would then embrace the land now in question, as follows:—"And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of said Indians, all the lands and territories not included within the limits and territory granted to the Hudson's Bay Company; and, also, all the lands and territories lying to the westward of the sources of the rivers which

13. JUDGMENT  
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"fall into the sea from the west and north-west, as aforesaid; and, we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements, whatsoever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained; and we do further strictly enjoin and require all persons, whatsoever, who have either wilfully or inadvertently seated themselves upon any lands within the countries described, or upon any other lands, which, not having been ceded to, or purchased by us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlement." The proclamation then forbids private persons from presuming to make any purchases from the Indians of any lands reserved to the said Indians, "within those parts of our colonies where we had thought proper to allow settlement," and directs that if at any time the Indians shall be inclined to dispose of the said lands, the same shall be purchased for us at some public meeting of the Indians, to be held for that purpose by the governor of the colony, within which they shall lie. This proclamation has frequently been referred to, and by the Indians themselves, as the charter of their rights, and the last clause I have condensed, relating to the manner of dealing with them in respect to lands they occupy at large or as a reserve, has always been scrupulously observed in such transactions. 10

This provisional arrangement, for the government of the country, was superseded by the Quebec Act. The effect of that Act upon the proclamation was two-fold, by the enlargement of the boundaries of Quebec, the district now in litigation, was brought within colonial limits, and subjected to the control and jurisdiction of the Governor. It was taken out of the vague region called the "Indian Territories" in 43 Geo. III., Cap. 138, (Imp. Statute 1803,) and was made part and parcel of the Province of Quebec. The next effect was that inasmuch as the governmental arrangements made for Quebec by the Proclamation, were declared inapplicable to its state and circumstances, all its provisions, so far as related to that Province, were revoked, annulled and made void (Sec. 4 of 13, Geo. III., Cap. 83.) New machinery of Civil Government was provided, which, however, was not to interfere with the tenure of land, as by the laws of England or the King's Prerogative (Secs 4, 8, 9 and *Doe dem Jackson vs. Wilkes*: 4, O.S. 147.) The proclamation, no doubt, remained operative as a declaration of sound principles, which then and thereafter guided the Executive in disposing of Indian claims, but as indicating for this country the scope of the Indian Reservations, or the intent with which they have been created under Provincial rule, it must be regarded as obsolete. 20 30

If the Proclamation of 1763, and the Constitutional Act of 1867, were to be read as *pari materia*, and all the intervening years of progress, material, legislative and political, overlooked, then the 40,000 square miles claimed by Ontario, being part of what is covered by the North-West Angle Treaty, is an "Indian Reserve." But in order to emphasize this *reductio ad absurdum* aspect of the case, let what little is known of the people in this remote region be recalled: When the treaty was made, the land it deals with formed the traditional hunting and fishing ground of scattered bands of Ojibbeways—most of them presenting a more than usually degraded Indian type. They belonged to the Sauteaux (*i.e.* Fallsmen) tribe of the Ojibbeway branch of the great and wide spread Algonquin stock. Divided into thirty bands, they numbered all told, some 2,600 or 2,700 souls. These only remained as representatives of the primitive possessors of 55,000 square miles of territory, whose claim of occupancy thereon was extinguished by the Treaty. If the whole is to be accounted a reserve, this would represent an average of over 9,200 acres for each individual, as against 92 acres which was actually reserved by the Treaty, the difference being one thousand fold. If the whole is a reserve, then what was surrendered should be sold for the 40



benefit of the Indians, according to the well understood practice in Old Canada, but this was never contemplated. So far from this land being held as reserved for the Indians, the parliamentary, as well as the popular view in modern days, is well illustrated by the Consolidated Statutes, Upper Canada, Cap. 128, which relates to unorganized tracts of country, bordering on and adjacent to Lakes Superior and Huron, which belong to this Province, and they are thus denominated, though section 104 speaks of Indians and Half-breeds as frequenting and residing in the same. There is an essential difference in meaning between the "Reservation" spoken of in the Royal Proclamation and the like term in the British North America Act. The Proclamation views the Indians in their wild state, and leaves them there in undisturbed and unlimited possession of all their hunting ranges, whereas the Act, though giving jurisdiction to the Dominion over all Indians wild or settled, does not transfer to that government all public or waste lands of the Provinces on which they may be found at large. The territorial jurisdiction of the Dominion extends only to lands reserved for them.

Now it is evident from the history of the "Reserves," that the Indians *there* are regarded no longer as in a wild and primitive state, but as in a condition of transition from barbarism to civilization. The object of the system is to segregate the red from the white population, in order that the former may be trained up to a level with the latter. The key note of the whole movement was struck unmistakably in 1838, by Lord Glenelg, in his instructions to Sir George Arthur. He writes thus:—"The first step to the real improvement of the Indians is to gain them over from a wandering to a settled life, and for this purpose it is essential that they should have a sense of permanency in the locations assigned to them. That they should be attached to the soil by being taught to regard it as reserved for them and their children by the strongest securities." One distinctive feature of the system in Canada was the grouping of the separate tribes for the purposes of exclusive and permanent residence within circumscribed limits. These limits were almost invariably allocated at their usual centres of settlement, and within the orbit of their respective hunting ranges as recognized among themselves. Contrasted with this is the plan chiefly followed in the United States, where the main object has been to mass all the Indian nations and tribes in one vast district called the "Indian Territory," which comprises an area of about 70,000 square miles. But in Canada, the bounds of the separate reserves being ascertained by survey or otherwise, the various communities betake themselves thereto as their "local habitation." Here they are furnished with appliances and opportunities to make themselves independent of the precarious subsistence procured from the chase; they are encouraged to advance from a nomadic to an agricultural or pastoral life, and thus to acquire ideas of separate property and of the value of individual rights to which in their erratic tribal condition they are utter strangers, so that ultimately they may be led to settle down into the industrious and peaceful habits of a civilized people.

Again, the relations between the Government and the Indians change upon the establishment of reserves. While in the nomadic state they may or may not choose to treat with the Crown for the extinction of their primitive right of occupancy. If they refuse, the Government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so sooner or later to displace them. If, however, they elect to treat, they then become, in a special sense, wards of the State, are surrounded by its protection while under pupillage and have their rights assured in perpetuity to the usual land Reserve. In regard to this Reserve the tribe enjoy practically all the advantages and safeguards of private resident proprietors. *Bastern v. Hoffman*, 17 L. C. R. 238. Before the appropriation of Reserves, the Indians have no claim,

13. JUDGMENT OF THE CHANCELLOR OF ONTARIO. except upon the bounty and benevolence of the Crown; after the appropriation, they become invested with a legally recognized tenure of defined lands, in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement.

It is "lands reserved" in this sense, for the Indians which form the subject of legislation in the British North America Act, *i. e.*, lands upon which, or by means of the proceeds of which, after being surrendered for sale, the tribes are to be trained for civilization under the auspices of the Dominion. It follows that lands ungranted, upon which Indians are living at large in their primitive state, within any Province, form part of the public lands, and are held as before Confederation by that Province under various sections of the British North America Act. [See section 92 (item 5), also secs. 6 & 109 & 117]. Such a class of public lands are appropriately alluded to in sec. 109, as lands belonging to the Province in which the Indians have an interest, *i. e.*, their possessory interest. When this interest is dealt with as being extinguished and by way of compensation in part, Reserves were allocated, then the jurisdiction of the Dominion attaches to those Reserves. But the rest of the land in which "the Indian title," so called, has been extinguished, remains with its character unchanged, as the public property of the Province. 10

The Indian title was in this case, extinguished by the Dominion Treaty in 1873, during a dispute with the Province, as to the true western boundary of Ontario. It was proposed in 1872 on behalf of the Dominion, that both the governments should agree upon some provisional arrangement and boundary, in order that both might proceed with the granting of land and the issuing of licenses, in distinct parts of this disputed territory, pending the definite settlement of the true line. This arrangement was not carried out till 1874, at which time a provisional boundary line was adopted. The delay arose from the desire of the Dominion to effectuate this Treaty. The Minister of the Interior in his official report of June, 1874, states that as the Indian title to a considerable part of the territory in dispute, had not been extinguished in 1872, it was thought desirable to postpone the negotiations for a conventional arrangement, under which the territory might be opened for sale or settlement, until a Treaty was concluded with the Indians. The boundary dispute having been referred to arbitration, an award was made in favor of Ontario, in October, 1878, after which in December, 1879, the Provincial Government notified the other Government that the provisional arrangement was at an end. This appears to have been acceded to by the Dominion, in January, 1882, and both were then understood to be left to assert their respective rights, in reference to all questions involved. A declaration of right to this territory was made in March, 1882, by the Legislature of Ontario, and after this the defendants procured the license to cut timber, which is now the subject of litigation. It appears to me, that the diplomatic attitude of both Governments during this transaction, favors the view that both understood the British North America Act to mean that which I now decide it does mean, as to "Public lands," and "Reserves," and "Indian title." 30

So also the inter-state dealings, which took place upon and after the admission of British Columbia into the Confederation, cast a light upon the whole subject I have been discussing which is favourable to the conclusion at which I have otherwise arrived. 40

Provision is made in section 146 of the British North America Act for the reception of other colonies into the Canadian Union "subject to the provisions of that Act," and, based upon that, the negotiations I am about to mention proceeded.

British Columbia, when a Crown colony, pursued a policy more or less definite with reference to the comparatively settled Indian population there resident, the object of which was to distribute the Indians to a greater extent among the white inhabitants than was deemed desirable by the Government of Old Canada. That policy however involved the setting apart of tracts of land as Reserves for the use of most of the tribes, and these as an invariable rule embraced the village sites, settlements and cultivated lands of the Indians, and of late years it was considered that a reservation in the proportion of ten acres for each family (five being regarded as the family unit) to be held as the joint and common property of the several tribes for their exclusive use and benefit, was a sufficient provision by way of compensation for all their claims upon the rest of the Crown  
 10 Lands.

After this colony joined the Canadian Union, discontent arose among the Indians, and it was deemed necessary to devise a scheme for the readjustment of the system of Indian land reserves so as to conform as far as possible, to the customary policy and practice of the older Provinces which had been adopted by the Dominion. The 13th Article of the terms of Union of 1871, provided as follows: "The charge of the Indians and the trusteeships and management of the lands reserved for their use and benefit shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union. To carry out such policy tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose shall from time to time be conveyed by the Local Government to the Dominion Government,  
 20 "in trust for the use and benefit of the Indians, on application of the Dominion Government," and in case of disagreement respecting the quantity, the matter was to be referred to the Secretary of State for the Colonies. The policy and practice of Old Canada being to concentrate the Indians upon Reserves and to allot land for such purpose in the proportion of at least eighty acres, for each family of five, it was contended on the part of the Pacific Province that such a policy should not be extended to the granting of future reserves, and that the previously existing Reserves should not be disturbed. It was alleged that this policy of extensive land Reserves, however suitable to the plain and mountain Indians of the North-West, was not adapted to the wants and habits of the maritime Indians.

The Provincial and Dominion Governments at last agreed upon a scheme for the settlement of the matters in difference and for the adjustment of the Reserves upon these among other terms. Three commissioners were to be appointed, who, after enquiry on the spot, should fix and determine for each nation separately, the number, extent, and locality of the Reserve or Reserves to be allotted to it; no basis of acreage was to be fixed, but each nation should be dealt with separately. In the event of any material increase or decrease, thereafter, of the numbers of a nation occupying a Reserve, such Reserve was to be enlarged or diminished, as the case might be. "The extra land required for any Reserve shall be allotted from Crown Lands and any land taken off a Reserve shall revert to the Province." In a large part of the unsettled domain of British Columbia, as I gather from the blue books, the Indian title had not been extinguished. The last provision I  
 40 have above quoted, was inserted in consequence of the contention of the Dominion that the quantity of land proposed to be assigned by the local government was inadequate, even for the present necessities of the tribes, and, that when land matters were involved, the claims of the red men were entirely subordinated to those of the whites.

Several deductions may, I think, be fairly made from those transactions: (1). That the term "Reserves" had the same well defined scope and meaning in British Columbia as in the other members of the Union. (2.). That the lands from which the Reserves were to be set apart by the Province, on the application of the Dominion, were Crown or Public lands, though inhabited at large by Indians. (3). That when the purposes of the Reserve were satisfied by the diminution, or absorption, or disappearance of the Indians, the land freed from that trust was to revert from the Dominion to the Province and to be dealt with thereafter as ordinary Public lands. (4). Underlying the whole there is an affirmance of the constitutional propositions, that the claim of the Indians, by virtue of their original occupation, is not such as to give any title to the land itself, but only serves to commend them to the consideration and liberality of the government upon their displacement, that the surrender to the Crown by the Indians of any territory adds nothing in law to the strength of the title paramount, and that in the case of Reserves created after Confederation, when the purposes are ended for which the appropriation of the land was made, the title, legal and equitable, reverts from the Dominion, whose trusteeship has thus ceased, to the proper constitutional owner; *i. e.*, the Province wherein the lands are territorially situated. 10

As the Dominion claimed this territory at the time of the North West Angle Treaty, that treaty was concluded *ex parte* so far as Ontario is concerned. But, as in case of British Columbia, when the Province is the owner of the Public lands, and for the purposes of settlement, it is needful to extinguish the Indian title and allot Reserves, it may well require the co-operation of both the General and Local Governments in order properly to adjust the terms and details. 20

It would seem unreasonable that the Dominion Government should be burdened with large annual payments to the tribes without having a sufficiency of land to answer presently or prospectively the expenditure, and it would also seem unreasonable to allot Reserves in the absence of the Province, whose schemes for opening up the country might be prejudiced by the Reserves being unsuitably placed. However that may be in the present case, my judgment is that the extinction of title, procured by and for the Dominion, enures to the benefit of the Province as constitutional proprietor by title paramount, and that it is not possible to preserve that title or transfer it in such wise as to oust the vested right of the Province to this land as a part of the public domain of Ontario. Whatever equities—I used the word for want of a more suitable—may exist between the two governments, in regard to the consideration given and to be given to the tribes, that is a matter not agitated on this record. 30

I have thought it fitting, because of the magnitude of the interests at stake, and because of the earnest and elaborate arguments on both sides, to give at, perhaps, unnecessary length, the reasons which have induced me to decide as I do.

Judgment will be entered for the plaintiff, with costs, and in terms as prayed.

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## JUDGMENT AS ENTERED.

Before the Honorable the Chancellor, Wednesday the 10th day of June, A.D., 1885.

14. JUDGMENT  
OF CHANCERY  
DIVISION,  
ONTARIO.

This action coming on for trial on Monday, the 18th day of May, 1885, before the court at the special sittings holden at the City of Toronto, for the trial of actions in the Chancery Division in presence of Counsel for both parties, upon hearing read the pleadings and proceedings had and taken herein, the admissions of Counsel for plaintiff and defendants, and the evidence adduced by and on behalf of the plaintiff and defendants, and what was alleged by Counsel aforesaid, this Court was pleased to direct that this action should stand over for judgment, and the same coming on this day for judgment:

- 10 1. This Court doth declare that the defendants had no right in respect of the timber cut on the lands and premises in the Statement of Claim referred to, and this Court doth order the said timber so cut to be delivered up to Her Majesty's Commissioner of Crown Lands for the Province of Ontario, or to whom he may appoint, and doth order and adjudge the same accordingly.
2. This Court doth order and adjudge that said defendants, their servants, agents and workmen, be, and they are hereby restrained from trespassing upon the said lands and premises, and from cutting or removing any timber standing and growing thereon.
3. And this Court doth further order and adjudge that said defendants, their servants, workmen and agents, be, and they are hereby restrained from removing any timber already cut, from the said lands and premises, or in any way interfering with the plaintiff's rights in respect thereof.
- 20 4. This Court doth further order and adjudge that this action be referred to the Master in Ordinary of the Supreme Court of Judicature for Ontario, to take an account of the damages sustained by the plaintiff by the cutting or removal of timber by the defendants from off the lands referred to in the Statement of Claim.
5. And this Court doth further order and adjudge that the defendants do pay to Her Majesty's Treasurer for the Province of Ontario, forthwith after the Master has made his report, the amount of such damages so to be ascertained by the Master aforesaid.
6. And this Court doth further order and adjudge that the defendants do pay to Her Majesty's Attorney General for the Province of Ontario, his costs of this action forthwith after taxation thereof.

30

(Signed),      GEORGE S. HOLMESTED,  
*Registrar.*

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From this judgment the defendants appealed to the Court of Appeal for Ontario, and the appeal, having been argued at the sittings of that Court in December, 1885, was, on the 20th day of April, 1886, dismissed.

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15. MEMORAN-  
DUM OF PRO-  
CEEDINGS.

## In the Court of Appeal, Ontario.

### ORDER DISPENSING WITH PRINTING OF CERTAIN PAPERS IN APPEAL BOOK.

IN CHAMBERS,  
Mr. Justice Osler, }

Saturday, the 31st day of October, 1885.

16. ORDER  
DISPENSING  
WITH PRINT-  
ING IN COURT  
OF APPEAL,  
ONTARIO.

Upon the application of the Appellants, upon hearing Counsel for the Appellants and the Respondent, and Counsel aforesaid consenting hereto :

1. I do order that the printing be dispensed with of such portions of the material and evidence used or referred to before the Chancellor at the trial of this action, as appears already printed in any of the Sessional Papers of the old Province of Canada or of the Dominion of Canada, or of any of the Provinces thereof, and treaties, opinions and other material and documents appearing in any printed book or in the case submitted to Her Majesty's Privy Council in the matter of the boundary between the Provinces of Ontario and Manitoba in the Dominion of Canada, and that the same may be treated and referred to on the argument, as part of the Appeal Case. 10

2. And I do further order that the costs of this application be costs in the cause to both parties.

(Signed,) F. OSLER.

J. A.

### REASONS OF APPEAL.

17. REASONS  
OF APPEAL.

The Appellants submit that the judgment pronounced herein is erroneous and ought to be set aside for the following amongst other reasons :— 20

1. The question in dispute depends upon the proper construction to be given to the sections of the "British North America Act" which deal with the distribution of Legislative Powers and of the assets of the old Provinces between the Dominion and the Provinces, viz.: Ss. 91, 92 and 109.

2. At the time of Confederation, that is, of the passage of the Act in the last Reason referred to, the Province of Canada—containing both Upper and Lower Canada, now Ontario and Quebec—had the exclusive jurisdiction, both territorial and legislative, over the Indian Lands as well as over all the other lands and property in the Province, subject, however, as to its dealings with the Indians and the Indian lands, to the well established principles upon which the Crown had, from the time of the Cession, been accustomed to treat and deal with the Indians, and as to the manner of acquiring their title to their lands. 30

3. The principles upon which the Crown had dealt with the Indians, as is well said in the judgment of the learned Chancellor, is to be found in the Royal Proclamation of 1763, which is regarded by the Indians as "the Charter of their rights," and "has always been scrupulously observed in all transactions with them."

4. It may be assumed as beyond the region of controversy that the Indians had a title of some kind to their unsurrendered lands. Technically the title may have been in the Crown, as indeed

might be affirmed of all lands in the British Dominions; but the Indians had, as indeed the learned Chancellor holds, the absolute right to the usufruct in the lands and their title to the timber thereon, for example, if cut in trespass, has been recognized in the Courts. They were denied the right of alienation, or rather, all white subjects were prohibited from acquiring or dealing with Indians in the acquisition of their lands. The limitation was strictly on the right of the white subject to buy, and not in restraint of the Indians' right to sell.

*Little et al. v. Keating*, 6 U. C. Q. B., O. S., page 265.

*Vanvleck et al. v. Stewart et al.*, 19 U. C. Q. B., 489.

5. Historically, it appears that all that is now Ontario, with the exception of the tract  
10 surrendered by Treaty No. 3, has been from time to time acquired from the Indians by Treaty with the particular tribe who inhabited the particular tract surrendered by each Treaty. Although within the territorial limits, subject to its civil and criminal laws, the Indian lands were treated as belonging to and being the property of the Indians, by a title, differing, it is true, from that by which the granted or patented lands were held, but still always recognized.

6. It is true, also, that in all or most of these Treaties portions of the lands hitherto held and enjoyed by the Indians were reserved by them, while the remaining and the greater part of the tract was surrendered to the Crown. The parts retained, however, were held by the Indians as of their former estate and by their original title, not by grant or a new title from the Crown, and their title to their reservations is technically, and, strictly speaking, no better than it was before  
20 the Treaty, although it may be admitted that their beneficial estate therein has been more definitely provided for.

7. The tracts surrendered by the Indians were ceded for good and valuable consideration—paid or payable by the Crown. It seems impossible to say, regard being had to these various considerations, that the Crown has not at all times recognized that the Indians, the original possessors of the lands of the continent, had not a title thereto of some description.

8. There remains the further fact to be stated that at the time of the passage of the Confederation Act all the territory, which is now declared by the judgment of the Privy Council in the Boundary dispute to be within the limits of the Province of Ontario, had been ceded and surrendered by the Indians, with the exception of the tract which was afterwards surrendered by the  
30 Crown, as represented by the Dominion of Canada by Treaty No. 3.

9. It may possibly be, and very probably is, the fact that the framers of the British North America Act, so far as Upper Canada is concerned, were under the impression that the territory ceded by Treaty No. 3 was not within the limits of the Provinces, and as apart from it there were no unsurrendered Indian lands within the Province, the Act was drawn without provision being expressly made for the condition of affairs that now presents itself, owing to the limits of Ontario being defined as embracing this particular tract. Nevertheless, the Act must be construed with reference to the existing state of affairs as subsequently ascertained by the decision of the Judicial Committee in the Boundary matter.

10. On the passage of the British North America Act, and up to the time of the making of  
40 Treaty No. 3, it is quite plain, that to the tract of land embraced by the provisions of the Treaty and the Indians dwelling upon it and claiming it as theirs, the Provincial Legislatures had not, nor had the Lieutenant-Governor of the Provinces, any legislative or executive authority. The Legislative authority vested in and belonged to the Parliament of Canada as regards the Indians

and their territory. Sub-sec. 24, of sec. 91, British North America Act and the absence of any Legislative power in the Province under sec. 92.

11. Further, it is not denied that the Governor-General could alone represent the Crown in treating with the Indians—could alone accept a surrender from them of their lands.

12. It can hardly, therefore, be contended with reason that while the Province could not legislate respecting the territory in question, nor with regard to the Indians, nor accept a surrender, or deal with the Indians, that, nevertheless, the land “belonged to the Province,” and was part of the assets of the old Province of Canada, which, in the distribution thereof, fell to the Province—and regard being had to the scheme of the British North America Act in assigning exclusive legislative power to the Dominion or Province, as the case may be, over the property assigned to them respectively—this affords strong ground for the contention that these Indian lands or reserves, or by whatever name called, did not pass to the Province. 10

13. The proper interpretation, therefore, of the Act is to read sub. sec. 24, or article 24 of section 91, as conferring the jurisdiction over this tract, on the Parliament of Canada, in the words used as “lands reserved for the Indians.”

14. If this article did not confer the power, then it is not to be found as given or conferred upon the Legislative Assembly, and as a consequence, not being embraced within the provisions of section 92, it must according to numerous decisions be in the Dominion.

*Attorney Gen., v. Mercer*, 8 App. Cases 767 & 5, S. C. R. 538.

*The Citizens' Insurance Co. of Canada, v. The Queen Insurance Co.*, 7 App. Cases 96 & 4, S. C. R., 215. 20

*Valin v. Langlois*, 5 App. Cases 115 & 3, S. C. R. 1.

*Regina v. O'Rourke*, 32, C. P. 388.

*City of Fredericton v. The Queen*, 3 S. C. R., 505.

*Russell v. The Queen*, 7. App. Cases 829.

*Hodge v. The Queen*, 9 App. Cases 117.

15. It is further contended, that at the time of Confederation the tract of Indian land, or Indian reserve, or land reserved for the Indians, was not “land belonging” to the Province of Canada, and consequently, did not pass to the Province of Ontario. Section 109 being in the viii. part of the Act which deals with “Revenues, Debts, Assets and Taxation,” was a conveyancing 30 clause, granting and assigning an asset to the Province, applicable to lands known as Crown or Public Lands, or Clergy Reserve Lands, but not to private property, nor, it is submitted, to lands in which the Crown had no beneficial estate, and only a mere right to accept a surrender when the Indian possessor thought fit to cede, and without the power to treat for the cession.

16. Either, therefore, the Indian lands must be included within the meaning of the words “lands reserved for the Indians,” which is the proper construction as it is submitted, or (2) no provision is to be found respecting them, and the matter is left unprovided for. In either view the land would not belong to the Province.

17. If, at the time of the passage of the British North America Act, the tract of land in question was not the property of the Province of old Canada, then it did not pass to the Province 40 of Ontario, nor would it afterward become the property of Ontario upon being acquired by the Dominion, by the surrender of it by the Indian tribe who ceded it by Treaty No. 3.



18. It cannot be that the Dominion, who only could treat with the Indians for the surrender, through whose authority alone the land could be ceded to Her Majesty, who had in acquiring it to make large compensation, can be held to have no estate, title, or interest in the acquisition, and the learned Chancellor erred in holding that the "extinction of title," that is the acquisition of the beneficial ownership "enured to the Province as constitutional proprietor by title paramount." 17. REASONS  
OF APPEAL.

19. In any event the Governor-General, as representing the Crown, would hold the possessory title acquired by the cession for the purpose of securing to the Dominion the compensation paid therefor, and would have the right to dispose thereof, or a sufficient portion thereof, to reimburse the outlay, and the Province without submitting and offering to pay this compensation, could not in equity be allowed to interfere with such disposition of the property by the Governor-General upon a mere allegation that he was disposing of the timber thereon.

20. Too much stress has been laid by the learned Chancellor upon the interpretation in the several Acts relating to the Indians placed upon the word "reserve." These interpretations were for the limited purpose of expressing the meaning the word was to have in these Acts and in them alone, and even in these Acts the words used in the British North America Act "lands reserved for the Indians" are not to be found.

21. The Appellants' right to cut the timber is conferred by a permit from the duly authorized officer of the Government of the Dominion of Canada, and they were, by virtue of such permit, legally licensed to enter upon the said lands and cut thereon the timber in question. It is not contended by the Respondent, but may be taken to be admitted, that the Appellants are entitled to do what is complained of, if the Government of Canada has the right to deal as they have done with this timber.

22. Even if the said lands do not belong absolutely to the Dominion, yet the Government of the Dominion has the right to deal with the timber thereon for the benefit of the Indians, to the extent at least of the moneys paid for the acquisition of the land, and still being paid to the Indians.

23. It cannot be contended that the Government of Ontario could negotiate or conclude a Treaty with these Indians for the acquisition of the lands in question. Such Treaty could be negotiated and concluded only by the Government of Canada, and the latter body has never handed over the said lands to the Government of Ontario, or parted with the possession thereof, but has retained possession thereof, and has continued to administer the same, subject to the rights of Ontario as to the government of the locality within the powers conferred upon the Provincial Legislature and Government by the British North America Act.

24. The Appellants will refer to the following authorities in addition to those already cited and referred to in the judgment.

The King *v.* Phelps, Taylor, U. C. K. B., Rep. 47.

Bown *v.* West, 1 U. C. O. S., 639 and 641, U. C. Jurist pages 287 and 289, and 1 E. & A. 117.

Jones *v.* Bain, 12 U. C. Q. B. 550.

Regina *v.* Baby, 12 U. C. Q. B. 346.

Fegan *v.* McLean, 29 U. C. Q. B. 202.

Regina *v.* Strong, 1 Chy. 392.

Church *v.* Fenton, 5 S. C. R. 239, 4 App. R. 159.

Totten *v.* Watson, 15 U. C. R. 395.

17. REASONS  
OF APPEAL.

Johnston *v.* McIntosh, 8 Wheaton's R. 543, 5 Constitutional R. 575.  
 Fletcher *v.* Peck, 6 Cranch 81.  
 The Cherokee Nation *v.* The State of Georgia, 5 Peters 1.  
 The United States *v.* Clarke, 9 Peters 168.  
 Clarke *v.* Smith, 13 Peters 195.  
 The United States *v.* Rogers, Hempsted 450.  
 Fellows *v.* Lee, 5 Den. (N. Y.) 628.  
 Strong *v.* Waterman, 11 Paige (N. Y.) 607.  
 Turner *v.* American Baptist Missions Union, 5 McLean 344.  
 Maiden *v.* Ingersoll, 6 McLean 374.  
 Godfrey *v.* Beardsley, 2 McLean 412.  
 Winter *v.* Shirley, 45 Mississippi.  
 Worcester *v.* State of Georgia, 6 Peters 515.  
 Gaines *v.* Nicholson, 9 Howard 356.  
 The Treaty of Paris, 1763.  
 Royal Proclamation establishing Quebec and other Provinces.

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D'ALTON McCARTHY.

## REASONS AGAINST APPEAL.

18. REASONS  
AGAINST  
APPEAL.

1. The Respondent submits that the judgment of the learned Chancellor should be affirmed and the claims of the Province of Ontario upheld for the reasons given in his judgment. 20
2. The Respondent further submits that the paramount title to the land upon which the trespass was committed was in the Crown, and not in the Indians, before the Federal union of the Provinces under the British North America Act, 1867, and by the provisions of that Act was vested in the Province of Ontario.  
 See Acts of the Crown in granting patents without surrender of Indian claim;  
 Colonial Records of Connecticut, 1717, p. 13.  
 Decision of Court upon Elizabeth Bill, Doug. Summary p. 275.
3. Section 108 of the British North America Act, 1867, provides that the public works and property of each Province enumerated in the third schedule to the Act shall be the property of Canada; and lands, the so-called Indian title in which had not been extinguished are not included in the schedule. 30
4. By sec. 91, sub-sec. 24, it is provided that the Parliament of Canada shall have control of "Indians and lands reserved for Indians." The Respondent contends that the "lands reserved for Indians" do not mean or include lands acquired for the Crown by discovery, occupation, conquest or cession, and as to which no treaty had been made with the Indians for the extinguishment of their claim; and that the reference is to such Crown lands only as in the various Provinces had from time to time been specially set apart by treaty or compact with Indians, or by Provincial Statute or Act of State, for the use of the band with which the treaty or compact had been made, or which had been named in the Provincial Statute or Act of State. Such lands were known in the respective Provinces (including Canada) as "lands reserved for the Indians," or "Indian Reserves," or "Indian Reservations," and were designated as such or in like terms in the Statutes 40

and public documents of the respective Provinces. At the time of the passing of the British North America Act there were lands in each of the Provinces (including Upper and Lower Canada) which had been in this sense "reserved for the Indians," and there were other lands in every Province to which the so-called Indian title had never been extinguished.

5. By section 92, sub-sec. 5 of the British North America Act, 1867, the lands belonging to the Province, and the timber and wood thereon, are placed under the exclusive management and control of the Provincial Legislature; and the Respondent contends that the lands so placed under the control of the Provincial Legislature include the unreserved lands in which the so-called Indian title had not been extinguished, as well as lands to which the Indians had surrendered their claim and which are admittedly the property of the Province.

6. By section 109 of the British North America Act, 1867, it is provided that all the lands, mines, minerals and royalties belonging to the several Provinces in which the same are situate or arise, subject to any trust existing in respect thereof, and subject to any other interest in the same, shall become the property of the Province. The Respondent claims that by the terms of this section the Province of Ontario acquired an absolute property in the lands in question.

7. By section 117 of the said British North America Act the several Provinces are to retain their respective public properties subject to the right of Canada to take such lands as may be required for fortifications or for the defence of the country. The express grant for this purpose negatives any right in the Federal authorities to take lands of the Provinces by expropriation for the purposes of establishing Indian Reserves.

8. If the Indians had any legal or equitable right to or in these lands, such right was at most only a right of personal occupation during the pleasure of the Crown, by the band of Indians occupying the same as hunting grounds or otherwise, and was not transferable. In that view the lands belong to the Province, subject and subject only, to this right of personal occupation, and the so-called surrender by Treaty No. 3 (regarding it as having extinguished the so-called Indian claim), did not and could not transfer the lands or any interest therein to the Dominion. Again, if the Indians had any property legal or equitable in such lands, their claim was subject at the least to a right of pre-emption in the Crown; and the title of the Crown thereto, including this right of pre-emption, went to the Province subject to the untransferable Indian claim to personal occupation during pleasure; and could not be and was not diverted by the Treaty to the Dominion.

9. The Crown never recognized the Indians as owners of the soil in any of the American Colonies, but, on the contrary, by letters patent under the Great Seal, granted the greater portion of the land in North America without any steps having previously been taken to secure the extinguishment of any claims of the Indians:

Johnson *v.* McIntosh, 8 Wheat, p. 574.

Fletcher *v.* Peck, 6 Cranch, p. 87.

Pennsylvanian Records, 1755, pp. 273-279.

Young's Chronicles of Plymouth, p. 259.

Meigs *v.* McClung, 9, Cranch, p. 11.

Journals of the House of Commons, Canada, 1871, p. 184.

10. The uniform practice on the American continent, down to a late period, was for the Crown to grant the lands in free and common socage to such of its subjects as choose to become

purchasers, leaving the grantees to deal with the Indians found within the limits of their grants, as such grantees thought best.

Early History of Pennsylvania ;  
Young's Chronicles of Plymouth ;  
Palfrey's History of New England ;  
Brodhead's History of New York, etc.

11. At the time of the discovery and during the settlement of North America, it was the law not only of England but of Europe, that heathen and barbarous nations were perpetual enemies of Christian States, and that any country inhabited by them became the property of the first Christian prince or people who made discovery and took possession of the country. 10

Calvin's Case, 7 Rep.  
Butts v. Penny, 2 Lev. p. 201.  
Gilly v. Cleve, 1 Ld. Raymond p. 147.  
Ld. Stowell, 2 Hogg, Ad. Rep. p. 105.  
Vattel's Law of Nations, Book I. c. 7, sec. 81 ; c. 18, secs. 207-9.

12. Discovery gave but an imperfect right of sovereignty, which was lost if not followed within a reasonable time by occupation ; and the sovereignty of the Crown in North America rested mainly upon settlement. When charters for settlement were granted they conveyed the lands, discovered or to be discovered, to the grantees, if it was not already possessed by some other Christian prince, or people, but no exception was ever made in favor of the aboriginal 20 inhabitants.

*Vide.* Grant to John Cabot, 1496.  
Grant to Sir H. Gilbert, 1578.  
Grant to Sir W. Raleigh, 1584.  
Virginia Charters, 1606, 1609, 1611-12.  
Plymouth Charter, 1620.  
Massachusetts, 1629.  
Hudson Bay Co.'s Charter, 1670.  
Vattel's Law of Nations, *supra*.

13. This was the practice of all the maritime States of Europe at the time colonies were being 30 established in North and South America.

Pope Alexander VI., Bull in favor of Spain, 1493.  
Grant by James VI., Scotland, 1621, of Nova Scotia to Sir William Alexander.  
Robertson's History of America.  
Prescott's Conquest of Peru, vol. 2. p. 164  
Sir James MacIntosh's Dissertations on Ethical Philosophy, sec. 3.  
Stith's History of Virginia.  
Proud's History of Pennsylvania.  
Memorials of the English and French Commissaries as to the boundaries of Acadia, 1751. 40

14. The practice of purchasing the so-called Indian title did not originate in the want, or supposed want, of a sufficient title in the Crown, but was because of the scruples of Puritan and Quaker settlers, who thought, on grounds of natural right, that the Indians had a better claim

than the Sovereign, and advised payment as a matter of conscience; and because in the case of others the same course was urged on grounds of prudence, to secure peace and friendship, and thus to facilitate settlement.

- Young's Chronicles of Plymouth, p. 259, note.  
 Hutchinson's Hist. Col. Mass., vol. 2, p. 226.  
 Haz. State Papers, vol. 1, p. 263.  
 Hubbard's Indian War, p. 3.  
 Green's History of Rhode Island, p. 13.  
 Buckley's Enquiry into the right of the Aborigines, Mass. Hist. Soc. Col. 1st Ser., vol. 4. 159.  
 Magnalia Christi Americana, vol. 1, p. 72.  
 Chalmers's Annals, book I., c. 22, pp. 676, 677.  
 Trumbull's History Conn., p. 279, note p. 304.  
 Opinion of Counsel as to nature of Indian Title, N.Y. Hist. Doc. vol. 13, p. 486.  
 Douglass' Summary, vol. II., pp. 275-280.

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15. Different tribes were from time to time dealt with for the surrender of the same territory, and the same tribe surrendered the same lands several times. The Crown of England, or the Colonies, dealt with the tribes more than once, for the same reason that they were dealt with at first, to secure peace, and to secure their support against French aggression.

- Colden's History of the Six Nations.  
 Albach's Annals.  
 Proud's History of Pennsylvania.  
 Bancroft's History U. S., vol. 2.  
 Plain Facts, pp. 65-104.  
 Parkman's Pontiac War, vol. I.

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16. The whole of the Province of Ontario south of Lake Huron and the Ottawa River was surrendered to the English by the Iroquois after the destruction or dispersion of the Huron and the Neutral nations who lived in it, and was again surrendered to the English by the Wyandots, the Chippewas, the Ottawas, the Pottewattamies, and other tribes who had subsequently found their way into the country.

- Albach's Annals of the West.  
 Clarke's History of the Wyandots.  
 Treaties at Ottawa in the Indian Department.

17. Down to the middle of the last century, the Indian population in the Colonies were in a condition analagous to that of *villains regardant*, where the Crown had conveyed away the lands over which they roamed in search of subsistence; the Crown reserved to them nothing, but left them to be dealt with by its grantees, as the grantees might think proper.

- Numerous sources of evidence.  
 Charters.  
 New Haven Col. Rec., 1639, p. 27.  
 Connecticut Col. Rec., 1680, pp. 57, 57.  
 N. Y. Hist. Doc., vol. I., pp. 56-58, etc.

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18. The law and usage in relation to the so-called Indian Title are to be gathered from the Colonial Records and from the history of the Colonies, extending over a long period of time, and

not from the King's Proclamation of 1763, which was special and temporary, and was expressly annulled soon afterwards by the Quebec Act. That Proclamation was intended to meet an emergency originating in political considerations, and not to confer rights of property in the Aboriginal inhabitants. The Proclamation is to be read in connection with the Colonial History from 1750 to 1763.

19. The respondent denies that the lands acquired by the Crown by discovery, or cession, &c., have ever been admitted by the Crown, or held by the Courts to be the property of the Indians. Nor has the so-called Indian Title ever been allowed to prevail over a grant from the Crown, and still less can it prevail against a transfer made by Act of the Imperial Parliament.

Douglass' Summary, Vol. 2, p. 275-80.

Colonial Records, New Haven, 1639.

Colonial Records, Connecticut, 1671, 1680, 1717, 1722.

Colonial Records, New Hampshire, Vol. 2, p. 17.

Colonial Records, Pennsylvania, 1754, pp. 147-157 ; 1755, pp. 273-279.

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20. The Provincial Title to the lands in dispute is not merely a tenure in the Province, but an ownership of the land itself. The jurisdiction of the Dominion Parliament over the Indians can not and does not give to the Federal Government a right to enter into treaty with them creating against one of the Provinces a liability. Such a liability might be fixed at a sum in excess of the value of the lands. Such a course would make not the Indians only but the Province also, wards of the Federal Government.

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21. The extent of the Crown's interest in the public domain was the same in all the Provinces : and in Nova Scotia, New Brunswick, Prince Edward Island, Quebec and the greater part of British Columbia, the so-called Indian title has never been extinguished, and the lands have been dealt with without such extinguishment, no right even of occupancy being recognized. The fact of Upper Canada having, before the Union, pursued a more generous policy towards the Indians than was adopted in the other Provinces, cannot and does not give to the Government of the Dominion a greater control over the lands of Ontario than it has over the lands in the other Provinces of the Dominion.

22. The Respondent denies that the lands called Indian Reserves are held by the Indians in virtue of their original right. The Indians are in occupation of these Reserves by compact with the Crown and in virtue of such compact, under laws made by Parliament, or under regulations made by its authority.

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23. The Respondent denies that at the time the British North America Act was passed it was supposed that Ontario did not extend north and west of the lands which had been dealt with by the Robinson Treaty. On the contrary, the Government of the Province of Canada, from an early period and up to the Union, laid claim publicly and otherwise to the whole country northward and westward ; and, after the Union, the Dominion Government insisted on the same claim on behalf of this Province, until after effecting a compromise with the Hudson Bay Company in 1870.

24. Some time after that compromise the Dominion Government set up for the first time the claim that certain territory, including the territory referred to in Treaty No. 3, was not within this Province ; but even then, and for twelve years afterwards, it was admitted or assumed by the successive Governments of the Dominion, though the so-called Indian title to these lands had not been extinguished at the time of the passing of the British North America Act, that the ownership of the lands depended upon the simple question whether they were situate within the limits

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of the Province or not. Treaty No. 3, was made in the year 1873, and until 1882 the Dominion authorities did not pretend to claim these lands, under this treaty or otherwise, unless they were outside the Province.

See Report of Sir John Macdonald, Premier of Canada, dated 1st May, 1872.

Order in Council 16th May, 1872.

Despatch of same date to Lieutenant-Governor of Ontario.

Report of Privy Council approved by His Excellency 7th November, 1872.

Report of Minister of Interior 7th June, 1874.

Order in Council thereon.

10 Provisional Agreement, 20th June, 1874.

Extension thereof under Report by Minister of Interior, 24th April, 1878.

Orders in Council of the two Governments concurring therein; House of Commons Debates, 1881, pp. 1450, 1456.

Debates in House of Commons on the Act for extending the Province of Manitoba.

Resolution of House of Commons, 4th April, 1882.

Despatch to Lieutenant-Governor, September 2nd, 1882, etc., etc.

25. The Respondent denies that the so-called Indian title to the lands now in question could only be extinguished by the Crown as represented by His Excellency the Governor-General. On the contrary, the Respondent insists that no one, without the sanction of the Provincial authorities, had a right to deal with the Indians so as to make a charge upon any such lands, or upon the Province. The history of the old proprietary colonies shows that when the Sovereign parted with the fee before the so-called Indian title had been extinguished, the owner of the fee, and not the Sovereign, was the proper party to deal with the Indians for the peaceable enjoyment of his own lands. If the Government of Canada, with view to carrying forward a great public work, found it necessary or expedient to conciliate the Indian population and to deal with them for the extinguishment of their claim to any portions of the country, such payment is a part of the cost of the enterprise, and not a liability of the Province.

26. The recognition of any right of occupancy in the Indians has always been on the part of the Crown or its assigns a matter of discretion, and (after the establishment of the practice of making the Indians wards of the Government) a matter of public policy, determined by political considerations, and has not been a recognition of property in the soil capable of being transferred.

27. The Sovereign granted a large part of the possessions of the Crown in North America in free and common socage, without having obtained any extinguishment of the so-called Indian title, and the Indian occupation has never been regarded as any cloud upon the grants so made. The Respondent submits that the transfer of the Sovereign's interest to the Province does not give to the Indian tribes a better claim against the Province than they before had against the Sovereign, nor can a uniform public policy on the part of the Government in any Province limit its authority in the matter, or enlarge the interest of the aboriginal inhabitants.

28. The title set up by the appellants, under Treaty No. 3, is not warranted by the terms of the Treaty itself. The annuities and other allowances to the Indians are expressly designated as mere acts of "bounty and benevolence," and not payments for the conveyance of the lands, or of a recognized legal interest therein.

WALTER CASSELS.

DAVID MILLS.

## JUDGMENTS IN THE COURT OF APPEAL.

## JUDGMENT OF HAGARTY, C. J. O.

19. JUDG-  
MENTS IN  
COURT OF  
APPEAL,  
ONTARIO.

JUDGMENT OF  
HAGARTY,  
C. J. O.

For a clear understanding of the case before us we are very much indebted to the learned Chancellor for the very clear, full and well arranged statement with which he prefaces his judgment. The field to be travelled over is necessarily very extensive. He has mapped it out with so much care and perspicacity as to very much reduce the labors of subsequent investigators. We may fully accept his historical treatment of the subject from the earliest period down to the Confederation Act of 1867. The review of the authorities as to the true nature and extent of the alleged "Indian Title" may well warrant our full acceptance of the conclusion at which the learned Chancellor has arrived on this important branch of the case. We have then to consider the effect 10 of the Confederation Act, and to glance at the existing position of the vast territories then moulded into a new constitutional form by Imperial Legislation.

The north-western boundary of the Province of Ontario had not then been clearly ascertained and it was not known whether the tract of country, which we may call the North West Angle, was or was not within Ontario. The Indian tribes were sparsely scattered over that region, and the rest of the northern continent to the Rocky Mountains. No surrender of Indian rights had been made, and according to the settled practice of the United Provinces of Canada—evidenced and sanctioned by repeated statutes, no attempt appears to have been made to grant titles or encourage settlement so long as the Indian claim was unextinguished.

We must except from this general statement any grants or titles from or under the Hudson's 20 Bay Company.

The Confederation Act declares (sec. 6) that the part of Canada which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario.

Sec. 91. The Dominion Parliament may make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislature of the Provinces, and the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects thereafter enumerated. No. 24 of these reads—"Indians and Lands reserved for the Indians."

Sec. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects thereafter enumerated. No. 5—"The management and 30 sale of the Public Lands belonging to the Province and of the timber and wood thereon." No. 13. Property and civil rights in the Provinces.

Sec. 109. All lands, mines, minerals and royalties belonging to the several Provinces . . . at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several Provinces of . . . in which the same are situate or arise, subject to any trust existing in respect thereof, and to any interest other than that of the Province in the same.

Sec. 117. The several Provinces shall retain all their respective public property not otherwise disposed of by this Act, subject to the right of Canada to assume any lands and public property for fortifications or the defence of the country.

Schedules are attached to the Act as to Provincial Public Works and property to be the 40 property of Canada, such as canals, harbors, and including (No. 9) property transferred by the



Imperial Government and known as Ordnance Property. No. 10. Armories, drill sheds, etc., etc., and lands set apart for general public purposes." Another schedule specifies certain assets and properties which are to belong to Quebec and Ontario jointly.

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Reference is made to these schedules to show the particularity with which the disposition of property was dealt with and the improbability of any rights to extensive properties being omitted.

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In considering the effect to be given to the claim of Ontario to these lands unsurrendered at Confederation to be part of the public domain, it may be well to refer to certain references in our statutes. In 1839 an Upper Canada Act, 2 Vict. ch. 15, was passed as to trespassing on lands of the Crown, and allowing proceedings against persons illegally possessing themselves of any of the ungranted lands or lands appropriated for residence of Indians, and to lands for the cession of which to Her Majesty no agreement had been made with the tribes occupying the same and who may claim title thereto.

12 Vict. ch. 9, Canada 1849, declaring as to the foregoing Act, that it was to extend to all lands in that part of this Province called Upper Canada, whether surveyed or unsurveyed, etc., and whether such lands be part of those usually known as Crown Reserves, Clergy Reserves, School Lands, or Indian Lands, etc., whether held in trust for the use of the Indians or of any other parties, etc., and it expressly repeals any limitation in the first section of the Act of 1839.

1860—23 Vict. ch. 2, sec. 28—"The term 'Public Lands' shall be held to apply to lands here-  
before designated or known as Crown Lands, School Lands, Clergy Lands, Ordnance Lands (trans-  
ferred to the Province) which designation for the purposes of administration shall still continue."

Sec. 9 allows the Governor-General to declare the provisions of the Act, or any of them, to apply to "the Indian Lands under the management of the Chief Superintendent of Indian Affairs," and the Chief Superintendent shall, in respect to said Indian Lands, have the same power as the Commissioner of Crown Lands has in respect to Crown Lands. In former Acts, such as Consolidated Canada, ch. 23, sec. 7, as to trespassers, the expression is "Crown, Clergy, School or other Public Lands." In a Public Land Act of 1849, 12 Vict. ch. 31, sec. 2, as to the effect of a receipt for purchase money from the Commissioner of Crown Lands it is enacted that it shall extend to "Sales of Clergy Reserves, Crown Reserves, School Lands and generally to sales of all lands of  
what nature, kind or description soever of which the legal estate is or shall be in the Crown, and  
the sale thereof is or shall be made by any Department of the Government or any officer thereof,  
for or on behalf of Her Majesty, whether such land be held by Her Majesty for the public uses of  
the Province, or in the nature of a trust for some charitable or other public purpose." These latter  
words are omitted in the next Land Act, 16 Vict. In the session of 1860 was passed 23 Vict. ch.  
151, Reserved Act—It declared that the Commissioner of Crown Lands should be Chief Superin-  
tendent of Indian Affairs.

Sec. 2. All lands for Indians or for any tribe or band of Indians, or held in trust for their benefit, should be deemed to be reserved for same purposes as before the Act, but subject to its provisions.

Sec. 3. All moneys or securities applicable to the support or benefit of the Indians, etc., 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 or dealt with before this Act.

Sec. 4 declared that no release or surrender of lands reserved for the use of Indians, etc., shall be valid except assented to by the Chiefs (as directed) at a meeting in presence of an officer,

duly authorized to attend by the Commissioner of Crown Lands, to be duly certified and returned to the Commissioner of Crown Lands.

Sec. 6. Nothing in the Act is to make valid any release or surrender other than to the Crown.

Sec. 7 allows the Governor-General to declare the provisions of 23 Vict. ch. 2, or ch. 23 Consol. of Canada, as to sale and management of timber on public lands, to apply to Indian Lands or to the timber on Indian Lands.

Sec. 8. He may also direct how, and in what manner, and by whom the money from sales of Indian Lands and from the property held or to be held in trust for the Indians, shall be invested, etc., and for the general management of such lands and moneys and to set apart therefrom for the construction or repairs of roads passing through such lands, and by way of contri- 10  
bution to schools frequented by such Indians.

We may refer to these Acts as shewing the state of the law at Confederation.

Much has been changed by Dominion Legislation since that period.

The subsequent Dominion Legislation may be referred to as indicative of the views of the framers of the Statutes.

In 1868, the 31 Vict. ch. 42, substitutes the Secretary of State as Superintendent General of Indian Affairs, and the learned Chancellor points out the language in which "lands reserved for Indians or held in trust for their benefit, shall be deemed to be reserved and held for the same purpose as before this Act, and no such lands shall be sold, alienated, or leased until they have been released or surrendered to the Crown." 20

The Act of 1870, 33 Vict. ch. 3, establishing the Province of Manitoba was passed before any treaty was effected with the Indians for that portion of the North West. It provides that after the transfer by the Queen's Proclamation of Rupert's Land, and the North West Territory to Canada (which was dated 23rd June, 1870,) the new Province shall be formed.

Sec. 30 declares that all ungranted or waste lands in the Province shall be vested in the Crown and administered by the Government of Canada, etc.

Sec. 31 declares that towards the extinguishment of the Indian title to lands in the Province, the Lieut.-Governor might select lots or tracts to the extent of 1,400,000 acres for the half-breed residents.

Sec. 32. And that all grants by the Hudson's Bay Company in freehold should be confirmed, 30  
and all persons in peaceable possession of tracts of lands at time of the transfer in those parts of the Province in which the Indian title had not been extinguished, should have the right of pre-emption thereto, etc.

By the terms of the arrangement with the Hudson's Bay Companies large quantities of land had been declared by the Imperial and Dominion authorities to be the Company's property absolutely. I refer to this statute and to these arrangements as a noteworthy commentary on some of the arguments addressed to us as to the extent of the alleged "Indian Title" to all unsurrendered lands. The treaties with the Indians affecting this part of the North West were in 1871. But the act passed prior to the treaty specifically appropriates large tracts of land.

The Chancellor properly refers to the Dominion Act of 1876, as to the definition of 40  
"Reserve" declared by sub. 6, sec. 3, to mean any tracts of land set apart by treaty or otherwise for the use or benefit of, or granted to a particular band of Indians of which the legal title is in the Crown but which is unsurrendered."

Sub.-sec. 8. The term "Indian Lands" means any reserve or portion of a reserve which has been surrendered to the Crown.

These definitions are repeated in 1880, 43 Vict. ch. 38.

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I think the Chancellor has placed the right interpretation on the words in the British North America Act. "Indians and Lands reserved for the Indians." They cannot, in my judgment, be held to embrace the enormous territories then lying beyond the settled or surveyed lands of Ontario. I adopt the language of the judgment appealed from on this head, and consider that the whole course of Canadian legislation, both before and after Confederation, has stamped a definite meaning on the words "Indian Reserves" or "lands reserved for Indians." That, in effect, such words do not cover lands which have never been the subject of treaty or surrender, and as to which the Legislature or Executive Government have never specifically appropriated  
10 or "reserved" for the Indian population.

The Confederation Act professed only to unite the then Provinces of Canada, Nova Scotia, and New Brunswick in a federal union "with provision for the eventual union of other parts of British America." The territory embraced within the boundaries of these Provinces we may consider as alone affected by the special provisions in the Act for the appropriation and division of property. The territory in this North West Angle, was at that time unsurveyed and its legal boundary unascertained. It was eventually found to be within the Province of Ontario, representing the old Upper Canada. The well understood "Indian title" had never been surrendered, and no part of it, as far as I can understand from the evidence, had been treated as "reserved" for special Indian use or purpose. Territorially it was of course part of Ontario.

20 The main contest before us, is whether it did not thereby become part of the public domain of Ontario. The appellants have to contend, as they do, that inasmuch as the Indian title had never been extinguished it still remained excluded from the dominion of Ontario, and could only be dealt with or disposed of by the Federal Government—that it did not form part of the "public lands belonging to Ontario." The consequences would be that it remained the property of the Dominion—that that power alone could grant any portion of the soil or timber and it must be at its pleasure when or at what date, if ever, the Indian title should be extinguished by its action, and the same result would follow, if at time of Confederation one-half or more of the Province of Ontario, clearly within its boundaries, had remained with the alleged Indian title unsurrendered. Difficulties may be suggested and may arise whichever of the opposing contentions may  
30 govern our decision. I do not propose to consider them further than the decision of the point in controversy requires.

If these lands passed under the British North America Act to Ontario our decision must be against this appeal. It is not sufficient to hold that without this Act the lands in question in 1867 fall properly within the designation of "Public Lands" as such words are used in some of our statutes. We must take the whole Act together and ascertain as far as we can from its whole scope and bearing how far it decides this controversy. The sub-sec. 5, already quoted, must be read with sec. 109 as to "lands, mines, minerals and royalties." And sec. 117, as to the Provinces retaining "all their respective public property not otherwise disposed of by this Act, subject to the right of Canada to assume any lands or public property for fortifications, etc." As to the  
40 words in sec. 109, "subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same," do not in my opinion help the appellants. I cannot hold that any trust or interest in the legal sense in which we are bound to regard them, can be said to have then existed or affected these lands, as waste lands of the Crown. We are not called on to decide whether Ontario could or could not before the extinguishment of the alleged Indian title, enter upon or sell these lands.

The treaty of 1873 has settled that matter. In the *Attorney-General v. Mercer* (L. R. 8 App. 770) Lord Selborne says:—"The fact that exclusive powers of legislation were given to the Provinces as to the management and sale of the public lands belonging to the Province would still leave it necessary to resort to sec. 109 in order to determine what those public lands were." He cites sec. 109, and discussing what "lands" are meant he says: "They evidently mean lands, etc., which were at the time of the Union in some sense and to some extent *publici juris*, and in this respect they receive illustration from another section 117—"The several Provinces shall retain all their respective public property not otherwise disposed of by this Act subject to the right of Canada to assume any *lands or public property* required for fortifications, etc." . . . It was not disputed on the argument for the Dominion at the bar that all territorial revenues arising 10 within each Province from "lands" (in which term must be comprehended all estates in land) which at the time of the Union belonged to the Crown were reserved to the respective Provinces by sec. 109, and it was admitted that no distinction could in that respect be made between Crown Lands then ungranted and lands that had previously reverted to the Crown by escheat.

Again in reference to 109 he says—"The general subject of the whole section is of a high political nature, it is the attribution of royal territorial rights for purposes of revenue and government to the Provinces in which they are situated or arise. It is a sound maxim of law that every word ought to, *primâ facie*, be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context."

I think the general scope of Lord Selborne's remarks strongly favor the opinion that the 20 whole effect of the Act was to vest the ungranted lands of the Crown within the bounds of Ontario in the ownership of that Province, and that no sound reason exists for exempting the unsundered lands over which the very sparse Indian population was scattered.

Assuming that the treaty making power rests wholly with the Dominion Government, and for the purposes of this case only, assuming that the appellants are right in asserting that until the Indian claims be extinguished the territory cannot properly be entered upon or occupied under either Government, I still feel great difficulty in agreeing that when the extinguishment takes place the territory and its timber remain or rather, become, the property of the Dominion. Believing, as I have stated, that the Union Act declared that all within the territorial limits of Ontario become the property of this Province subject to any trust, etc., I feel myself forced to 30 the conclusion that when the Dominion Government in 1873, extinguished the Indian claims, such action must be held to enure to the benefit of the Province in which is the legal ownership of the land thus relieved from an alleged burden.

The Confederation Act and subsequent Imperial Legislation left the General Government of Canada in full possession of the immense North-West Territories. It left each Province in the legal ownership of all the territory comprised within its limits, with certain carefully specified exceptions. The Indian Treaty of 1873 extended over part of Ontario as well as a large part of territory not included in any existing Province. Unfortunately at that time the true boundaries had not been ascertained. Had it been otherwise we might naturally suppose that some under- 40 standing would have existed between the Local and the General Government as to a distribution of the burdens undertaken by the latter in extinguishing the Indian claims. But I cannot see how the absence of any such provision can alter the legal result.

If I hold otherwise I must decide that the fact of a burden, less or greater, being undertaken, necessarily affects the title to the released territory. If, as has occurred before in Indian treaties, the bargain had been that the Indians should remove altogether from the North West Angle to

other lands assigned to them in the more distant regions, the argument would be equally strong for declaring the surrendered lands to remain for ever in the hands of the General Government, although an integral part of Ontario, and wholly freed from the presence of a single Indian. I think we must assume under the known uncertainty as to true boundaries, that the treaty was made by the Dominion as it were, "for the benefit of all concerned."

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I cannot consider that we are dealing with the case of two rival claimants for the separate beneficial enjoyment of a valuable estate. I look upon the position of the Federal Government in a case like this, as that of a power entrusted with large legislative authorities to be exercised, so far as the Provinces are concerned, for their general benefit. If any Province had a portion  
10 of its territory, as fixed by the paramount authority of the Union Act, encumbered or embarrassed by an Indian claim, it would be I assume the duty of the Federal Government to endeavor to relieve it therefrom. The omission to make some provision for a fair share of the cost or burden, cannot, I think, affect the question.

The peculiar facts of this case suggest it as one eminently calling for some amicable arrangement in view of the great public interests. I do not underrate the difficulties presented by these facts. The treaty seems clearly to have been made on the assumption that the Dominion had the whole control of the surrendered territory. For example we find a clause by which (p. 323 App.) Her Majesty agrees that the Indians shall have the right to hunt and fish over the tract surrendered, subject to such regulations as may from time to time be made by the Dominion Government,  
20 except over such tracts, etc., required for settlement, etc., by the Government, or by her subjects duly authorized by such Government.

This latter clause could, I presume, be carried out in good faith by arrangement between the two Governments. I think the appeal must be dismissed.

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The case, when we come to understand the facts, does not present any very formidable difficulties, although a perusal of the reasons for and against the appeal, and the numerous authorities cited in them might well impress one at first with the idea that it was beset with intricacies and complications. It is a case in which we are again called upon to place a construction upon the British North America Act, but the first objection of the learned counsel for the appellants is a very start-  
30 ling one, viz.: That the Act can have no application to the lands in question, inasmuch as at the time of Confederation the title to them was in the Indians, and that it consequently could not pass under the Act which professed to deal only with lands which were the property of the former Provinces. In other words that a tract of country of over one hundred thousand square miles in extent, about one-half of which by the recent decision of the Privy Council was held to be within the confines of Ontario, and which was supposed hitherto to belong to the Provinces of Ontario and Quebec, was owned by the small body of Indians, less than four thousand in number, who were roaming over it at large in their primitive state, and occupying it merely as hunting or fishing grounds.

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It would require very strong authority to induce any Court to come to such a conclusion, and  
40 whatever dicta there may be in American text books or decisions in support of such a view, I think it is the first time that such a contention has been urged in a British Court of Justice. Nor do I think the decisions in the United States warrant any such conclusion. It was stated in *Fletcher v. Peck* arguendo (6 Cranch 87, Feb. 1810), that the Indians' title was a mere occupancy for the

purpose of hunting. It is not like our tenure, they have no idea of a title to the soil itself. It is over-run by them rather than inhabited. Citing Vattel, c. 1, s. 81 and 209, bk. 2, sec. 97; Montesquieu, bk. 18, ch. 12; Smith's "Wealth of Nations," bk. 5 ch. 1. It is a right not to be transferred but extinguished. And Marshall C. J. in delivering judgment refers to the question merely in this way: "The Court is of opinion that the nature of the Indian title which is certainly to be respected by all Courts until it be legitimately extinguished is not such as to be absolutely repugnant to seizen in fee on the part of the State." And in 1823 the same eminent Judge again discusses the question in an able and exhaustive judgment from which the learned Chancellor has made some extracts.

The whole discussion and judgment in that case are very interesting and instructive. Counsel referred to the practice of all civilized nations to deny the right of the Indians to be considered as independent communities having a permanent property in the soil. And it was said in argument that the North American Indians could have acquired no proprietary interest in the vast tract of territory which they wandered over, and their right to the lands on which they hunted could not be considered as superior to that which is acquired to the sea by fishing in it; the use in the one case as in the other is not exclusive. According to every theory of property the Indians had no individual right to the land; nor had they any collectively, or in their national capacity, for the lands used by each tribe were not used by them in such manner as to prevent their being appropriated by settlers.

The learned Judge in the course of his able judgment referred to the exclusive power of the Crown to grant lands, though in the occupation of the Indians before the Revolution as being undoubted, and then adds: "The existence of the power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist at the same time in different persons or in different Governments. An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." I am aware that there are to be found in some of the United States decisions expressions which would seem to place the so called Indian title on a higher footing, but I think that is met by the extract I have made from Chief Justice Marshall's judgment that, "an absolute title cannot exist at one and the same time in different persons or in different Governments," and that in truth the recognition of any right in the Indians has been on the part of the Government a matter of public policy determined by political considerations, and motives of prudence or humanity and has not been a recognition of property in the soil capable of being transferred. That has always been the view taken of their rights in this country, and so far back as 1858 the late Sir John Robinson in giving judgment in *Totten v. Watson*, very clearly enunciates the opinion that the Indians had no title even as regards *the lands reserved for them*, and which as he expresses "they are merely permitted to occupy at the pleasure of the Crown," (15 U. C. R. 392).

Mr. McCarthy contended that the principles upon which the Crown had been accustomed to deal with the Indians since the cession had been so well established, and so uniformly and continuously exercised as to have grown into a right. There is no question that the same humane policy which the Imperial Government pursued in reference to them has been faithfully observed by the old Province of Canada from the time that the jurisdiction passed to them, and I have no doubt will still be continued whether the jurisdiction be with the Provinces or the Dominion, all that we are at present concerned with is, that this right, whatever it may be, is not a title to the

land, and that by the 109th sec. of the British North America Act, the lands being within the limits of that portion of the old Province of Canada which now constitutes the Province of Ontario, belong to that Province subject to any trusts at the time of the passing of the Act existing in respect thereof, and to any interest other than that of the Province in the same. Sec. 109 became necessary in consequence of Ontario and Quebec having previously to Confederation formed but one Province and on their becoming disunited it became necessary to assign to each the property each should have, apart from this the plain and obvious intent and spirit of the Act is, that all lands situate within a Province continued to belong to the Province with the exception of those which were specifically transferred to the Dominion and set forth in a schedule, and as if to place this beyond all question, Section 117 declares that the several Provinces shall retain all their  
10 respective public property not otherwise disposed of in the Act subject to the right of the Dominion to assume any lands or public property required for fortifications or the defence of the country.

Mr. McCarthy further contended that they did not pass to the Province, inasmuch as they were "Lands reserved for Indians as described in sub-sec. 24 of sec. 91," and so become the property of the Dominion, and that up to the time of the making of Treaty No. 3, it was clear that neither the Executive nor Legislature of the Province had any power to deal with them; and that the Governor-General could alone represent the Crown in treating with the Indians, and could alone accept a surrender from them. I am not prepared to accede to either proposition. It by no means follows that because exclusive jurisdiction to legislate in reference to property, referred to  
20 in s. s. of sec. 91, is given by that sec. to the Parliament of Canada, the property itself should vest in the Dominion. On the contrary Parliament, as I have already pointed out, has clearly and specifically defined what property shall go to the Dominion, and "lands reserved for Indians" are not in the schedule so defining it. But the first proposition seems to assume the whole question in controversy, viz., what is meant by the words "Lands reserved for Indians."

I certainly should not have thought of resorting to the Proclamation of 1763 for the definition of the words in question, which at the time of Confederation had acquired a well understood meaning which had been repeatedly recognized in the statutes and public documents of the Provinces, and in the first Act passed by the Dominion Parliament upon the subject, they treated their jurisdiction as confined to such lands as had been reserved for Indians, or for any tribe, band or  
30 body of Indians or held in trust for their benefit, and eight years subsequently when they consolidated the laws respecting Indians, they passed interpretation clauses in which the terms "Reserve" and "Special Reserve," and Indian Lands are thus clearly defined, viz:

(6) The term "Reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein.

(7) The term "Special Reserve" means any tract or tracts of land, and everything belonging thereto, set apart for the use or benefit of any band or irregular band of Indians, the title of which is vested in a society, corporation or community legally established, and capable of suing and being  
40 sued, or in a person or persons of European descent, but which land is held in trust for or benevolently allowed to be used by such band or irregular band of Indians.

(8) The term "Indian Lands" means any reserve or portion of a reserve which has been surrendered to the Crown," indicating very clearly that the Government and Parliament of the Dominion adopted the construction which had always been attributed to the words in the Provinces, and their own construction of the language of the Imperial Act.

But I understand the learned counsel for the appellants to push his argument to the extent of saying that the Imperial authorities kept so jealous a control over the Indians and their affairs, that they would not have entrusted the Provinces with the power of treating for the extinguishment of their rights. The best answer to that argument is: that many years before Confederation those authorities had handed over the control of the Indians to the Provinces and that the division of the Dominion and Provincial powers was settled by delegates from the several Provinces, the Imperial Parliament having little more to do with the matter than to give legal effect to the agreement then arrived at by the delegates. The main feature of the scheme of division being to give to the Dominion power to Legislate upon subjects of national interest, or matters common to all the Provinces and to the Provinces power to deal with matters of a local or private nature. It was reasonable therefore that the power to legislate for Indians generally throughout the Dominion should be vested in the central authority, and that the same power should deal with the lands which the Provinces had reserved or set apart for them, but this power was expressly limited to such subjects. It would have been very unlikely that the delegates would have consented to place the power of legislation in reference to the large unorganized tracts of public lands like that in question in the hands of the Dominion. If then the lands in question passed, or to speak more accurately remained part of the Province of Ontario, it would seem to follow almost as of course that the Provincial and not the Dominion authorities were the parties and the only parties who could extinguish the so-called Indian title in the absence of any express power to the Dominion to deal with it. We were referred to the case of *Ritchie v. Lenoir*—more commonly known as the Great Seal case—as authority against the Lieutenant-Governor of a Province having power to deal with such a matter on behalf of Her Majesty. Whenever a case involving the grave issues which were presented for decision in that proceeding comes before us under similar circumstances we shall be bound to follow that decision, but I must respectfully decline to adopt the views expressed by some of the Judges in that case as to the limited powers of the Lieut.-Governors and of the Legislatures of the Provinces. 10

It was intended that each of the Provinces at the time of Confederation should stand upon the same footing as to constitutional and proprietary rights.

The 12th sec. provides that all the powers authorities and functions which under any Act of Parliament were vested in or exercisable by the respective Governors or Lieutenant-Governors, shall as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in or exercisable by the Governor-General whilst the 65th sec. vests the same powers in the Lieutenant-Governors of Ontario and Quebec as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec, as were formerly exercised by the Governor General. This became necessary, as before Confederation the Province of Canada (now Ontario and Quebec) formed only one Province, presided over not by Lieutenant-Governors but by the Governor-General. But as respects New Brunswick and Nova Scotia by the 64th sec. the Provincial Constitutions were continued. In other words, whatever powers might have been exercised by any Governor fell to the Governor General of the Dominion *if the subject matter related to the Dominion of Canada* and fell to the Lieutenant-Governor if the matter related to the Province. 30

If it had not been for the expression to be found in some judicial utterances placing within very narrow limits the powers of the executive of the Provinces, I should have thought it too clear for argument, that the powers formerly exercised by the Lieutenant-Governors of the other Provinces, and by the Governor-General of Canada in reference to Provincial matters, including agree- 40



ments or so-called Treaties with the Indians for the extinguishment of their rights, and granting 19. JUDG-  
to them in lieu thereof certain reserves either for occupation or for sale, were now vested, exclu- MENTS IN  
sively in the Lieutenant-Governors. The view that has been sometimes expressed that they do not COURT OF  
represent Her Majesty for any purpose, appears to me to be founded on a fallacy, and to be taking APPEAL,  
altogether too narrow a view of an Act, which is not to be construed like an ordinary Act of Parlia- ONTARIO.  
ment, but as pointed out in the Queen *v.* Hodge, is to be interpreted in a broad liberal and *quasi* JUDGMENT OF  
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It is obvious that as the public lands are vested in the Queen the Lieutenant-Governor must have the power in Her Majesty's name to grant the same or they cannot be granted at all for the  
10 Governor-General clearly has no such power, and it has always been assumed without any express provision in the statutes for making such grants in Her Majesty's name, that the power is vested in the Lieutenant-Governor. There are several clauses of the British North America Act in which his power to act in the name of the Queen is expressly recognized as for instance; Section 82 which empowers him in the Queen's name to summon the legislature, in sec. 72 the Lieutenant-Governor of Quebec is authorized to appoint Legislative Councillors in the Queen's name, and the Provincial Legislatures create Her Majesty's Courts of Civil and Criminal Jurisdiction, the writs in which are issued in Her Majesty's name. And this view appears to have received the direct confirmation of the Privy Council in *Theberge v. Landry*, in which the Judicial Committee refer to an Act of the Provincial Legislature (L. R. 2, P. C. 108) as having been assented to on the part  
20 of the Crown, and to which therefore the Crown was a party. If then it is within the competency of the Legislature of Ontario to legislate for the management and sale of these lands as being public lands belonging to the Province, it would follow that they have the minor power of empowering the Executive to make any agreement for the extinguishment of the so-called Indian right. And I am of opinion therefore that there is no force in the learned Counsel's objection that the Governor-General could alone as the representative of Her Majesty accept a surrender of that right from the Indians.

Another reason for assuming that the Provincial authorities are the proper parties to deal with it arises from the consideration that in the event of the tribes ceasing to exist the lands which have been reserved to them, to use Sir John Robinson's language, "for occupation at the  
30 pleasure of the Crown" would revert to the Province. Although when once reserved the Dominion Parliament has alone power to deal with their management, it could scarcely have been in the contemplation of Parliament that the Dominion should prescribe to the Provinces the extent or nature of the Reserves.

The Dominion authorities assumed to make the treaty in question under the mistaken belief that the lands were beyond the confines of the Province and were consequently Dominion lands, which will account for the reservation of the right to the Indians still to occupy the vast tract outside their actual reserve for hunting and fishing until granted to settlers by the Dominion Government; which if the treaty is to be adopted in its integrity, would mean for all time to come, as the Dominion Government have no power to make such grants. Even if I did not think  
40 the language of the British North America Act which I have quoted clearly conferred upon the Provincial authorities the power to extinguish the Indian title, the same reasoning which compelled us to hold in *Leprehon v. Ottawa*, that the Local Legislature had no power to tax the official income of a Dominion officer for Provincial or Municipal purposes, would compel us in my opinion to hold that the local Governments alone must be the judges of the extent to which lands belonging to them shall be set apart for the use or benefit of any tribe of Indians. If the

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Dominion Government have the power, being in its nature unlimited, it might as was pointed out in that case be so used as to defeat the Provincial power, and control over these lands altogether.

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In the view which I take of the whole case it was not necessary to consider the question I have lastly discussed, but I thought it due to Mr. McCarthy to let him see that his argument was not overlooked, and I also desired to record my dissent from the view expressed by the Chief Justice upon this part of the case. If however the lands were public lands which passed or remained with the Province, subject to the rights which the Indians might possess, as in my opinion they were, it is clear that the claim of the Dominion to authorize the cutting of the timber cannot be sustained, and the judgment appealed from should consequently be affirmed. 10

#### JUDGMENT OF PATTERSON, J. A.

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The discussion of this appeal has ranged over a rather wild field, and we have had the benefit of much learning and historical research, for which we are indebted to the industry of counsel on both sides; but I have not been convinced that the learned Chancellor erred in his construction of the provisions of the British North America Act, on which the question of property has to be decided. Two leading propositions were insisted on for the appellants, as Mr. McCarthy reminded us in his reply. First: That the lands in question are not lands in the sense intended in section 109, or public property of the kind mentioned in section 108, but are of a nature of private property; and secondly, that if this should be otherwise decided, they still passed to the Dominion as "lands reserved for Indians," described in article 24, of sec. 91. The contest has turned to a 20 great extent upon the second proposition, the effort on the part of the appellants being to establish that lands which had not been the subject of a treaty with the Indians but over which they had always been allowed to hunt and fish without molestation were "lands reserved for Indians" within the meaning of section 91; while it is insisted for the Crown that that phrase is employed to denote a class of lands well known as Indian Reserves, and being tracts of land set apart by treaties for the use of certain tribes or bands, and reserved from the ordinary course of settlement; but it can scarcely be said that each proposition was discussed by itself, and there is no good reason for attempting to consider them separately, even if it were practicable to do so.

I shall not attempt to follow the course of the arguments to which we have listened, or to deal with the historical evidence touching the recognition or disregard by European powers of 30 the rights of the natives of the countries they discovered or conquered or seized on this continent to which counsel on both sides appealed in aid of the views they advocated. I have not failed to consider it attentively, and I am satisfied that to discuss it at any length would be only to traverse the same ground which has been gone over by the learned Chancellor in his very able and perspicuous judgment, without adding anything of importance to what he has said.

The general result of the historical evidence is I think as correctly and as concisely stated in Story's Commentaries on the Constitution of the United States as in any other work. I quote from section 6, of the author's abridged edition of 1833: "It may be asked, what was the effect of this principle of discovery in respect to the rights of the natives themselves. In the view of the Europeans it created a peculiar relation between themselves and the aboriginal inhabitants. 40 The latter were admitted to possess a present right of occupancy or use in the soil, which was subordinate to the ultimate dominion of the discoverers. They were admitted to be the rightful

occupants of the soil, with a legal, as well as just claim to retain possession of it, and to use it according to their own discretion. In a certain sense they were permitted to exercise rights of sovereignty over it. They might sell or transfer it to the sovereign who discovered it; but they were denied authority to dispose of it to any other persons; and until such a sale or transfer, they were generally permitted to occupy it as sovereigns *de facto*. But notwithstanding this occupancy, the European discoverers claimed and exercised the right to grant the soil while yet in possession of the natives, subject however to their right of occupancy; and the title so granted was universally admitted to convey a sufficient title in the soil to the grantees in perfect dominion, or, as it is sometimes expressed in treaties of public law, it was a transfer of *plenum et utile dominium*." This view is evidently that of the Parliament of Canada as may be gathered from the Indian Act, 1880, where "Reserve" is defined as "any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsundered."

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I start therefore with the proposition that the title to all these Indian Lands, even before what is called the surrender by the Indians, is in the Crown without attempting by any argument of my own to prove its correctness; and shall content myself with making a few observations, chiefly concerning the effect of the British North America Act as it strikes me.

The British North America Act when it established the Dominion of Canada by the union of the four provinces of Ontario, Quebec, Nova Scotia and New Brunswick, had to provide for two great subjects, viz., the constitution, including the legislative powers, of each province, and of the Dominion, and the ownership of the public assets or property of every kind, besides other subsidiary matters.

The division of the Act numbered VIII. and including sections 102 to 126, is headed "Revenues, Debts, Assets, Taxation."

Section 108 declares that the public works and property of each province enumerated in the third schedule to the Act shall be the property of Canada. From reading this schedule along with section 91, it is evident that in the scheme of the Act, the vesting of property in the Dominion as against the Provinces was not intended to follow or to be inferred merely from the bestowal of exclusive legislative jurisdiction over the subjects with which the property was connected. Thus while exclusive legislative power is given over: (5) Postal Service; (7) Militia, Military and Naval Service and defence; (9) Beacons, Bouys, Lighthouses, and Sable Island; (10) Navigation and Shipping; the schedule expressly enumerates Post-offices, Ordnance property, Armories, Drill-sheds, etc.; Lighthouses, Piers and Sable Island; Harbours, River and Lake improvements, etc., etc. There is, however, nothing answering in the schedule to the "lands reserved for Indians" over which by Article 24 of section 91, the parliament has exclusive legislative jurisdiction.

Therefore to argue that lands reserved for Indians become, by force of the British North America Act, the property of the Dominion as against the Provinces in which the reserves are situated, is in my judgment to attribute to section 91 an effect not contemplated or intended by the framers of the Act, and certainly not the necessary result of the language of the section. The question of the ultimate ownership as between the Dominion and the Provinces, of the ordinary Indian Reservation may not be too speculative a question for discussion. It would become a practical question in the event of any such land ceasing to be required for the occupation of the tribe, or for application by way of sale or lease for its benefit, and falling in, as it were, for ordinary public uses; and it might become a practical question if it were attempted to dispose of the land or the timber on it for other uses than the benefit of the Indians. It does not at present appear

to arise except on the assumption that the lands reserved for Indians, mentioned in section 91, include not only tracts within the definition of "Reserve" in the Indian Act, 1880, but also such lands as those which are the subject of this litigation.

It does not strike me as being involved in the circumstance that the administration of the Reserves belongs to the Dominion Government. The administrative and the legislative functions, I take to be made co-extensive by the Act, as indicated by, *inter alia*, section 130. Nor is the fact that, as part of the administration of Indian Affairs, the Dominion Government has made sales or carried out, by granting patents, sales already made, for the benefit of the Indians, of portions of the Reserves inconsistent with the ultimate ownership of the lands by the Provinces. The title is in the Crown, and the patent, whether issued by the Government of the Dominion or by that of a Province, is a grant from the Crown. If the lands should cease to be held for an Indian tribe or band, by reason of the tribe or band ceasing to exist or for any other reason, the question between the Dominion and the Provinces may have to be decided. 10

I am strongly inclined to the opinion that the lands reserved for the Indians mentioned in sect. 91, whatever that term includes, are not vested in the Dominion for any purpose except legislation and administration on behalf of the Indians; but I do not discuss that question more fully because I hold, with the learned Chancellor, that the lands with which we are concerned are not touched by the section.

The title of the Province to the lands in question is in my opinion established by the direct force of sections 109 and 117. By section 109 all lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick, at the Union, were to belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same were situate or should arise, subject to any trust existing in respect thereof, and to any interest other than that of the Province in the same; and section 117 declares that the several Provinces shall retain all their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications, or for the defence of the country. 20

To take the lands in question out of the operation of the extremely comprehensive effect of these sections, it is essential to establish one of two things: either that by some other provision of the Act they were assigned to the Dominion, or that they were private property of the Indians. The only other provision of the Act on which an argument can be based is section 91. I have made all the remarks I think necessary with regard to it. 30

The contention that the lands belonged to the Indians in any sense which deprived them of the character of lands belonging to the Province, or public property of the Province, is answered by the extract I have read from Story on the Constitution, and by the judgment of the learned Chancellor to which, as I have said, I do not propose to add anything on this point.

The action of the Dominion Government in procuring the extinguishment of the Indian title does not, in my view, in any way affect the legal question which is before us. The defendants assert a right to cut timber on the lands by virtue of a license from the Dominion Government, which is not pretended to have been given in the course of the administration of Indian Affairs, or in dealing with lands reserved for Indians, but was admittedly given as a means of producing revenue for the general purposes of the Government. If the lands were, as I hold they were, assigned to the Province, subject to whatever rights the Indians had in them, the Province must have the right to interfere to prevent the spoliation of the lands, whether the Indians retain or have surrendered their title. 40

Other matters connected with the surrender of the Indian title were referred to at the bar, and from reading the Treaty of the North-West Angle and the history of the negotiations in the volume published by the Hon. Mr. Morris, we see that certain outlay was incurred and certain burdens assumed by the Government. Of these things I can say no more than that they seem to me to leave the legal question untouched. Whether they give rise to any claims or equities between the Dominion and the Province is a matter of policy as to which we have no information, and with which we are not concerned beyond the one question of the effect on the right to the timber.

I agree that we must dismiss the appeal.

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JUDGMENT OF OSLER, J. A.

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I am satisfied to affirm the learned Chancellor's Judgment for the reasons stated therein, and in the Judgment of the learned Chief Justice which I have had an opportunity of reading.

19. JUDG-  
MENTS IN  
COURT OF  
APPEAL,  
ONTARIO.  
—  
JUDGMENT OF  
PATTERSON,  
J. A.

JUDGMENT OF  
OSLER, J. A.

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## In the Supreme Court of Canada.

### APPELLANTS' FACTUM.

This is an appeal from a judgment of the Court of Appeal for the Province of Ontario, delivered on the 20th day of April, 1886, affirming the judgment of the Honorable the Chancellor of Ontario, declaring that the Appellants herein had no right to cut timber on certain lands set out in the Statement of Claim in this action; restraining the Appellants from trespassing upon the said lands, cutting or removing any timber standing and growing thereon, and from removing any timber already cut on the said lands by the Appellants; and referring the action to the Master in Ordinary of the Supreme Court of Judicature for Ontario to take an account of the damages done to the Respondent by the cutting or removing of timber by the Appellants from off the lands in question.

This action was commenced on the 30th day of October, 1884. The Respondent complained that the Appellants, during the season of 1883, without permission from the Crown or the Province of Ontario, entered upon certain lands situate in, and the property of, the Province of Ontario, lying south of Wabigoon Lake, in the District of Algoma, and cut certain timber therefrom; and they asked for the remedy afterwards granted by the judgment of the Chancellor above referred to. The Appellants denied the right of the Respondent to the Injunction and damages claimed, on the following grounds:—

(1) That they (the Appellants), a Company duly incorporated for the purpose of prosecuting a general lumber and milling business within the Dominion of Canada, in the prosecution of such business, and for the purpose of procuring saw-logs to manufacture into lumber, during the month of April, 1883, applied to the Government of the Dominion of Canada, and upon payment of a considerable sum of money (namely, the sum of \$4,125.52), obtained permission and authority from the Government of Canada, to enter upon a certain tract of timber lands situated on the south side of Wabigoon Lake, in that portion of the Canadian territory situated between Lake Superior and Eagle Lake, that is to say, the land in respect of which the action was brought; and that they did, pursuant to the leave and license so obtained, enter upon the lands referred to, and cut a considerable quantity of pine timber thereon, with the intention of removing the same for the purposes of their milling business,—which were the acts complained of.

(2) That the lands in question, and the timber growing thereon, including the timber cut by the Appellants, were not the property of the Province of Ontario, but were the property of the Dominion of Canada, or of the Crown, as represented by the Dominion of Canada; and

(3) That the Government of Canada acted within its power and rights, in granting to the Appellants the permission and license referred to, to cut on and remove timber from the tract of timber lands in question, and that the Appellants acted within their strict legal rights in entering upon the said land and in cutting timber thereon, and in attempting to remove the latter under the license or permit, duly obtained from the Government of Canada.

The grounds upon which the Appellants based their contention that the lands and timber in question were and are the property of the Dominion of Canada, and not of the Province of Ontario, were briefly as follows:—This land, together with other in the same district, was until recently claimed by the tribes of Indians who inhabited that part of the Dominion, and the claims

of these tribes have always been recognized and admitted by the various Governments, and by the Crown; and such Indian claims are, and always have been, paramount to the claim of the Province of Ontario, or of the Crown as represented by the Government of Ontario. The Government of the Dominion of Canada, in consideration of a large expenditure of money made for the benefit of the Indians inhabiting these lands, of payments made to them from time to time, and of other valuable considerations, have acquired by purchase the Indian title to the land and the timber growing thereon; and by reason of the acquisition of this Indian title, as well as by reason of the inherent right of the Crown, as represented by the Government of Canada, the Dominion of Canada and not the Province of Ontario, has the right to deal with the said timber lands, and at the time of the granting of the license under which the Appellants claim had, and still 10 has, full power and authority to confer upon the Appellants the rights, powers and privileges claimed by them, with regard to the cutting of timber in question, and complained of by the Respondent. (The license referred to, and a map showing the portion of the lands in question, will be found on page 13 of the Case and the opposite page.)

After the granting of an Interim Injunction on the 20th day of January, 1885, the action came on for trial before the learned Chancellor of Ontario on the 18th day of May, 1885, and on the 10th day of June, 1885, judgment was given in the terms above set out. (See page 15 of the Case). This judgment was appealed from to the Court of Appeal for Ontario, and the Appeal came on for argument on the 10th, 11th and 14th days of December, 1885. Judgment was given on the 20th day of April, 1886, dismissing the appeal of the Appellants, and affirming the judgment of the 20 learned Chancellor. (See page 44 of the Case). It is from this judgment of the Court of Appeal that this appeal is now brought.

Before entering upon the consideration of the questions in dispute in this appeal, it may be well to first set out in full the Admissions that were made by counsel for all parties at the trial before the Chancellor. They are to be found on page 8 of the Case, and are as follows:—

“(1) That the lands upon which the timber in question was cut were at the time of granting the permit hereinafter mentioned, and are now in the Province of Ontario, but it is not admitted, but denied by the defendants (the present Appellants) that such lands did or do belong to Ontario, but on the contrary the defendants contend that the lands and the timber thereon became, and were at the time of the granting of such permit, the property of the Government of the 30 Dominion of Canada by virtue of the purchase from, and the cession by, the Indians to the said Government of Canada.

“(2) That the defendants cut the timber in question.

“(3) That they did so under the authority of the permit from the Government of the Dominion of Canada, which is to be produced at the hearing, and that the moneys claimed by the Government of Canada for such permit were paid by the defendants to the Government, as per receipts and accounts produced under order of production.

“(4) Treaties made with the Indians as described and set out in the book published by the Honorable Alexander Morris, and such other treaties as may be produced from the proper departments at Ottawa.

“(5) That the Indian tribes have not surrendered their title, if any they had or have, to the said timber lands except to the Government of Canada, and by the treaties which will be produced.



“(6) Judicial notice may be taken at the hearing of this cause, or on any appeal (and without formal proof), of any documents set out in the Sessional Papers of the Province of Canada, or Dominion of Canada, or Province of Ontario, and the same shall be admissible, *quantum valeant*, on any matter or question on which evidence would be admissible in the cause. 22. APPELLANTS’  
FACTUM.

“(7) Judicial notice may be taken herein and on any appeal, respectively, of any other treaties and of any public documents, and of historical facts bearing on the issues and contained in any printed book heretofore published, and which may be duly authenticated.”

It is believed that a perusal of these admissions will materially lighten the labors of the Court, and simplify the investigation of the points remaining in issue.

10 The oral evidence taken before the Chancellor will be found on page 10 of the Case, and the references and documentary evidence will be found in the Joint Appendix thereto.

In order to a thorough and accurate understanding and appreciation of the Appellants’ contention that the lands in question belong to the Dominion, and not to the Province of Ontario, it is necessary to consider, with some minuteness of detail, the circumstances of, and the contents and effect of, the treaty with the Indians relating to the lands in question.

The Treaty in question was signed on the 3rd day of October, 1873, by the Commissioners appointed to bring it about if the Indians were in a mood to treat with them, and by Indian Chiefs representing the various bands of Indians inhabiting the country the cession of which was thus arranged and achieved. A full account of the preliminary arrangements and negotiations, taken from a work by the Honorable Alexander Morris, entitled “The Treaties of Canada with the Indians of Manitoba, the North-West Territories, and Kee-wa-tin,” will be found at p. 253 of the Joint Appendix to the Case herein. From that account it appears that in 1871 a commission was issued by the Privy Council of Canada to certain commissioners, authorizing them to deal with the Ojibbeway Indians of the Lake Superior region for the surrender to the Crown of the territory occupied by them—covering the area from the watershed of Lake Superior to the north-west angle of the Lake of the Woods, and from the American border to the height of land from which the streams flow towards the Hudson’s Bay;—the objects being, to secure the safety of the route known as the “Dawson Route,” and to open up the country for settlement and improvement. This large tract of country—comprising an area of about 55,000 square miles,—was then inhabited, as will be hereafter more particularly pointed out, by the Saulteaux tribe of the Ojibbeway Indians, and had been so inhabited by them for upwards of two centuries, or as far back as our definite knowledge of this part of the North American continent extends. The territory was divided into districts inhabited by various distinct bands, who, occupying and owning their separate fishing and hunting-grounds, lived in a continual state of mutual suspicion, only combining for the purpose of opposition to a common enemy. It was thus scarcely to be expected that any reasonable arrangement would be arrived at with a nation thus divided, widely-scattered and mutually-distrustful, without difficulty and delay; the more especially as, up to the time when first the attempt was made to treat with them by the Dominion Government, there had never been a meeting of representative chiefs of all the bands, capable of representing the views and interests of all parts of the Saulteaux nation and of binding them by a national action or agreement. So the seasons of 1871 and 1872 passed, the chiefs and their peoples met and dispersed, and apparently little was accomplished. But when in 1873, towards the end of September, the then commissioners,—the Honorable Alexander Morris, then Lieutenant-Governor of Manitoba and

the North-West Territories, Lieut.-Col. Provencher, and Mr. Dawson,—arrived at the north-west angle of the Lake of the Woods, they there met the chiefs and representatives of the whole Saulteaux people,—with the exception of two small bands in the Shebandowan district, whose adherence had been previously obtained,—prepared as a nation to treat with the Crown, and having definitely formulated the demands which they proposed to make. After the Commissioners had announced their firm determination, that unless some end were now made to their proceedings so long delayed, and some agreement come to, the Crown would not again consent to deal, at so great trouble, with the chiefs and their peoples, on so favorable terms as those now proposed, the Indians began a series of meetings, negotiations, and consultations with the Commissioners, which lasted many days, and the report of which shows the importance attached to the meeting in the minds of this Indian nation, and their clear recognition of the critical character of the occasion in their history as a people. It is only necessary to read the full, accurate and graphic reports of the proceedings given by Mr. Morris and by Mr. Dawson, to be forced to an acknowledgement that never was a treaty entered into in a more solemn manner, or with more serious intentions in the minds of both contracting parties to abide by and carry out the terms of the agreement. The long days and nights of council and debate, among the Indians, showed the importance, in their eyes, of the step they were asked to take. The prolonged and numerous deliberations and consultations over the most minute stipulations of the proposed treaty, showed their determination to take no step in the dark, or without the most complete available information. And the diplomatic shrewdness and ability displayed by the chiefs to whom was entrusted the management of the negotiations, showed how perfectly they comprehended, before signing the treaty, the nature and solemnity of the obligations into which they were about to enter. When the head chief, speaking on behalf of the whole people, and in presence of their representatives, closed the preliminary negotiations with the words, “In giving you my hand, I deliver over my birth-right and lands,” he and his people knew that they were making an irrevocable surrender of their territories, and that henceforth they were to stand towards the white man and his Government in new and altered relations. The treaty, which is known as Treaty Number Three, was signed on the 3rd day of October, 1873, after fourteen days occupied by the Commissioners in satisfying the Indians as to the liberality and genuineness of their offers, and by the latter in satisfying themselves and one another as to the sufficiency of the consideration to be given for the surrender of their national territorial rights and privileges. And thus was opened up for settlement, freed from all claim on the part of the Indians, the original possessors and occupants, an extent of territory of about 55,000 square miles; and for a consideration, which, in relation to the position and requirements of the tribes dealt with, was free from any suspicion of illiberality or injustice. The solemnity of the proceedings and actions of both the Commissioners and the Indians was quite equalled by the exactitude of the language in which the formal cession of the lands was made. The conveyancing clauses of the treaty are as follows:—“The Saulteaux tribe of the Ojibbeway Indians, and all the other Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:

(Here follows a description of the territory ceded, to be found on p. 271 of the Joint Appendix):

“The tract comprised within the lines above described, embracing an area of 55,000 thousand square miles, be the same more or less.

“To have and to hold the same to Her Majesty the Queen and her successors forever.”

It is admitted by the Respondent, that if it be established, as the Appellants submit they can and have established, that the Saulteaux tribe of Ojibbeway Indians were the real possessors and owners of the lands in question, and covered by this treaty, and had such a title in the soil thereof as they could transfer to the Crown—that title was fully and perfectly transferred by Treaty Number Three. There remains, then, to consider the character of the title which these Indians had in the territory in question, and the effect of their formal cession of that title to the Crown.

It may, however, materially contribute to a clear understanding of the Appellants' position, if, before entering upon a general consideration of the view taken of the extent and validity of the Indian proprietary title by the various European nationalities which have participated in the colonization of the North American continent, some indication is given of the position of the particular nation of Indians whose rights are dealt with in Treaty Number Three; for the purpose of showing, in the first place, that the Saulteaux tribe of the Ojibbeways were undoubtedly proprietors of the tract of land in question, at the time of the treaty made by them, as against any other Indian tribe or nation; and, in the second place, that they have so long been in exclusive possession of that tract as to give them that title by exclusive and prescriptive possession.

Our information with regard to the occupation of this territory, and indeed of the whole territory between Lake Superior and Hudson's Bay, is not of so definite or reliable a character as that concerning many other parts of this Continent, owing to the immense distance from the Atlantic Ocean, and the absence of necessity, in early times, to the European colonists or conquerors, to penetrate thus far inland in order to carry out the objects of their western wanderings. So we are not surprised to find that the French explorers who succeeded in pushing their way farther westwards than Lake Huron and Deiroit, did not venture north of the lake whose size astonished their European imaginations; or that Alexander Henry, in 1767, was the first Englishman who penetrated the country north of Lake Superior, and gave, from actual observation, a brief account of the occupation of the district and its natural characteristics. But, on the other hand, we find all the authorities worthy of any credence or consideration upon questions concerning the Indian country in the centre of the Continent, agreeing upon this point, that, from the time when our knowledge of the country immediately north of Lake Superior, about Lake Nepigon, and towards Hudson's Bay, became to any considerable extent authentic, certain tribes of the Algonquin Nation, under various names, gradually driven westward by more powerful tribes, have maintained their stand upon the north shores of Lakes Huron and Superior, and are still, after the lapse of two centuries, to be there found, the remnant of a once powerful and extensive nation. The Saulteaux tribe, over the whole of the district between Lake Superior and the country of the Montagnais have long since been recognized to be the direct successors of, or so far as identity of lineage is concerned, the descendants of this Algonquin Nation, so far as the latter is represented in the Lake Superior region. It will be sufficient to refer to two or three authorities of historical worth, to show that this has long been and is now accepted by historians.

In Schoolcraft's *History, Condition and Prospects of the Indian Tribes of the United States*, at page 28 of Vol. II., will be found a map of remarkable accuracy for that time, by which it appears that all territory around Lake Superior, north and south, from the Rocky Mountains to the Gulf of St. Lawrence, and north to Hudson's Bay, was territory of the Algonquins. This map is dated 1600.

A map to be found on page 136 of the same volume shows that the Ojibewas of the United

States occupied a territory reaching from the Red River eastward along the north shore of Lake Superior to the boundary, then about the Pigeon River.

At page 136 of Volume II. we read as follows:—

“They (the Ojibwas) were probably driven from the East by more powerful tribes till they made their first stand, above two centuries and a half ago, on Lake Superior, and made their central town on an island in the lake (Lapointe), where they were found by the first whites. At last we find them on Lake Superior, from which place they have still pressed westward for the past two centuries, till they occupy all the country about the headquarters of the Mississippi, and stand, one foot on the edge of the vast Western prairies, and the other in the dense forests of Eastern America. For a long time prior to this event (the acquaintance of the Ojibwas with the white man), the Ojibwas branch of the Algonquin stock of the aboriginal race of America, had been living on Lake Superior. In the traditionary emigration of the tribes from the East, a portion of them moved in the direction of the north of Lake Superior, and are now known as the Muskegoes. Other portions of the tribe stopped at South Sault Ste. Marie, which has also been one of the oldest towns they now tell of.” 10

In the map at page 96 of Volume III., the territory mentioned above as shown in the map at page 136 of Volume II., is shown as occupied by the Chippewas. The Chippewas and the Ojibwas or Ojibbeways have long been acknowledged to be identical; and this identification is accepted by Mr. Morris in his work on the Indian Treaties before referred to.

The following extracts are taken from subsequent volumes of the same work. 20

Volume IV., page 187:—“The whole region of the Upper Lakes is occupied by bands of Chippewas and Ottawas, who are identical in their lineage, language, history, manners and customs. They were found here on the arrival of the French, in the early part of the 17th century, and were called by their historians, together with certain affiliated tribes, Algonquins. The term Chippewa, bestowed by travellers on the tribe occupying the lake is derived from the native word O-jib-wa.”

Volume IV., p. 609:—“The Chippewas were found in force when the French advanced their discoveries to the Falls of Sault Ste. Marie, and they were found to occupy the basin of Lake Superior, North and South, from our earliest historical period.”

Volume V., page 143:—“History is clear as to the unity of origin of the Algonquins and Chippewas. In 1649, the Iroquois succeeded in overthrowing and driving the Wyandots, whom the French call Hurons, out of the Lower St. Lawrence. They fled up the Ottawa to the Lake since called Huron, after then they were finally settled, after having been pursued by the infuriated Iroquois to their refuge on the Islands of Michilimackinac, and even to the upper shores of Lake Superior. Their flight carried with them their allies the Atawawas or Atowas, and other Algonquin bands, which had been in close alliance with them.” 30

Page 144:—“To those of the Algonquin or Nipercinean, who had prior to the discovery proceeded North-west through the Strait of St. Mary into the basin of Lake Superior, and to the countries north of it, they (the French) simply gave the name of Saultaur or Fallsmen. These three local tribes, that is to say, the Nipercineans or Algonquins proper, the Mississagies and the Saulteaux or Ojibwas, were originally one and the same people. They spoke and they still speak, the same language.” 40

Without multiplying extensive quotation from other historical works or documents, reference may be made, in corroboration of the above statement as to the early distribution of the Indians

to the north of Lake Superior, to Alexander Henry's *Travels and Adventures in Canada and the Indian Territory* (page 211, and chapter 8 of Part II); to Carver's *Travels through the Interior Parts of North America in the years 1763, 1767 and 1768* (pages 137 and 138); to the *Relations des Jesuits* (1648, page 46; 1654, page 30; and 1660, pages 9, 10 and 11); and to Garneau's *Histoire du Canada* (Volume I., pages 87, 204 and 295).—All of these authorities together lead to the incontrovertible conclusion that all the country north of Lake Superior to the country of the Christinaux (who dwelt near Hudson Bay), and including the lands covered by Treaty Number Three, has been for at least two centuries and a half occupied by, and acknowledged to be the hunting grounds of a branch of the Algonquin nation, known under the various names of Ojibwas, Chippeways and Sauteaux. Latterly the name Sauteaux has come to be confined to the people of the locality in question, while the other names referred to, which are, according to usage and derivation, more generic in their application, have been retained to denote other Algonquin bands of more wandering nature, or more scattered in their habitations. The territory in question has been, for a long time, in such firmly established possession of the Sauteaux, that when it was first proposed to deal with them for the surrender of their lands, it was found that the country which they looked upon as theirs was divided into distinct and recognized districts ruled over by independent chiefs, jealous as princes of their territorial rights, and having little interest in common beyond the necessity for union against the common enemies of their nation as a whole. At the meetings of September and October, 1873, at the North-West angle of the Lake of the Woods, at which the Treaty, to which the place of meeting gave its name, was signed, the territorial representation of the region ceded was complete, (with the exception of the acquiescence afterwards obtained by Mr. Dawson). The chiefs referred to each other as being present to treat regarding localities, not peoples. And a glance at the minuteness and exactness with which the chiefs whose acceptance of the treaty Mr. Commissioner Dawson subsequently obtained, set out the territories represented by them, shows that every precaution was taken to prevent the possibility of future claim by any Indian tribes who might consider themselves as possessed of any interest in the lands of the Sauteaux, and slighted or ignored by the white man in his dealings for the surrender of the Indian possessions.

Assuming, then, that the Indians with whom the treaty in question was effected were the *bona fide* possessors of the ceded territory as against all other Indian tribes or nations, and that whatever right they may have had in the soil was effectually granted and surrendered to the Crown, there remains to be considered, on this branch of the case, the nature of the title which they actually did possess, and what were the meaning and effect of the formal conveyance by them.

Upon this question, the contention of the Appellants is this:—That the Indian title has always been recognized as a valid title to the soil, from the times of the earliest settlements of the North American Colonies, and that it has been dealt with as such by all the various European nations on whose behalf the different portions of the continent have been taken possession of and settled by Europeans, and by the various commonwealths which have grown up on this continent; and that, whatever may have been the rule laid down as governing the European powers who long struggled for possession of the continent, as between themselves, and founded upon a right of sovereignty acquired by discovery and possession, yet the right which they were acknowledged to acquire over the invaded country, where it was inhabited, was simply a right of prior purchase from the natives of the title which belonged to them as the original possessors. It is contended that this is the principle which has always guided the Spaniards, the French and the English

22. APPELLANTS' FACTUM.

in their dealings with the lands of the continent, and that it is a principle of the same validity to-day as when first it was adopted and acted upon as founded upon principles of international law and justice.

To establish this contention, it will be necessary to consider, at some length, both the conclusions to be drawn from the course of history with regard to the dealings of the Europeans with the North American Indians; and, in the second place, the effect, if any, which the course of English and Canadian legislation has had upon the principles upon which those dealings were conducted, so as to answer and refute the objections which have been drawn from our Statutes, in the Courts below, against the position maintained by the Appellants. It will thus be seen that the subject naturally divides itself into two heads, both as regards the line of consideration to be followed, and the class of authorities which it will be necessary to review. It is proposed, then, to consider, firstly, the historical aspect of the question before us, as briefly as is consistent with a thorough attention to the facts and conclusions bearing upon the question, and to be drawn from an immense mass of accumulated history of varying value. 10

The whole course of the history of the Spanish, French and English colonies on this continent, shows that, whatever may have been the validity and the application of the rule as to the fee being in one or another Crown, there has practically been a recognition in the Indians of the beneficial ownership of the soil of the country of which they were in possession when the continent was invaded by European powers. It may be quite true, that as between the different European nations who were struggling for possession of the continent,—Spain, France and Great Britain,—there was recognized a general binding rule, that discovery,—discovery followed by possession,—gave rights of sovereignty here. This was a convenient principle of international law as between the competing nations. And it will easily be seen that some such rule was necessary for the maintenance of peace and the settlement of disputes when such arose, as they were continually arising all along the coast of the Atlantic. But while the establishment and recognition of that rule gave definite understood rights, as between the European nations and their representatives, those rights consisted of nothing more than a right of eminent domain,—a right as against all other powers, or private individuals or corporations, to deal with the natives for the purchase and possession of the soil of their country. The title to the soil belonged to the Indians, where it was inhabited by them; and, as against them, the only right given to the Europeans by discovery and possession was that of purchasing such lands as the natives were willing to sell, in other words, a right of pre-emption. This is the view taken of the legal principles on the subject in Kent's *Commentaries*, and the concise statement there made is the best preface that can be given to the historical evidence to be adduced in support of the contention made, which is precisely the contention of Chancellor Kent himself. 20 30

At page 284 of Vol. III. of the *Commentaries* (12th Ed.) the following appears:—

“ The Supreme Court of the United States in the case of *Worcester* reviewed the whole grounds of controversy, relative to the character and validity of Indian rights within the territorial dominions of the United States, and especially in reference to the Cherokee nation, within the territorial limits of Georgia. They declared that the right given by European discovery was the exclusive right to purchase, but this right was not founded on a denial of the right of the Indian possessor to sell. Though the right to the soil was claimed to be in the European 40

" Governments as a necessary consequence of the right of discovery and assumption of territorial  
 " jurisdiction, yet that right was only deemed such in reference to the whites ; and in respect to  
 " the Indians, it was always understood to amount only to the exclusive right of purchasing such  
 " lands as the natives were willing to sell. The royal grants and charters asserted a title to the  
 " country against Europeans only, and they were considered as blank paper, so far as the rights of  
 " the natives were concerned. The English, the French, and the Spaniards, were equal competitors  
 " for the friendship and the aid of the Indian nations. The crown of England never attempted to  
 " interfere with the national affairs of the Indians, further than to keep out the agents of foreign  
 " powers, who might seduce them into foreign alliances. The English Government purchased the  
 10 " alliance and dependence of the Indian nations by subsidies, and purchased their lands when they  
 " were willing to sell, at a price they were willing to take, but they never coerced a surrender of  
 " them. The English Crown considered them as nations competent to maintain the relations of  
 " peace and war, and of governing themselves under her protection. The United States, who  
 " succeeded to the rights of the British Crown in respect to the Indians did the same, and no more :  
 " and the protection stipulated to be afforded to the Indians and claimed by them was understood  
 " by all parties as only binding the Indians to the United States as dependent allies. A weak  
 " power does not surrender its independence and right to self-government by associating with a  
 " stronger, and receiving its protection. This is the settled doctrine of the law of nations ; and  
 " the Court concluded and adjudged that the Cherokee nation was a distinct community, occupying  
 20 " its own territory, but with boundaries accurately described, in which the laws of Georgia would  
 " not rightfully have any force, and into which the citizens of Georgia had no right to enter, but  
 " with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts  
 " of Congress. The Court accordingly considered the acts of Georgia which have been men-  
 " tioned to be repugnant to the constitution, treaties, and laws of the United States, and conse-  
 " quently that they were, in judgment of law, null and void."

If this opinion is a correct one, the right given by discovery and possession here was but a  
 right of purchase from the native Indians, and was not a right of ownership of the soil until such  
 purchase was effected ; and the restriction, too, which was implied in the prohibition to individuals  
 against dealing with the Indians for a transfer of their ownership, and the reservation of that  
 30 privilege to the Crown, was a restriction only upon the individual's right to purchase, and not upon  
 the Indian's right to sell. The Indian tribes were dealt with by the Crowns or their duly authorized  
 representatives, because those tribes were looked upon as independent nations capable of treating  
 as nationalities, and of binding themselves by the solemn compacts of formal treaties.

And here a distinction should be pointed out between the modes of dealing with lands which,  
 when discovered, were uninhabited, and with those which were found inhabited by natives. A  
 large portion of this continent was uninhabited ; other parts were inhabited by tribes with juris-  
 diction over well-defined limits, within which the respective tribes claimed absolute rights, which  
 rights, as among the Indians themselves, were well known and recognized. With regard to the  
 uninhabited territory, the European governments, on discovery, assumed, and properly enough  
 40 assumed, a sovereign power, and were at once permitted and enabled to grant estates, and to sell  
 and dispose of the land. But where the land was claimed by the Indians, and owned and possessed  
 by them, the Indian title was respected, and was dealt with by the Crowns as a valid title to  
 the soil.

It is proposed to show that this has been the recognized principle from the beginning. And  
 it is thought that in the following brief historical sketch there is no statement which is not capable  
 of deduction from the extracts given in its support.

The field of investigation covers a wide range, both in respect of time and place, embracing, as regards the latter, the whole country lying between the Atlantic and the Alleghanies, and reaching from New England to Southern Carolina ; and extending, in point of time, from the days of Queen Elizabeth to the declaration of Independence in 1776. We are to endeavor to ascertain in what manner the early settlers in that vast region treated the Indians among whom they had come, and how they were treated in turn ; to find out whether our forefathers respected in any degree what seems, on first considering the matter, to be the natural and inalienable right of the aboriginal inhabitants to the soil of their own country ; or whether, resting satisfied with a patent from a European sovereign, did they immediately proceed to take possession of the territories thereby granted to them, without regard to any rights which the Indians might claim, viewing the latter 10 merely as obstacles to their own aggrandizement, to be got rid of as soon as possible.

To one looking at this question for the first time, there certainly seems an incompleteness in a title resting solely on a patent, say from the King of England, of lands thousands of miles beyond the sea, concerning which neither he nor any one about him had aught beyond the most vague and shadowy ideas, which were inhabited by a people who have possessed the country for centuries it might be, and who, so far from acquiescing in the transfer, were ignorant of the very existence of the Monarch who was dealing with their lands in such a summary manner.

The earliest substantial attempt at the establishment of a colony in that part of America with which we are now dealing, was made under the auspices of Sir Walter Raleigh at Roanoak, now forming part of North Carolina, in the month of August, 1585. It was he who first gave to this 20 country the name of Virginia, in honor, it is said, of Queen Elizabeth, his patroness, though some think it was so called because the soil seemed to retain the virginity and purity of its first creation. Seven years earlier, indeed, Queen Elizabeth had granted a patent to Sir Humphrey Gilbert, half brother to Raleigh, for this purpose, which conferred upon him the largest powers. His enterprise, however, proved a failure, and he himself perished in the attempt, without even having landed on the shores of America.

In 1584, Raleigh applied to the Queen for a patent in all respects similar to the one she had bestowed on Gilbert, which she granted him. This patent authorized him, says Graham, in his *History of the United States*, to "explore and appropriate all remote and barbarous lands unoccupied by Christian powers ;" it invested him with powers of civil and criminal legislation over all the 30 inhabitants of the territory which he might occupy, with the limitation that his laws should conform as nearly as possible to those of England, and should not derogate from the supreme allegiance due to the British Crown. The endurance of the patent, so far as related to the acquisition of territory, was limited to six years.

The relations between Raleigh's colonists and the Indians were, for a time, most amicable ; then a coolness arose which culminated in blood being shed. Finally in 1586, after enduring a good deal of hardship, Drake took the whole party off in his ships, and conveyed them back to England. Thus ended, in failure, the first attempt at colonization on the part of England in the New World.

Very shortly after this, Sir Richard Grenville landed a number of men at the then desolate settlement of Roanoak. This party was killed by the Indians, and the next year one of Raleigh's 40 captains, White, by name, made a similar attempt with a like result.

In April, 1606, King James I. conceived the idea of dividing that part of America called Virginia into two Provinces, and of granting a charter of incorporation to each,—to a Company, styled the London Company, which was headed by Captain John Smith, a name familiar in the



annals of Virginia, was assigned the southern part of the country. To the Plymouth Company was appropriated the northern portion—that afterwards known by the name of New England, to which further reference will be made hereafter.

And here there must be noted an abatement in the pretensions of the English sovereigns with respect to these newly discovered lands. In this later patent of James no attempt was made, nor right pretended, to legislate for the Indian tribes of America. This, says Graham, in his *History of the United States*, “was an advance in equity beyond the practice of the Spaniards and the ideas of Queen Elizabeth, whose patent asserted the jurisdiction of the English Crown over the “old as well as the new inhabitants of her projected colonies.”

10 It is not necessary to trace the history of these early Virginian settlements through their successive stages. During the early years of Smith’s settlement in the country, he seems to have been in a state of constant embroilment with the Indians, and the record of their friendly relations is very meagre. In a work, however, published in London over a century ago, (*Notes of Virginia*, 1782), it is affirmed with a good deal of positiveness that the opinion that Virginia had been taken by force from the natives is not well founded, but on the contrary, that there are repeated proofs of purchases of land from the Indians; and then the writer goes on to say, with regard to the ‘Upper Country,’ ‘we know that has been acquired altogether by purchases made in the most ‘unobjectionable form.’

20 The next English settlement in these parts, in point of time, was that of the Pilgrim Fathers in New England, in 1620. But, before speaking of it, it may be well to depart a little from the chronological order of events, and say a few words about what is certainly the most famous incident in this connection, that has come down to us of the early days of the settlement of North America by the English, William Penn’s celebrated treaty with the Indians under the Great Elm Tree at Shachamaxon on the occasion of his arrival in this country in 1682.

Charles Second, under a Patent bearing date the 4th March, 1681, granted to William Penn, his heirs and assigns, the whole of the Province of Pennsylvania, bestowing upon him the largest powers consistent with the retention, by the King, of his paramount authority. This instrument is of record in the office of the Secretary of Pennsylvania.

30 The Duke of York also executed to Penn about the same time, a deed from himself of Pennsylvania, as security against any attempt which might afterwards be made to claim this territory for the Duke, Charles having previously (in 1664) made large grants of land in this part of America to his brother. The descriptions in these grants are often so vague and indefinite that it is sometimes very difficult to determine exactly what is meant to be conveyed by them; and so to strengthen Penn in his possession, James conveyed to him any interest he might have had in the new colony.

In March or April, 1681, Penn sent over to Pennsylvania, as Deputy-Governor, his cousin, William Markham, with instructions to take possession of the country in his name, and generally to prepare the way for his own coming. He himself sailed on the 1st September, 1682, and arrived at Newcastle on the 27th October.

40 Historical authorities hereafter referred to, will show that the very first thing Markham did on his arrival in the country was to call the Indians around him, and to ask them whether they would sell a piece of land to their new lord. This they agreed to do, and on the 15th July, 1682, a deed of conveyance to Penn of certain lands was formally executed by Idquahon and other Indian sachems. A copy of this document is to be found in Hazard’s *Annals of Pennsylvania*, pages 581-583.

The fact is deserving of attention that this deed expressly declares that the lands therein conveyed for certain considerations to Penn, are "lying and being in the Province of Pennsylvania;" that is, they form a portion of the domain already granted to Penn by King Charles.

This compact, however, while of much greater value to the purposes of this sketch, is not the celebrated treaty to which allusion has been made above, and concerning which a few words will not be out of place in this connection.

Much difference of opinion exists as to the precise object of Penn's great treaty, as it is called, and the difficulty of arriving at any conclusion is greatly enhanced by the fact of there being no trace of such a document in existence, nor even any evidence to show that it took the form of a written compact. Some writers hold that the treaty was for the purchase of lands from the Indians. Some maintain that it was merely for the purpose of forming a league of friendship with them, while others are inclined to think that no such gathering ever took place at all. 10

The consensus of opinion of the great majority of writers upon the early history of Pennsylvania, as well as the uninterrupted tradition among the natives, leave, however, little room to doubt that such a treaty actually was entered into between William Penn and the Lenni Lenape Indians, with certain of the Susquehannah bands. The gathering took place under a great elm tree at Shachamaxon (near the site of the present city of Philadelphia), in the latter part of November, 1682, Penn, as we have seen, having arrived in the country only a month before.

No record of this treaty has come down to us in written form, though the minutes of the meeting were in existence down to 1792. No further reference, therefore, shall be made to such accounts, authentic or otherwise, as exist to the present, beyond the mention of the fact that the treaty of 1682 was but a preliminary step in the direction of those extensive purchases of lands which Penn afterwards made. The treaty was faithfully observed by the Indians, and it is the compact of which Voltaire sarcastically observed that it is the only one that was never sworn to, and the only one that was ever kept. 20

But whether Penn did, or did not, on this occasion treat with the Indians for the purchase of lands, that it was his avowed policy so to do, a policy which he inflexibly adhered to, is beyond all dispute, as will be shown hereafter. As we have already seen, Penn sent over Commissioners for this very purpose, and positive proof is not wanting that later on he, himself, not satisfied with the title acquired under his Patent from the King of England, bought from the native owners his vast domain, paying them therefor, it is computed, not less than £20,000 sterling. 30

Over and over again, and notably in his letters of the 14th and 16th August, 1683, the first to the Lords of the Council of the Plantations Committee, and the second to the Free Society of Traders in England, he lays down the principle that governed his relations with the Indians; namely, that he recognized in the native inhabitants of the country the inalienable right to the disposal of the soil.

To give two instances out of many. Penn in his own person made a purchase from the Indians of a considerable quantity of land lying between the "Neshaminy and Pennepact Creek." The deed of sale is dated the 23rd June, 1683, and is of record; as is also another deed dated the 14th July following, for lands lying between the Schuylkill and Chester Rivers. 40

But Penn was far from being the first who thus recognized the rights of property on the part of the natives, and dealt with them on the basis of those rights; though he has often been erroneously referred to as the exponent of a just and equitable principle which was an exception to the ordinary course of dealing, on the part of Europeans, with the soil of this continent of which they desired to become possessed. It is not difficult to show, from authentic historical records, that

a similar policy, followed in the recognition of the Indian title and in its purchase from the sovereign tribes, was practised by the Swedes and Dutch in Penn's own province, long before it was known by its present name ; and that it was repeated by the settlers of New England, New Jersey, Delaware, Rhode Island, New York, Maryland and Carolina, years before Penn was born. Let us, then, resuming the chronological study of the Colonies in this direction, examine the early records of those provinces and see what is to be found that will throw light upon the question before us.

The first European visitors to the country lying between Virginia and New England, now comprising the States of New York, New Jersey, Pennsylvania and Delaware, were the Dutch, who gave it the name of New Netherland. They seemed to have touched at several places along the coast without, however, attempting to effect any permanent settlement as early as 1598.

Henry Hudson, an Englishman by birth, but in the employ of the Dutch East India Company in March, 1609, while endeavoring to find a north-west passage to the East Indies, entered Chesapeak Bay, and proceeding on his course sailed up the River Manhattan (now the Hudson) To him belongs the honor of having been the first white man to penetrate these then unknown regions, which were immediately claimed by the Dutch. Hudson's employees, shortly after this, applied to the High and Mighty States-General of Holland for certain trading privileges in connection with their discovery, and on the 11th October, 1614, a special Edict was issued in their favor, limited, however, to three years from the 1st January, 1615.

On the 3rd June, 1621, was chartered the Dutch West India Company, to whom certain powers and privileges were granted, and among them, authority in the name of the States to make contracts, engagements and alliances with the princes and natives of the countries mentioned.

In 1624, Peter Minuit came to the country from Holland as Director-General.

We find that the Company soon began to establish themselves in the New Country, and in order the more effectually to do this they at once commenced to treat with the natives for the purchase of lands. Thus Samuel Godyn and Samuel Blummaert, two of the directors, despatched two agents to South River for this purpose, with such success that on the 1st June, 1629, they completed a purchase from the Indians of a large tract of land, the formal patent for which was attested on the 15th July, 1630, by the director and council, at Manhatten, which also gives details of other purchases of lands by the Dutch from the Indians about this time.

In 1626, Gustavus Adolphus, King of Sweden, granted a charter to a Swedish company to explore these parts. No settlement, however, appears to have been made by the Swedes before 1638, when a company of about fifty landed at Cape Henlopen under the leadership of Peter Minuit, who it seems had transferred his allegiance from the Dutch to the Swedes. Some say that after his recall from the governorship of New Netherland, in 1633, he was dismissed from the service of the States General. However that may be, it is as a Swede that we have now to deal with him. Under his new allegiance he followed the principles in his dealings with the Indians adopted when he was a Dutchman ; for we find that the very first thing that he did on getting ashore was to bargain with a sachem for as much ground as would enable him to put up a house, and, also, as much land as was contained within " six trees " which the sachem sold Minuit. On his newly acquired property Minuit erected a fort and trading-house, which he named Christina, after his Queen.

" The Swedes," says Hazard in his *Annals of Pennsylvania*, page 48, " purchased all the land from Cape Henlopen to Santikan (the falls at Trenton), and then fixed up stakes and mark-

"The original deeds for these lands, with the marks of the Indians, were sent to Sweden and "presented in the archives at Stockholm," etc.

As was to be supposed, the English did not long allow to the Dutch and Swedes the monopoly of this country. About the year 1640, stragglers from Connecticut first began to make settlements on the Delaware. Hazard says, in his *Annals of Pennsylvania*, that of these early English pioneers little is known, except that they purchased lands, and met with ill treatment both from the Swedes and Dutch. A certain Captain Turner, for example, purchased, says Trumbull, in his *History of Connecticut*, a large quantity of land, sufficient for a number of plantations, on both sides of the Delaware Bay and River.

During succeeding years a great deal of wrangling went on between the Dutch and the 10 English as to who had the better title, and an extract from Broadhead's *History of the State of New York*, shows that both the English and Dutch recognized the fact that he who could show most clearly that he had acquired the Indian title had the stronger claim. For instance, we read at Vol 1, page 295 of that work :—

"In vain Commissary op Dick pleaded Dutch discovery before English knowledge of the "river, and Dutch possession under a title from the Indian owners anterior to English purchase "and settlement. . . . To fortify the English claim of title, Sequasson, the son of the Sachem "who had assented to Van Curlee's original purchase, was brought into Court to testify that he "never sold any ground to the Dutch," etc.

From about the year 1640, we find that the English encroached steadily upon the Dutch 20 possessions, making large purchases of lands from the Indians whenever opportunity offered, until in 1664, the Dutch and Swedes, hemmed in as it were between the Virginians and the New Englanders, yielded up the country to the British. In 1673, New York and Delaware again reverted to the Dutch, who, however, held them but a short time, for under a treaty between England and the States-General signed at Westminster on the 19th February, 1674, these Provinces were restored to the English Crown.

It is thus seen that the Dutch, the Swedes, and the English were alike governed by the same principle with respect to the ownership of the soil, that they all recognized the original title as residing in the Indians.

Immediately after the cession of the country by the Dutch, indeed during the interval between 30 the cessions, Charles Second, as we have already seen, granted to his brother, the Duke of York, the present State which takes its name from the latter's title. James sent out as Governor Edmund Andross, to whom slight further reference will be made, and the end of whose term of office brings us to Penn's time.

The mode by which the New England Fathers acquired their lands may now be considered.

It has been shown that in the year 1606, King James I. granted to the Plymouth Company of Adventurers a charter of incorporation, and assigned to them that portion of America afterwards known by the name of New England.

Some years later the Plymouth Company disposed of a portion of the lands under their grant to an association of Puritans styled the Pilgrim Fathers, who, resolving to form a settlement in the 40 New World, sailed from England in the *Mayflower*, for their new home on the 6th September, 1620.

We learn from their records that they landed on the 22nd December, 1620, at a spot (in the present State of Massachusetts) which they called New Plymouth.

We find that they at once entered into treaties of amity with the Indians, and notably with a celebrated Sachem called "Massasoiet," with such success that the chief was not only content

with the provisions of the treaty, but "gave away all the lands adjacent, to the planters and their heirs forever." 22. APPELLANTS' FACTUM.

This, it is to be observed, was sixty-two years before the date of Penn's great treaty, and twenty-four years before he was born.

We also find it affirmed of the early settlers of New England of about the year 1630, "that they fairly purchased of the natives the several tracts of land which they afterwards possessed."

The settlements of the Pilgrim Fathers are here dealt with as the first made by Europeans in New England; but while for practical purposes they were, still Englishmen had been over the ground before them. It is said that in 1602, one Bartholomew Goswold with thirty-two other Englishmen settled on the Elizabeth Islands, in Buzzard's Bay, in the present State of Massachusetts; which settlement, however, was abandoned the same year.

Captain John Smith, of Virginia, about the year 1614, explored the country from the south, and wrote home accounts of it to England. The French are also said to have penetrated from the north. Nevertheless the certain record does not begin until the year 1620.

An examination of the early records of the State of New Jersey shows us that on the 22nd November, 1630, one Michael Pann made an extensive purchase from the Indians of lands which included the whole neighborhood of Jersey City, and further, that between the years 1673 and 1676, the Quakers, who had purchased the western half of New Jersey for £1,000 from Lord Berkeley, immediately on their arrival in the country entered into negotiations with the Indians for the purchase from them of these same lands which they had acquired by purchase from Lord Berkeley, paying them therefor.

In 1638, the first settlers of Rhode Island under Mr. Coddington bought from the Indians certain tracts of land paying them liberally therefor, and the narrative goes on to say that "the other parts of the State were purchased of the natives at several successive periods."

So also with Maryland. The Province of Maryland was granted by King Charles I. to Lord Baltimore under patent bearing date the 20th June, 1632. Lord Baltimore, under this charter, was created Lord Proprietary, and endowed with the most liberal powers. This nobleman immediately fitted out two vessels, and got together some two hundred English Catholic gentlemen under the command of Leonard Calvert, his brother, whom he had appointed the first Governor of Maryland. The party set sail from England on the 22nd November, 1633, and arrived off the coast of Maryland, near the mouth of the Potomac, in March of the following year.

They landed on the 25th instant, and the Governor, we are told, immediately sought out the chief of the Indian tribe dwelling in that neighborhood, from whom he purchased a quantity of land, about thirty miles (square). At this spot, with great pomp and ceremony, on the 27th March, 1634, two days after their first landing, the new comers formally took possession of the soil of Maryland, which, says history, "they had purchased from the native owners."

The abstention on the part of these settlers from taking possession of the lands, under their grant, until they had first settled with the Indians therefor, is very marked, and clearly shows what ideas they entertained upon the point.

This was the first settlement within this Province; but in order to show that the policy of Calvert was adhered to in subsequent years, attention is asked to note 83, page 682, of Bozman's *History of Maryland*, where will be found the full text of a treaty made between the English and the Susquehanagh Indians, dated the 5th of July, 1652, under which the Indians ceded to the English certain lands therein described.

There remains now only Carolina to be enquired into. The early records of this Province are not so clear as could be wished. It seems that Sir Robert Heath, Attorney-General to Charles I., obtained under a patent from the King dated the 5th October, 1629, a grant of the lands lying between the thirty-eighth degree of north latitude, and the river St. Matheo. This country by the grant was erected into a Province by the name of Carolina. Heath, however, neglected to make use of the powers and privileges thus conferred upon him. Some time afterwards he sold his grant to the Earl of Arundel, who also seems never to have done anything with it, and the patent finally lapsed.

In 1663 Charles Second granted to the Duke of Albermarle, Lord Clarendon and others of his courtiers, this same territory, which was again erected into a Province by the name of Carolina. 10 Their charter was on the lines of the Maryland grant, and was most liberal in its provisions. This Company after a time made settlements in the country. There were, however, a body of emigrants from New England settled near Cape Fear before their arrival, as well as a colony from Virginia, who, says Graham in his *History of the United States*, Vol. 2, page 75, had settled on the north-east shore of a river called the Chowan, but which now received the name of Albermarle, and who "had purchased their lands at an equitable price from the aboriginal inhabitants."

In the latter part of the year 1664, Sir John Yeomans, a planter from Barbadoes, led from that island a large number of emigrants, and established a settlement on the southern shore of Cape Fear River. These new-comers first purchased from the Indians a tract of land 32 miles square, and then solicited from the lord proprietors a charter of incorporation. 20

In the foregoing *résumé* of the historical records of the colonies considered, nothing is said of transactions subsequent to the date of Penn's treaty, 1682; the immediate object being to show that Penn was by no means the first to adopt the policy of buying the Indian lands, as often erroneously supposed, but that such had been the custom and the recognized principle from the beginning, or so far back as our definite knowledge extends. It is as easy to show that Penn's treaty, while it was not the first of a series, was just as far from being the last.

We are informed that Penn made treaties of peace with the Indians on the Potomac, and with the ambassador of the Five Nations in the year 1700.

We know, too, that on the 19th July, 1701, these same Five Nations made a grant to the British Crown of a vast tract of land; and that on the 14th September, 1726, the Sachems of the 30 Six Nations signed a deed at Albany confirming their grant of 1701.

Again, in 1753, a purchase was made by the settlers of Connecticut from the Six Nations of a large tract of land at Wyoming; and lastly, in the year 1755, "a great treaty," says Ramsay in his *History of South Carolina*, pages 12 and 13, "was made between Governor Glen and the Cherokee warriors in their own country, for the purpose of obtaining an extinction of the Indian claims by a cession of territory to the King. At this Congress a prodigious extent of territory was ceded to the King of England. Deeds of conveyance were drawn up and formally executed by the head men of the Cherokees in the name of the whole nation."

Such is a brief sketch of the dealings of the Europeans with the native Indians, during the period referred to, in the Provinces of New England, New York, New Jersey, Rhode Island, 40 Delaware, Pennsylvania, Maryland and Carolina; and we find that throughout all these colonies, from the days of the treaty made by the Pilgrim Fathers with Massasuit on the shores of Massachusetts in 1620, down to that made by Governor Glen, of Carolina, with the Indians in 1755, alike

among the English, Dutch and Swedes, whether by the agency of Godyn, Blummaert, Minit, Penn, Coddington, Penn, Calvert or Yeomans, the same policy with respect to the Indians prevailed;— that everywhere the white men recognized that they had not brought with them from over the sea all that was requisite to their entering into possession, and that over and above the Royal Charters there were necessary to a perfect title the voluntary transfers by the natives of their hereditary interest in the soil.

22. APPELLANTS' FACTUM.

The various works and documents from which the foregoing synopsis is taken are so widely scattered and so difficult of access, that the Appellants consider it will conduce to convenience and ease of reference, to set out here, at some considerable length, a series of extracts most directly bearing upon the questions dealt with on this branch of the case. These will be arranged so as to present a systematic collection of records and opinions with regard to the policy pursued in the colonies above mentioned, and in the same order in which those colonies have been studied above. And first of Pennsylvania :—

PENNSYLVANIA. Graham's *History of the United States*, vol. 2, page 346 : After relating the various circumstances connected with the celebrated treaty made between William Penn and the Indians in 1682, the author goes on to say :—

“ Nothing can be more exaggerated or inapplicable than the encomiums which numerous writers have bestowed on this celebrated transaction between Penn and the Indians. They have, with “ unhappy partiality, selected as the chief, and frequently the sole object of commendation, the “ supposed originality of the design of buying the lands from the savages, instead of appropriating “ them by fraud or force, which last they represent as the only method of acquisition that had been “ employed by the predecessors of Penn in the colonization of North America. This is at once to “ reproach all other founders of civilized society in North America with injustice and usurpation, “ to compliment the Indians with the gratuitous supposition that only bare justice on the part of “ the colonists was requisite to the preservation of peace between the two races ; and to ascribe to “ Penn a merit which assuredly did not belong to him, and which he himself has expressly “ disclaimed. The example of that equitable consideration of the rights of the native owners of the “ soil, which has been supposed to have originated with him, was first exhibited by the planters of “ New England, whose deeds of conveyance from the Indians were earlier by half a century than “ his, and was successively repeated by the planters of Maryland, Carolina, New York and New “ Jersey, before the Province of Pennsylvania had a name.”

The same statement is quite as strongly put in the 3rd volume of the 2nd part of *Memoirs of the Historical Society of Pennsylvania*, p. 146.

Brodhead's *History of the State of New York*, p. 232 :—

“ Aaron Corssen was appointed Commissary (by the Dutch West India Company), and was “ instructed to purchase a tract of land on the Schuylkill. . . . In the course of this year “ Corssen succeeded in purchasing for certain cargoes from the right owners and Indian chiefs a “ tract of land called ‘ Armenverius,’ lying about and on the Schuylkill. The Indian title being “ thus secured, formal possession of Pennsylvania was taken by the Dutch, who erected a trading “ house there ; and afterwards a more considerable post to which they gave the name of Fort “ Beverside.”

*Memoirs of the Historical Society of Pennsylvania*, vol. 3, part 2, page 164:—

“It must also be observed that when William Penn first came to Pennsylvania it was not a newly discovered country; the banks of the Delaware had been settled on by Europeans for more than forty years, and treaties had repeatedly been made before that time with the Indian inhabitants by the Swedes, the Dutch, and the English. We have an account given us by Campanius of a treaty made with them in 1654, by the Swedish Governor Rising, the stipulations of which appear pretty much the same as those of the great treaty.”

Hepworth Dixon's *Life of William Penn*:—

From this work we learn that in March, 1681, Penn commissioned Col. Markham, his cousin, to go over to America and act as his representative until his arrival, (page 191,) that on his arrival he called the Indians into council, and enquired of them whether they would sell a piece of land to their new lord; that the terms of sale were fixed in July, and signed in August of that year. P. 199.

That about this time Penn also sent out in advance a surveyor, Thomas Holme by name, who made extensive purchases of land from the Indians. P. 214.

That Markham made treaties of amity with the Indians as distinct from the treaties for the purchase of lands. P. 215.

That Markham informed the Indians on behalf of Penn, “That although the King had granted him the whole country from the Cape of Henlopen to these distant regions, stretching away beyond the great mountains to the northern lakes, of which their people had remote traditions, yet he would not take from them by force a single rood of their hunting grounds, but would buy it from them with their full consent.”—*Ibid*, p. 215.

That not only did Penn purchase of the savages occupied lands but he also made proposals for the purchase from them of unoccupied lands.—*Ibid*, page 216.

That the Indians claimed the lordship of the soil as theirs by immemorial right.—*Ibid*, page 185.

That in the autumn of 1681, Penn sent out these commissioners to Pennsylvania, William Crispin, John Bezar, and Nathaniel Allen, with written instructions to buy land from them in his name, to arrange a regular course of trade, and to enter into treaties of peace and friendship.—*Ibid*, page 200.

That Penn made treaties of peace with the Indians on the banks of the Potomac, and with the Ambassador of the Five Nations.—*Ibid*, page 312.

That Penn would not take from the Indians a rood of land until they had fixed a price.—*Ibid*, page 318.

Penn, in his letter to the Lords of the Council of the Plantations Committee, dated 14th August, 1683, acknowledged that in making his treaty with the Indians his intention was ‘that he might exactly follow the Bishop of London’s Counsel, by buying and not taking away the native’s land.’ (Note 3, Bozman’s *History of Maryland* page 570).

Noble, in his *Continuation of Granger*, says:—

“He (Penn) occupied his domains by actual bargain and sale with the Indians.” (See also Graham’s *History of the United States*, Vol. 2, Note to page 346).

*Memoirs of the Historical Society of Pennsylvania*, Vol. 1, Part 1, pages 164, 165, 166:—

“It is impossible to say to what extent the English had made settlements within the limits of what is now the State of Pennsylvania an early as the days of William Penn’s charter, but that they had long exercised dominion over the Bay and River Delaware abundantly appears from



“the record of the Proprietary Government of the State of New York, (certified copies of which <sup>22. APPEL-  
LANTS’  
FACTUM.</sup> are on record in the office of the Secretary of the Commonwealth at Harrisburg). Charles  
“Second had granted to his brother the Duke of York in 1664 an immense territory in America,  
“embracing the Dutch settlements at New York, and extending southward to the eastern shore of  
“the Bay and River Delaware.” . . . . . “Amongst the same documents, (those  
“alluded to above), is an Indian Deed of as early date as 1675, to Edmund Andros, Governor and  
“Lieutenant of the Duke, for land lying at least 20 miles above Philadelphia. This deed is  
“perhaps the earliest made by the aborigines to the English of lands on the western shore of the  
“Delaware, etc.” “ . . . . . The consideration, amongst the details of ammunition, clothing,  
10 “etc., exhibits the amusing predilection of the grave Sachems for fifty looking glasses and one  
“hundred jews-harps. It contains also covenants of seizin and quiet enjoyment, breaches of  
“which I presume could only effectually be tried by the sword. This tract of country was  
“selected probably for the peculiar excellence of its soil, and patents were granted for it by  
“Andros, before the country bore the name of Pennsylvania. The lands below at that time  
“remained in the tenure of the Indians, as a commission was three years afterwards issued by  
“Andros, to Cantwell and Hannum, to purchase from the Savages the land as yet unpurchased  
“from the Indians, below the late purchase at the falls on the western shore of Delaware River.”

*North American Indians and Friends :—*

Penn and his colleagues recommend in their instructions for the Government of the Province  
20 in 1676, “that the Commissioners immediately agree with the Indians for lands.”—Page 14.

“We have already seen by the treaty which friends had with the Indians for the purchase  
“of lands in west Jersey in 1677, that the principle prevailed to recognise in them the undisputed  
“right to the disposal of the soil which from time immemorial they had occupied.”—Page 19.

This book speaking of Penn’s celebrated treaty says it was “to form a treaty of peace with  
“the Indians, and to settle for the purchase of lands.”

An Indian Chief speaking to the Delawares at Philadelphia in 1742, said, “We have seen  
“with our eyes a deed signed by nine of our ancestors above fifty years ago, for this very land.”—  
Page 34.

Proud, in his *History of Pennsylvania*, says :—

30 “From Maryland to Coaquannoe he purchased lands of the Indians, whom he treated with  
“great justice and sincere kindness.”—*Ibid*, page 37.

In 1836, a Committee of the House of Commons, appointed “to consider what measures  
“ought to be adopted with regard to the native inhabitants of countries where British settlements  
“are made,” made a report accordingly, and connected with that report is a paper containing  
the evidence of T. Hodgkin, Esquire, from which the following are extracts :—

“In reply to the question addressed to me respecting the course adopted by William Penn in  
“his dealing with the Indians, . . . . . Penn obtained possession of his territory by  
“treaty and purchase of those who possessed a natural and hereditary right to it, instead of  
“resting satisfied with having obtained his right and title by Letters Patent from the King of  
40 “England.”

In refutation of this statement (namely, that Penn’s purchase was merely a semblance of a  
purchase, and that he never gave value for the lands), Mr. Hodgkin states in this report that Penn  
appears to have given about £20,000 to the Indians, and at a time when European manufactures

were worth more than at present. He also states that Penn, although he purchased the land from the Indians, did not desire their removal from it. They were at liberty to settle as his subjects in many parts of the Province.—*Ibid*, pages 74 and 75.

Martin's *History of North Carolina*, Volume I., page 175.

"William Penn immediately afterwards entered into a treaty with the natives from whom he purchased as much of the soil as the circumstances of the Province called for."

Tarleton's *History of America*, page 41 :—

"Mr. Penn, notwithstanding the grants made to him by the Crown and Duke of York, did not esteem himself the real proprietor of the lands granted him, until he had given the Indians valuable considerations, (or what they esteemed such), for their country; he therefore assembled their Sachems or Princes, and purchased countries of a very large extent of them, for a very moderate price, as they made scarce any other use of their country than hunt in it." 10

*Constitutions of Pennsylvania*, (London, 1759) :—

"The charter Mr. Penn obtained of the Crown comprehended a far greater extent of territory than he thought fit to take up of the Indians at his first purchase. . . . Rendered thus the only purchaser, he reckoned he might always accommodate himself at the Indian market on the same terms, with what quantity of land he pleased; and till the stock in hand, or such parts of it as he thought fit to dispose of, were in a fair way of being sold off, he did not think it for his interest to encumber himself with more."—Page 81.

In 1751, the Assembly urged upon the proprietaries the justice of their assuming a share in the charge of Indian affairs. To this the proprietaries replied, giving among other reasons why they should not contribute to this charge, "that they pay the Indians for the land they purchase," to which the Assembly *inter alia* rejoined, "that by the Act forbidding all but the proprietaries to purchase lands of the Indians, they had obtained a monopoly of the soil, consequently ought to bear the whole charge of every treaty for such purchases," etc.—Pp. 97 and 98. 20

*Memoirs of the Historical Society of Pennsylvania*, Vol. 3, Part 2, page 157 :—

"Two considerable purchases of land were made by William Penn from the natives, the deeds of conveyance of which are on record; the first dated 23rd June, 1683, conveys to him and his heirs the land lying between the Neshaminy and Pennypack Creek, and the other which bears date of the 14th July, following, is for lands lying between the Schuylkill and Chester River." 30

In Hazard's *Annals of Pennsylvania*, pages 488-500, is to be found the text of the grant of Pennsylvania from Charles Second to William Penn, dated the 14th March, 1681. In the same work is a copy of the deed from the Duke of York to Penn, dated 21st August, 1682; also, copies of two deeds of feoffment, dated 24th August, 1682; the text of Penn's Commission to William Markham, as Deputy-Governor of Pennsylvania, dated 10th April, 1681; and the text of the first deed of purchase of lands from the Indians, made for William Penn by William Markham, dated the 15th July, 1682. (Pages 581, 582 and 583.)

Penn's opinion of the treaty-making power and business ability of the Indians with whom he dealt is shown in the following words from his own pen :—"He will well deserve the name of wise who outwits them in any treaty about anything they understand." (See Graham's *History of the United States*, Vol. II., page 343, Note.) 40

The last extract which shall be given with regard to the colony of Pennsylvania is from a French source. It is to be found in Vol. I. of a collection of historical documents printed by the Legislature of the Province of Quebec, in 1883, under the title, *Collection de Manuscrits, Contenant Lettres, Mémoires, et autres Documents Historiques relatifs à la Nouvelle France*. At page 9 of that volume commences an elaborate "*Mémoire touchant les prétentions des François et des Anglois sur les terres de la Nouvelle France*," and the extract referred to commences at page 21, and is as follows:—

10 "Les Iroquois n'ont jamais prétendu que leur païs dépendit ny de la France ny de l'Angleterre, quoy que les Iroquois, comme je l'ay desjà dist, eussent soumis leur païs à la Couronne de France dans un traité de paix qu'ils furent forcez d'accepter; ils s'en regardent cependant toujours les maistres; en l'an 1685, ils déclarèrent a Monsieur de la Barre leur neutralité entre les François et les Anglois, et dirent, par la bouche de leurs orateurs: 'Je tends un bras vers mon Père le gouverneur des François, je tends l'autre vers l'Anglois

20 mon frère, mon corps est sur mon propre terrain qui ne relève de personne que du Créateur de lumières qui me l'a donné avant qu'aucun Européen fust venu chercher de nouvelles terres, en ces quartiers. Je suis neutre et c'est par tolérance que j'ay permis à l'Anglois d'occuper des terres qui estoient de mon dépendance et dont il m'a payé le prix qu'il me paye encore toutes les fois qu'il s'approche de moy.'"

30 "En effet, les Anglois ont payé les terres de la Pennsylvanie aux Iroquois qui s'en estoient rendu maistres par la destruction de la nation des Onontaquez."

"The Iroquois have never supposed that their country was subject to either France or England, although the Iroquois, as I have already said, had submitted their country to the Crown of France, by a treaty of peace which they were forced to accept; they always consider themselves masters of it; in the year 1685, they announced to M. de la Barre their neutrality between the French and the English, and said, by the mouth of their orators: 'I stretch out one arm towards my Father the Governor of the French, I stretch out the other towards the Englishman my brother, my body is upon my own domain, which is dependent upon no one but the Creator of days, who gave it to me before any European came to seek new lands, in these quarters. I am neutral and it is by indulgence that I have permitted the English to occupy lands which belong to me, and for which he paid me the price which he still pays me whenever he approaches me.'"

"In fact, the English have paid for the lands of Pennsylvania to the Iroquois, who had rendered themselves masters of it, by the destruction of the nation of the Onontaquez."

NEW ENGLAND.—Neal's *History of New England* (London, 1720):—

From this work we learn that the First Company of the Pilgrim Fathers sailed out of Plymouth in the "May Flower" on the 6th September, 1620, that they landed at Cape Cod on the 11th November; that they chose John Carver, one of their number, as Governor; that not having a good harbor at that place they returned to their ships and set about finding one; that on the 22nd December, 1620, they landed at what is now New Plymouth; that Massasoiet, a celebrated

40 Indian Sachem, the Lord of these parts, came to see them; that with him the English made a solemn treaty of amity. After reciting the Seven Articles of this treaty, this work goes on to say that the "Sachem was not only content with the conditions, but was willing to become a subject of the King, his heirs and successors; and gave away all the lands adjacent to the Planters and "their heirs forever." Pages 80 to 90.

From the same work (page 134) we learn that "the planters, notwithstanding the Patent which they had for the country from the Crown of England, fairly purchased of the natives the several tracts of land which they afterwards possessed." (See also Barber's *History of New England*, page 24).

Palfrey's *History of New England*, Vol. 3, page 137 :—

"The quiet of this time (1675) was undisturbed by any general apprehension of danger from the natives. The course of conduct pursued towards them had been praiseworthy in a singular degree. The Indians were a people extremely difficult to deal with, by reason alike of their mental and moral defects; but they were treated equitably and generously. . . . When they (the English Settlers) wanted an enlargement of their borders, they acquired it, if at all, by amicable agreement with any who had earlier possession." 10

(NOTE.—"I think I can clearly say that, before these present troubles broke out, the English did not possess one foot of land in this colony, but what was fairly obtained by honest purchase of the Indian proprietors. Nay, because some of our people are of a covetous disposition, and the Indians are in their straits easily prevailed with to part with their lands, we first made a law that none should purchase or receive a gift of any land of the Indians without the knowledge and allowance of our Court. . . . And if at any time they have brought complaints before us, they have had justice impartial and speedy, so that our own people have frequently complained that we erred on the other hand in showing them overmuch favor." *Governor Winslow to the Commissioners*, May 1st, 1676). 20

CONNECTICUT.—Brodhead's *History of the State of New York* :—

"It was therefore thought expedient that to their existing rights by discovery and exclusive visitation, should be added the more definite title by purchase from the aborigines. In the course of the following summer, the Dutch traders on the Connecticut were accordingly directed to arrange with the native Indians for the purchase of most all the lands on both sides of the river. This was accomplished, and Hans den Sluys, an officer of the Company, also purchased at the same time the 'Kievits Hoeck,' afterwards called Saybrook Point, at the north of the Connecticut, where the arms of the States General were affixed to a tree in token of possession."—Pp. 234 and 235.

The *Connecticut Historical Collection* shows :— 30

That Sir Edmond Andross was sent out as Governor of New England, arriving in Boston on the 19th December, 1686. He made himself very objectionable to the people, and as an example of his injustice, it is shown that he held that the title of the colonists to their lands was of no value; that the Indian deeds were of no more value than the "scratch of a bear's paw;" that on the accession of William III. Andros was removed, and the old state of things resumed. This shows clearly that the practice obtained among the first settlers of Connecticut of buying their lands from the natives.

Again we read, "that in 1753, a company was formed with the design of planting the lands within the charter of Connecticut on the Susquehannah. The next year a purchase was made from the Sachems of the Six Nations, of a large tract at Wyoming. In 1774 the settlement was formed into a town called Westmoreland, which sent representatives to the Assembly at Connecticut." 40

"The treaty of the Connecticut men with the Indians, and their purchase of the lands, excited the jealousy of the proprietaries of Pennsylvania," etc.—P. 28.

NEW YORK.—Smith's *History of New York* :—

22. APPEL-  
LANTS'  
FACTUM.

Page 19.—“The author of the account of New Netherland (printed in Amsterdam in 1651), asserts that the Dutch purchased the lands on both sides of that river (*i. e.*, Hudson's River), in 1632, before the English had settled in those parts.”

Page 162.—“Mr. Nanfan (the Lieutenant-Governor), in his speech to the House, informed them of the memorable grant made to the Crown on the 19th July, 1701, by the Five Nations, of a vast tract of land to prevent their submitting to the French in case of a war; that His Majesty had given out of his exchequer £2,500 sterling for forts, and £800 to be laid out in presents to the Indians,” etc.

10 Page 266.—Mr. Burnet, the Governor, at a meeting of the Sachems and the Six Nations at Albany on the 14th September, 1726, “embraced this favorable opportunity to procure from them a deed surrendering their country to His Majesty to be protected for their use, and confirming their grant in 1701, concerning which there was only an entry in the books of the Secretary for Indian Affairs.”

Note at the bottom of page 267 :—

“Besides the territories at the west end of Lake Erie, and on the North side of that, and the Lake Ontario, which were ceded in 1701, the Indians now granted for the same purpose all their habitations from Oswego (Niagara) to Cayahoga River, which disembogues into Lake Erie, and the country extending sixty miles from the southermost banks of those lakes. Though the first 20 “surrender, through negligence, was not made by the execution of a formal deed under seal; yet, as it was transacted with all the solemnity of a treaty, and as the second surrender confirms the first, no intermediate possession by the French can prejudice the British title derived by the cession in 1701.”

Brodhead's *History of the State of New York* :—

Speaking of Peter Minuit's administration of New Netherland as Director-General, the work goes on to say, “up to this period (1626) the Dutch had possessed Manhattan Island only by right of first discovery and occupation. It was now determined to superadd a higher title by purchase from the aborigines. As soon as Minuit was installed in his Government, he opened negotiations with the savages; and a mutually satisfactory treaty was promptly concluded, by which the entire 30 “Island of Manhattan, then estimated to contain about 22,000 acres, was ceded by the native proprietors to the Dutch West India Company, for the value of sixty guilders, or about twenty-four dollars of our present currency. This event, one of the most interesting in our colonial annals, as well deserves commemoration as the famous treaty, immortalized by painters, poets, and historians, which William Penn concluded fifty-six years afterwards, under the Great Elm with the Indians at Shackamaron.”—Page 164.

Lands purchased by Hosset for Van Rensselaer from the Indian Sachems, “on the west side of North River, south and north of Fort Orange,” and adjoining lands. “These purchases were confirmed a few days afterwards by formal patents signed by the Director and Council at Manhattan.—*Ibid*, pages 201 and 202.

40 Michael Pann purchased from the native Indians the whole of Staten Island; sale confirmed by Director and Council (*ibid*, pages 202 and 203); also the site of Jersey City.—*Ibid*, page 203.

Kieft purchased the lands between Norwalk and North River, erected thereon the Standard and Arms of the “High and Mighty States General,” and thus “obtained the Indian title to all the lands between Norwalk and North River, comprehending much of the present country of West Chester.”—*Ibid*, page 296.

“Up to this time the Dutch settlements on Long Island had been confined to the neighborhood of the present city of Brooklyn. By purchases from the Indians, the West India Company had already become the proprietary of Mespeth Newton, and of the regions eastward as far as Cow Bay, and southward to the Atlantic coast. Kieft now bought from the great Chief Penhawity, the head of the tribe of Canarsee Indians, who claimed the territory forming the present County of Kings, and a part of the town of Jamaica, his hereditary rights to lands on Long Island. Thus all the Indian title to that part of the Island westward of Oyster Bay, comprehending the present counties of Kings and Queens, became vested by purchase in the West India Company.”

“The territory east of Oyster Bay, now forming the County of Suffolk, however, remained in the hands of its aboriginal lords. But the Dutch, who were the first Europeans that occupied any part of Long Island, always considered it the “Crown of New Netherland,” whence they obtained their supplies of wampum; and the possession which they had formally asserted by affixing to a tree the Arms of the States General, they were determined to maintain.”

“A new encroachment now threatened this “Crown” itself. Under his grant from the Council of Plymouth in 1635, Lord Stirling soon afterwards gave a power of attorney to James Farrett, to dispose of any part of his property upon Long Island or its neighborhood. Farrett accordingly visited New England, and having selected for his own private use Shelter Island and Robin’s Island, in Peconick Bay, extinguished the Indian title by a formal purchase.

Previous to Farrett’s arrival, however, Lion Gardner, the Commandant at Say Brook, had purchased of the ancient inhabitants “the Island near Montauk Point, called by the Indians Manchonock, and by the English, the Isle of Wight. This valuable purchase was soon afterwards confirmed by Farrett, who, in the name of Lord Stirling, granted to Gardiner and his heirs the full possession of the Island, and the power to “make, execute, and put in practice, such laws for Church and Civil Government, as are according to God, the King’s and the practice of the country.” Gardiner immediately removed from Say Brook and fixed his residence on the Island, which has since been known by his name. The next year his daughter Elizabeth, was born at Gardiner’s Island; and thus was commenced the first permanent English settlement within the present limits of the State of New York.”—*Ibid.*, pages 297, 298.

“The next month, Hudde,” who was the Commissary of Kieft, the Director General, received a letter from Kieft, in which he was “imperiously commanded to purchase from the Savages some land on the west shore, about a mile distant from Fort Nassau to the north. On the following day the Dutch Commissary accordingly took possession of the spot, which seems to have adjoined Corssen’s first purchase, and soon afterwards a bargain was completed with the ‘original proprietor,’ who assisted in affixing the arms of the Company to a pole erected on the limits. Several Dutch freemen immediately made preparations to build on this newly acquired possession, which, considering its distance and direction from Fort Nassau, may be very properly regarded as the site of the present City of Philadelphia.”—*Ibid.*, pp. 426, 427.

NEW JERSEY.—Brodhead’s *History of the State of New York* :—

“The purchase of Staten Islands was succeeded in the following autumn by the still more advantageous investiture of ‘Ahasimus’ and ‘Aressick,’ extending along the river Mauritius and Island Manhattan on the east side, and the Island Hobokan-Hacking on the north side, and surrounded by marshes serving sufficiently for distinct boundaries.

“The spot was a favorite resort for the Indians, who were in the habit of conveying their

“peltries from that point directly across the river to Fort Amsterdam. This desirable purchase 22. APPEL-  
 “included the whole neighborhood of “Paulus Hook,” or Jersey City; and the sagacious Pann, LANTS’  
 “latinizing his patronymics, gave the name of Pavonia to his embryo colony.”—Pages 202 and 203, FACTUM.

Just before, it is stated, that Staten Island was ceded by “its Indian owners.” The owners of the above were evidently the same Indians.

The Quakers purchased the western half of New Jersey for £1,000 from Lord Berkeley, who obtained the whole of what is now New Jersey under a grant from the Duke of York. They sailed in the ship *Kent*, and immediately on arrival entered into treaties with the Indians for the purchase of lands, paying the Indians therefor.—See Hepworth Dixon’s *Life of Penn*, pages 143  
 10 and 149.

DELAWARE.—From Brodhead’s *History of the State of New York*:—

“While the details of the Charter were yet under advisement in the meetings of the Company, “several directors of the Amsterdam Chamber, who had been appointed Commissaries of the New “Netherland, hastened to appropriate to themselves the extensive privileges which they knew “would soon be publicly guaranteed to colonial proprietaries. The most prompt in action “were Samuel Godyn and Samuel Blommaert; the latter of whom had befriended Isaac de “Rasienes, the late Secretary of the Province. Influenced perhaps by his representations, Godyn “and Blommaert dispatched two persons to South River, ‘to examine into the situation of these “‘quarters,’ and purchase a tract of land from the savages. At the first meeting of the Amsterdam  
 20 “Chamber after the adoption of the Charter, Goydn notified his associate Directors that, in quality “of patron he had undertaken to occupy the Bay of the South River, and that he had advised the “Director, Peter Minit, and charged him to register the same there.”

The agent in the New Netherland faithfully executed the orders of their principals in Holland.

A tract of land on the south corner of the Bay of South River, extending northward about thirty-two miles from Cape Hinlopen to the mouth of the said River and Island, about two miles in breadth, was actually purchased from the native Indians for Godyn and Blommaert a few days before the adoption of the Charter in Holland. The formal Patent for the territory thus secured was attested in the summer of the following year by the Director and Council at Manhattan. It was the first European title by purchase from the aborigines within the limits of the present State  
 30 of Delaware; and it bears date two years before the Charter of Maryland granted to Lord Baltimore by Charles I.—Pages 200 and 201.

From Hazard’s *Annals of Pennsylvania*:—

Peter Minit in 1638 brought out a settlement of Swedes. They landed at Cape Henlopen. After his arrival, says Hazard, “he early proceeded to select a location for a fort. An Indian “Sachem named Mattheorn declared that when Minit came into the country with a ship, he “remained lying before the Minquas Creek near which at that time the Sachem had a house in “which he lived. Minit offered and gave him a kettle and other small articles, and requested of “him as much ground as to enable him to put up a house, and also as much land as was contained “within six trees, which the Sachem sold Minit, who promised half the tobacco which would  
 40 “grow upon it, which, however, the Sachem says, he never gave him. On this Creek Minit com-  
 “menced and erected a fort and trading house which, in honor of his Queen, he called Christina.”  
 Page 47.

Martin, in his *History of North Carolina*, (page 93) affirms

That "a number of Swedes and Finns came over in the year 1627 and landed on Cape Henlopen, which they called Paradise Point; they purchased from the natives all the land from that Cape to the Falls of the Delaware."

NEW HAVEN.—From *Story on the Constitution*, 4th Ed., Vol. I., page 56 :—

"The colony of New Haven had a separate origin and was settled by emigrants immediately from England, without any title derived from the patentees. They began their settlements in 1638, purchasing their lands of the natives, and entered into a solemn compact of government."

(See, also, *Hutchinson's History*, 82, 83; 1 *Holmes' Annals*, 244, 245; 1 *Chalmer's Annals*, 290; *Robertson's America*, B. 10; 3 *American Museum*, 523). 10

RHODE ISLAND.—*Story on the Constitution*, 4th Ed., page 6 :—

"Rhode Island was originally settled by emigrants from Massachusetts, fleeing thither to escape from religious persecution, etc. . . . One body of them purchased the Island which has given the name to the State; and another the territory of Providence Plantations from the Indians, and began their settlements in both places nearly at the same period, viz. : in 1636 and 1638."

(See, also, *Hutchinson's History*, 72; 1 *Holmes' Annals*, 225, 233, 246; 1 *Chalmer's Annals*, 269, 270; *Robertson's America*, B. 10.)

*Barber's History of New England*, page 39 :—

"The whole colony of Massachusetts at this time was in a violent ferment. . . . Certain of the settlers in quest of new settlements came to Providence, where they were kindly entertained 20 by Mr. R. Williams, who, by the assistance of Sir Henry Vane, Jr., procured for them from the Indians, Aquidneck, now Rhode Island. Here in 1638 the people, eighteen in number, formed themselves into a body politic, and chose Mr. Coddington, their leader, to be their Judge and Chief Magistrate. This same year the Sachems signed the deed or grant of land, for which Indian gift, it is said, they paid very liberally, by being obliged to make repeated purchases of the same lands from several claimants. The other parts of the State were purchased of the natives at several successive periods."

MARYLAND.—*Graham's History of the United States*, pages 11 and 12 :—

"The first body of emigrants to Maryland sailed from England in November, 1632. They reached the coast of Maryland near the River Potomac in the beginning of the following year. 30 Leonard Calvert, their leader, determined to respect the rights of the Savages. With this intention he called the Chiefs around him, and submitted his proposition to occupy a portion of the country. He then made a treaty with them, and having purchased the rights of the aborigines at a price which gave them perfect satisfaction, the colonists obtained possession of a large district including an Indian town, which they forthwith occupied, and distinguished by the name of St Marys."

From McSherry's *History of Maryland*, pages 24-30, we learn that Lord Baltimore obtained his charter for Maryland on the 20th June, 1632; that he sent his brother, Leonard Calvert, out as the first Governor, who sailed on the 22nd November, 1633. Having landed, he took possession of Maryland, on the 25th March, 1634.

"Calvert immediately sought out the Chief of Piscataway, a celebrated Indian tribe, and 40 determined to win his friendship. They then entered the mouth of the St. Mary's River and selected a site about one thousand paces from the River on the right shore, and having purchased



“from the Indians in exchange for axes, hatchets, hose and cloth, about 30 miles of territory, which they called ‘Augusta Caroline,’ now the County of St. Marys, they landed in great solemnity, and began the founding of the City of St. Marys. . . . With great pomp and ceremony the pilgrims then took possession of the soil which they had purchased from the native owners. This important event took place on the 27th March, 1634, and may be considered as the date of the actual settlement of the State, etc.” Page 32.

Bozman’s *History of Maryland*, (Vol. II, pages 28-32), gives substantially the same historical account. It will be noticed that Graham and McSherry differ in their dates by exactly one year. Bozman concurs in this particular with McSherry.

10 In Bozman’s work, at page 682 (note 83), is the text of a treaty made between the English and the Susquehanagh Indians, dated 5th July, 1652.

Chalmer’s *Annals*, Chapter 9, page 207 :—

“Animated by very different principles, Calvert, their leader, pursued a very different conduct from those who first planted the shores of James’ River. He purchased the rights of the aborigines at a price which seems to have given them satisfaction, and, with their free consent in the subsequent March, took possession of their town, which he named St. Mary’s. Prudence as well as justice dictated the continuation of this salutary policy with regard to that people,” &c.

VIRGINIA—In a book called *Notes of Virginia*, published in London in 1782, the following passage occurs :—

20 “That the lands of this country were taken from them (the Indians), by conquest, is not so general a truth as is supposed. I find in our historians and records repeated proofs of purchase which cover a considerable part of the lower country ; and many more would doubtless be found on further search. The Upper Country, we know, has been acquired altogether by purchases made in the most unexceptionable form.” Page 170.

Judge Haliburton (Sam Slick), in his work on *The English in America*, page 99, says, with regard to the complaints of the Virginians against the monopoly created by the Navigation Law (12 Charles II., chapter 18):—

30 “The King,” they said, “in fact, had no title himself by pretence of discovery, which was a mere Popish doctrine derived from Alexander VI., and their own was far better, being founded on prior possession, actual and continued occupation and improvement, and purchase from the Indian Chiefs.”

CAROLINA :—Martin’s *History of North Carolina*, page 143 :—

“The emigrants from Barbadoes, had purchased from the Indians a tract of land 32 miles square, for which they now solicited a grant from the Lords Proprietors, with a Charter of Incorporation.” (See also Ramsay’s *History of South Carolina*, p. 4.)

Ramsay’s *History of South Carolina* :—

In 1755 a great treaty was made between Governor Glen and the Cherokee warriors, in their own country, for the purpose of “obtaining an extinction of the Indian claims by a cession of territory to the King.”

40 “At this Congress a prodigious extent of territory was ceded to the King of England. Deeds

"of Conveyance were drawn up, and formally executed by the head men of the Cherokees, in the name of the whole nation." Pages 12 and 13.

"The lands thus obtained by treaty form the present districts of Edgefield, Abbeville, Lawrens, Newberry, Union, Spartanburg, York, Chester, Fairfield and Richmond." Page 16.

Having thus reviewed a number of the historical authorities with regard to the various European colonies in particular, it may be proper in this place, as a fitting conclusion to the critical consideration of the dealings with the Indians in particular provinces or localities, to refer to a few writers, and to a few documents, dealing in a more general aspect with the question of the extent and foundation of European rights on this continent.

From *A Brief Narration of the English Rights to the Northern parts of America* (A.D. 1656), 10 to be found in Thurloe's *State Papers*, Vol. V, page 81, the following extract is taken :

"As a part of the westward part of the fourth part of the world, called America, or the West Indies, was first discovered by Columbus, at the charges of Ferdinand and Isabel, sovereigns of Spain, and as by virtue of that discovery their successors claim a general right and title to all the lands within that tract, and a particular, either to such land, which they shall purchase from the native proprietors, or such which are void of inhabitants, or such which they shall conquer and subdue with the sword ; and as the two first particular rights are undeniable, so they may plant and erect what colonies they please therein of their own native subjects or others."

In a letter to Captain John Endecott, from "the Governor and Deputy of the New England Company for a Plantation on Massachusetts Bay (1629)," the following advice and instructions 20 are given :—

"If any of the Salvages pretend right of Inheritance to all or any part of the lands granted in our Patent, we pray you to endeavor to purchase their tytle, that we may avoid the least scruple of intrusion."

In the *Documents Relating to the Colonial History of the State of New York*, Vol. I., page 56, is set out the text of a "Remonstrance of the Ambassadors of the States-General to King Charles I.," from which the following is an extract :—

"The subjects of their Lordships, the States, have, for a long time, traded in the River Manathans, now called Maurice, in the West Indies, having purchased from the native inhabitants and paid for a certain island called also Manathans, where they remain surrounded on all sides by the 30 natives of the country, and have, from all time, in coming and going, freely enjoyed Your Majesty's ports and harbors without any objection."

(The Dutch Ambassadors then go on to complain of the detention of a ship belonging to the Dutch West Indian Company at an English port, Plymouth harbor.)

The date of this "Remonstrance" was probably 1632, that being the date of the "Answer" made to it, the substance of which is contained in the following extract :—

"They demand the release of a vessel seized at Plymouth, returning from a certain plantation usurped by them in the north parts of Virginia, which they say was acquired from the natives of the country. But, first, it is denied that the Indians were *possessores bonæ fidei* of those countries, so as to be able to dispose of them either by sale or donation, their residences being 40 unsettled and uncertain and only being in common ; and in the second place, it cannot be proved, *de facto*, that all the natives of the country had contracted with them at the said pretended sale."

A work by Joseph Blunt, published in New York in 1825, entitled "*A Historical Sketch of the Formation of the Confederacy*, particularly with reference to the Provincial Limits and the Jurisdiction of the General Government over Indian Tribes and the Public Territory," deals so clearly and thoroughly with the question under consideration, from what the Appellants think to be the correct point of view, as to warrant extensive quotation in corroboration of the views and the authorities above adduced.

Page 1.—"The oldest title of the European nations is not involved in so much doubt. It was founded upon papal grants. This continent was discovered at a time when none dared to call in question the right of the vicegerent of Christ, to dispose of the countries inhabited by the heathen, according to his sovereign pleasure.

Page 4.—"At that early period the title to newly discovered countries appears to have been derived from the apostolic power of the pope. Every Christian prince indeed considered himself entitled to those countries, independent of any papal grant, from the religious obligation by which they all felt bound to convert the heathen, or to drive them from the possessions they so unworthily held; and the discovery of the countries inhabited by infidels gave them the privilege of first exerting their arms for the propagation of Christianity, and also a strong claim upon the considerate bounty of the father of the church; but still to him they looked for a confirmation of their claims, and for a distribution of the territories discovered.

"This is the foundation of the European title to the American continent. The right derived from the labor and expense of discovery is a subsequent improvement, which we owe to the doctrines of the Reformation and the diminution of the papal power. Had not those great changes in the religious belief of Christendom taken place the whole of the American continent, except Brazil, which fell to Portugal under the treaty of 1494, would probably to this day have been claimed and held by the Spanish crown.

Page 5.—"The words in the commission to Cabot (that is the commission by Henry VII.) authorizing him to discover countries which were before that time unknown to all Christian people, are thought by Judge Marshall to imply an admission of the right of any Christian people who had made a prior discovery, thus affording evidence of the early authority of that sort of title.

Page 6.—"The title of Spain to the American continent seems to be generally acquiesced in by the European powers except Henry VIII, who, having denied the supremacy of Rome, also questioned the validity of the gift to Spain and Portugal.

"This, however, was a novel doctrine, savoring of protestantism; and more than a century elapsed after the discovery of America before it obtained general currency.

"England, indeed, adhered to that principle during the reigns of Henry VIII. and Edward VI.; but their successor Mary restored the Catholic faith, and with it a submission to the Spanish title to America. In her reign we hear of no claim of England to any part of this continent, nor of any voyages nor expeditions to America."

Page 9.—"A treaty was concluded in 1670 between England and Spain whereby it was agreed that the King of Great Britain and his subjects should remain in possession of what they then possessed in America. This was the first recognition by Spain of a title to American territory in any European power but herself, and may be regarded as the era when the validity of the papal grant was formally relinquished. From this date the right of discovery connected with occupation may be considered to be established, and the triumph of the Protestant principle over the Catholic complete."

22. APPEL-  
LANTS'  
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Page 10.—“ In the commission to De Montz, dated 1603, constituting him Lieutenant-General of Acadia, no mention is made of the right of discovery, but the settlement and occupation of the American continent are justified by reason of the unbelief of the inhabitants, and the desire of the grantors to extend the blessings of Christianity and civilization to barbarous and, in some instances, almost uninhabited regions.”

Pages 10 and 11.—“ It is here stated that the charters for nearly all the Atlantic States and colonies showed that England’s motive in undertaking the colonies and the chief end of the adventures are declared to be by means of commerce and intercourse with the natives to bring them to the knowledge of Christianity, and to bring them by just and gentle manners to the love of civil society.”

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Page 11.—“ The Catholic and Protestant monarchs differed only in this, that the former derived their title from the Pope, who made the donation for the purpose of extending the kingdom of Christ ; and the latter occupied the territory under the same pretence without a grant ; but neither asserted that prior discovery gave any right to the soil. The right of occupation was derived by both, either directly or through the Pope, from their obligation to ameliorate the condition and Christianize the aboriginals, whose permission to make a settlement was generally asked and obtained. In the British Provinces, although individual instances may be found in which Indian rights were violated, their title to the soil was always respected by the public authorities. It was not indeed regarded as a fee simple, which cannot properly belong to wandering tribes in a hunter state. But that they had a right to territory within certain boundaries and that they were treated with by the colonial Governments from the first settlement of the country until those Governments became independent of the Crown, to induce them to transfer and sell their title to the whites, are incontrovertible facts. Upon the first landing of the colonists they purchased in person of the Indian Chiefs the title of the tribes to tracts required for their accommodation and afterwards made agreements for the extension of their limits upon the increase of population. Such were the purchases made by the first settlers at Jamestown and Plymouth, by the Dutch at New York and Albany, the Swedes in the Delaware, by Baltimore in Maryland, and by Penn at Philadelphia.”

20

Page 12.—“ Afterwards when civil governments were established and conquests were made at the common expense in the Indian wars that grew out of the different habits and institutions of the two parties, the legislatures or the royal governors took the subject under their control, and prohibited citizens from purchasing the aboriginal title without public authority. In short they assumed the right of pre-emption of that title, as a right of the community, and it became vested in that body or person that possessed the constitutional right to act in its behalf. In this manner the sea coast of the North American continent became studded with European settlements of various nations, which extended themselves into the interior, and, along the shore, until they encroached upon the limits claimed by a colony of another power. This produced a conflict of interests, generally resulting in a decision by force, in which the mother countries often, although not invariably, sustained their colonies. In discussing the respective titles of the European powers, the right of prior discovery was of course strongly insisted upon, especially by those whose claims were not supported by the better title of actual occupation.

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“ All Christian princes professed to be equally desirous of civilizing and converting the savages, and as none would allow the superior qualifications of their antagonists to impart those benefits to the aboriginals, it became necessary to appeal to some other principle, by which their clashing claims might be settled. In this dilemma it was natural to resort to the right of prior discovery,

"it having been the foundation of the papal grants and the right of Spain. This soon became generally acknowledged as between Europeans, especially when followed by occupation ; and the limits of their several claims were marked out by treaties, made at different times, by the principal powers."

22. APPELLANTS' FACTUM.

Page 33.—" These tribes (that is the Six Nations) claimed either in their own right or as belonging to their tributaries, most of the territory south of Lake Erie, and bordering on the Ohio. They also claimed the whole of the western part of the State of New York. The extent and limit of their claim will more particularly appear by an examination of the maps of the early geographers and travellers. This claim of theirs, indefinite as in its nature it necessarily was, was so far acknowledged by the other Provinces that the Governors of Maryland, Pennsylvania, Virginia, and New York, thought it necessary to procure their assent to any occupation of the lands west of the Alleghany."

Page 35.—" The validity of the claim of the Six Nations to the western territory, the dependence of those nations upon New York, and the acquiescence of Massachusetts, Connecticut, Virginia, Maryland and Pennsylvania in that dependence are to be seen in all the colonial records."

Page 45. —After discussing the Royal Proclamation of October, 1763, the author says, (page 46) :

" All the lands beyond the mountains and not within the governments of Quebec or Floridas, were thus reserved under the sovereignty, protection and dominion of Great Britain for the use of the Indians, and all persons were enjoined to remove from the same and not to make any settlements within those limits for the future."

Page 52.—" 9thly.—That previous to the revolution and after the colonies had been brought under a systematic government the management of Indian affairs had belonged to the Crown, and its immediate representatives. The New England colonies indeed had regulated their own Indian relations by means of Commissioners appointed for the confederacy of New England, until the dissolution of their charters. This however was owing to their peculiar spirit, and that tone of independence, which had prompted them to deny the supremacy of the Mother Country under Cromwell, and to proclaim their contempt of Charles' authority by the sound of the trumpet. This contumacy existed until the forfeiture of their charters, and their consolidation under Andross. Their joy at their deliverance from that tyranny by the Prince of Orange, induced them to submit to some modification of their government, but previous to that moment, the Indian title to the greater part of the territory east of New York had been extinguished by conquest or purchase ; and the aboriginals had become too insignificant in point of numbers to engage the attention of the royal government. As the charters in those provinces had been given to the colonists, the soil when the Indian title was extinguished belonged to them, as a body politic. In the other provinces it was vested in the proprietors, or in the Crown. Here the savages were more formidable, and the British Government, as possessing the power of peace and war, and the treaty making power assumed the management of the Indian affairs. This power was exercised in different ways. Some of the tribes which were on the point of dissolution were subjected to the provincial governments. Others, more powerful, bordering on the frontier settlements, but within the acknowledged boundaries of the provinces, were placed under the special superintendence of the royal governors. The Six Nations, which then was the most important body of natives, not only from their numbers, but from their tributaries, allies, and the extent of their territory, were under the protection and jurisdiction of New York ; and the other tribes, inhabiting that vast wilderness west of the Appallachian mountains, were under the super-

“intendence of the British Crown ; which treated with and conveyed its intentions to them through  
“the immediate representatives of the sovereign in America ; sometimes through the governors of  
“New York, Virginia, Carolina, and Georgia ; and sometimes through the Commander-in-Chief of  
“the regular troops.”

Page 61.—After relating the results of the American Revolution, and the different state of circumstances in which they found themselves situated , the author goes on to say :—

“This question (that is the boundary question) was intimately connected with another,  
“touching the Indian title to the territory occupied by them and the right of pre-emption of that  
“title. This right of pre-emption, according to the English doctrine, belonged to the crown ;  
“excepting in the States of Massachusetts, Rhode Island and Connecticut, where it was vested in 10  
“the colonists, and in Pennsylvania and Maryland, which were proprietary governments. When  
“the authority of the crown was thrown off, it was natural and proper that those aborigines who  
“were surrounded by the white population, and within the actual jurisdiction of the local legisla-  
“tures, should be confided to their superintendence. Without any of the attributes of indepen-  
“dence ; unable to protect themselves from their neighbors, and even from their own passions ; and  
“almost on the point of dissolution, as most of the tribes surrounded by the whites soon  
“become, it was humane and necessary, that those who were able, should assume the power and  
“right of protecting and governing them. They could not be regarded as fit subjects for the  
“care of a government instituted for national purposes ; but formed a part of the several commu- 20  
“nities in which they resided, as the gypsies formerly made a part of many of the European  
“States.

“On the other hand those tribes which did not come in contact with even the frontier settle-  
“ments of the colonists, as naturally fell within the jurisdiction of the general government. They  
“were independent in fact ; under the government of their own chiefs and national councils, and  
“at the formation of our government, so far from claiming any authority over them, great  
“solicitude was manifested and great pains taken by the public authorities to conciliate them, and  
“preserve their friendship or neutrality in the impending contest.”

Page 62.—“Other tribes almost in contact with the white settlements, without being enveloped  
“by them, could not be so distinctly classed. They were too powerful and too well organized to  
“be ranked with the former as under no government of their own, and still they were so connected 30  
“with the colonists and the crown by treaties, as to be considered partly dependent.

“Another question was also presented by the nature of the Indian title, and the doctrine that  
“notwithstanding this title, the ultimate dominion, or right of pre-emption belonged to the crown ;  
“within the acknowledged limits of many of the States the Indians still claimed and occupied large  
“tracts of territory to which their title had not been extinguished. Here again were conflicting  
“claims. The Confederacy contended that all this was royal property and therefore became vested  
“in the antagonists of the crown. The States insisted that they possessed the sovereignty over the  
“soil, and that that carried with it the property. These complicated difficulties left no other alter-  
“native than to arrange the matters by compromise and negotiations.”

Page 64.—“Even in the provisional government proposed by Dr. Franklin, July 21st, 1775, 40  
“which was to last only until an honorable reconciliation could be effected with Great Britain, there  
“were articles prohibiting any colony from engaging in war with an Indian nation without the  
“consent of Congress, and securing to the Indians their lands, and appointing agents to reside  
“among them, and to supply their wants at the general expense. It was also provided that no

“private nor colony purchases should be made of the Indians, but that all purchases should be made by congress for the benefit of the united colonies.”

22. APPEL-  
LANTS'  
FACTUM.

Page 86.—After giving a history of the Indians in Georgia, and the conflict between the United States and Spain as to ownership of that country, the writer goes on to say.—

“In order to strengthen her title Spain concluded treaties in June, 1784, with the Chickasaw, Choctaw and Creek nations, by which the former acknowledged the Spanish title to the territory within the boundary claimed by that power, and promised to support it in its right thereto.

“The treaty making power in these tribes, as in most other Indian nations, was vested in the principal men. No particular number was necessary to make a treaty; inasmuch as its binding force upon the Indian tribes, in some measure, depended upon the influence of those who supported it. If their power in the nation was greater than that of the dissenting party, its provisions were complied with. But if its conditions were unacceptable to the majority of the nation, the making a treaty often produced a war, either among the Indians or with the whites. In general, however, the aborigines conformed to their agreements, and almost always, when made by a national council properly called.

“During and subsequent to the American Revolution, however, they assumed more of a national character, and as a distinct people, entered into treaties with the two powers, which claimed the right of pre-emption of their territory.”

Page 92.—“By the federal constitution ratified by Georgia in January, 1788, the States were prohibited from entering into any treaty or alliance, but the treaty making power was confided exclusively to the general Government. This grant of power comprehended all agreements with the Indians.”

Page 104.—The author discusses, on pages 98 to 104, the dealings between the United States and the State of Georgia, for the extinguishment of the Indian title, and goes on to the agreement between these parties, the 4th section of which, at page 102, is as follows:—

“That the United States should at their own expense extinguish for the use of Georgia, the Indian title to all the lands within the State, as early as the same could be obtained on reasonable terms.”

And after stating at page 103 that most of the Indian tribes had, at that time, within the undisputed limits of the Thirteen States, lost their independent character, the author proceeds to say:—“This agreement was necessarily qualified by the subsisting obligations of the United States, and if the fair and faithful fulfilment of their Indian treaties compelled them to perpetuate the aboriginal claim to the soil, the complete performance of their agreement with Georgia was not only postponed, but its postponement was expressly provided for by the terms of that agreement.

“The rights of the representative parties to this controversy, did not depend upon the obscure and equivocal terms of grants from a monarch on the opposite side of the Atlantic. These were only evidences, together with royal proclamations, legislative acts, and Indian purchases, of what had been the customary and constitutional jurisdiction of the local legislatures, and testimony by no means conclusive as to limits and boundaries, still less as to sovereignty and property in the soil.”

Page 105.—“The acquisitions by the United States were, amongst other things, sovereignty over the territory within the boundaries described in the Treaty of Peace with Great Britain, and the right of extinguishing the Indian title within those limits with the consent of the aborigines.”

Page 109.—Extract from a message delivered by Governor Delancy to the Assembly of New York, April 24th, 1754.

“The lands lying between the Senecas’ country, the Lake Erie and the River Ohio, formerly belonged to a nation of Indians called the Eries, whom the five nations conquered and extirpated, and thus became masters of their lands.”

Page 114.—Extract from the Report of the Committee to which was referred certain papers relative to the Indians’ affairs, and the motion of the delegates from Georgia, August 3rd, 1787 :—

“The Committee conceive that it has long been the opinion of the country, supported by justice and humanity, that the Indians have just claims to all lands occupied by, and not fairly purchased from them; and that in managing affairs with them the principal objects have been those of making war and peace, purchasing certain tracts of their lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former.”

Extract from article published in *New York Review*, August, 1825, being examination of the controversy between Georgia and the Creeks :—(This article is to be found set out in Mr. Blunt’s work above quoted from) :—

“Scarcely two centuries have elapsed since the Europeans landed upon the American Continent. They then found the country covered by the native tribes of the New World. The resources of the country were not so fully developed, as if civilized men had applied their faculties and arts to that end. Agriculture, commerce and manufactures did not flourish as if under the control of civilization. This, however, did not give to Europe a right to depopulate America. To vacant territory the white comer has as good a right as the tawny natives; but to occupied territory, to land appropriated to the purposes of planting and hunting, the Indian had a right, which was as valid as that of an English nobleman to his extensive manor and vacant park. The history of the early colonial settlements shows this right to have been generally respected, and purchases were made from the native chieftains by the first settlers of large tracts of land, for which a valuable consideration was given.”

“Again, the United States asserted a right to prevent any European power from purchasing the Indian title. This right was respected by the European powers; it was sanctioned by their practice, and the Creeks had confirmed it by the treaty of New York. But this was only a contingent right of property, depending upon the consent of the Indians. It was merely a right to the ultimate dominion of the soil, that is the sovereignty, to the exclusion of civilized nations, and the absolute property upon the extinguishment of the Indian title. The colonies before the revolution, and the States since that event, never conceived that they had a right to appropriate the soil without the consent of the aboriginal inhabitants. Treaties were made with them for that purpose from the earliest settlements of the country. In some of the provinces the Indian title was considered as complete, so that it might be transferred from an Indian to a white man without the consent of the Government; and the termination of Andross to subject those titles in New England to a quit rent or patent tax caused a rebellion, which ended in his deposition and imprisonment. In other parts of the country the colonies were compelled to purchase through the Governments. But in no province did the colonists conceive their title to be good so long as the Indian title remained unextinguished. To the honor of the country be it recorded that in no instance did the public authorities sanction the abominable doctrine, that civilization gave to the white man a right to exterminate or enslave the aboriginal, or to confiscate or appro-



"priate the property and land of his tribe. These Indians, whatever may be thought of that <sup>22. APPEL-</sup>  
 "wisdom of the Providence who so ordered it, were the original occupants and owners of the <sup>LANTS'</sup>  
 "country. They had enjoyed it from immemorial time. Our ancestors, indeed, had a right to land <sup>FACTUM.</sup>  
 "on this continent, and to occupy as much vacant soil as was necessary for their accommodation ;  
 "but neither they, nor any other men, had a right to drive the aboriginals from their possessions.  
 "This right of accomodating themselves, by occupying vacant land in a wilderness, must be so  
 "exercised as not to interfere with the rights of others. It is founded upon a presumption that  
 "the Deity intended the soil for cultivation ; but the Deity also created the Indian to enjoy the  
 "soil after his manner, and unnecessarily to deprive him of his limited enjoyment, would not only  
 10 "be unjust, but cruel. Such are the great and immutable principles of morality and natural  
 "jurisprudence."

"The Indians also had a right of property by the law of nature to the soil, modified, indeed,  
 "by our right to occupy such portions as they did not need, but as to what was necessary for  
 "them, their right was absolute, and not to be affected by any claim of civilized man."

It may be appropriate here to refer to an argument to which the Respondent seems to have  
 attached great weight in the Courts below, and which has been tacitly assumed in those Courts as  
 a correct statement of the law and practice upon the point under consideration. It was urged at  
 great length, by reference to the grants, patents and charters which have been given at various  
 times, of Provinces and plantations on the eastern shores of this continent, that no notice has been  
 20 taken of, and no effect given to, any claim on behalf of the Indian proprietors to the soil whose  
 sovereignty was being gradually assumed. So Mr. Justice Burton takes for granted, without  
 discussion, that notwithstanding the Indian occupancy, "the European discoverers claimed and  
 exercised the right to grant the soil while yet in possession of the natives, subject, however, to  
 their right of occupancy," and that these grants ignored entirely any claims of the aboriginal  
 inhabitants to the lands occupied by them. It is easy to show that this view, though insisted upon  
 by counsel for the Respondent in the Courts below as beyond the possibility of question, is an  
 entirely erroneous one, and that its error is shown by two very important charters which have been  
 asked for by men who had dealt, before the issue of their grants, with the Indians for the sale to  
 them of lands as individuals.

30 Among the reasons for the granting of the Patent for the Providence Plantation, (1643) we find  
 the following set out :—

" And whereas there is a tract of land in the Continent of America aforesaid, called by the  
 " name of the Narraganset Bay, bordering northward and north-east on the patent of the Massachu-  
 " setts, east and south-east on Plymouth Patent, south on the ocean, and on the west and north-west  
 " by the Indians called Narragansets ; the whole tract extending about 25 English miles into the  
 " Pequot River and country.

" And whereas divers well affected and industrious English inhabitants . . . . have also  
 " purchased, and are purchasing of and amongst the said natives, some other places, which may be  
 " convenient both for plantations, and also for building of ships, etc., etc."

40 (Charter of incorporation granted.)

(The full text of this Patent is set out in Hazard's *Annals*, Volume I., page 538.)

Then the Rhode Island Charter (1662) is based upon a similar claim. The full text may be  
 found in Hazard's *Annals*, Vol I., p. 55, and the following extract is from the recital which precedes  
 the conveying clauses of the Charter.

. . . "Whereby we have been informed by the humble petition of our trusty and well  
 "beloved subjects, John Clarke, etc., etc., . . . that they, pur uing with peace and loyal  
 "minds, their sober, serious and loyal intentions, etc., etc., and in pursuance of the aforesaid ends,  
 "did once again leave their desirable stations and habitations, and with excessive labor and travel,  
 "hazard and charge, did transplant themselves into the midst of the Indian natives, who, as we  
 "are informed are the most potent princes and people of all that country; whereby the good  
 "providence of God upon their labor and industry, they have not only been preserved to admiration,  
 "but have increased and prospered, and are seized and possessed, by purchase and consent of the  
 "said natives, to their full extent, of such lands, islands, rivers, harbors, and roads, as are very con- 10  
 "venient for plantations, etc., etc., . . . they having by their neighborhood to and friendly  
 "society with the great body of the Narraganset Indians, given them encouragement, of their own  
 "accord, to subject themselves, their people, and lands unto us, etc., etc." (The Charter then goes  
 on to incorporate the grantees as a Company).

. . . "And it is hereby declared, that it shall not be lawful to or for the rest of the colonies  
 "to invade or molest the native Indians, or any other inhabitants inhabiting within the bounds  
 "or limits hereafter mentioned (they having subjected themselves unto us, and being by us taken  
 "into our special protection) without the knowledge and consent of the Governor and Company of  
 "our colony of Rhode Island and Providence Plantations."

The words of these grants show, that the title of the Indians was recognized and acknowledged,  
 but that the sale to individuals, the validity of which no Government has yet allowed or conceded, 20  
 required confirmation by Sovereign grant. But, as has been stated before, and as will be more  
 fully established hereafter, the denial of the validity of individual purchases from the Indians is  
 founded, not upon any limitation of the power of the Indians to sell, but upon a limitation of the  
 rights of the individual to buy—a limitation whose foundation is easily traced to international  
 arrangement and statutory enactment.

The question of the extent of the Indian title to the soil, and the manner in which that title  
 has been looked upon, and dealt with, by European invaders and colonists at various times, has  
 occupied the minds and attention of some of the most eminent jurists of this century; and the  
 expression of their views, founded upon a thorough and unprejudiced study of the available  
 historical and judicial authorities, is of the very greatest assistance in enabling us to come to a 30  
 sound conclusion as to the result of a vast mass of evidence, not always of uniform value or  
 genuineness, and now to a large extent almost inaccessible. The conclusions at which they have  
 arrived, and the grounds upon which their views are founded, can be best set out by presenting  
 their statements in their own language, and in their own order of treatment.

Kent, in his *Commentaries*, 12th Edition, Volume 1, commences at pages 258 a long considera-  
 tion of the question of the relations of the Indians on this continent to the soil occupied by them,  
 from which the following extracts are gathered as embodying his opinion:—

Vol. I., p. 258.—"Congress has the exclusive right of pre-emption to all Indian lands lying  
 "within the territories of the United States. This was so decided in the case of *Johnson v.*  
 "*McIntosh*, (8 *Wheaton*, 543). Upon the doctrine of the Court in that case, and in that of 40  
 "*Fletcher v. Peck*, (6 *Crunch*, 142, 143), the U. S. own the soil as well as the jurisdiction of the  
 "immense tracts of unpatented lands included within their territories, and of all the productive

"funds which those lands may hereafter create. The title is in the U. S. by the Treaty of Peace  
 "with Great Britain, and by subsequent cessions from France and Spain, and by cession from the  
 "individual states; and the Indians have only a right of occupancy, and the U. S. possess the legal  
 "title, subject to that occupancy, and with an absolute and exclusive right to extinguish the  
 "Indian title of occupancy, either by conquest or purchase. The title of the European nations,  
 "and which passed to the U. S. to this immense territorial empire, was founded on discovery and  
 "conquest; and, by the European customary law of nations, prior discovery gave this title to the  
 "soil, subject to the possessory right of the natives, and which occupancy was all the right that  
 "European conquerors and discoverers, and which the United States as succeeding to their title,  
 10 "would admit to reside in the native Indians. The principle is, that the Indians are to be considered  
 "merely as occupants, to be protected while in peace in the possession of their lands, but to be  
 "deemed incapable of transferring the absolute title to any other than the Sovereign of the  
 "country. The Constitution (Art. 4, Sec. 3) gave to Congress the power to dispose of, and to  
 "make all needful rules and regulations respecting the territory or other property belonging to  
 "the United States and to admit new states into the Union . . . . The unpatented lands  
 "belonging to the United States within the States of Ohio, Indiana, Illinois, Michigan and the  
 "territory of Wisconsin, arose from cessions from the States of Virginia, Massachusetts,  
 "Connecticut, and New York, before the adoption of the present Constitution of the United States.  
 "North Carolina, South Carolina and Georgia made similar cessions of their unpatented lands, and  
 20 "which now compose the States of Tennessee, Alabama, and Mississippi. The lands so ceded were  
 "intended to be, and were considered, as constituting a common fund, for the benefit of the Union,  
 "and when the States in which the lands are now situated were admitted into the Union, the  
 "proprietary right of the United States to those unimproved and unsold lands was recognized.  
 "Those lands belong to the United States as part of their public domain, subject to the Indian  
 "right and title of occupancy, in all cases in which the same has not been lawfully extinguished."

22. APPEL-  
LANDS'  
FACTUM.

Vol. III. p. 379.—"With respect to the Indian reservation lands, of which they still retain  
 "the occupancy, the validity of a patent has not hitherto been permitted to be drawn in question  
 "in a suit between citizens of the State, under the pretext that the Indian right and title, as  
 "original lords of the soil, had not been extinguished. It was also declared, in *Fletcher v. Peck*  
 30 "(6 Cranch, 87), to be the opinion of the Supreme Court of the United States, that the nature of  
 "the Indian title to lands lying within the territorial limits of a State, though entitled to be  
 "respected by all courts until it be legitimately extinguished, was not such as to be absolutely  
 "repugnant to a seisin in fee on the part of the Government within whose jurisdiction the lands  
 "are situated."


(NOTE.—"This was the language of a majority of the court in the case of *Fletcher v. Peck*. It  
 "was a mere naked declaration, without any discussing or reasoning by the court in support of it;  
 "but Judge Johnston, in the separate opinion which he delivered, did not concur in the doctrine.  
 "He held that the Indian nations were absolute proprietors of the soil, and that, practically, and in  
 "cases unaffected by particular treaties, the restrictions upon the right of soil in the Indians  
 40 "amounted only to an exclusion of all competitors from the market, and a pre-emptive right to  
 "acquire a fee simple by purchase when the proprietors should be pleased to sell.")

TITLE BY DISCOVERY.—"The history and grounds of the claims of the European Governments  
 "and of the United States to the lands on this continent, and to dominion over the Indian tribes,  
 "have been since more largely and fully considered. In discussing the rights and consequences

22. APPEL-  
LANTS'  
FACTUM.

" attached by the international law of Europe to prior discovery, it was stated in *Johnson v. McIntosh* (8 *Wheaton*, 543), as an historical fact that in the discovery of this continent by the nations of Europe, the discovery was considered to have given to the Government by whose subjects or authorities it was made a title to the country, and the sole right of acquiring the soil from the natives, as against all other European powers. Each nation claimed the right to regulate for itself, in exclusion of all others, the relation which was to subsist between the discoverer and the Indians. That relation necessarily impaired, to a considerable degree, the rights of the original inhabitants, and an ascendancy was asserted in consequence of the superior genius of the Europeans, founded on civilization and Christianity, and of their superiority in the means and in the art of war. The European nations which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The natives were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it and to use it according to their own discretion, though not to dispose of the soil at their own will, except to the Government claiming the right of pre-emption. The practice of Spain, France, Holland and England, proved the very general recognition of the claim and title to American territories given by discovery. The United States adopted the same principle, and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned. The rights of the British Government within the limits of the British colonies passed to the United States by the force and effect of the Act of Independence and the uniform assertion of those rights by the Crown, by the Colonial Governments, by the individual States, and by the Union, is, no doubt, incompatible with an absolute title in the Indians. That title has been obliged to yield to the combined influence which military, intellectual and moral power gave to the claim of the European immigrants."

QUALIFIED INDIAN RIGHTS.—" This assumed but qualified dominion over the Indian tribes, regarding them as enjoying no higher title to the soil than that founded on simple occupancy, and to be incompetent to transfer their title to any other power than the Government which claims the jurisdiction of their territory by right of discovery, arose in a great degree, from the necessity of the case. To leave the Indians in possession of the country, was to leave the country a wilderness; and to govern them as a distinct people, or to mix with them, and to admit them to an intercommunity of privileges, was impossible under the circumstances of their relative condition. The peculiar character and habits of the Indian nations rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage. There was no other way in dealing with them than that of keeping them separate, subordinate and dependent, with a guardian care thrown around them, for their protection. The rule that the Indian title was subordinate to the absolute, ultimate title of the Government of the European colonists, and that the Indians were to be considered as occupants, and entitled to protection in peace in that character only, and incapable of transferring their rights to others, was the best one that could be adopted with safety. The weak and helpless condition in which we found the Indians, and the immeasurable superiority of their civilized neighbors, would not admit of the application of any more liberal and equal doctrine to the case of Indian lands and contracts. It was founded on the pretension of converting the discovery of the country into a conquest; and it is now too late to draw into discussion the validity of that pretension or the restriction which it imposes. It is established by numerous compacts, treaties, laws and ordinances, and founded on immemorial usage. The coun-

“try has been colonized and settled and is now held by that title. It is the law of the land, and no Court of Justice can permit the right to be disturbed by speculative reasoning on abstract rights.” 22. APPELLANTS' FACTUM. 

“This is the view of the subject which was taken by the Supreme Court, in the elaborate opinion to which I have referred. The same Court has since been repeatedly called upon to discuss and decide great questions concerning Indian rights and title, and the subject has of late become exceedingly grave and momentous, affecting the faith and character, if not the tranquility and safety of the Government of the United States.”

“In the case of *Cherokee Nation v. State of Georgia*, (5. Peters, 1), it was held by a majority of the Court, that the Cherokee Nation of Indians, dwelling within the jurisdictional limits of the United States was not a foreign state, in the sense in which the term is used in the Constitution, nor entitled as such to proceed in that Court against the State of Georgia. But it was admitted that the Cherokees were a State, or distinct political society, capable of managing its own affairs, and governing itself, and that they had uniformly been treated as such since the settlement of our country. The numerous treaties made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, and responsible in their political capacity. Their relation to the United States was nevertheless peculiar. They were domestic dependent nations, and their relation to us resembled that of a ward to his guardian; and they had an unquestionable right to the land they occupied, until that right should be extinguished by a voluntary cession to our Government. The subject was again brought forward and the great points which it involved reasoned upon and judicially determined in the case of *Worcester v. State of Georgia*, (6 Peters, 515), which was another case arising out of the operation of the laws of Georgia.”

“The legislature of that State, in the years 1828, 1829 and 1830, passed several penal statutes in reference to the Cherokee nation and territory. The purpose and effect of those laws was to demolish the Cherokee Government and institution, and annihilate their political existence as a nation, and to divide their territory among the adjoining counties, in Georgia, and extend the civil and criminal law of the State over the Indian territory. Those laws dealt with them as if they were alike destitute of civil and political privileges, and were mere tenants at suffrance, without any interest in the soil on which they dwelt, and which had been uninterruptedly claimed and enjoyed by them and their ancestors as a nation from time immemorial. Their lands had been guaranteed to them as a nation, and the protection of the United States pledged them in their national capacity; and their existence, competence, and right as a distinct political society recognized by treaties made with them in the years 1785, 1791, 1798, 1805, 1806, 1816, 1817 and 1819, by the Government of the United States, under all the forms and solemnities of treaty compacts. The Statutes of Georgia, nevertheless, prohibit the Cherokees, under highly penal sanctions, from the exercise within the territory they so occupied, of any political power whatever, legislative, executive or judicial. They were declared not to be competent witnesses in any Court of the state to which a white person might be a party, unless such white person resided in the Cherokee nation; and they were, also, declared to be incompetent to contract with any white person. Their territory was divided into sections, and directed to be surveyed and sub-divided into districts, and disposed of by lottery among the citizens of Georgia. Their gold mines were taken possession of by force, and the use of them by the Indians prohibited. They were, however, declared to be protected in the possession of their improvements, until the legislature should ‘enact to the contrary,’ or the Indians should voluntarily abandon them.”

Here follows the passage quoted above, at page 9; the author then proceeds:—

“ The decision of the Supreme Court of the United States was not the promulgation of any  
 “ new doctrine ; for the several local governments, before and since our Revolution, never regarded  
 “ the Indian nations within their territorial domains as subjects or members of the body politic,  
 “ and amenable individually to their jurisdiction. They treated the Indians within their respective  
 “ territories as free and independent tribes, governed by their own laws and usages, under their  
 “ own chiefs, and competent to act in a national character and exercise self-government, and while  
 “ residing within their own territories owing no allegiance to the municipal law of the whites. The  
 “ judicial decisions in New York and Tennessee, in 1810 and 1823, correspond with those more  
 “ recently pronounced in the Supreme Court of the Union, and they explicitly recognized this 10  
 “ historical fact, and declared this doctrine. (*Jackson v. Wood*, 7, Johns, 295 ; *Goodell v. Jackson*,  
 “ 20, *ibid.*, 693 ; *Holland v. Pack*, Peck (Tenn.), 151 ; *Blair v. The Pathkiller*, 2 Yerg, 407). The  
 “ original Indian nations were regarded and dealt with as proprietors of the soil, which they claimed  
 “ and occupied, but without the power of alienation except to the governments which protected  
 “ them and had thrown over them and beyond them their assumed patented domains. These  
 “ governments asserted and enforced the exclusive right to extinguish Indian titles to lands,  
 “ enclosed within the exterior lines of their jurisdictions, by fair purchase, under the sanction of  
 “ treaties ; and they held all individual purchases from the Indians, whether made with them indi-  
 “ vidually or collectively as tribes, to be absolutely null and void. The only power that could  
 “ lawfully acquire the Indian title was the State, and a government grant was the only lawful 20  
 “ source of title admitted in the Courts of Justice. The Colonial and State Governments, and the  
 “ Government of the United States, uniformly dealt upon these principles with the Indian nations  
 “ dwelling within their territorial limits. The Indian tribes placed themselves under the protection  
 “ of the whites, and they were cherished as dependent allies, but subject to such restraints and  
 “ qualified control in their national capacity as was considered by the whites to be indispensable to  
 “ their own safety and requisite to the due discharge of the duty of that protection. (*Mitchell v.*  
 “ *United States*, 9 Peters, 711, 745, 746.)

“ RIGHT OF COLONIZATION.—There has been considerable diversity of opinion and much  
 “ ingenious speculation, on the claim of right to this country by the Europeans, founded on the  
 “ title by discovery. We have seen that with respect to the English colonists in America, the claim 30  
 “ was modified and much of its extravagance destroyed, by conceding to the native tribes their  
 “ political rights and privileges, as dependent allies, and their qualified title to the soil. As far as  
 “ Indian rights and territories were defined and acknowledged by the whites by treaty, there was  
 “ no question in the case, for the whites were bound by the moral and national obligations of con-  
 “ tract and good faith, and as far as Indian nations had formed themselves into regular organized  
 “ governments, within reasonable and defined limits necessary for the hunter state, there would  
 “ seem also to be no ground to deny the absolute nature of their territorial and political rights.  
 “ But beyond these points our colonial ancestors were not willing to go. They seemed to have  
 “ deemed it to be unreasonable, and a perversion of the design and duties of the human race, to  
 “ bar the Europeans with their implements of husbandry and the arts, with their laws, their 40  
 “ learning, their liberty and their religion, from all entrance into this mighty Continent, lest they  
 “ might trespass upon some part of the interminable forests, deserts, and hunting grounds of an  
 “ uncivilized, erratic, and savage race of men. Nor could they be brought to entertain much respect  
 “ for the loose and attenuated claim of such occupants, to the exclusive use of a country evidently  
 “ fitted and intended by Providence to be subdued and cultivated, and to become the residence of  
 “ civilized nations.”

“It was part of the original destiny and duty of the human race to subdue the earth, and till the ground whence they were taken. The white race of men, as Governor Pownall observed, hath been “land workers from the beginning,” and if unsettled and sparsely scattered tribes of hunters and fishermen show no disposition or capacity to emerge from the savage to the agricultural and civilized state of man, their right to keep some of the fairest portions of the earth a mere wilderness, filled with wild beasts, for the sake of hunting, becomes utterly inconsistent with the civilization and moral improvement of mankind. Vattel did not place much value on the territorial rights of erratic races of people, who sparsely inhabited immense regions, and suffered them to remain a wilderness, because their occupation was war, and their subsistence drawn chiefly from the forest. He observed that the cultivation of the soil was an obligation imposed by nature upon mankind, and that the human race could not well subsist, or greatly multiply, if rude tribes, which had not advanced from the hunter state, were entitled to claim and retain all the boundless regions through which they might wander. If such a people will usurp more territory than they can subdue and cultivate they have no right to complain, if a nation of cultivators puts in a claim for a part, and confines the natives within narrower limits. He alluded to the establishment of the French and English colonies in North America as being in his opinion entirely lawful; and he extolled the moderation of William Penn, and of the first settlers in New England, who are understood to have fairly purchased of the natives the lands they wished to colonize.” (*Droits des Gens*, Chap. 1, sec. 81, 209).

“The original English emigrants came to this country with no slight confidence in the solidity of such doctrines, and in their rights to possess, subdue and cultivate the American wilderness, as being, by the law of nature and the gift of Providence, open and common to the first occupants in the character of cultivators of the earth. The great patent of New England, which was the foundation of the subsequent titles and subordinate charters in that country, and the opinions of grave and learned men tended to confirm that confidence. According to Chalmers the practice of the European world had constituted a law of nations which sternly disregarded the possession of the aborigines, because they had not been admitted into the society of nations. (*Chalmers' Political Annals*, p. 676). But whatever loose opinions might have been entertained, of latitudinarian doctrines inculcated in favor of the abstract right to possess and colonize America, it is certain that in point of fact the colonists were not satisfied, or did not deem it expedient to settle the country without the consent of the aborigines, procured by fair purchase, under the sanction of the civil authorities. The pretensions of the patent of King James were not relied upon, and the prior Indian right to the soil was generally, if not uniformly, recognized and respected by the New England Puritans. (See *Bancroft's History*, p. 400). They all negotiated with the Indian nations as distinct and independent powers; and neither the right of pre-emption, which was uniformly claimed and exercised, nor the state of dependence and pupilage under which the Indian tribes within their territorial limits were necessarily placed were carried so far as to destroy the existence of the Indians as self-governing communities. See *Chalmers' Political Annals*, p. 398; *Revised Statutes of Connecticut 1821*, 279, note; *Proclamation of 1763* also referred to).

“The manner in which the people of this country through all periods of their colonial history, treated and dealt with the Indians, is a subject of deep interest, and well worthy of the thorough and accurate examination of every person conversant with our laws and history, and whose bosom glows with a generous warmth for the honor and welfare of his country.”

INDIAN RIGHTS, HOW REGARDED. I. *By the Colonists.*—"The settlement of that part of America now comprising the United States has been attended with as little violence and aggression, on the part of the whites, in a national point of view, as were compatible with the fact of the entry of a race of civilized men, into the territory of savages, and with the power and the determination to reclaim and occupy it. The colony of Massachusetts, in 1633, prohibited the purchase of lands from the natives, without license from the Government; and the colony of Plymouth, in 1643 passed a similar law. Very strong and authentic evidence of the distinguished moderation, and equity of the New England Governments toward the Indians is to be found in the letter of Governor Winslow, of the Plymouth colony, of the 1st May, 1676, in which he states, that before King Philip's war, the English did not possess one foot of land in that colony, but what was fairly obtained by honest purchase from the Indian proprietors, and with the knowledge and allowance of the General Court. (*Hazard's Collection of State Papers*, p. 2, 531-534). The New England annals abound with proofs of a just dealing with the Indians in respect to their lands. The people of all the New England colonies settled their towns upon the basis of a title procured by fair purchase from the Indians with the consent of Government, except in the few instances of land acquired by conquest, after a war deemed to have been just and necessary. (*Holmes' Annals*, Vol. I., p. 166, etc.; *Winthrop's History*, Vol. I., p. 259; *Hazard's State Papers*, etc.) Instances are to be met with in the early annals of New England, of regular and exemplary punishment of white persons, for acts of injustice and violence towards the Indians. (*Winthrop's History of New England*, Vol. I., pp. 34, 267, 269). The Massachusetts Legislature, in 1633, threw the protection of its government over the Indians in the enjoyment of their improved lands, hunting grounds and fishing places, by declaring that they should have relief in any of the Courts as the English have. (*Holmes' Annals*, Vol. I., p. 217)."

"The Government of the colony of New York has a claim equally fair with that of any part of America, to a policy uniformly just, temperate, and pacific towards the Indians, within the limits of its jurisdiction. While the Dutch held and governed the colony, the Indian titles were always respected; and extinguished by fair means, and with the consent of the natives. This policy was continued by their conquerors; and on the first settlement of the English at New York, in 1665, it was ordained that no purchase of lands from the Indians should be valid without the governor's license, and the execution of the purchase in his presence; and this salutary check to fraud and injustice was essentially continued (*Smith's History of New York*, I. 39). Regulations of that kind have been the invariable American policy. The King, by proclamation, soon after the Peace of 1763, prohibited purchases of Indian lands, unless at a public assembly of the Indians, and in the name of the Crown, and under the superintendence of his colonial authorities. A prohibition of individual purchases of lands without the consent of Government, has since been made a constitutional provision in New York, Virginia, and North Carolina. The colonists of New York settled in the neighborhood of the most formidable Indian confederacy known to the country, and came in contact with their possessions. But the Six Nations of Indians, of which the Mohawks were the head, placed themselves and their lands under the protection of the Government of New York, from the earliest periods of the colony administration. They were considered and treated as separate but dependent nations—and the friendship which existed between them and the Dutch and their successors, the English, was cemented by treaties, alliances, and kind offices. It continued unshaken from the first settlement of the Dutch on the shores of the Hudson and the Mohawk, down to the period of the American war; and the fidelity of that friendship is shown by the most honorable and the most undoubted attestations. And when we consider the long and distressing wars in which the Six Nations were involved, on our account,



“ with the Canadian French, and the artful means which were used from time to time to detach  
 “ them from our alliance, it must be granted that the faith of the treaties has nowhere and at no  
 “ time, been better observed, or maintained with a more intrepid spirit, than by those generous  
 “ barbarians.”

22. APPEL-  
 LANDS'  
 FACTUM.

“ In New Jersey, the proprietaries very early secured all their titles by Indian purchases ; and  
 “ all purchases to be made, without consent of the Government, were, by law, in 1682, declared  
 “ to be void. In West New Jersey, in 1676, the liberality of the Quaker influence went so far as  
 “ to provide by law, that in all trials where Indians, being natives of the Province, were concerned,  
 “ the jury was to consist of six persons of the neighborhood and six Indians. In 1758, the Indians,  
 10 “ at the treaty at Easton, released for a valuable consideration, all claims to lands in New Jersey ;  
 “ and the legislature of Pennsylvania, in 1783, asserted it to have been their uniform practice to  
 “ extinguish Indian titles by fair purchase. The justice and equity of the original Indian purchases  
 “ by William Penn, the founder of Pennsylvania, particularly at his memorable treaty of 1682, were  
 “ known and celebrated throughout Europe. So, Governor Calvert, in 1633, planted Maryland,  
 “ after fair purchases from the Indians ; and in 1644, all Indian purchases, without the consent of  
 “ the proprietary of the Province, were declared, by law, to be illegal and void. There are also  
 “ repeated proofs upon record, of purchases from the Indians, which covered a considerable part of  
 “ the lower country of Virginia ; and Mr. Jefferson says, that the upper country was acquired by  
 “ purchases made in the most unexceptional form. (*Notes on Virginia*, 153). The cases of  
 20 “ unauthorized intrusions upon the Indian lands happened in the early settlement of Virginia ; for  
 “ laws were very soon made in Virginia to protect the Indians in their territorial possessions and  
 “ rights from the frauds of the whites. Georgia was settled under similar good auspices ; and  
 “ Savannah, with a considerable tract of land, was purchased from the Creek Indians by Governor  
 “ Oglethorpe, in 1733 and 1738, under the sanction of solemn treaties. In 1763, a large cession of  
 “ lands in Georgia was also made by the Creeks, Cherokees, and other nations of Indians.

“ The historical facts and documents to which we have referred relative to the acquisition of  
 “ the Indian lands in this country, are sufficient to vindicate the justice and moderation of our  
 “ colonial ancestors. But wars with the natives resulted almost inevitably, from the intrusion of  
 “ the whites. The origin of these wars is not imputable to any general spirit of unkindness or  
 30 “ injustice on the part of the colonial authorities, though they sometimes exhibited signal and severe  
 “ proofs of display of superior power and cruel retaliation. There were also, at times, acts of  
 “ fraud and violence committed by individual colonists prompted by cupidity and a consciousness  
 “ of superior skill and power, and springing from a very blunt sense of the rights of savages. The  
 “ causes of wars with the Indians were inherent with the nature of the case. They arose from  
 “ Indian jealousy of the presence and location of white people, for the Indian had the sagacity to  
 “ perceive, what the subsequent history of this country has abundantly verified, that the destruction  
 “ of their race must be the consequence of the settlements of the English and their extension over  
 “ the country. And if wars with them were never unjustly provoked by the Colonial Governments  
 “ or people, yet they were, no doubt, stimulated on the part of the Indians by the consciousness of  
 40 “ impending danger, the suggestions of patriotism, and the influence of a fierce and lofty spirit of  
 “ national independence. In all their wars with the whites, the means and the power of the parties  
 “ were extremely unequal, and the Indians were sure to come out of the contest with great losses  
 “ of numbers and territory, if not with almost total extermination. There was always much  
 “ in the Indian character, in its earlier and better state, to excite admiration, as there was, and still  
 “ is, in their sufferings, to excite sympathy.

22. APPEL-  
LANTS'  
FACTUM.

(2) *By the United States.* "The Government of the United States, since the period of our independence, has pursued a steady system of pacific, just and paternal policy towards the Indians within their widespread territories. It has never insisted upon any other claim to the Indian lands than the right of pre-emption, upon fair terms; and the plan of permanent annuities, which the United States and the State of New York, among others, have adopted as one main ingredient in the consideration of purchases, has been attended with beneficial effects. The efforts of the national Government to protect the Indians from wars with each other, from their own propensity to intemperance, from the frauds and injustice of the whites, and to impart to them some of the essential blessings of civilization, have been steady and judicious, and reflect lustre on our national character. This affords some consolation, under a view of the melancholy contrast between the original character of the Indians, when the Europeans first visited them, and their present condition. We then found them a numerous, enterprising, and proud-spirited race, and we now find them a feeble and degraded remnant, rapidly hastening to annihilation. The neighborhood of the whites seems, hitherto, to have had an immoral influence upon Indian manners and habits, and to have destroyed all that was noble and elevated in the Indian character. They have generally, and with some very limited exceptions, been unable to share in the enjoyments, or to exist in the presence of civilization; and, judging from their past history, the Indians of this continent appear to be destined at no very distant period of time, to disappear with those vast forests which once covered the country, and the existence of which seems essential to their own." 10

Extract from note, page 400 :—

"President Van Buren, in his message to Congress of 4th December, 1838, . . . . stated that the exclusive and peaceable possession of their (the Indians') new territory west of any of the States, was guaranteed to them by the United States; and that since the 4th of March, 1829, the Indian title to upwards of one hundred and sixteen millions (116) of acres of lands had been acquired, and that the United States had paid upwards of seventy-two millions of dollars to and on behalf of the Indians, in permanent annuities, lands, reservations, and the necessary expense of removal and settlement of them." 20

So in Wheaton's *International Law*, second edition, the author's opinion of the legal status of the Indians, with respect to their territorial rights, is given in the following sentences :— 30

"The political relation of the Indian nations on this continent towards the United States, is that of semi-sovereign States, under the exclusive protectorate of another power. Some of these savage tribes have wholly extinguished their national fire, and submitted themselves to the laws of the States within whose territorial limits they reside; others have acknowledged by treaty that they hold their national existence at the will of the State; others retain a limited sovereignty, and the absolute proprietorship of the soil. The latter is the case with the tribes to the west of Georgia. (*Fletcher v. Peck*, 6 Cranch, 146).

"Thus, the Supreme Court of the United States determined in 1831 that, though the Cherokee nation of Indians, dwelling within the jurisdictional limits of Georgia, was not a 'foreign State' in the sense in which that term is used in the constitution, nor entitled, as such, to proceed in that Court against the State of Georgia, yet the Cherokees constituted a State, or a distinct political society, capable of managing its own affairs, and governing itself, and that they had uniformly been treated as such since the first settlement of the country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the 40

"relation of peace and war, and responsible in their political capacity. Their relation to the United States was nevertheless peculiar. They were a domestic dependent nation; their relation to us resembles that of a ward to his guardian; and they had an unquestionable right to the land they occupied until that right should be extinguished by a voluntary cession to our Government, (*The Cherokee Nation v. Georgia*, 5 Peters, I. See also the *State of Georgia v. Stanton*, 6 Wallace, 71).—Page 51, sec. 38."

22. APPELLANTS' FACTUM.

After a citation and adoption of the views expressed in Kent's *Commentaries* (12th Ed., Vol. 3, p. 383), reference is then made to the Act of Congress of the year 1872, which declared that "No Indian nation or tribes within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power, with whom the United States may contract by treaty," and to which the important proviso is added, that "No obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3rd, 1871, shall be hereby invalidated or impaired." (See the *United States Revised Statutes*, Title XXVIII., Indians, chap. 2, sec. 2079).

In *Story on the Constitution*, 4th Edition, is a clear statement of the law upon this question, such as might have been expected from a writer of so great industry and ability, and one so familiar with the facts and principles bearing upon the point under consideration. At page 6, sec. 2, (speaking of the right by prior discovery) he says:

"It became the basis of European polity, and regulated the exercise of sovereignty and settlement in all the Cisatlantic plantations. In respect to desert and uninhabited lands, there does not seem any important objection that can be urged against it. But in respect to the countries then inhabited by the natives, it is not easy to perceive how, in point of justice or humanity, or general conformity to the laws of nature, it can be successfully vindicated. As a conventional rule it might properly govern all the nations which recognized its obligations, but it could have no authority over the aborigines of America, whether gathered into civilized communities or scattered in hunting tribes over the wilderness. Their right, whatever it was, of occupation or use, stood upon original principles deducible from the law of nature, and could not be justly narrowed or extinguished without their free consent."

So again in section 3:—

"There is no doubt that the Indian tribes, inhabiting this continent at the time of its discovery, maintained a claim to the exclusive possession and occupancy of the territory within their respective limits, as sovereigns and absolute proprietors of the soil. They acknowledge no obedience or allegiance or subordination to any foreign sovereign whatever, and as far as they have possessed the means, they have ever since exerted this plenary right of dominion, and yielded it up only when lost by the superior force of conquest, or transferred by a voluntary cession."

Sec. 6.—"The principle, then, that discovery gave title to the Government, by whose subjects or by whose authority it was made, against all other European Governments, being once established, it follows almost as a matter of course, that every Government within the limits of its discoveries excluded all other persons from any right to acquire the soil by any grant whatsoever from the natives. No nation would suffer either its own subjects or those of any other nation to set up or vindicate any such title. It was deemed a right belonging exclusively to the Government in its sovereign capacity to extinguish the Indian title, and to perfect its own dominion over the soil, and dispose of it according to its own good pleasure."

22. APPEL-  
LANTS'  
FACTUM.

Sec. 7.—“It may be asked, what was the effect of this principle of discovery in respect to the rights of the natives themselves? In the view of the Europeans it created a peculiar relation between themselves and the aboriginal inhabitants. The latter were admitted to possess a present right of occupancy, or use in the soil, which was subordinate to the ultimate dominion of the discoverer. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion. In a certain sense they were permitted to exercise rights of sovereignty over it. They might sell or transfer it to the sovereign who discovered it; but they were denied the authority to dispose of it to any other persons; and until such a sale or transfer, they were generally permitted to occupy it as sovereigns *de facto*. But notwithstanding this occupancy, the European discoverers 10 claimed and exercised the right to grant the soil, while yet in possession of the natives, subject, however, to their right of occupancy; and the title so granted was universally admitted to convey a sufficient title in the soil to the grantees in perfect dominion, or, as it is sometimes expressed in treaties of public law, it was a transfer of *plenum et utile dominium*.”

Sec. 8.—“This subject was discussed at great length in the celebrated case of *Johnson v. McIntosh*, etc., etc.”

Finally, in Curtis' *History of the Constitution of the United States* (Volume III., page 325) we find briefly stated what, it is submitted, is the correct view with regard to the question now before this court. He says:—

“By the system which has always prevailed in the relations of Europeans and their 20 descendants with the Indians of America, those tribes had constantly been regarded as distinct independent political communities, retaining their original rights, and among them the undisputed possession of the soil; subject to the exclusive right of the European nation making the first discovery of their territory to purchase it. This principle, incorporated into the public law of Europe at the time of the discovery and settlement of the New World, and practised by general consent of the nations of Europe, was the basis of all the relations maintained with the Indian tribes by the Imperial Government, in the time of our colonial state, by our Revolutionary Congress, and by the United States under the Confederation.”

There are two ways of acquiring plantations or colonies in distant countries. Such plantations or colonies are, says Sir William Blackstone (*Commentaries*, Volume I., page 107), “either 30 such where the lands are claimed by right of occupancy only by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations.” Which of these principles is more applicable to the acquisition of the lands of North America? Is the contention of the Respondent a right one, that this continent has been always dealt with as unoccupied, and uninhabited, and that “the Crown never recognized the Indians as owners of the soil in any of the American colonies?” Or was Blackstone nearer the truth, when he said, that the English plantations in America are principally of this latter sort, “being obtained in the last century, either by right of 40 conquest and driving out the natives (with what natural justice I shall not at present inquire) or by treaties?” The inconsiderable extent of territory obtained by England, on this continent,

in the seventeenth century, by conquest or treaty, shows that Blackstone, when he refers to the lands here, as contradistinguished from such lands as are taken possession of in an uninhabited state, must have referred to lands occupied by the native aboriginal proprietors.

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It may be appropriate here, to refer to the "Six Counsell's opinion," upon which the learned Chancellor so strongly relied, and which he accepted and adopted as a correct statement of the law with regard to the question with which it dealt, and which opinion will be found at page 78 of the Joint Appendix. It is to be noticed that of the circumstances under which this opinion was given, nothing is known; nor are we aware upon what data it was founded; and even its date is still uncertain. It is submitted, too, that in so far as it seems to deny any right whatever, in the Indians, to the lands of which the English may have taken possession, it is not only inconsistent with the general weight of opinion and the general practice since, as abundantly shown above; but it is also inconsistent with itself. Beginning with what is apparently a denial of all right in the Indians, the opinion goes on to distinguish between the position of an individual planter purchasing from the Indians, and proprietors so purchasing under the authority of the Crown, and the comparative validity of these respective purchases where they came into conflict. This seems, so far as we can judge, to have been the point at issue; and the "Six Counsell" gave as their opinion, that the latter mode of acquisition was entitled to prevail, and that the former, though a good title "as against the Indian, was of no validity against the proprietors, without a confirmation from them upon the usual terms of other plantations." Now, it certainly would seem an absurdity to allow that a purchase from the Indians gave a good title as against them and at the same time to deny that they had had any title or right whatever in the lands conveyed. What was meant, doubtless, is this—that individual purchases from the Indians have no validity (which has never been denied); and, on the other hand, that the Crown only can deal with the Indians for the lands, the Crown being exclusively entitled to the fee—the eminent domain—in the lands discovered and taken possession of in its name. But it is not denied that such rights, of the Crown and the Indians respectively, may exist together. The right of the Indians to their lands, and to compensation if disturbed in the possession of them, is (to use the words of a case to be hereafter referred to) "not absolutely repugnant to a seisin in fee on the part of the State."

Before proceeding to a consideration of the extent to which the line of opinion shown in the above records and authorities is borne out and supported by the decisions of the various United States Courts, before which the questions involved have come up at any time,—and it can be easily demonstrated, it is submitted, that the whole trend of such decisions is in the same direction,—the Appellants would desire to refer to a few of our Canadian records of recognized authority, upon matters relating to the Canadian Indians, and their rights to the lands they occupy.

To commence with the year 1760, we find the Articles of Capitulation, of that year, providing, in Article 40, that: "The Savages, or Indian allies of His Most Christian Majesty shall be maintained in the lands they inhabit, if they choose to reside there; they shall not be molested on any pretence, whatsoever, for having carried arms and served His Most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries."

This was followed by the Royal Proclamation of 1763, distinctly acknowledging the Indians' right of occupancy of their old hunting grounds, and their claim to compensation for its surrender, and reserving to the Crown the exclusive privilege of dealing with them for the surrender or purchase of any portions of their land. This Proclamation will be found fully set out in the Joint Appendix (p. 39); and it is still looked upon by the Indians of Canada as the "Charter of their rights," and referred to by them in all their dealings with the Crown. It is this Proclamation of which the Court said in *Johnson v. McIntosh* (8 Wheaton, 597): "The authority of this Proclamation, so far as it respected this Continent, has never been denied, and the titles it gave to lands have always been sustained in our Courts."

It was contended in the Courts below, and stated by the learned Chancellor of Ontario in his judgment herein, that this Royal Proclamation was merely of a temporary character, and that it was expressly abrogated by the Quebec Act of 1774. But by section 3 of that Act, it is enacted that no "right, title or possession derived under any grant, conveyance, or otherwise, howsoever" is interfered with, but "shall remain and be in force, and have effect as if this Act had never been made." And the mode of treatment of the Indians' rights by the various Canadian Governments, clearly shows that it has all along been assumed that the rights given or preserved to the Indians by the Proclamation, have not been interfered with or taken away by public authority, but still exist, and are entitled to recognition.

Sir F. B. Head, in his memorandum to Lord Glenelg, of November, 1836 (see Appendix, p. 52), speaks of the Indians of America as "the real proprietors of its soil"; and his dealings with them show that he always considered himself as negotiating with them as such.

In the "Report of the Commissioners (Messrs. Rawson, Davidson & Hepburn) appointed to enquire into the affairs of the Indians in Canada," dated 22nd January, 1844, (see Appendix, p. 145, where copious extracts are given), and in a further "Report on the Indian Affairs," by Messrs. Pennefather, Talfourd & Worthington, made in 1858 (also largely quoted from in the Appendix, p. 184), is to be found much valuable information otherwise extremely difficult of access.

From the former of these Reports, a document of the strongest authority, the following extracts are taken, as showing the opinions of the Commissioners upon the question of the Indian title in the soil. After a recital of the 40th Article of the Article of Capitulation, above referred to, the report goes on:—

"The subsequent proclamation of His Majesty George Third, issued in 1763, furnished them with a fresh guarantee for the possession of their hunting grounds, and the protection of the Crown. This document the Indians look upon as their Charter. They have preserved a copy of it to the present time, and have referred to it on several occasions in their representations to the Government."

"Since 1763 the Government, adhering to the Royal proclamation of that year, have not considered themselves entitled to dispossess the Indians of their lands, without entering into an agreement with them, and rendering them some compensation. For a considerable time after the conquest of Canada, the whole of the western part of the Upper Province with the exception of a few military posts on the frontier, and a great extent of the eastern part, was in their occupation. As the settlement of the country advanced, and the land was required for new occupants, or the predatory and revengeful habits of the Indians rendered their removal desirable, the British Government made successive agreements with them, for the surrender of portions of their lands."

Speaking of the Iroquois of St. Regis, the report says:—"Their title was originally a mere occupancy for the purpose of hunting, but it was recognized and acknowledged by the Government of France before the Conquest, and was subsequently secured to them by that of England, in common with all similar titles existing at the time of the Conquest."

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"Under the heading, "Title to Lands," are the following sentences:—

"Although the Crown claims the territorial estate and eminent dominion in Canada, it has ever since its possession of the Province conceded to the Indians, the right of occupancy upon their old hunting-grounds, and their claim to compensation for its surrender, reserving to itself the exclusive privilege of treating with them, for the surrender or purchase of any portions of the land. This is distinctly laid down in the Proclamation of 1763, and the principle has since been generally acknowledged and rarely infringed upon by the Government. The same rule has been followed by the Government of the United States, who pay annuities for the surrender of Indian lands to the extent of about £140,000 a year.

"In Lower Canada, where settlement had made considerable progress before the conquest, and where civilization and Christianity had been introduced among the Indians, their territorial possessions had at that time become circumscribed within defined limits, and in many instances were held by patents under the French Crown or individual seigneurs. Of these Reserves the several tribes still retain possession, and there is only one section of the country, viz., on the Ottawa, in which the Indians have been dispossessed of their ancient hunting-grounds without compensation.

"In Upper Canada, on the other hand, where at the time of the conquest the Indians were the chief occupants of the territory, where they were all Pagans and uncivilized, it became necessary as the settlement of the country advanced, to make successive agreements with them for the peaceable surrender of portions of their hunting-grounds. The terms were sometimes for a certain quantity of presents, such as have been before described, once delivered, or for an annual payment in perpetuity either in money or more generally in similar presents. One of the earliest of these agreements was made with the Mississaga tribe, on the Grand River in 1784, by which the Crown purchased above 670,000 acres, to be again ceded to the Six Nations on their retirement from the United States, at the close of the War of Independence."

Speaking of a claim of the Algonquins, Nipissings and Iroquois at the Lake of Two Mountains to compensation for lands of which they had been dispossessed, the following is reported:—

"The nature of their claim, founded on the former occupation and gradual dispossession of the territory on the banks and in the islands of the Ottawa, upon the terms of the proclamation of 1763, and upon the fact of their having (although illegally) received rents for lands occupied by settlers in those islands, gives them a title to the favorable consideration of the Government."

In Appendix No. 46 to this Report occurs the Speech delivered to the Six Nations Indians by Sir John Johnston, at Niagara, 23rd July, 1783, wherein he addressed these words to the assembled Six Nation chiefs and tribes:—

"Although the King, your father, has found it necessary for the happiness and ease of his more domestic subjects, to conclude a long, bloody, expensive and unnatural war, by a peace which seems to give you great uneasiness, on account of the boundary line agreed upon between His Majesty's Commissioners and those of the United States; yet you are not to believe, or even think, that by the line that has been ascribed, it was meant to deprive you of an extent of

“country of which the right of the soil belongs to, and is in yourselves as sole proprietors, as far as the boundary line agreed upon and established in the most solemn and public manner, in the presence, and with the consent of the Governors and Commissioners deputed by the different colonies for that purpose, by your late worthy brother and friend, Sir William Johnston, in the year 1768, at Fort Stanwix. Neither can I harbor an idea that the United States will act so unjustly or impolitically, as to endeavour to deprive you of any part of your country, under the pretence of having conquered it. The King still considers you his faithful allies, as his children, and will continue to promote your happiness by his protection, and encouragement of your usual intercourse with traders, with all other benefits in his power to afford you.”

In the latter of the above-mentioned Reports,—that of Messrs. Pennefather, Talfourd and Worthington,—the Commissioners thus speak of the Mississaguas of Alnwich. (See Appendix, p. 192):—

“The acceptance of the surrender from the Indians in 1856 by the Government, is an acknowledgment that those islands had never been ceded by them.

“By the Proclamation of 1763, territorial rights, akin to those asserted by Sovereign Princes, are recognized as belonging to the Indians, that is to say, that none of their land can be alienated save by treaty made public between the Crown and them. Later, however, as this was found insufficient to check the whites from entering into bargains with the Indians for portions of their land, or for the timber growing thereon, it has been found necessary to pass stringent enactments for the protection of the Indian Reserves; as these differ in two sections of the Province, it may be well to consider separately the laws passed for the attainment of this object, both in Upper and Lower Canada.”

Under the heading, “Position of the Native Tribes in the Eye of the Law,” the question is asked, whether the government are not pledged to abide by the Proclamation of 1763, a document on which many of the tribes rest their claims, in part at least, to the lands now occupied by them; the Proclamation so far as dealing with Indian rights, is cited, and complaints are made against both individuals and the government, on account of their unwarrantable and unjust treatment of the Indians with respect to their lands. “The Crown itself, too,” says the Report, “while adhering to the letter of this Proclamation, have . . . purchased large tracts from the Indians for a mere nominal sum, sometimes in goods, sometimes for an annuity utterly inadequate to the value of the land.” . . .

That the foregoing references to Canadian records convey a correct idea of the views which have, down to the present time, been held by both the Imperial and Canadian governments, is obvious from the fact, that, in the official correspondence which took place upon the uniting of Rupert's Land and the North-western Territory to the Dominion, it was deemed necessary to remove all doubts, and to make adequate provision with regard to the future treatment of the Indians. In the “Address to Her Majesty from the Senate and House of Commons of Canada,” of December, 1867, the following clause occurred:—

“And furthermore, that upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement, will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the Aborigines.”



And the Imperial Order in Council "respecting Rupert's land and the North-western Territory," 1870, provided, in clause 14, that "Any claims of Indians to compensation, for lands required for purposes of settlement, shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them."

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The opinion too, of those who have, at different times, been entrusted with the management of Indian affairs in various parts of the Dominion, is, it is submitted, of very considerable weight. That opinion has been almost uniformly in the one direction. A very few references must suffice.

Mr. J. A. N. Provencher, Indian Commissioner at Winnipeg, thus expresses his opinion in a report of December, 1873: (See Appendix, p. 240):—

"The Indians of this Continent have always been considered, if not as proprietors, at least as occupants of the soil. It was always understood that they had rights as owners, and that the Crown would first have to extinguish those rights to afterwards assume full possession of the land. From this point of view there is a double right and a double interest which cannot be settled without the free consent of those interested.

"It is an act of indemnity for these rights, resulting from possession, that the Government pays the annuities to the Indians, and in return these latter limit their rights exclusively to the concessions preserved to them.

"Their right in the reserve is precisely of the same nature as that which they had before the treaty over the whole territory, a right of undivided possession, without the power of selling or ceding it in any manner whatever. It requires special legislation to clothe them with the rights of full property, being that which usually accompanies the act of emancipation."

And long before this, in 1839, Mr. S. P. Jarvis, then one of the Indian Superintendents, and a man of vast experience in connection with the management of the Indians and their lands, dealing with the Indians of Upper Canada, reported as follows:—

"It is true that they generally reserve to themselves small blocks, in order that they might not be entirely without a home; but in making these reservations for themselves, their usual improvidence and shortsightedness were but too conspicuous, for they do not seem to have contemplated that the game upon which they principally relied for support, and with which the forest then abounded, would be destroyed or driven away to more distant parts, as the land which they ceded became cultivated and thickly inhabited by a white population. Had they looked forward to such a result, it is reasonable to suppose that they would have stipulated for an equivalent commensurate with advantages now and for ever gone from them. By entering into treaties with the Aborigines of the country for the purchase of lands, the Government has acknowledged the right of soil to be in them; but I think that it would have better comported with the established character for justice and liberality of the British Government, had the agents employed to treat with the Indians, for the surrender of their lands, been instructed to pledge the Government for at least such an equivalent as would be adequate for feeding, clothing, and providing them with religious and moral instruction."

Having now given sufficient attention to the available historical records, and to some of the most reliable authorities, Canadian and otherwise, to convey what, it is submitted, is a correct view of the question concerning the recognition of an Indian title to lands, founded upon immemorial

usage and occupation, it is proposed to show that the whole course of judicial decisions in the Courts of the United States is to precisely to the same effect. Those Courts have long recognized and allowed that the Indian tribes inhabiting this Continent have been, from the beginning, so dealt with by Europeans, and by the United States since the Revolution, as to establish the binding legal principle of an acknowledgment of their title,—whatever it may be,—and of the necessity of a relinquishment or surrender of it before the right of the Crown or State becomes complete as against them. The independent position of the various Indian tribes and nations is dealt with and conceded; and the validity and binding force of their treaties with the Government assumed.

In proof of the correctness of this view as to the general effect of the United States judicial opinions, the Appellants would desire to refer to the following extracts from a few of the 10 leading cases mentioned:—

*Worcester v. State of Georgia.* (6 Peters, 515):—

“The Indian nations have always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power which excluded them from intercourse with any other European potentate, than the first discoverer of the Coast of that particular region claimed, and this was a restriction which the European potentates imposed upon themselves as well as on the Indians. The very term “nation” so generally applied to them, means, a people distinct from others. The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned 20 the previous treaties with the Indian nation, and consequently admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense.”

“By numerous treaties with the Indian tribes, we have acquired accessions of territory, of incalculable value to the Union. Except by compact, we have not even claimed a right of way through the Indian lands.”

See United States Statutes at large Vol. VII., p. 10, citing *United States v. Clark*, (9 Peters, 168):— 30

“One uniform rule appears to have prevailed in the British Provinces of America by which Indian lands were held and sold, from the first settlement, as appears by their laws; that friendly Indians were protected in the possession of lands they occupied, and were considered as owning them by perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the Crown, and its grantees; which could be granted by the crown or colonial legislatures, while the lands remained in possession of the Indians; though possession could not be taken without their consent.

“Individuals could not purchase Indian lands without permission or license from the Crown, Colonial Governors, or according to the rules prescribed by Colonial laws; but such purchases 40 were valid with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the Crown by the license, the title of the purchaser became complete.

“Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the

“whites; and their rights to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, until they abandoned them, made a cession to the Government or an authorized sale to individuals. In either case their rights became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. Such was the tenure of Indian lands by the laws of Massachusetts, Connecticut, Rhode Island, New Hampshire, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia.”

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10 “It was a universal rule, that purchases made at Indian treaties, in the presence, and with the approbation of the Officer under whose direction they were held by the authority of the Crown, gave a valid title to the lands; it prevailed under the laws of the States after the Revolution, and yet continues in those where the right to the ultimate fee is owned by the States, or their grantees. It has been adopted by the United States, and purchases made by treaties held by their authority have been always held good by the ratification of the treaty, without any patent to the purchasers from the United States. This rule in the colonies was founded on a settled rule of the law of England, that by his prerogative, the king was the universal occupant of all vacant lands in his dominions, and had the right to grant them at his pleasure, or by his authorized officers.”

*Cherokee Indians v. The State of Georgia*, (5 Peters, 1) :—

20 “The condition of the Indians, in relation to the United States, is perhaps unlike that of any other two people in existence. In general, nations not owning a common allegiance are foreign to each other. The term ‘foreign nation’ is with strict propriety applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

30 “The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our Government. It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—meanwhile they are in a state of pupilage. Their relations to the United States, resemble that of a ward to his guardian. They look to our Government for protection; rely upon its kindness and its power; appeal to it for relief of their wants; and address the President as their Great Father.”

*Clark v. Smith*, (13 Peters, 195) :—

“The ultimate fee (encumbered with the Indian right of occupancy) was in the Crown previous to the Revolution, and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power, and respected by the Courts until extinguished; when the patentee took the unencumbered fee. So this Court, and the State Courts, have uniformly, and often, holden.”

*Jackson v. Porter*, (1 Paine, 457) :—

40 “The seizin of land belonging to Indian tribes is in the sovereign and the Indians are mere occupants, and a purchaser from them can only acquire the Indian title, and they may resume it and make a different disposition of it, but it continues under the Indian title. The Indians having afterwards resumed the title and granted it to the Crown, an occupant, under an Indian title grant, holds as a tenant at will of the King, and no length of such occupancy would give him the title by adverse possession.”

*Godfrey v. Beardsley*, (2 McLean, 412):—

“An Indian treaty which sets lands within certain boundaries reserving certain parts does not in any respect change the original right as to such parts.”

*Wheeler v. Me-shing-go-me-sia*, (30 Indiana, 402):—

“The practice of the United States has been to regard the Indian tribes as quasi proprietors of the country in which they dwell, from their occupancy, but with the incapacity to alienate, except to the national government. The right to acquire and extinguish the title pertained exclusively to the United States; therefore, individual purchases made from them separately or as tribes were null and void. This applied to all the public domain in which the ultimate sovereignty and proprietorship of the soil, was in the United States.” 10

*Minter v. Shirley*, (45 Mississippi, 376):—

“The United States have recognized the Indian nations, as so far having the attributes of sovereignty, as to be capable of making treaties and being bound by them, and as having also such title to the country occupied by them as may be granted by alienation and cession. This practice was uniformly adhered to toward the Indian tribes of the South West. (3 Kent's Commentaries 492, and *Mitchell v. U. S.*, 9 Peters, 711).”

“The several acts of Congress, in reference to the survey and sale of the public lands, distinctly kept in view the fact ‘that the Indian title must first have been extinguished, and acquired by the United States, before individual right to any part of the soil can be derived and vest.’ Thus the act of March 3rd, 1803, regulating the grants and disposition of lands south of the State of Tennessee, in its first section, directs, among other things, ‘All the lands in the Mississippi territory, to which the Indian title had been extinguished, to be surveyed.’” 20

“The Government never regarded the absolute title to the soil as resting in the United States, as proprietors in fee, until ceded by the Indians. Nor did they undertake to dispose of them by grants for charitable uses, or to individual purchasers, until the acquisition of the Indian title. It was upon this principle and practice of the Government that the case in 9 Howard was decided.”

*Gaines v. Nicholson*, (9 Howard, 356):—

“Where there are reservations in Indian treaties of specific tracts of land, which are afterwards found to be the sections set apart for school purposes under a general law, the reserves have the better title. No previous grant of Congress would be paramount, according to the rights of occupancy which this Government has always conceded to the Indian tribes, within her jurisdiction. It was so much carved out of the territory ceded, and remained to the Indian occupant, as he had never parted with it. He holds strictly speaking not under the treaty of cession but under his original title, confirmed by the Government in the act of agreeing to the reservation.” 30

*Fletcher v. Peck*, (6 Cranch, 87):—

“The nature of the Indian title, which is certainly to be respected by all courts until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State.”

*Fellows v. Lee*, (5 Den, N. Y., 628):—

“The title of the Indians to their lands is an absolute ownership, and the right of pre-emption of lands in the western part of the state ceded to Massachusetts, 1786, was simply the right to purchase lands from the Indians when they chose to sell them. Therefore the grantee of pre-emption right, cannot maintain it over for saw-logs cut on such lands from the Indians and sold to the defendants.” 40

The foregoing brief extracts from a few of the authorities established by the Courts of the United States (to the full reports of which the Appellants will refer upon the argument), are sufficient, it is submitted, to show conclusively the error of the contention, that the Indians of the United States have not been recognized in the courts of that country, as possessed of a right of some nature in the soil. The numerous cases which deal with the 'Indian reserves,' technically so called, are referred to, and will be referred to more fully upon the argument, for the purpose of showing that where, upon the surrender of Indian country to the State or the United States, certain portions of the lands surrendered are specially set apart under the name 'reserves,' those reserves are held by the Indians, not by title created by the treaty of cession, but as expressed in *Gaines v. Nicholson* above referred to, "under his (the Indian's) original title, confirmed by the Government in the act of agreeing to the reservation."

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It has also been alleged that the validity and solemnity of Indian treaties have not been recognized in the Courts in the United States, to the extent claimed by the Appellants. It is only necessary to refer to the cases which occur, in which the nature of the Indian treaties has ever been discussed and commented upon, to see at once that those treaties are looked upon, and have always been looked upon, as possessed of the most binding force, and as compacts made between nationalities and peoples capable of dealing with one another in a treaty-making capacity, however one or other party may at times have been cajoled or deceived in the terms of the compact agreed upon.

Thus in *Turner v. The American Baptist Mission Union* (5 McLean, 344), we find it assumed that "A treaty with our native Indian tribes has the same dignity and effect as with a foreign and independent nation."

And in *Maiden v. Ingersoll* (6 McLean, 374), the judicial opinion is given that "When a treaty has been made by the proper Federal authorities and ratified, it becomes the law of the land, and the Courts have no power to question, or in any manner look into the powers or rights recognized by it, in the nation or tribe with whom it was made."

And so in the important case of *Worcester v. The State of Georgia*, above quoted from, we find the following clear statement of the Court to the same effect:—"The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nation, and, consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense."

Many other cases might be referred to as enunciating a recognition of the same principle with regard to the dignity of Indian treaties. But enough, it is submitted, has been said, to show how erroneous and absurd is the contention, that those treaties are not to be looked upon by a Court of law, in this or in any other country, as possessed of any legal weight, or entitled to any serious legal construction or consideration. It is clear that a widely different view has been taken of the question by the Courts of the United States. It is a matter of no difficulty to show, with equal clearness, that in our own Canadian Courts, also, the same position has been almost universally assumed. But before coming to a consideration of the decisions to be found in our own Courts with regard to the questions which arise in this action, it will better conduce to a clear under-

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standing of the matters in issue, if attention is first drawn to such legislation as we have, Imperial and Canadian, which can in any way throw light upon the questions which have arisen.

The determination of the questions involved, depends to a very great extent on the construction to be placed upon the British North America Act of 1867. But it is submitted that the scope and intention of that Act cannot be correctly ascertained and understood without reference to, and consideration of, the legislation which preceded it, and of which it may be said to be, in a certain sense, a consolidation. And the history of British and Canadian statutory enactments ought to be borne in mind when we come to construe the British North America Act, so far as it affects, or is understood to affect, the Indians and their lands.

As far back as 1803, we find Imperial legislation with regard to offences committed upon the lands of the Indians, as contradistinguished from the lands over which the ordinary civil tribunals had jurisdiction. The Statute 43 Geo. III., cap. 138, deals with crimes and offences committed in "the Indian Territories," or, as more fully defined, "all offences committed within any of the Indian Territories, or parts of America not within the limits of either of the said Provinces of Lower or Upper Canada, or of any civil government of the United States of America." And all through this Act the lands with reference to which the Act was passed are spoken of as "the Indian Territories," and dealt with as requiring separate and independent legislation.

And the Statute, 1 and 2 Geo. IV., cap. 66 (1821), also an Imperial Act, "For Regulating the Fur Trade," continues the special specific dealing with "the Indian Territories," and was intended so far as the Indians were concerned, for their protection against injury arising from the trading competition between certain licensed private corporations; and all through this Act, too, we find the plain distinction between Indian and other lands embodied in the unambiguous words, "the Indian Territory and other parts of America," "the Indian Territories or such other parts of North America," "any Indian Territories or other parts of North America," etc., etc. See sections 6, 7, 10 and 12.

Coming then to a consideration of our colonial legislation, we find the Ordinance of the Province of Quebec of 1777 (17 Geo. III., cap. 7), regulating trade and intercourse with the Indians of the Province, and providing, in section 3, that "from and after the passing of this Ordinance, it shall not be lawful for any person to settle in any Indian village, or in any Indian country within this Province, without a license, etc." And 31 Geo. III., cap. 1 (1791), provided, in section 4, "that it shall and may be lawful for His Excellency the Governor or Commander-in-Chief, for the time being, by and with the advice and consent of His Majesty's Council, to restrain the trade and commerce to any part or place of the said western countries and inland territories, and regulate the same with any of the Indian tribes or nations, or other inhabitants thereof, etc."

Of the Statutes of the late Province of Upper Canada, the first necessary to refer to is 41 Geo. III., cap. 8 (1801), which, "for the comfort of the Moravian Indians inhabiting that certain tract of land on each side of the river Thames, called the Township of Orford," prohibited the sale of liquor within that district.

Next was passed the important Statute, 10 Geo. IV., cap. 3 (1829), intituled "An Act the better to protect the Mississaga tribes living on the Indian Reserves of the River Credit, in their exclusive right of fishing and hunting therein." The preamble is as follows:—"Whereas here- tofore the principal chiefs and warriors of the Mississaga Indians, that is to say Chechalk,

“Osenega, Acheton, and others of the said chiefs, for themselves and their people, did sell, make 22. APPEL-  
 “over, and surrender, by several deeds registered in the office of the Secretary of the Province, to LANTS’  
 “His Majesty, King George the Third, his heirs and successors, divers large tracts of land lying FACTUM.  
 “between the River Etobicoké and the head of the Lake Ontario, reserving to themselves, their  
 “people, and their posterity forever, amongst other portions of the said tracts, a certain parcel  
 “thereof on the River Credit, called in the Indian language the River Mazonahekasepa, with  
 “the sole right to the fisheries therein, etc;” and so on, reciting the rights of the Indians and  
 their complaints against trespasses upon their lands; and the Act then goes on to prohibit such  
 trespass upon “the said reserved land, and the waters thereof,” and to provide for forfeiture to the  
 10 Indians themselves of all game and fish, and utensils used in hunting or fishing, in the possession  
 of any offender captured within the Indian reserve. But the most important part of the Act is  
 that which speaks of the original sale or surrender by the Indians before any reserve was  
 constituted, as showing the validity in the mind of the Government and Parliament, and the  
 necessity for recognition, of the original surrender from the Indians as the basis of all subsequent  
 rights and all mutual dealings as between the Indians and the Government.

Then 2 Victoria, Cap. 15 (1839),—“An Act for the Protection of the lands of the Crown in  
 “this Province from Trespass and Injury.” “Whereas the lands appropriated for the residence of  
 “certain Indian tribes in this Province, as well as the unsurveyed lands and lands of the Crown  
 “ungranted and not under location, or sold or held by virtue of any lease or license of occupation,  
 20 “have from time to time been taken possession of by persons having no lawful right or authority so  
 “to do,” and so on. Then comes the enacting part: “that it shall and may be lawful for the  
 “Lieutenant-Governor of the Province, from time to time, as he shall deem necessary, to appoint  
 “two or more Commissioners under the Great Seal of this Province, to receive information, and to  
 “enquire into any complaint that may be made to them, or any one of them, against any person  
 “for illegally possessing himself of any of the aforesaid lands, for the cession of which to Her  
 “Majesty no agreement hath been made with the tribes occupying the same, and who may claim  
 “title thereto; and, also, to inquire into any complaint that may be made to them, or any one of  
 “them, against any person for having unlawfully cut down or removed any timber, trees, stone or  
 “soil, on such lands, or for having done any other wilful and unlawful injury thereon.”

30 This Act was considered to be explained and amended by 12 Vic., Cap. 9 (1849), which enacted,  
 “That so much of the first section of the said Act (the section above quoted from), as doth or may  
 “in any wise limit or restrain the provisions thereof, or the jurisdiction of the Commissioners  
 “appointed or to be appointed under the authority of the same, to lands for the cession of which to  
 “Her Majesty no agreement hath been made with the tribes occupying the same, and who may  
 “claim title thereto, shall be and the same is hereby repealed; and that the said Act and all the  
 “provisions thereof shall extend and shall be construed to extend to all lands in that part of the  
 “Province called Upper Canada, whether such lands be surveyed or unsurveyed, for which no  
 “grant, lease, ticket either of location or purchase, or letter of license of occupation hath been or  
 “shall have issued, either under the great seal, or by or from the proper department of the Provincial  
 40 “Government, to which the issuing of the same at the time belonged, and whether such lands be  
 “part of those usually known as crown reserves, clergy reserves, school lands, or Indian lands, or  
 “by, or under any other denomination whatsoever, and whether the same be held in trust or in  
 “the nature of a trust for the use of Indians, or of any other parties whatsoever;” recognizing in  
 that way the Indian title, the interest of the Indian in the soil unsurrendered to the Crown, and  
 the necessity of assent by the Indians to dealings with regard to it.

*No - assent by the Indian  
 to act*

Then 13 and 14 Vic., Cap. 74 (1850), "An Act for the Protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury," or, as the recital reads, "to provide more summary and effectual means for the protection of such Indians in the unmolested possession and enjoyment of the lands and other property in their use or occupation," enacted, "That no purchase or contract for the sale of land in Upper Canada, which may be made of or with the Indians, or any of them, shall be valid unless made under the authority and with the consent of Her Majesty," etc.; and such purchase without consent was made a misdemeanor. And it was, also, made unlawful "for any person or persons, other than Indians or those who may be intermarried with Indians, to settle, reside upon or occupy any lands or roads, or allowances for roads running through any lands belonging to or occupied by 10 any portion or tribe of Indians within Upper Canada."

14 and 15 Vic., Cap. 51 (1851), "An Act to consolidate and regulate the general clauses relating to railways," provided (sec. 11 (22)), that where any railways thereafter built should pass through "any land belonging to or in possession of any tribe of Indians in this Province," compensation should be made to the Indians in the same manner as was provided with respect to the lands or rights of other individuals.

16 Vic., Cap. 91, (1853), "An Act to authorize the formation of Joint Stock Companies to construct works necessary to facilitate the transmission of timber down the rivers and streams in Upper Canada," provided "That if any such work shall be constructed upon or otherwise interfere with any tract of land or property belonging to or in possession of any tribe of Indians in 20 this Province," compensation should be made to the Indians in the same manner as that provided in the case of other individuals, whose property, possession or right might be encroached upon or interfered with.

Then we have the important Statute, 20 Vic., Cap. 26, (1857), "An Act to encourage the gradual civilization of the Indian tribes in this Province, and to amend the laws respecting Indians." Section 1 deals with "lands which have never been surrendered to the Crown (or which having been so surrendered have been set apart or shall then be reserved for the use of any tribe or band of Indians in common);" section 7 provides for compensation for surrender; and section 10 for escheat to the Crown, in certain cases, of the lands of enfranchised Indians.

In the Consolidated Statutes of Canada, Cap. 9, (22 Vic., 1859), we find the two kinds of Indian 30 lands still distinguished, "lands which have never been surrendered to the Crown," and lands "which having been so surrendered have been set apart or are then reserved for the use of any tribe or band of Indians in common."

The Consolidated Statutes of Upper Canada, Cap. 81, (22 Vic., 1859), consolidates most of the legislation above referred to, and is intitled "An Act to prevent trespasses on Public and Indian lands."

The Consolidated Statutes of Lower Canada, Cap. 14, (23 Vic., 1860), may also be referred to as showing the legislation of that Province with regard to the Indians within its limits. And the following Statutes of the Dominion of Canada may also be referred to as showing the course of legislation with regard to the Indians and their lands since Confederation:—31 Vic., Cap. 42, 40 (1868); 32 and 33 Vic., Cap. 6, (1869); 39 Vic., Cap. 18, (1876); and 42 Vic., Cap. 28, (1880).

In considering the Acts passed before Confederation, those have been left unnoticed here which deal exclusively with "Indian Reserves," technically so called; namely, such tracts of land



as have been specially set apart for the use of the Indians out of lands surrendered by them, and possession of which has been guaranteed to them and their successors forever; or such tracts of public lands as have been granted to certain Indian bands under such special circumstances as the grant on the Grand River to the Six Nations, or the grant to the Mohawks of the Bay of Quinté. It is obvious that the Statutes with regard to such "reserves" must be of a special nature, as dealing with special rights, and do not directly effect the questions arising on this appeal.

Now, what does this whole course of legislation, briefly summarized above, show to have been our principles and modes of dealing with the Indians in these Provinces from the beginning? All the way down from the Royal Proclamation of 1763, the principle seems to have been uniform and universal. The British, coming in here, and advancing westward, from generation to generation, find the Indian in possession of the soil, and assuming the position of Lord Paramount. He is acknowledged to be lawfully in possession, by a title which must be recognized,—founded as it is on immemorial usage and occupation,—and must be dealt with, if his lands are to be obtained and placed in a condition rendering them free for British settlement. For the cession of this title compensation is given in various forms. One of these is the establishment of the "Reserve." It is not necessary to grant to the Indian; he is already in possession, entitled to hold under his original rights. But in consideration for the promised and guaranteed protection of the Crown, he confines his claim to narrower and defined limits. "The British Crown," says Mr. Justice Gwynne in *Church v. Fenton*, (to be hereafter more fully referred to), "has invariably waived its right by conquest over all the lands in the Province until the extinguishment of what the Crown has been pleased to recognize as the Indian title, by a treaty of surrender of the nature of that produced in this case; until such extinguishment of that title, the Crown has never granted any of such lands." The recognition of this title is not a matter of favor or courtesy on the part of the Crown; but it has come to be part of the settled law of the country. While rules of international law,—founded on custom,—may have been established and followed by European nations, *inter se*, on this continent, the only way to get at the mode in which Great Britain has treated the Indians, is to study the Statutes that have been passed, and the treaties and dealings which have been entered into; all showing a recognition of the title of the Indian to the soil. The old charters upon which many opposite rights have been attempted to be established, have long been disregarded, and treated with the silent contempt they deserved. And the more equitable and the more natural principle has long been followed, of allowing the substantial property, the beneficial interest to reside in the Indians as proprietors of the soil they occupied. And the further fact that they have been forbidden to sell to individuals, and that it has been made a criminal offence for individuals to buy, assumes that they had something to sell; otherwise what profit would it be to buy from the Indian if he had no right in the soil, if nothing would pass by his conveyance? The law of the United States has equally recognized the right of the Indian to the soil he occupied. The whole of the treaties made with the Indians recognize that right; and it is a right established by law which cannot and may not be easily set aside.

Before passing to a critical consideration of the British North America Act, it might be well to look at some of the cases which have been decided in our Courts, and in which the question of the Indian title has come up for judicial investigation.

*Bown v. West* (I. E. and A. 117), deals with the title to "Indian Lands." The following extract is from page 118 :—

"Enough is disclosed in the case to enable us to see, that the contract between these parties was for the sale of what is commonly called in this country Indian Lands, being part of the large tract of the Grand River, in the District of Gore, which the Government of the Province of Quebec, before the division of the Province into Upper and Lower Canada, set apart and reserved for the exclusive occupation of the Six Nations of Indians, who at the conclusion of the American rebellion were compelled to abandon their former possessions in the revolted colonies, on account of their adherence to the British Crown.

"The Government, we know, always made it their care to protect the Indians so far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants. What particular regulations have been made with this view was not in evidence in this cause, but we cannot be supposed to be ignorant of the general policy of the Government in regard to the Indians, so far as it has been made manifest from time to time, by orders of Council and proclamations, of which all people were expected and required to take notice. In the second year of Queen Victoria a statute was passed, (ch. 15), the object of which was to prevent trespasses upon lands reserved for the Indians; it has no provisions which can affect the case before us. But we know that beside this attempt to restrain the people from intruding as trespassers upon Indian Lands, the Government has always been desirous to deter and prevent white inhabitants from bargaining with the Indians for the purchase of their lands, though their efforts to that end had been very far from effectual.

"This large tract of land on the Grand River, extending from the mouth of the River on Lake Erie, to its source, and comprising a breadth of six miles on each side of the river, having been with other lands purchased by the Government from its aboriginal inhabitants of the Chippewa Nation, was set apart by the Government for the exclusive use and occupation of the Six Nations of Indians; and the intention of the Government to retain it always for their use and benefit, was formally declared in an instrument signed by General Haldimand, Governor in Chief of the Province of Quebec, in the year 1784, and sealed not with the Great Seal of the Province which would have been necessary to constitute it a patent, but with the Seal at Arms of General Haldimand. The Government of Upper Canada, acting not by any means in derogation of the rights of the Six Nations of Indians, but acting on their behalf and for their benefit, and upon a full understanding with them, has disposed from time to time of parcels of this territory in order to raise funds for the support and assistance of the Six Nations."

*Little v. Keating*, (6, O. S., 265), also shows a clear distinction between the two kinds of Indian Lands,—lands recognized as belonging to and in possession of the Indians, but unsurrendered to the Crown, and lands specially reserved for particular tribes or bands. This case was decided under 2 Vic., Cap. 15, above referred to, and the head-note to the report is as follows :—

"Commissioners appointed under 2 Vic., ch. 15, to receive informations and inquire into complaints that may be made to them against any person for illegally possessing himself of the lands mentioned in the Statute, must show upon the face of a conviction by them under that Act, that the lands of which illegal possession had been taken, had been actually occupied and claimed by some tribe or tribes of Indians, and for the cession of which no agreement had been made with the Government. A conviction alleging that the party convicted had unlawfully possessed himself of Crown Lands is bad, as they have no general jurisdiction over such lands."

The following is an extract from the judgment :

“ . . . . They (the commissioners) assert that they have authority given to them under the Statute, 2 Vic., ch. 15, to act as commissioners for the purposes of that Act, in which there is an inconsistency between the title and preamble and the enacting clause. The former indicate that the legislature meant to afford a summary remedy for dispossessing intruders upon any of the ungranted lands of the Crown, but the enacting clauses do not extend so far; they only gave power to appoint commissioners “to receive informations, and to inquire into any complaint that may be made to them or any of them, against any person for illegally possessing himself of any of the aforesaid lands for the cession of which to Her Majesty, no agreement hath been made with the tribes occupying the same, and who may claim title thereto.” It may become a question hereafter whether these words extend only to lands in which the title of the aboriginal inhabitants has never been extinguished, or whether they embrace also lands which the Crown has acquired by purchase from the tribes first inhabiting them, and which have been afterwards reserved by the Government, for the occupation of other Indians, or as the case is in some instances, of the same tribes from whom the land had been acquired. It is clear at least that the provisions extend only to such land as some tribe or tribes actually occupy or claim title to. . . . “There is nothing in the conviction any more than in the writ, to show it to be Indian land. We cannot conjecture that it is because the complaint was made by Indian Chiefs, nor can we tell judicially whether Walpole Island be land occupied and claimed by Indians or not; so far as we might conjecture, we should conclude otherwise, for it is said to be in the Township of Sombra, and generally speaking Indians Lands are not surveyed and divided into Townships, though in some cases they have been.”

22. APPRI-  
ANTS  
FACTUM.

*Regina v. Baby*, (12 U. C. Q. B., 346), was decided under 13 and 14 Vic., Cap. 74, and placed a wide construction upon the terms “Indian Lands.” The following is the head note to the case,

“The 13 and 14 Vic. ch. 74, prohibits the buying or contracting to buy from Indians, not merely any lands of which they are in actual possession, but any lands held by the Government for their use or benefit; but

“Quære, whether the clauses of the act relating to trespasses on Indian lands extend to any lands not actually possessed by them.”

30 Special case, reserved under 14 and 15 Vic. ch. 13. The defendant was indicted under the Statute 13 and 14 Vic. ch. 74 for making a contract with certain Indians, concerning the sale and purchase of certain lands, and of the interest of the said Indians therein.

And the following extract is from the judgment, page 353 :—

“The Statute does, we think, prohibit the buying from Indians, or contracting to buy from them without the consent of the Crown, not merely any lands of which they are actually in possession, but any lands held by the Government for their use and benefit, whether actually used and possessed by them or not. The consideration which led to the enactment would apply in the latter case as well as in the former, and there is nothing in the language of the clauses relating to this prohibition which would warrant us in giving to it so limited a construction as that contended for.”

(The land in question was situated in the Town of Sandwich, and there is nothing to show that it was reserve-land.)

“We cannot doubt from the evidence that the land in question was in fact what we ordinarily understood by Indian lands; and indeed the indictment does not contain the averment that White and the others named were, as such Indians, entitled to the land mentioned.”

"We do not think that there is anything in the objection taken at the trial, that the indictment alleges that the defendant made a purchase from certain Indians named, whereas the purchase, so far as it was proved, was from the body or tribe of Indians through their Council; and also that it was not proved that the particular Indians named in the indictment had any interest to dispose of."

"The statute is very general in its terms. It provides that no contracts made with the Indians, or any of them, for the sale of land in Upper Canada shall be valid; and that if a person shall take any contract with the Indians in Upper Canada, or any of them, for or concerning the sale of any lands therein, without the authority and consent of Her Majesty, he shall be deemed guilty of a misdemeanor. 10

"The evidence given upon the trial tended to prove that the defendant did make a contract with certain Indians in Upper Canada for and concerning the sale of lands therein. The persons named were proved to be three of the Indians interested in the land in question, or claiming to be so; and it was proved that they contracted to sell to the defendant for £250, the land named. He knew they had not the legal title, which was vested in the Crown, and not in a tribe of Indians, but what they contracted to sell was the interest of the Indians in it, including their own interest, which is what the indictment charges, and is within the letter and spirit of the Act."

"We can easily believe it possible that this defendant or any other person wishing to buy land from the Indians, might be under the impression that if he entered into the contract only conditionally, and openly and avowedly made his agreement subject to the consent and approbation of the Government, he would not be offending against the Act, and we can believe that if the jury in this case had been satisfied upon the evidence that the defendant had acted openly in that spirit and upon that understanding, and no other, from the first, they would probably not have found the defendant guilty. 20

"The meaning (of the statute) probably is, that no one shall attempt to traffic with the Indians for the purchase of their lands, till he first obtained the authority and consent of the Government for entering into a contract with them. The Indians would not seem to be adequately protected against the evils recited in the statute, if persons were first allowed to enter into a treaty with them, and after the Indians had compromised themselves as to price and terms of payment, to apply then for the confirmation of the Crown. 30

(Conviction affirmed).

The case of *Vanvleck v. Stewart* (19 Q.B., 489), decided under 2 Vic., Cap. 15; 12 Vic., Caps. 9 and 30; 13 and 14 Vic., Cap. 74; and 20 Vic., Cap. 26, shows the object and the limitation of the restriction against purchases from the Indians, even in respect of the special Indian reserves; as appears from the following sentence from the judgment of Chief Justice Robinson:—

"Upon the existing statutes . . . I do not see that said logs cut upon Indian lands by the Indians themselves, or cut by white people by the assent of the Indian occupants, are liable to be seized and sold by the Commissioners for restraining trespasses upon the lands under any of the statutes referred to." 40

Then the case of *Regina v. Strong* (1 Chy., 392), also shows clearly the recognized distinction between the two kinds of 'Indian lands,' properly so called. The judgment construes 2 Vic., Cap. 15, sec. 1, and 12 Vic., Cap. 9, sec. 1, and proceeds as follows, (page 406):—

"It was contended in the first place that the 12th Victoria, chapter 9 had repealed altogether the first section of the 2nd Victoria, chap. 15; inasmuch as the latter Act it was argued repeals so

" much of the first clause of the former as restricts the powers of the Commissioners to lands ' for <sup>22. APPEL-</sup>  
 " the cession of which to Her Majesty no agreement had been made' ; and it was argued that in as <sup>LANTS'</sup>  
 " much as that clause is exclusively conversant about such lands, therefore the clause must be <sup>FACTUM.</sup>  
 " treated as entirely repealed. I do not feel the force of this argument. The former statute recites  
 " in the preamble the different circumstances under which the public lands had been subjected to  
 " trespasses of various kinds, and in regard to which it would be expedient to arm the Commis-  
 " sioners with summary jurisdiction. Of the lands thus enumerated, the first class consists of lands  
 " ' appropriated for the residence of certain Indian tribes' ; and this class is treated throughout as  
 " a distinct denomination. The enacting clause, however, after authorizing the appointment of  
 10 " Commissioners and empowering them to enquire respecting trespasses to ' any of the aforesaid  
 " lands' (not confining it to Indian lands), adds this curious qualification—' for the cession of which  
 " to Her Majesty no agreement hath been made with the tribes occupying the same, and who claim  
 " title thereto.' It is not easy to conjecture the object with which such a qualification was introduced.  
 " It would seem in effect almost to nullify the statute. But it is quite obvious that the qualification  
 " is by no means exclusively applicable to the first class of land (those appropriated for the resi-  
 " dence of Indian tribes), as was argued, but affects equally all the denominations mentioned in  
 " the preamble. The 15th chapter of the 2nd Victoria therefore, was not confined in its operation  
 " to ' lands appropriated for the residence of Indians' in the sense in which those words are used in  
 " the preamble, but extended to all unceded lands ; and when the 12th Victoria, chap. 9, repeated  
 20 " so much of the former Act as limited the operation thereof to ' lands for the cession of which to  
 " Her Majesty no agreement hath been made with the tribes so occupying the same, and who may  
 " claim title thereto' (using the very terms employed in the former Act), the effect of that provision  
 " was to leave the former Act applicable to all the lands enumerated in the preamble without  
 " qualification, and among the number ' lands appropriated for the residence of certain Indian tribes.' "

*Fegan v. McLean* (29 U.C., Q.B., 202), shows also, as does *Vannvleck v. Stewart*, above referred  
 to, that, even in the case of the reserves technically so called, as well as in that of Indian lands  
 generally, the limitation by Statute upon the selling power of the Indians is a special one, and  
 established for a certain purpose, on behalf of the Indians themselves. In that case, an Indian had  
 cut cordwood and sold it to the Plaintiff. The question under consideration was—Did that sale  
 30 pass away property? In the course of his judgment, Wilson, J., said :—" There is nothing in the  
 " Statute referred to (C.S., U.C., cap. 81, Sec. 21, and C.S.C., cap. 9), nor in the tenure or interest  
 " which the Indians have in such unsurrendered or reserved lands which prevents the Indian  
 " occupant from cutting more cordwood than he requires for his own use upon and from the land  
 " he occupies. He cannot be prosecuted or punished in any way for doing so. Having cut this  
 " cordwood what is there to prevent his selling it and passing the property in it to the purchaser.  
 " I see nothing by way of enactment or of rule of law prohibiting such sale. If anyone trespassed  
 " on land occupied by an Indian, he might most likely be proceeded against under Sec. 30, at the  
 " instance of the Crown or its authorized officers, notwithstanding the actual occupation by the  
 " Indian, but when the alleged act of trespass was done by the consent of the occupant, he himself  
 40 " having the right to do the very act licensed if he chose, I do not see that the act so done can be  
 " a trespass."

There is one further case, of great importance upon this point, to which the Appellants would  
 desire particularly to refer, namely, *Church v. Fenton*, which came from the Court of Common  
 Pleas and the Court of Appeal for Ontario to this Court, and is variously reported in 28 C. P.,  
 U. C. 384 ; 4 Appeal Reports, 159 ; and 5 S. C. R., 239.

The question was as to the validity of a tax sale of Indian land. The land had been surrendered and sold; but the Indian Department of the Government had not objected at the time. The ordinary location ticket had been issued; the land was in possession of the purchaser for taxes for two years; sale was afterwards made; and a conveyance from the late purchaser was made, subject to the Crown confirmation. The case is an important one, in view of Mr. Justice Gwynne's exhaustive and elaborate judgment upon the question of the validity of the Indian title in general. His Lordship in delivering the judgment of the Court of Common Pleas, deals with the question in issue as follows:

"The question upon which our judgment in this case depends is—Was or was not the lot in question, which is a part of a tract of land surrendered by the Indians to the Crown in 1854, 10  
 "rateable for taxes and liable to be sold for arrears of taxes at the date of the first sale, of which  
 "evidence was given, and which took place in the month of November, 1870? If it was, our  
 "judgment must be for the Defendant. The British Crown has invariably waived its right by  
 "conquest over all the lands in the Province until the extinguishment of what the Crown has been  
 "pleased to recognize as the Indian title, by a treaty of surrender of the nature of that produced in  
 "this case. Until such extinguishment of that title, the Crown has never granted any of such lands.  
 "Hence has arisen the expression, not, as it appears to me, strictly accurate, but which has been  
 "sanctioned by the Acts of the Legislature, to the effect that certain lands are vested in Her Majesty  
 "*in trust* for the Indians. But whether Her Majesty be or be not a trustee of those lands, cannot  
 "affect our determination of this case, for, undoubtedly, the legal estate in these lands, as in other 20  
 "Crown Lands, until sold in accordance with the provisions of the law affecting them, is vested in  
 "Her Majesty.

"Prior to the execution of this treaty or surrender, Her Majesty was seized of the lands  
 "therein mentioned in right of her Crown, but by an usage which has never been departed from,  
 "the Crown had imposed upon itself this restriction, and it never would exercise its right to sell or  
 "lease those lands, or any part of them, until released or surrendered by the Indians, for the  
 "purpose thereby of extinguishing what was called the Indian title, but when, as in the case of  
 "this surrender now before us, the consideration to be paid for it was in the nature of an annuity  
 "by way of interest, securing from the proceeds of the sale of the lands, the lands being still  
 "retained under the control and management of the Indian Department, became designated 30  
 "'Indian Lands,' to distinguish them from other Crown Lands, the proceeds arising from the sale of  
 "which being applicable to the public uses of the Province, and constituting part of the Provincial  
 "revenue, came to be designated 'Public Lands.'

"As early as 1837 was passed the Act, William IV., Cap. 118, intituled 'An Act to provide  
 "for the disposal of the Public Lands in the Province, etc.' That was an Act passed for regulat-  
 "ing the management and sale of that portion of lands vested in Her Majesty which consisted of  
 "Crown lands, clergy reserves and school lands, the proceeds arising from the sale of which were  
 "to be accounted for as forming part of the public revenue through the Commissioner of Crown  
 "Lands and the Receiver-General.

"This Act did not affect the lands vested in Her Majesty in which the Indians were interested, 40  
 "either as lands appropriated for their residence, as to which there had been no treaty of surrender  
 "for the purpose of extinguishing the Indian title, nor lands of which there had been a surrender  
 "of such title, but in the proceeds arising from the sale of which, the Indians being interested, the  
 "sale and management of them was retained in the Indian Department."

His Lordship then goes on to consider the effect of the various Statutes relating to "Public Lands," including 2 Vic., Cap. 14 ; 4 and 5 Vic., Cap. 101 ; 16 Vic., Cap. 159 ; 23 Vic., Cap. 2 ; 16 Vic., Cap. 182 ; and Consolidated Statutes of Upper Canada, Cap. 55 : and his judgment continues as follows :—

"By the 15th sec. of 15 Vic., ch. 159, it was provided that it would be lawful for the Governor-in-Council, from time to time, as he should deem expedient, to declare that 'The provisions of this Act or any of them shall extend and apply to the Indian lands under the management of the Chief Superintendent of Indian Affairs, and the said Chief Superintendent shall, in respect to the lands so declared to be under the operation of this Act, have and exercise the same powers as the Commissioner of Crown Lands may have and exercise in respect to Crown Lands.'"

"In this Act a distinction is expressly drawn between what are called Crown Lands, which term, as other sections of the Act shew, comprehended Crown reserves, clergy reserves and school lands, as distinguished from the lands which, although vested in Her Majesty and in that sense Crown Lands, being under the management of the Chief Superintendent of Indian Affairs, were called Indian Lands. This 15th section of 16 Vic., ch. 159, is consolidated in section 6 of the Consolidated Statutes of Canada, ch. 22. This latter Statute was repealed by 23 Vic., ch. 2, the 9th sec. of which re-enacted in substance the 15th sec. of 16 Vic., ch. 159, and the 26th and 27th secs. of 23 Vic., ch. 2, re-enacted with slight variations the 15th and 24th secs. of 16 Vic., the chief variation being that what in the latter Act are termed Crown, Clergy and School Lands, are in 23 Vic., termed 'Public Lands.' None of those Acts passed respecting the sale and management of the Public Lands affected lands vested in Her Majesty, in the sale or management of which the Indians were in any way interested, save in so far as the clauses provided, which enabled the Governor by Order in Council to apply the provisions of those Acts or any of them to those Indian lands."

The learned Judge then proceeded to analyze the further Statutes affecting the questions raised,—and among them the sections of the British North America Act which deal with Public and Indian lands, and the distribution of assets, which will be more fully dealt with hereafter,—and gave judgment for the Defendants. This judgment is affirmed in 4 Appeal Reports, p. 159, and in 5 Supreme Court Reports, p. 239, and the Appellants desire to refer as well to that part of it which is not cited above. But attention is especially asked to the views taken as to the meaning of the words "reserved for the Indians." The land in question was part of the Saugeen peninsula ; the Indians had surrendered it to the Crown ; the Government had sold the land prior to Confederation ; the patent came from the Dominion Government ; and the question came to be whether, the land having passed to the Dominion, it became free from assessment under the Provincial Law. Mr. Justice Gwynne decided that it was not covered by the section which speaks of "lands reserved for the Indians," but that it was covered by another section of the Act ; it was property of the Dominion ; it was property patented by the Dominion ; nevertheless, as far as the purchase was concerned, it was properly assessed by the Assessor in the ordinary way.

The Appellants would desire here to refer briefly to the various treaties by which the Indians of Canada have made surrender of their lands, and which are now of record in the Indian Department at Ottawa. A list of these will be found on page 142 of the Case, and reference will be made to the full texts on the argument before this court. Reference is especially asked to the words of conveyance in these surrenders, as showing that the Government, the framer of the

Treaties of surrender, has, in its dealings with the Indians with respect to their lands, adopted the most technical language, to which a definite meaning and construction must have been attached, and must now be attached by a court having these legal surrenders under consideration. Extracts may be given from a few of these treaties, to show the language made use of by the Government, and adopted by the Indians, as expressing the terms of the mutual agreements arrived at, and the mutual obligations thus established.

Thus, in the surrender of Grosse Isle, by the Chippewas, in 1781, there will be found the following words of conveyance :—

“ We, the following Chiefs, . . . do surrender and give up into the hands of the Lieutenant-Governor, etc., . . . and we do hereby make for ourselves and posterity a renunciation  
“ of all claims in future to said island.” 10

Again, in the surrender of the Tract on the south side of the Detroit River, by the Ottawas and Chippewas, in 1786, the conveyance is made in these words :—

“ We, the principal Village and War Chiefs of the Ottawa and Chippewa Nations of Detroit, . . . have, by and with the consent of the whole of our said nation, given, granted, enfeoffed, alienated and confirmed, and by these presents do give, grant and enfeoff, alien and confirm, unto His Majesty George the Third, King, etc., . . . to have and to hold the said lands and premises hereby given and granted, or mentioned, or intended to be given and granted, unto His said Majesty George the Third, his heirs and successors, for the only purpose or proper use and behoof of his said Majesty George the Third, his heirs and successors for ever.” 20

In the surrender of the Rivière au Chaudière Tract, on the north side of Lake Erie, by the Ottawas, Chippewas, Pottowattamies and Hurons, in 1790, the words of conveyance are as follows :—

“ We, the principal Village and War Chiefs, etc., . . . have, by and with the consent of the whole of our said nations, given, granted, enfeoffed, alienated and confirmed, and by these presents do give, grant, enfeoff, alien and confirm, unto His Majesty George the Third, etc.”

Again, in the surrender of a Tract between Lakes Ontario and Erie, by the Mississagas, in 1792 :—

“ The said . . . have granted, bargained, sold and confirmed, and by these presents do grant, bargain, sell and confirm to His Britannic Majesty, his heirs and successors, etc.” 30

Again, in the surrender of Land north of the River Thames, by Chippewas, in 1796 :—

“ We, etc., . . . have given, granted, sold, disposed of and confirmed, and by these presents do give, grant, sell, dispose of and confirm, forever, etc.”

Again, in the surrender of Land on the Grand River, by the Six Nations, in 1798 :—

“ We, etc., . . . do hereby, for ourselves and our posterity, surrender, relinquish and quit claim to our possession of, etc.”

Again, in the surrender of Land in the Huron Tract, by Chippewas, in 1818 :—

“ The said . . . do freely, fully and voluntarily surrender and convey the same to His Majesty without reservation or limitation in perpetuity, etc.”

Again, in the surrender of the Longwood Tract, on the River Thames, by Chippewas, 1822 :— 40

“ They, the said Chiefs, etc., . . . have, and each of them hath, granted, bargained, sold, released, surrendered, and forever yielded up, and by these presents do, and each of them doth, grant, bargain, sell, release, surrender and forever yield up, unto His said Majesty, etc.”



And, again, in the surrender of Land west of Lake Superior, by Ojibewas, in 1850:—

“They, the said Chiefs, etc., . . . . do freely, fully and voluntarily surrender, cede, grant and convey, unto Her Majesty, her heirs and successors for ever, all their right, title and interest in the whole of the territory, etc.”

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Could language of conveyance be clearer, to show the recognition in the Indians of an estate of some kind, a vested estate, and the right to voluntarily convey that estate to the Crown on terms to be mutually agreed upon? The very words used imply such an estate. The word “surrender,” used in numerous dealings both here and in the United States, with the Indians, implies an estate in the surrenderor. “The surrenderor must have a vested estate.” (See Coke on Littleton, 18th Ed., Volume III., page 338 (a); Kerr’s Blackstone, 4th Ed., Volume II., page 278; Smith’s Real and Personal Property, 5th Ed., Volume II., page 758.) Can it be reasonably argued that these and similiar words, had no meaning or validity as so used by the Government? Is it not more reasonable to accept the view which has been accepted by the United States Courts in several of the cases which have been referred to above, that the words used in the treaties and the dealings with the Indians, are words which have been deliberately adopted by the Government, and which must be reasonably and legally construed? It is submitted that, in the consideration by a Court of Law, of the wording of our Canadian Indian Treaties and Indian surrenders or conveyances, the language made use of, and relied upon by both parties to the negotiations, ought not to be entirely lost sight of.

20 There remains to be considered the British North America Act of 1867, in so far as that Act is relied upon by the Respondent in this case. The Canadian cases, which have been above referred to, will throw considerable light upon the construction and effect of the sections of the Act which have to be considered here, and which the Appellants would now desire to consider, with as great brevity as the matter to be dealt with will admit.

Section 91 and 92, of the British North America Act, deal with the “Distribution of Legislative Powers,” of the Dominion and the Provinces. Jurisdiction over the Indians is dealt with in Section 91, and is given exclusively to the Dominion, under Article 24 of that Section.—“Indians and lands reserved for the Indians.” On the other hand, the Province, by Section 92, is given exclusive control over “The management and sale of public lands belonging to the Province, and  
30 “of the timber and wood thereon.” These two clauses deal with the distribution of the Legislative power. But, at the time of Confederation, there was property belonging to the separate Provinces, which had to be in some way disposed of,—old Canada containing the two Provinces. That property was dealt with by Sub-Head VIII. of the Act, under the head of “Revenues; debts; assets; taxation.” Under this sub-head, Sections 102 to 126 deal with the disposition of the property belonging to the different Provinces, as between the Provinces themselves and the Dominion, assigning some portions to the Dominion, and others to the separate Provinces. Sections 102 and 126 are co-relative, and should be read together. Section 102 says that “All duties and  
40 “revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick, “before and at the Union had, and have power of appropriation, except such portions thereof as “are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them “in accordance with the special powers conferred on them by this Act, shall form One Consolidated “Revenue Fund, to be appropriated for the Public Service of Canada, in the manner and subject “to the changes in this Act provided.” And Section 126 provides that, “Such portions of the duties

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"and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick, had before the Union, power of appropriation, as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund, to be appropriated for the Public Service of the Province." So the effect is, that by Section 102, "All duties and revenues," whatever these words in their widest sense may mean, over which the respective Legislatures had *no* power of appropriation, except such power as was conferred on them by this Act, were handed over by the Provinces to the Dominion, to form a Consolidated Revenue Fund to be appropriated for the Public Service of the Dominion.

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Between these Sections are what may be called the conveyancing clauses of the Act:—

"107. All stocks, cash, bankers' balances, and securities for money belonging to each Province at the time of the Union, except as in this Act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the Provinces at the Union."

"108. The public works and property of each Province, enumerated in the third Schedule to this Act, shall be the property of Canada."

"109. All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

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"110. All assets connected with such portions of the public debt of each Province as are assumed by that Province shall belong to that Province."

"117. The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the rights of Canada to assume any lands or public property required for fortifications or for the defence of the country."

These, then, are the sections of the Act which it is necessary here to consider as those upon which the respective rights of the Dominion and the Province of Ontario, so far as the lands in question in this action are concerned, must depend.

And first it is contended by the Appellants, that this property, if it belongs to the Province, passed by and has belonged to the Province ever since the Act of Confederation. It is only under sections 109 and 117, and only the words, "all lands," and "public property," that the property, if it belonged to the Province, passed. This, indeed, is the ground of decision in the Courts below. The line has to be drawn at Confederation. If this land was not Public Land, and did not pass by the Confederation Act, it cannot pass now. This is the position taken in the *Mercer Case* by the Privy Council. There is no provision subsequent to Confederation; either this land belonged to the Province at Confederation, or it does not now belong to it

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In this view, the Appellants further contend that the whole course of legislation with regard to Public and Indian Lands, shows that the lands in question were not, at the time of Confederation, public Provincial lands; and, further, that they were not such as to pass as an "Asset" to the Province. It will be seen how closely this question is connected with the view to be taken of the Indian title to the soil of unsurrendered territories. Had the Indians any such right or interest, of a *bona fide* character, in the land, as to render it impossible to say affirmatively that this land was an asset at the time of the union, which could be transferred, and was intended to

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be transferred, under the sections of the Act? It is submitted that they had such an undeniable right. Dealing with the distribution of the assets, it is contended that this land was not an asset; it was not an asset that could be transferred; it was not and did not become the property of the Province at the time; nor did it become property to be dealt with by the Crown until the Treaty Number Three was made. And as that was made subsequently to Confederation, and on behalf of the Dominion Government,—the only power entitled so to act,—which paid a fair, substantial value for the surrender out of the funds of the Dominion, the Province of Ontario cannot now come in and claim the benefit derived under the treaty,—claim that the treaty was made solely in their behalf. If this land did not pass to the Province at the time of Confederation, it belongs to the Dominion as unprovided for in the Act.

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But it is further contended by the Appellants that this land in question was intended to pass to the Dominion and did so pass, by section 91 of the Act, as "lands reserved for the Indians;" that the construction put upon those words by the Courts below is narrow and unreasonable, and not justified by any construction of the Statutes relied upon; but that the only reasonable and consistent meaning that can be attached to the words as they occur in the Act, and in previous Statutes, is such a meaning as will include such lands as those involved in this action. These lands are, or were prior to 1873, when they were surrendered to the Crown, as much "lands reserved for the Indians" as any "Indian reserve," technically so called, and as the term is now applied in this Province.

The Appellants would desire to call attention to the circumstances under which, and principles upon which, the Confederation of 1867 was brought about. This, it is submitted, is necessary in order to a thorough understanding of the intention of the Legislature in the enactment of the British North America Act, and to the construction of the clauses of that Act, to ascertain the meaning and effect to be given to them. The partnership between the old Provinces of Upper and Lower Canada was being dissolved, and a new partnership was being created in the Confederation. Some arrangements had to be made between the parties as to the distribution of the assets. This was done by the sections of the Act to which we have referred as the conveyancing clauses—from 107 to 110, and 117. Did the lands in question pass to the Province by these sections?

The position of the lands ceded by Treaty Number Three should not be lost sight of. At the time of Confederation, this territory was the only part of what is now within the limits of the Province of Ontario, and what was in the old Province of Upper Canada, which had never been surrendered by the Indians to the Crown. It was not surrendered until the treaty of surrender in 1873. And up to that time its position was different from that of the other lands within the limits of Ontario in many most important respects. Only the Dominion could make laws with regard to it; and no white man could go into that country or deal with the Indians. This latter was made a criminal offence as early as 4 and 5 Victoria, and remained so up to, and subsequently to, Confederation. And no treaty with the Indians could be made, except by the Governor-General or Her Majesty. Can it be supposed that such lands passed under the words "lands" to the Province?—lands which all white men were forbidden to enter upon; with regard to which, the Province had no authority to make laws, with regard to which, if laws were necessary, only the Dominion Parliament could legislate; lands inhabited by people to be dealt with only by the Dominion. Looking where the section which gave the "public lands" to the Province occurs, under the head of "Revenues; debts; assets; taxation," we find it deals with the public lands of the country, the public lands formerly belonging to the Provinces, and did not deal with anything except property which may be designated as beneficial estate. Can there be reasonably said to

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have been a beneficial estate in these lands in the old Province, when they were closed to settlement and to legislation from or by the Province?

Nor must there be forgotten the steadily-pursued policy of the Imperial authorities with regard to dealings with the Indians of Canada, and their lands. It was not until the year 1851 that the Imperial authorities permitted the Canadians to deal entirely with Indian affairs. Up to that time the Superintendent of Indian Affairs was an Imperial officer. The reason for this is well known; the Imperial authorities were anxious that the Indians should be treated properly; they hesitated, when the colony was small, and there was pressure, or supposed pressure, on the colonial authorities, for land, to trust the administration of Indian affairs to the colonists. They were anxious, moreover, that there should be no opportunity given for a departure on the part of the colonists, from those principles which had been established and followed, of recognizing in the Indian the beneficial ownership of the land he occupied, till that beneficial interest should be voluntarily surrendered to the Crown. Bearing this in mind, and remembering the existing and acknowledged restrictions upon any interference but Dominion interference in the lands of the Indians, can it be possible to suppose that the Imperial Legislature intended to hand over all the miscellaneous unsurrendered territories occupied by Indians, to the exclusive control of such local authorities as might be established?

Furthermore, it is to be remembered that all through our legislation with regard to the Indians, and with regard to Public Lands, we find Public Lands and Indian Lands systematically treated of as separate and independent. We find, as explained in the case of *Church v. Fenton*, above referred to, that Public Lands include Crown Lands, School Lands, Clergy Reserves, but not Indian Lands. And the lands in question, it is submitted, have been shown to be Indian Lands, according to the meaning of our whole course of statutory enactment and our whole course of dealing with Indian affairs. It was Public Lands only that were given to the Province by the British North America Act; and the lands in question, being acknowledged to be outside the class of Public Lands, properly so called, and as the term must be allowed to have been used in the Act, could not have passed, and did not pass, thereby.

Another reason which, it is submitted, is sufficient to show that the lands in question could not have passed by the section of the Act referred to, is founded upon what, the Appellants contend, has been established beyond doubt to be a genuine title to the lands in the Indians themselves. What that title is, in the language of the Common Law, has not yet been determined. It is a perpetual right of occupancy, with power to sell in the meantime, although the Crown by its own act, confined the right of purchase to itself alone. It is more than a life estate, because it lasts as long as there remain survivors or successors of the tribe or nation in possession. It differs from a fee simple only in the restraint placed upon the right of alienation, which right is allowed only in favor of the Crown under which the land is held. Whatever may be the exact nature of this title, it is at any rate a title always recognized, by custom, legislation and treaty, and always treated as a title necessary to be dealt with on the part of the Crown. If this is clear,—and it is submitted that it is clear beyond reasonable contradiction,—the lands in question were as much private property as any individual estate in this Province, at the time of Confederation. The British North America Act, in the distribution of the "Assets" under the conveyancing clause before referred to, made no pretence of dealing with private property of any kind. And if the lands in question were of such a nature; if they were lands belonging to the Indians, and not to the old Province; they did not pass to the Province under the Act, but were left totally unprovided for.

In the light of all these contentions,—established, it is submitted, beyond doubt,—it cannot surely be contended with reason that while the lands in question were recognized Indian Lands, upon which the white man was forbidden to trespass; while the Province could not legislate respecting the territory in question, nor with regard to the Indians upon it, nor accept a surrender, nor deal with the Indians; that, nevertheless, the land “belonged to the Province,” and was part of the “Assets” of the old Province, which, in the distribution thereof, fell to the Province of Ontario. And regard being had to the scheme of the British North America Act, in assigning exclusive legislative power to the Dominion or Province, as the case may be, over the property assigned to them respectively, this also affords strong ground for the contention that these Indian lands, by whatever name they may be called, did not pass to the Province by the provisions of the Act.

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If this view of the case is correct,—if, apart from the consideration of any other portion of the British North America Act, it is rendered clear that the lands in question did not pass by the sections of the Act above considered, that the power claimed by the Respondent to be given to the Local Legislature was not so given, then, not being embraced within the provisions in favor of the Province, and not being embraced in section 92, it must according to numerous decisions, belong to the Dominion, as must also the lands with which that power is connected.

(See *Attorney-General v. Mercer*, 8 App. Cases 767, and 5 S. C. R., 538; *The Citizens Insurance Co. of Canada v. The Queen Insurance Co.*, 7 App. Cases, 96, and 4 S. C. R., 215; *Valin v. Langlois*, 5 App. Cases, 115, and 3 S. C. R. I; *Regina v. O'Rourke*, 32 C. P., 388; *City of Fredericton v. The Queen*, 3 S. C. R., 505; *Russell v. The Queen*, 7 App. Cases, 829; and *Hodge v. The Queen*, 9 App. Cases, 117).

But, apart from the construction to be placed upon, and the effect to be attached to, the sections of the Act above analyzed, it is contended by the Appellants that the lands in question are provided for specifically in another part of the Act, and that by Article 24 of Section 91 (if the legislative power and the executive power are co-relative), they passed to the Dominion as “Lands reserved for the Indians.” It is contended that the learned Judges in the Courts below have placed too narrow a construction upon the term “Reserve,” and one not justified by the authorities. It will be found, it is submitted, that in all those Statutes to which reference has been made in the Courts below for the purpose of ascertaining the meaning of the word “Reserve,” that word has been given a definition solely for the purposes of the various Statutes under consideration. To arrive at the correct and recognized meaning of the term, it is necessary to look beyond particular recent statutes, and to the general course of legislation and of the dealings with Indians with respect to their lands. It is contended by the Appellants that a reference to the Statutes which have been above considered will show beyond any doubt that the lands of Indians who have never surrendered to the Crown, but who are in actual and undeniable occupation and possession, are properly speaking “Indian Lands,” and can only be dealt with and controlled by the Department of the Government having control over Indian lands and Indian affairs. The very words of the Statutes show this. The words of almost every treaty made with the Indians show it. And it is shown most distinctly as far back as the Royal Proclamation of 1763, the Charter of the Indian rights, which speaks repeatedly of “lands reserved to the Indians,” and “lands reserved for the use of the Indians.” The lands in question are as much “lands reserved for the Indians,” or “lands reserved to the Indians,” as if specially surveyed and set apart, as are any of the small accurately defined “Reserves” in Ontario. They are reserved, and always have been reserved, for the use of the Indians inhabiting them, and free from the intrusion of the

white man or the interference of any local authority. It is submitted that it could never have been the intention of the Legislature, looking at the whole scope of the Act, to hand over the lands in question, and their inhabitants, to local government; that the construction put upon the word "Reserve" in the Act by the learned Chancellor of Ontario, and adopted by the Court of Appeal, is a narrow and illiberal one; and that the only reasonable construction to put upon the word is the wider one contended for by the Appellants, and which would include the lands in question. This, it is submitted, is the only possible construction consistent with the whole course of dealings with the Indians on the part of the British Government; and the establishment of any more narrow principle would be a reversal of a recognized rule of governmental dealing, and the adoption of a rule at variance with the intention of the Act of 1867. 10

If either of these views is correct, the contention of the Appellants is established. Either the Indian lands in question in this action must be included in the words "Lands reserved for the "Indians," which, it is submitted, is the proper construction; or no provision is to be found in the Act respecting them, and the matter is left altogether unprovided for; in either view, the land would not belong to the Province, but to the Dominion.

But it is further contended on behalf of the Respondent that, even if the Dominion Government was the only power that could deal with the Indians for the cession of the lands, and did so deal by the Treaty Number Three, yet, upon the acquisition or extinguishment of the Indian title, the title thereby acquired or extinguished inured to the benefit of the Province. This contention was given force in the Courts below. But it is difficult to see on what grounds it could be established. It is difficult to see why, when the Dominion Government dealt with the Indians for the surrender of the lands in question, (as they undoubtedly had the right, and the sole right, to do, though that right need not have been so exercised), and dealt with them on the basis of compensation out of the funds of the Dominion, the Province could be allowed to step in, and claim the lands thus acquired to the Dominion, without at the same time accepting the liabilities and responsibilities incurred by the treaty of cession. No authority has as yet been given for this position, and it is submitted that it cannot reasonably be supported. On the contrary, upon the very lowest estimate which it has been attempted to place upon the rights of the Dominion in this respect, the Dominion Government, who must be assumed (as it is not contradicted), to have acted reasonably and with discretion, and as trustees for all the Provinces constituting the Dominion, has the undoubted right to retain possession of these lands for the purpose of indemnifying itself for the outlay necessarily incurred. 20 30

In any view, the Province is not entitled to the possession of the lands in question.

The popular argument has been advanced by the Respondent that if the contention of the Appellants in this case is allowed, the result will be a discrimination against the Province of Ontario such as has never been allowed against any of the other Provinces of the Dominion. But it is obvious that no such question as arises here could have arisen in any of the other Provinces referred to by the Respondent. British Columbia is specially cited in this connection. But the dealings with the Indian Lands and the Public Lands in that Province have been the subject of a special agreement, of a separate contract between the Province and the Dominion, by which the latter took over the Indians and their lands, upon certain terms. (See Appendix, page 235). When the Confederation of 1867 was formed, it was provided by the British North America Act that other Provinces might be afterwards admitted upon such terms and conditions as might be agreed upon. The Act was only to govern the relations between the Dominion and the admitted Province when no special terms were arranged. The arrangement between the Dominion and British Columbia was 40

a special one. Until Confederation, the Province had exclusive control over the Indian lands ; and to determine the respective rights of the Dominion and the Province with regard to that control at present, reference must be made, not to the British North America Act, but to the special articles of the Terms of Union of 1871. Nor can any argument, it is submitted, in favor of the Respondent, be drawn from the position of the Province of Quebec in this respect. In that Province specific grants of lands had been made to the Indian tribes in consideration of their relinquishment of all territorial claims. There were no Indian Reserves, as that term is technically applied. But the "Indian villages" and "Indian country" were recognized, and passed to the Dominion as "lands reserved for the Indians." So also with New Brunswick and Nova Scotia.

10 There could be no dispute there. Prince Edward Island came into the Dominion subsequently to Confederation, in 1873, under different circumstances. The Indian population was very small, and their reserve limited and definite ; and no dispute could arise with regard to the respective rights of the Dominion and the local authority in that Island.

The Appellants' right to cut timber upon the land in question is conferred by a permit from the duly-authorized officer of the Government of the Dominion of Canada, and they were, by virtue of such permit, legally licensed to enter upon the said lands, and cut thereon, and remove therefrom, the timber in question. It is not contended by the Respondent, and must therefore be assumed, that, if the Government of the Dominion has the right to deal as it has dealt with the land and timber in question, the Appellants were, and are, entitled to do what is complained of.

20 It is submitted that it has been established that the Dominion Government had the right to so deal ; that the Appellants were entitled to do the acts which have been enjoined at the suit of the Attorney-General for Ontario ; and that the injunction granted in this action ought to be removed.

For these reasons the Appellants submit that the judgment appealed from is erroneous, and should be reversed.

D'ALTON McCARTHY.

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### RESPONDENT'S FACTUM.

The defendants in this case cut timber on Crown Lands in Ontario without authority from the Ontario Government, and the present suit was brought for an injunction and other relief. The Chancellor made a decree as prayed, and the Court of Appeal unanimously confirmed the decree and dismissed the appeal with costs.

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The defendants justify the cutting by setting up a license from the Dominion Government, dated 1st May, 1883. The defence is made and carried on at the expense of the Dominion Government. The contention of the defence is, that the land on which the timber was cut, though confessedly situated in Ontario, belongs to the Dominion and not to the Province, because, the Indians claiming this land not having surrendered their claim before Confederation, the Dominion Government had since obtained a treaty from them making such surrender.

The land on which the timber was cut lies in the westerly part of Ontario, north of the height of land, and is a portion of the territory which, at the time of Confederation, was claimed by Canada as part of Upper Canada, but the right to which was disputed by the Hudson's Bay Company. The right of Upper Canada to this territory had been asserted and insisted upon by the successive Governments of the Province of Canada, for many years before Confederation, and

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continued to be insisted upon by the Government of the Dominion until 1870. The Dominion Government in that year effected a compromise with the Hudson's Bay Company; the Company surrendered all its claims to Her Majesty; and Her Majesty, by Order in Council, dated 23rd June, 1870, gave to the Dominion Rupert's Land and the North-West Territory, not theretofore belonging to any Province. The Dominion Government then changed its views in regard to the territory, and claimed that the same was not within the limits of Upper Canada or of Ontario, but passed to the Dominion under Her Majesty's Order in Council. The controversy thus raised was decided in favour of the Province by arbitrators in 1878, and by the Right Honorable the Judicial Committee of the Privy Council in 1884, thus establishing that such territory was, and from the year 1774 had been, within the legal boundaries of the Province, and was therefore not within the operation of the Order in Council of 1870. Since this decision the new claim has been set up that the lands, though lying within Ontario, belong to the Dominion, and not to the Province. If this claim is well founded, the Boundary controversy was not worth being pursued by either party. 10

The right of the Province to these lands is established by the express enactment of the British North America Act. Section 109 provides that "all lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." 20

Section 117 provides that "the several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country."

The effect of these provisions manifestly is, to give to each Province (amongst other property) all unpatented lands lying within the Province, except lands that were to go to the Dominion under the 108th section of the Act. That section provides that "the public works and property of each Province enumerated in the third schedule to this Act, shall be the property of Canada." It is not pretended that the lands involved in the present question fall within the enumeration found in that schedule. The Province of Canada, at and before the passing of the British North America Act, claimed that Upper Canada, (now Ontario) extended to the Rocky Mountains on the west, 30 and on the north to the North Pole.

But it is now contended by the appellants that lands as to which the Indian tribes had not entered into any treaty of surrender before Confederation are exempt from the operation of the 109th and 117th sections; that such lands did not, like other unpatented lands, "belong" to the Province, and were not "public property" of the Province; that at the passing of the British North America Act such lands were the property of the Indians; and were "lands reserved for the Indians," as to which the Dominion Parliament has jurisdiction under the British North America Act to make laws that the Indians had a legal right to make, by treaty, an absolute transfer of such lands to the Dominion Government, for the use of the Dominion; that they have done so; and that thereby the Dominion became absolute owner, and that the Government of the Dominion 40 was and is entitled to dispose of the lands, and the timber thereon, for the use and the benefit of the Dominion. All these positions are controverted by the respondent on behalf of Ontario.

The so-called treaty under which these lands are so claimed (called treaty No. 3) is one of several treaties which the Dominion Government effected with the Indians about the same time, and which together covered very extensive territories, amounting to about 450,000 square miles,



Treaty No 3 includes, with other territory, about 32,000 square miles lying within Ontario. The object of these treaties was, by conciliating the Indian populations whose hunting grounds would be interfered with, to facilitate the construction of a contemplated railway, and the settlement and development of the territory by a white population.

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The treaty No. 3 provided, like other Indian treaties, for certain annuities and other allowances to the Indians. It recites that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her may seem meet, the tract of country described, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and to arrange with them so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence; and the treaty further states that the Queen undertook and agreed to lay aside, out of the territory, "reserves for farming lands," and "other reserves of land" for occupation by the Indians, or to be sold for their benefit. These reserves are not in question in the present suit.

To the argument which the appellants found on the treaty there are many answers.

1. A treaty like this, with Indians, through their chiefs or principal men, or otherwise, is not a transaction which has any legal effect. It gives no legal rights not theretofore existing against the tribe on whose behalf it is entered into; and its obligation as against the Crown is an obligation of honour and justice, not of law.
- 20 2. Such a treaty when duly entered into on the part of the Dominion, is binding in honour and justice upon the Dominion Government and Parliament; and when entered into by a Province, is binding in honour and justice upon the Government and Legislature of the Province. So far as such a treaty affects Dominion interests, it is entered into by His Excellency the Governor-General through his Ministers. So far as such a treaty affects Provincial interests, it must be entered into or accepted by the authority of the Lieutenant-Governor in Council, or by the Legislature of the Province, as the case may require. The Lieutenant-Governor is Her Majesty's representative in Provincial matters, as the Governor-General is Her Majesty's representative in Dominion matters. The Lieutenant-Governor, or the Province, was no party to the treaty. The appellants say that the Dominion Government has the exclusive power to make such treaties. If so, the treaties would enure to the benefit of the Province whose lands they affect. But the Dominion Government has no such exclusive power. There is certainly nothing in the British North America Act giving such a power; it is absurd that the Dominion Government should have the power of determining what the Province is to pay for extinguishing claims to Provincial lands; and history and practice are against the pretence. Thus, prior to the establishment (in 1754) by the Imperial Government of the office of Superintendent of Indian Affairs, the individual Governments of the old British American Colonies had the sole management of matters relating to the natives, and entered directly into treaties with them. Thereafter such treaties were negotiated through the agency of the Superintendent, but with the approval of the colony concerned, and in presence of its Governor or of its duly accredited commissioners. And this system continued after the American Revolution, with the sole change of the substitution of an agent or commissioner of the Federal Government for the Superintendent.

Chitty on Prerogatives, p. 31;

Cameron v. Kyte 3, Knapp, pp. 345, 346;

Langtry v. Laberge, 2 App. Cas. 102;

B.N.A. Act, ss. 61, 64, 65, 72, 75, 82, 92, 109, 130, etc.;

- Representation of the Lords of Trade to the King, 1768, Doc. Hist., N.Y., vol. 8, pp. 19 *et seq.*; [Joint App., p. 42.]  
 Doc. Hist. N.Y., vol. 8, pp. 32, 33, 135; [Joint App., pp. 48, 49.]  
 American State Papers—Indian Affairs, vol. 1, pp. 52, 53, 61, 169, 545, 585, 626, 627, 628, 636, 641, 664; vol. 2, pp. 323; [Joint App., pp. 95-97, 100-109, 112-115.]  
 U.S. Statutes at Large, vol. 1, pp. 330, 469, 743; vol. 2, p. 143; vol. 4, p. 730; vol. 7, pp. 15-16, 55, 61, 138-139, 215-216, 557, 559, etc.; [Joint App., pp. 120-124.]

3. If the claim of the Dominion is good as respects lands in Ontario, it would be equally good as respects lands in the other Provinces of the Dominion; the British North America Act certainly did not intend to put Ontario in a worse position in regard to such lands than the other Provinces were to be in as to their lands; and no such claim as that made against Ontario is made or pretended as against the other Provinces, all of which have been left (as before Confederation) to deal with all Crown Lands, with or without first treating therefor with the Indians, according to the discretion of the Provincial authorities. Thus, as respects all the Provinces of the Dominion except Ontario, such lands, though they were not the subject of treaties before Confederation, are, and always have been, admitted to be lands "belonging to" these Provinces respectively, within the meaning of the expressions in the British North America Act. Of these lands, at the time of Confederation, there were in Quebec 109,370,116 acres, besides the enormous area, unascertained, north of the height of land; in Nova Scotia, 6,328,327 acres; and in New Brunswick, 9,762,863 acres. In Nova Scotia and New Brunswick, nearly one-half the area of each Province, and in Lower Canada something like 20,000,000 acres, had, up to the time of Confederation, been actually granted, and that without any regard to Indian title. In Upper Canada, although the Indians were dealt with more liberally than in any of the other Provinces, yet, without any prior extinguishment of the so-called Indian title, large tracts of land were granted; and in the great mining regions of Lakes Superior and Huron, licenses were issued to numerous companies and individuals. As to the Island of Prince Edward, almost its entire area was granted away, over a century ago, by patents under the Great Seal of Great Britain, without any extinguishment of Indian title, and without even an allotment of any reserves for the natives. The "reserves" now in their possession, set apart within recent years, were the gift of private individuals or societies.

- Sess. Paps., Quebec, 1869, p. xiii.; [Joint App., p. 144.]  
 Appx. No. 5 to Jours., Nova Scotia, 1867, p. 6; [Joint App., p. 204.]  
 Appx. II. to Jours., New Bruns., 1868, p. 90; [Joint App., p. 213.]  
 Campbell's History of P. E. I., pp. 10, 20, 134, 139; [Joint App., p. 214.]  
 Sess. Paps., Can., 1876, No. 9, p. 1.  
 Sess. Paps. Can., 1875, No. 8, Report of Dep. Sup.-Gen. Indian Affairs, p. 8; [Joint App., p. 214.]  
 Licenses, Orders in Council and Mining Regulations before 1850; [Joint App. pp. 130-133.]  
 Printed Papers respecting tract between Lake Nipissing and the Ottawa, Sess. Paps. Can., 1879, No. 7, pp. 10, 11; [And see Joint App., p. 141.]  
 Schedules and Map of surrendered lands, App. (T) to Jour. Ass., Can., 1847; [Joint App., pp. 168, 182.]

Schedule of surrendered lands, Sess. Paps. Can., 1858, No. 21, App. No. 35; [Joint App., p. 199.] 23. RESPON  
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List of surrenders recorded in the Department of Indian affairs, produced by, and printed at the instance of, the Appellants; [Joint App., pp. 142, 143.]

Certificate of Commr. of Crown Lands of Grant of unsurrendered Lands;

Lakes Huron and Superior Treaties, 1850; [Joint App., pp. 133-138.]

Papers relating to British Columbia prefixed to Dominion Statutes of 1872, pp. 88, 89, 92, 93, 96, 97, 101, 102, 105, 106, &c.; [Joint App., pp. 234, 235.]

4. For sixteen years after Confederation, and for nine years after the treaty, it was not pretended that these lands, if situated within Ontario, would not belong to Ontario, as like lands situated within other Provinces belong to those Provinces. The contrary was admitted from time to time by the Dominion Government, under the leadership of Ministers who knew the intention of the Act. It is an historical fact that the Premier of the Dominion and several of his colleagues were the representatives of Canada in all the proceedings up to Confederation. The notion that the British North America Act might be made to bear a different construction is of very recent origin, and had evidently not occurred to anyone when the Act was prepared or passed, nor for many years afterwards.

Report of Committee of the Privy Council of Canada, approved 28th November, 1871; [Joint App., p. 2.]

Report of Sir John Macdonald, Premier of Canada, dated 1st May, 1872; [Joint App., p. 2.]

Order in Council, 16th May, 1872; [Joint App., p. 3.]

Despatch of same date to Lieutenant-Governor of Ontario; [Joint App., p. 3.]

Report of Privy Council, approved by His Excellency, 7th November, 1872; [Joint App., p. 4.]

Report of Minister of Interior, 2nd June, 1874; [Joint App., p. 8.]

Order in Council thereon; [Joint App., p. 8.]

Provisional Agreement, 20th June, 1874; [Joint App., p. 9.]

Extension thereof under report by Minister of Interior, 24th April, 1878; [Joint App., p. 13.]

Orders in Council of the two Governments concurring therein; [Joint App. p. 10.]

Debates in House of Commons on the Act for extending the Province of Manitoba, 1881, pp. 1443-4, 1450, 1453, 1455-9; [Joint App., pp. 15-18.]

Resolution of House of Commons, 4th April, 1882; [Joint App. p. 18.]

Despatch to Lieutenant-Governor, September 2nd, 1882, &c. [Joint App., p. 19.]

Thus by a report of Committee of the Privy Council, approved by the Governor-General on the 28th November, 1871, it was stated, that applications had been made to the Secretary of State 'for mining licenses and patents for land in the neighbourhood of Lake Shebandowan, and in places about the head of Lake Superior, and recommending that, "pending the locating of the boundary line between the North-West Territory and the Province of Ontario, no action be taken upon these or any similar applications;" and the Report further recommended that the Lieutenant-Governor of Ontario should be informed of the course proposed to be taken by the Dominion Government, and that it be suggested, "that the Government of that Province should in like manner refrain

from granting patents or mining licenses in the region of country about the head of Lake Superior and Lake Shebandowan until after the *boundary line* shall have been so located."

Again by a report of the Minister of Justice dated 1st May, 1872, and approved of by His Excellency the Governor-General on the 16th May, the Minister of Justice suggested "that the Government of Ontario be invited to concur in a statement of the case for immediate reference to the Judicial Committee of the Privy Council of England, with a view to the settlement, by a judgment or decision of that tribunal, of the western and northern boundaries of Ontario," and the Minister called "attention to the fact that the mineral wealth of the north-west country is likely to attract a large immigration into those parts, and, with a view to its development, as well as to prevent the confusion and strife that is certain to arise and continue among the miners and other 10 settlers so long as the uncertainty as to boundary exists," the Minister recommended "that the Government of Ontario be urged to arrange with that of the Dominion for some joint course of action as to the granting of lands and mining licenses, reservation of royalties, etc.," and it was suggested "that the Government of Ontario be moved to appoint a Commissioner to meet the Honorable J. C. Aikins, and arrange some joint system, and that any such arrangement when ratified by the two Governments, shall be held to bind both, and shall be subject to the decision of the Judicial committee of the Privy Council upon the question of the boundary; and that after such decision, titles to lands or mining rights shall be confirmed by the Government, whether of Canada or of Ontario, as shall, under the decision of the Judicial Committee, be the proper party to legalize the same." 20

On the 2nd June, 1874, the Minister of the Interior made a report which was adopted by the Privy Council and approved by His Excellency the Governor-General on the 3rd June, 1874, which report referred to the report adopted on the 16th May, 1872, and stated as follows: "that as the Indian title to a considerable part of the territory in dispute had not then been extinguished, it was thought desirable to postpone the negotiations for a conventional arrangement, under which the territory might be opened for sale or settlement until a treaty was concluded with the Indians. That barrier being now removed, the undersigned has the honor to recommend that as some considerable time must yet elapse before the boundaries of Ontario can be finally adjusted, it is desirable in the meantime to agree upon conventional boundaries, otherwise the development of that important portion of Canada lying between Lake Superior and the Lake of the Woods will be 30 seriously retarded, as applications to take up lands in that section are being constantly made, and the inability to obtain recognition of claims from either the Government of Ottawa or Toronto is impeding the settlement of the country. The undersigned would therefore suggest that the Ontario Government be invited to arrange with the Dominion Government for some joint course of action as to the granting of land and adjusting disputed rights in the territory claimed by both Governments, and that the Ontario Government be moved to appoint a Commissioner to meet the undersigned and arrange some joint system for the sale of lands, by the adoption of a conventional boundary on the west and north, and that after the final adjustment of the true boundaries titles to the land should be confirmed by the Government, whether of Ontario or the Dominion, which- 40 ever should be the proper party to legalize the same."

Accordingly, a joint agreement was come to, on the 26th of June, 1874, between the Dominion and Ontario Governments to the effect thus recommended. A conventional boundary between the Province and the Dominion was agreed to, and it was further agreed "that all patents for lands in the disputed territory, to the east and south of the said conventional boundaries, until the true boundaries can be adjusted, shall be issued by the Government of Ontario; and all patents of

lands on the west or north of these conventional boundaries shall be issued by the Dominion Government. That when the true west and north boundaries of Ontario shall have been definitely adjusted, each of the respective Governments shall confirm and ratify such patents as may have been issued by the other for lands then ascertained not to be within the territory of the Government which granted them, and each of the respective Governments shall also account for the proceeds of such lands as the true boundaries, when determined, may show to belong of right to the other. That the Government of the Dominion shall transfer to the Government of the Province of Ontario, all applications for lands lying to the east and south of the conventional boundaries, and also all deposits paid on the same; and the Ontario Government shall transfer to the Dominion Government all applications for lands lying to the west or north of the said boundaries, and likewise all deposits paid thereon; and such of the said applications as are *bona fide* and in proper form, shall be dealt with finally, according to the priority of the original filing, and where applications for the same lands have been filed in the departments of both Governments the priority shall be reckoned as if all had been filed in one and the same office.”

So also by a memorandum of the Minister of the Interior, dated 24th April, 1878, it was set forth as follows: “Referring to the terms of the Order in Council, dated 8th July, 1874, relative to the provisional arrangement respecting the westerly and northerly boundaries of Ontario, intended to provide a joint system for the administration of the lands within the territories claimed by the respective Governments of the Dominion and Ontario, the undersigned has the honour to call the attention of Council to the fact that while all necessary provision is made therein for the confirmation eventually of any patents issued by either Government, it is not specifically mentioned in the said Order that any lease granted by either Government in the interim shall similarly be ratified. The question has been brought under the notice of the undersigned in connection with the lease recently authorized by Council to Mr. Macaulay for a timber limit situate in Keewatin, between the Lake of the Woods and Rainy Lake; and the undersigned having been advised by the Deputy Minister of Justice that it would be desirable to add the right of giving leases to that of making grants of land, to the respective Governments, over the country apportioned to each by the conventional boundary, respectfully recommends that communication be had with the Government of Ontario with that in view, the understanding to be that all such leases shall be *ratified* and confirmed, and that all bonuses, rents and royalties received by either Government for limits which may prove to be *situate within the true boundaries of the other*, shall be transferred in accordance with the sections three and four of the Order in Council quoted.” Orders in Council were passed a few days afterwards in accordance with the recommendation of this memorandum.

5. The supposed absolute ownership by the Indians, whether at law or in equity, of Crown Lands which they have not surrendered by treaty, is opposed by the whole course of practice and decision with reference to lands on this continent from the time of its discovery.

6. As regards the Provinces now constituting the Dominion of Canada, in every Province, at the time of Confederation, the Indians resident therein were under the guardianship of the Provincial Government; and specific lands had from time to time, in every Province except Prince Edward Island, been “reserved” or set apart for bands of Indians by treaty, Provincial statute, or Order in Council, and these, as well as the Indian lands in Prince Edward, were known in all the Provinces as “lands reserved for the Indians,” or “Indian reserves,” or “Indian reservations;” and were so designated in the Statutes and Public documents of the respective Provinces. As to these no question has arisen. These reservations were made, partly from policy, partly from humanity, and partly from a feeling that the lands having been appropriated by the nation, it

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was just that the Indians, who had been accustomed to gain a livelihood by roaming over them in hunting and fishing, should be aided towards providing for themselves otherwise. In Upper Canada it had been deemed expedient by the advisers of the Crown from time to time, that, as a general rule, the Crown should not make grants of land, or otherwise exercise ownership, without first getting the consent of the Indians by treaty; but the legal right to make grants without such consent was never doubted, and was in fact from time to time exercised whenever there appeared occasion therefor. It is to lands "reserved" in the sense here mentioned that the British North America Act refers in the article which gives to the Dominion Parliament jurisdiction to make laws respecting "lands reserved for the Indians." Of these "reserves" there were, at the time of Confederation, in Ontario about 3,000,000 acres (less such portions as had been from time to time 10 surrendered to the Government, in trust, to be sold for the benefit of the bands interested, the remainder of the reserves being held for the actual residence and occupation of these bands); in Quebec, 345,000 acres; in Nova Scotia, 20,000 acres; in New Brunswick, 60,000 acres; and in Prince Edward Island, 1,500 acres.

Statutes of the Provinces of Upper Canada, Lower Canada, Nova Scotia, New Brunswick, Prince Edward Island and British Columbia, and of the Dominion of Canada, as collected in separate volume for this Case, and particularly, pp. 28-30, 68-70, 73-4, 91, 94, 96-105, 109, 111-114, 119-126, 128-134; also the following in the same volume: 23 Vict., c. 151 (Can.); Proclamation of the Governor of British Columbia, 4th January, 1860; 20 Ordinances of British Columbia (Revision of 1871), Nos. 125 and 144. The following pages may also be referred to: 20, 23, 24, 36-39, 40, 45, 52, 53, 55, 58-60, 67, 80, 82, 92, 93.

Extracts from the proceedings of the Executive Council of Upper Canada, 1st April, 1793. [Joint App., p. 127.]

Extracts from the minutes of the Executive Council of Nova Scotia, 1819, 1820. [Joint app., p. 202.]

Correspondence and papers respecting the Indians of Canada, 1836-8, ordered by the House of Commons to be Printed 17th June, 1839, and particularly pp. 4, 5, 7, 8, 22, 26, 30, 31, 76, 88, 139-143, 169. [Joint App., pp. 50-65.] 30

Report of the Royal Commission on the Public Departments of Upper Canada—Report on the Indian Department, January-February, 1840, and particularly pp. 29, 30, 34-39. [Joint App., p. 127.]

Appendix to Journals, House of Assembly, New Brunswick, 1842, pp. [xcii-cxxi,] cxxvi-viii. [Joint App., pp. 208-210.]

Journals House of Assembly, New Brunswick, 1842, p. 6. [Joint App., p. 208.]  
Do. Legislative Council, 1841-3, p. 501. [Joint App., p. 210.]

Appendix (E.E.E.) to Journals Legislative Assembly, Canada, 1844-5, and particularly pp. 16, 17, 20, 21, 23, 29, 30, 31, 37, 39, 41. [Joint App., pp. 145-159, and particularly 150, 152, 153, 155-158.] 40

Appendix (T) to Journals Legislative Assembly, Canada, 1847, and particularly pp. 17, 18, 19, 23, 42, 44, 99, 111, 112, 125, 141, 149. [Joint App., pp. 159-183, and particularly 160-164, 166, 167, 174, 178-181.]

Map of Surrenders, and shewing the Reserves, appended to the Commissioners' Report in this Appendix; [Joint App., facing p. 168.]

Lake Superior Treaty, 1850, and Schedule; [Joint App., pp. 133, 134.]

Lake Huron Treaty, 1850, and Schedule; [Joint App., pp. 135, 136.]

Return to an Address of the Honourable the House of Commons, ordered by the House of Commons to be printed, 26th August, 1853, pp. 3-9; [Joint App., pp. 66-68.]

Appendix No. 21 to Journals House of Assembly, Canada, 1858; [Joint App., pp. 184-199.]

Appendix to Journals House of Assembly, New Brunswick, 1857-8, p. ccclxxxiii; [Joint App., p. 211.]

10 Sessional Papers, British Columbia, 1876, pp. 175-178, 181, 324-7, 261-5; [Joint App., pp. 215-234.]

Papers connected with the Indian Land Question, British Columbia, 1850-1875. [*Ibid.*]

Appendix No. 6 to Journals House of Assembly, Nova Scotia, 1867, pp. 1, 2, 4. [Joint App., pp. 204-206.]

Appendix II. to Journals House of Assembly, New Brunswick, 1867, pp. 170, 172; [Joint App., pp. 212, 213.]

Appendix II. to same Journals, 1868, p. vi.; [Joint App., p. 213.]

20 Appendix No. 39 to Journals House of Assembly, Nova Scotia, 1867, p. 1; [Joint App., p. 206.]

Prefix, Statutes of Canada, 1872, p. lxxxviii; [Joint App., pp. 234, 235.]

Sessional Papers Canada, 1876, No. 9, pp. xlvii-lii., lv., lvii.; [*See* Joint App., pp. 215-234.]

Treaty No. 1; [Joint App., p. 237.]

Treaty No. 3, and the papers relating to it in Morris's Treaties, and particularly pp. 44, 48, 50, 52, 58, 70, 71, 73, 320-328; [Joint App., pp. 253, 255-258, 261, 267, 268, 270-276.]

Sessional Papers, Canada, 1875, No. 8, p. 8 of Report of Dep. Sup. Gen., and Return G., pp. 99-103; [Joint App., pp. 214, 243-246.]

30 7. Even if the Dominion Parliament had jurisdiction to make laws in respect to all the Provinces as to which there had been no treaty with the Indians, this would not give the Dominion any beneficial interest in such lands, or any right to deprive the Province of them by treaty with the Indians or otherwise. Construing the statutory expression, "lands reserved for the Indians," in the way claimed by the appeal, is contrary to the sense in which that expression, and like expressions, were used in all the Confederated Provinces, and indeed on the whole American continent, at the time of the passing of this Act, and for a century and a half before. Such a construction is also contrary to the sense in which like expressions are used in the very treaty under which the claim of the Dominion is made, and contrary to the sense in which these expressions have, since Confederation, been used by the Dominion Parliament itself.

40 See, as to the Provinces, the documents already referred to in No. 6, *ante*—

See also the following :—

American State Papers—Indian Affairs, vol. 1, pp. 512, 545, 616, 617, 620, 641, 664, 668, 685; vol. 2, pp. 391, 392, 545; [Joint App., pp. 94, 97, 100-102, 105-109, 116, 117, 123.]

- U. S. Statutes at Large (Boston: Little, Brown & Co.) vol. 4, p. 740; vol. 5, pp. 73, 186; vol. 7, pp. 557, 558, 559, 560, 601, 602; vol. 13, pp. 40, 63, 432, 538, 632, 681, 693; [Joint App., pp. 103, 120, 121, 124, 125.]
- Prov. Papers, New Hamp., vol. 1, pp. 56, 57.
- Col. Rec., New Haven, 1638-1649, pp. 1-4, 5-7.
- Trumbull's Hist. Conn., vol. 1; pp. 107-110, 116-120.
- Douglass' Summary, vol. 2, pp. 84, 162, 359, 360.
- Hubbard's Indian Wars, new ed., Peoples Hist., p. 633.
- Col. Rec., Conn., 1678-1689, pp. 7, 54-57, 444, 445; 1717-1725, pp. 31, 32, 148, 149. 10
- Colden's Five Nations, vol. 2, pp. 94, 96.
- Min. Prov. Col. Penna., 20 Jan., 1755.

8. It is matter of history that different tribes in British North America were from time to time dealt with for the surrender of the same territory, and surrenders were taken from the same tribes of the same lands several times, the motive being, partly bounty and benevolence, and partly to secure the good-will, or continued good-will, of the tribes so dealt with.

- Col. Rec., New Haven, 1653-1665, pp. 517, 518, 531, 532.
- Colden's History of the Five Nations, vol. 1, pp. 51-56; vol. 2, pp. 34-35.
- Douglass' Summary Historical and Political, vol. 2, pp. 275-280, 306, 317, 318.
- Pennsylvania Archives, 1748-1756, pp. 147, 148, 156, 157, 273, 279, 303, 304. 20
- Minutes of the Provincial Council of Pennsylvania, vol. 6, pp. 110, 111, 113, 114, 118, 124, 125, 128, 129, 171, 273, 279, 286-293.
- Doc. Hist. N. Y., vol. 4, pp. 896-911; vol. 5, pp. 786-801; vol. 8, pp. 145, 158-166, 291, 292, 302; and vol. 13, pp. 311, 312, 486.
- Parkman's Conspiracy of Pontiac, vol. 1, pp. 80-82.
- Trumbull's History of Connecticut, vol. 1, pp. 116-120; vol. 2, pp. 468-474, 478-480.
- Brodhead's History of New York, vol. 2, pp. 48, 49, 166, 327, 328, 376, 377.
- Gordon's History of New Jersey, pp. 27, 65, 66, 336, *Note O*.
- Raum's History of New Jersey, pp. 73, 74. 30
- New Jersey Hist. Soc. Coll., vol. 3, pp. 25, 26, 119, 123.
- Albach's Annals, pp. 94-98, 106, 107, 207, 208.
- Palfrey's History of New England, vol. 2, p. 605.
- Peters' His. Conn., p. 33.
- Smith's Hist. N. Y., p. 35.
- Massachusetts Hist. Soc. Coll., 1795, 1st Ser., vol. 4, pp. 159, 160, 174, 175, 180, 181.
- Campbell's History of Michigan, pp. 170, 193, 195-197, 202, 247.
- Journals Leg. Ass. Canada, 1847, Appx. (T).
- “ “ “ 1858, Appx. No. 21. 40
- Correspondence between the Colonial Secretary and the Governors respecting the Indians 1836-8, pp. 123, 124.
- Morris's Indian Treaties, pp. 299, 302, 305, 313.
- [See, as to all the references to this Section, Joint Appendix, pp. 247-252.]



9. Besides what was done in the Provinces now constituting the Dominion, the Crown had granted the greater portion of the land in North America without the previous extinguishment of the Indian claim; and the legal validity of these grants has been recognized in all the courts and is unquestionable.

Jackson *v.* Jones, 4 Kings Bench, Old Series, 142;  
 Doe Sheldon *v.* Ramsay, 9 U. C., Q. B., 123, 133;  
 Opinions of English Counsel, N. Y. Hist. Vol. 13, p. 486;

Johnson *v.* McIntosh, 8 Wheaton, 574;

Fletcher *v.* Peck, 6 Cranch, p. 87;

Meigs *v.* McClung, 9 Cranch, p. 11;

I Kent's Commentaries, 276;

Washburn on Real Property, 532;

Commission to the Cabots, 1496;

Grant to Sir Humphrey Gilbert, 1578;

Grant to Sir Walter Raleigh, 1584;

Virginia Charters, 1606, 1609, 1611-1612;

New England (Plymouth) Charter, 1620;

Grants to Sir William Alexander, 1621, 1625, 1728;

Charter of Massachusetts Bay, 1629;

Charter of Maryland, 1632;

Commission and Grant to Thomas Young, 1633;

Grant of New Albion to Sir E. Plowden, 1634;

Grant to Sir Ferdinando Gorges, 1639;

Charter of Connecticut, 1662;

Charter of Carolina, 1663;

Charter of Rhode Island and Providence Plantations, 1663;

First Grant to the Duke of York, 1664;

Hudson's Bay Company's Charter, 1670;

Second Grant to the Duke of York, 1674;

Charter of Pennsylvania, 1681-2;

Second Charter of Massachusetts Bay, 1691;

Charter of Georgia, 1732;

Grant of the Island of Vancouver, 1849;

Transfer of North-Western Territory, Her Majesty to the Dominion, 1870.

Transfer of all other British North-American Territories to the Dominion, 1880.

[See such of the above Charters, etc., as are printed, and Memo. respecting such of them as are not printed, Joint Appendix, pp. 20-37.]

10. Again, if the Indians had any legal or equitable right to or in these lands, such right was at most only a right of personal occupation during the pleasure of the Crown, by the band of Indians occupying the same, as hunting grounds or otherwise, and was not transferable. In that view the lands belonged, under the British North America Act, to the Province, subject to this right of personal occupation.

Doe Sheldon *v.* Ramsay, 9 U. C., Q. B., 105.

11. If the Indians had any further right, legal or equitable, in such lands, their claim was subject (at the least) to a right of pre-emption in the Crown; and the title of the Crown to the lands,

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including this right of pre-emption, went to the Province under the express terms of section 107 of the British North America Act, subject to the untransferable Indian claim of personal occupation during pleasure. The treaty was at most an extinguishment of the Indian claim to occupancy, and enured to the benefit of the Province.

12. The view acted upon in the States of the American union with reference to lands there is the same as that contended for by the respondent with respect to lands in this Province, except that the Courts of the United States appear to have recognized, as our Courts have not, a legal right of occupation on the part of the Indians, and to treat grants as being legally subject thereto though valid otherwise. This legal right of occupancy is, by the laws of the States, not transferable, and when it is extinguished by any means, the extinguishment is held to enure to the benefit 10 of the previous grantee, if any, his heirs and assigns; or where there is no previous grant, the extinguishment is held to enure to the benefit of the United States, or of the individual State entitled (as the case may be), and not to any other party procuring the extinguishment. There, too, the general Government has, by the Constitution, express jurisdiction to make treaties with the Indians; and, notwithstanding this provision, such treaties, in respect of lands in which individual States are concerned, are not made without the concurrence of such States.

Hening's Statutes at Large of Virginia, vol. 10, pp. 97-98; [Joint App., p. 93.]  
Poore's Federal and State Constitutions, pp. 9, 801, 802, 1338, 1348, 1352, 1410, 1912; [Joint App., pp. 92, 93, 111, 112, 121; and p. 9 of Poore]  
American State Papers—Indian Affairs, vol. 1, pp. 52, 53, 61, 169, 512, 513, 20 545, 552, 553, 560, 585, 516, 617, 620, 626-8, 636, 641, 664, 668, 685; vol. 2, pp. 88, 323-5, 391, 397, 398, 473, 495, 496; [Joint App., pp. 94-119.]  
U. S. Statutes at Large, (Boston: Little, Brown & Co.) vol. 1, pp. 137, 329, 330, 469, 743; vol. 2, p. 143; vol. 4, p. 730; vol. 7, pp. 557-8, 559-60, 601, 602; [Joint App., pp. 103, 120-123.]

13. No ownership of the lands in question was intended to be, or was, conferred or recognized by Statutes passed before Confederation, as contended by the appellants. Any expressions in the statutes which may seem to recognize an ownership or legal interest in the Indian occupants of Crown Lands refer, not to lands as to which there had been no treaty, but to lands reserved in the manner hereinbefore stated. 30

*Church v. Fenton*, 1 Cartw., Sup. Ct. Rep.;  
S. C., 1 Cartw., pp. 832, 833, &c.;  
*Totten v. Watson*, 15 Q. B., 392, 396;  
*Regina v. Baby*, 12 Q. B., 359.

14. The only other argument for the appellants is founded on the language of the Royal Proclamation of 1763, which they say reserved and gave to the Indians all the lands of the Crown in North America not already dealt with. But the Proclamation had no such intention, and no such effect. It had not the operation of a grant, and was by its express terms temporary only, and was expressly annulled by the Quebec Act, 1774. History shows that the object of the Proclamation was to restrain settlement to the sea-board in the supposed interest of British manufac- 40 tures, and not to confer any rights of property on the aboriginal inhabitants. The practice of obtaining surrenders from Indian occupants of Crown Lands existed before the Proclamation as well as afterwards,

15. It was suggested in the appellants' printed reasons for the Court of Appeal that the Dominion was entitled to compensation from the Province for payments made under Treaty No. 3, and was entitled to sell the timber and lands for this purpose. No such ground was taken in the argument of counsel before either the Chancellor or the Court of Appeal and there is no principle of law upon which such an argument could have been sustained, even if the propriety of compensation should be admitted. But the Dominion Government has hitherto made no claim of that kind; has given to the Province no opportunity of discussing or discharging such a claim; has on the contrary insisted on the lands having become, by the treaty, the lands of the Dominion absolutely, free from any trust or liability to redemption; and the Dominion Government has undertaken on that assumption of absolute ownership, to grant licenses and permits to cut timber, and to otherwise deal with the lands, in spite of the protests of the Government and Legislature of the Province.

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16. The Respondent also relies on the other reasons and authorities set forth in the judgments of the Honourable the Chancellor and the Honourable the Judges of the Court of Appeal, and on the Respondent's reasons against the appeal from the Chancellor to the Court of Appeal.

O. MOWAT,

E. F. B. JOHNSTON.

## REASONS FOR JUDGMENT.

DELIVERED IN THE SUPREME COURT OF CANADA.

SIR W. J. RITCHIE, KNIGHT, C. J.

I am of opinion, that all ungranted lands in the Province of Ontario belong to the crown as part of the public domain, subject to the Indian right of occupancy, in cases in which the same has not been lawfully extinguished, and when such right of occupancy has been lawfully extinguished absolutely to the crown, and as a consequence to the province of Ontario. I think the crown owns the soil of all the unpatented lands, the Indians possessing only the right of occupancy, and the crown possessing the legal title subject to that occupancy, with the absolute exclusive right to extinguish the Indian title either by conquest or by purchase; that, as was said by Mr. 10 Justice Story (1):—

“It is to be deemed a right exclusively belonging to the Government in its sovereign capacity to extinguish the Indian title and to perfect its own dominion over the soil and dispose of it according to its own good pleasure. \* \* The crown has the right to grant the soil while yet in possession of the Indians, subject, however, to their right of occupancy.”

That the title to lands where the Indian title has not been extinguished is in the crown, would seem to be clearly indicated by Dominion legislation since confederation. Sec. 31 Vic. cap. 42; 33 Vic. cap. 3; 43 Vic. cap. 36.

I agree that the whole course of legislation in all the provinces before, and in the Dominion since, confederation attaches a well understood and distinct meaning to the words “Indian reserves 20 or lands reserved for the Indians,” and which cover only lands specifically appropriated or reserved in the Indian territories, or out of the public lands, and I entirely agree with the learned Chancellor that the words “lands reserved for Indians,” were used in the B. N. A. Act in the same sense with reference to lands specifically set apart and reserved for the exclusive use of the Indians. In no sense that I can understand can it be said that lands in which the Indian title has been wholly extinguished are lands reserved for the Indians.

The boundary of the territory in the north-west angle being established, and the lands in question found to be within the Province of Ontario, they are necessarily, territorially, a part of Ontario, and the ungranted portion of such lands not specifically reserved for the Indians, though unsurrendered and therefore subject to the Indian title, forms part of the public domain of Ontario, 30 and they are consequently public lands belonging to Ontario, and as such pass under the British North America Act to Ontario, under and by virtue of sub-sec. 5 of sec. 92 and sec. 109 as to lands, mines, minerals and royalties, and sec. 117, by which the Provinces are to retain all their property not otherwise disposed of by that Act, subject to the right of the Dominion to assume any lands or public property for fortifications, etc., and therefore, under the British North America Act, the Province of Ontario has a clear title to all unpatented lands within its boundaries as part of the Provincial public property, subject only to the Indian right of occupancy, and absolute when the Indian right of occupancy is extinguished.

I am therefore of opinion, that when the Dominion Government, in 1873, extinguished the Indian claim or title, its effect was, so far as the question now before us is concerned, simply to 40

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(1) Story on the Constitution 4th Ed. ss. 687.

relieve the legal ownership of the land belonging to the Province from the burden, incumbrance, or however it may be designated, of the Indian title. It therefore follows that the claim of the Dominion to authorise the cutting of timber on these lands cannot be supported, and the Province has a right to interfere and prevent their spoliation.

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—  
THE CHIEF  
JUSTICE.

This case has been so fully and ably dealt with by the learned Chancellor, and I so entirely agree with the conclusions at which he has arrived, that I feel I can add nothing to what has been said by him. Many questions have been suggested during the argument of this case, and in some of the judgments of the court below, but I have, purposely, carefully avoided discussing, or expressing any opinion, on questions not immediately necessary for the decision of this case, leaving  
10 all such matters to be disposed of when they legitimately arise and become necessary for the determination of a pending controversy.

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By the report of the Judicial Committee of the Privy Council of the 23rd July, 1884, made  
upon a reference to it of the question of disputed boundaries between the Provinces of Ontario and Manitoba, and which report was adopted by Her Majesty and embodied in the Order in Council of the 11th August, 1884, the territory in which the lands now in question are included was determined to be comprised within the limits of the Province of Ontario. This decision of the Judicial Committee, whilst defining the political boundaries according to the contention of the last named province, does not, however, in any way bear upon the question here in controversy between  
20 the Dominion of Canada and the Province of Ontario regarding the proprietorship of the lands now in dispute. The decision of the present appeal depends altogether upon the construction to be placed upon certain provisions of the British North America Act. By the 24th enumeration of section 91 of that Act the power of legislation in respect of "Indians and lands reserved for the Indians" is conferred exclusively upon the parliament of Canada. By section 109 of the same Act,

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"All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals and royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trust existing in respect  
30 "thereof, and to any interest other than that of the province in the same."

By sec. 92, enumeration 5, exclusive power of legislation is given to the provinces regarding "the management and sale of the public lands belonging to the province, and of the timber and wood thereon."

The contention of the appellants is, that the lands now in question, and which are embraced in the territory formerly in dispute between the Provinces of Ontario and Manitoba, and which have been decided by the Judicial Committee to be within the boundaries of Ontario, were, at the time of confederation, lands which had not been surrendered by the Indians, and consequently, come within the definition of "lands reserved for the Indians" contained in sub-section 24 of section 91, and are therefore not public lands vested in the province by the operation of section  
40 109. The province, on the other hand, insists that these are not "lands reserved for the Indians" within sub-section 24, and claims title to them under the provision of section 109 as public lands which at the date of confederation "belonged" to the Province of Ontario.

It is obvious that these lands cannot be both public lands coming within the operation of section 109 and "lands reserved for the Indians," and so subject to the exclusive legislative power of the Parliament of Canada, by force of the 24 sub-section of section 91. The "public lands"

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mentioned in section 109 are manifestly those respecting which the Province has the right of exclusive legislation by section 92 sub-section 5. Then, these public lands referred to in sub-section 5, and which include all the lands "belonging" to the Province, are clearly distinct from "lands reserved for the Indians," since lands so reserved are by section 91 sub-section 24 made exclusively subject to the legislative power of the Dominion. To hold that lands might be both public lands within section 109 and sub-section 5 of section 92, and "lands reserved for the Indians" within sub-section 24 of section 91, would be to determine that the same lands were subject to the exclusive powers of two separate and distinct legislatures, which would be absurd (1). This consideration alone is sufficient to dispose of any argument derived from the latter clause of section 109, saving trusts existing in respect of public lands within its operation. Moreover, the trusts thus preserved are manifestly of a different order from anything connected with lands reserved for Indians, for instance, those trusts subsisting in favor of persons who had contracted for the purchase of Crown Lands, but whose titles had not been perfected by grants. The word "trusts" would not be an appropriate expression to apply to the relation between the Crown and the Indians respecting the unceded lands of the latter. As will appear hereafter very clearly, such relationship is not in any sense that of trustee and *cestui que trust*, but rather one analogous to the feudal relationship of lord and tenant, or in some aspects to that one, so familiar in the Roman law, where the right of property is dismembered and divided between the proprietor and a usufructuary.

It will be convenient here to notice a point to which some importance has been attached in the Courts below. It is said that the British North America Act contains no clause vesting in the Dominion the ultimate property in lands reserved for the Indians over which an exclusive power of legislation is by section 91 conferred on the Dominion Parliament, and that consequently, even though the lands now in question should be held to come within the 24th enumeration of the last mentioned section, yet as they are not vested in the Crown in right of the Dominion nothing passed by the lease or license under which the appellants claim title. The answer to this objection is, first, that as this is an information on behalf of the Province, complaining of an intrusion upon Provincial lands, the question to be decided in the first instance is that as to the title of the Province. To support the information the respondent must establish that these lands were vested in the Province by the British North America Act, failing which the information must be dismissed, whether the lease or license granted by the Dominion to the Appellants conferred a legal title or not. If therefore the respondent fails in making out the title of the Province, it is not essential that the appellants should be able to show that under some particular clause of the British North America Act, the lands of which this *locus in quo* forms part were vested in the Dominion. I am of opinion, however, that the ultimate Crown title in the lands described in sub-section 24 of section 91, whatever may be the true meaning of the terms employed (an inquiry yet to be entered upon), became, subject to the Indian title in the same, vested in the Crown in right of the Dominion. The title and interest of the Crown in the lands specified in sub-section 24 at the date of confederation belonged to it in the rights of the respective Provinces in which the lands were situated; for the reasons already given these lands were not vested in the new Provinces created by Confederation Act; they must therefore have remained in the Crown in some other right, which other right could only have been, and plainly was, that of the Dominion. For, having regard to the scheme by which the British North America Act carried out confederation, by first consolidating the four original Provinces into one body politic—the Dominion—and then re-distributing this

(1) Sec. as to conjoint effect of s. 109 and s. 92, subs. 5, *Attorney General v. Mercer*, 8 App. Cas. at p. 776.

Dominion into Provinces and appropriating certain specified property to these several Provinces, it follows that the residue of the property belonging to the Crown in right of the Provinces before Confederation not specifically appropriated by the appropriation clauses of the Act, sections 109 and 117, to the newly created Provinces, must of necessity have remained in the Crown, and it is reasonable to presume, for the use and purposes of the Dominion. Next, inasmuch as all revenues, casual or otherwise, arising from the title and interest of the Crown in "Lands Reserved for the Indians," (whatever may upon subsequent consideration appear to be the proper meaning of that expression) are by the effect of section 102 allotted to the Dominion, this assignment of revenue to the Dominion, according to a well understood rule of construction, implies a vesting of the lands and property from which the revenue is to arise. This last mentioned construction, which is analogous to that so familiar in construing wills by which a gift of rents and profits is held to be equivalent to a gift of the land itself, was referred to with approbation in *Attorney-General v. Mercer* (1), though its application was excluded in that case for the reason that the right of escheat there was held to be expressly vested in the Province under section 109, which cannot be the case as regards "Lands reserved for the Indians," over which an exclusive power of legislation is conferred on the Dominion, whatever may appear as the result of further consideration to be the proper meaning attributed to that expression.

The questions to be determined are therefore now restricted entirely to the construction to be placed on the words, "Lands reserved for the Indians," in sub-section 24 of section 91, and we are to bear in mind, that whatever are the lands subjected by this description to the exclusive legislative power of the Dominion they cannot be lands belonging to the Province, since all these last mentioned lands are expressly subject to the exclusive legislative powers of the Provinces. In construing this enactment we are not only entitled but bound to apply that well established rule which requires us, in placing a meaning upon descriptive terms and definitions contained in statutes to have recourse to external aids derived from the surrounding circumstances and the history of the subject matter dealt with, and to construe the enactment by the light derived from such sources, and so to put ourselves as far as possible in the position of the legislature whose language we have to expound. If this rule were rejected and the language of the statute were considered without such assistance from extrinsic facts, it is manifest that the task of interpretation would degenerate into mere speculation and guess work.

It is argued here for the appellants, that these words "lands reserved for the Indians" are to have attributed to them a meaning sufficiently comprehensive to include all lands in which the Indian title, always recognized by the Crown of Great Britain, has not been extinguished or surrendered according to the well understood and established practice invariably observed by the Government from a comparatively remote period. The respondent, on the contrary, seeks to place a much narrower construction on these words and asks us to confine them to lands, first, which having been absolutely acquired by the Crown had been re-appropriated for the use and residence of Indian tribes, and secondly, to lands which, on a surrender by Indian nations or tribes of their territories to the Crown, had been excepted or reserved and retained by the Indians for their own residence and use as hunting grounds or otherwise. In order to ascertain whether it was the intention of Parliament by the use of these words "lands reserved for the Indians" to describe comprehensively all lands in which the Indians retained any interest, and so to include surrendered lands generally, or whether it was intended to use the term in its restricted sense, as the respondent contends, as indictating only lands which had been expressly granted and appropriated

(1) 8 App. Cas. at p. 174,

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by the Crown to the use of Indians, or excepted or reserved by them for their own use out of some large tract surrendered by them to the Crown, we must refer to historical accounts of the policy already adverted to as having been always followed by the Crown in dealings with the Indians in respect of their lands.

In the Commentaries of Chancellor Kent and in some decisions of the Supreme Court of the United States we have very full and clear accounts of the policy in question. It may be summarily stated as consisting in the recognition by the Crown of a usufructuary title in the Indians to all unsundered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested. This short statement will, I think, on comparison with the authorities to which I will presently refer, be found to be an accurate description of the principles upon which the Crown invariably acted with reference to Indian lands, at least from the year 1756, when Sir William Johnston was appointed by the Imperial Government superintendent of Indian affairs in North America, being as such responsible directly to the Crown through one of the Secretaries of State, or the Lords of Trade and Plantation, and thus superseding the Provincial Governments, down to the year 1867, when the Confederation Act constituting the Dominion of Canada was passed. So faithfully was this system carried out, that I venture to say that there is no settled part of the territory of the Province of Ontario, except perhaps some isolated spots upon which the French Government had, previous to the conquest, erected forts, such as Fort Frontenac and Fort Toronto, which is not included in and covered by a surrender contained in some Indian treaty still to be found in the Dominion Archives. These rules of policy being shown to have been well established and acted upon, and the title of the Indians to their unsundered lands to have been recognized by the Crown to the extent already mentioned, it may seem of little importance to enquire into the reasons on which it was based. But as these reasons are not without some bearing on the present question, as I shall hereafter shew, I will shortly refer to what appears to have led to the adoption of the system of dealing with the territorial rights of the Indians. To ascribe it to moral grounds, to motives of humane consideration for the aborigines, would be to attribute it to feelings which perhaps had little weight in the age in which it took its rise. Its true origin was, I take it, experience of the great impolicy of the opposite mode of dealing with the Indians which had been practised by some of the Provincial Governments of the older colonies and which had led to frequent frontier wars, involving great sacrifices of life and property and requiring an expenditure of money which had proved most burdensome to the colonies. That the more liberal treatment accorded to the Indians by this system of protecting them in the enjoyment of their hunting grounds and prohibiting settlement on lands which they had not surrendered, which it is now contended the British North America Act has put an end to, was successful in its results, is attested by the historical fact that from the memorable year 1763, when Detroit was besieged and all the Indian tribes were in revolt, down to the date of Confederation, Indian wars and massacres entirely ceased in the British possessions in North America, although powerful Indian nations still continued for some time after the former date to inhabit those territories. That this peaceful conduct of the Indians is in a great degree to be attributed to the recognition of their rights to lands unsundered by them, and to the guarantee of their protection in the possession and enjoyment of such lands, given by the Crown in the proclamation of October, 1763, hereafter to be more fully noticed, is a well



known fact of Canadian history which cannot be controverted. The Indian nations from that time became and have since continued to be the firm and faithful allies of the Crown and rendered it important military services in two wars—the war of the Revolution and that of 1812.

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The American authorities, to which reference has already been made, consist (amongst others) of passages in the commentaries of Chancellor Kent (1), in which the whole doctrine of Indian titles is fully and elaborately considered, and of several decisions of the Supreme Court of the United States, from which three, *Johnston v. McIntosh* (2); *Worcester v. State of Georgia* (3); and *Mitchell v. United States* (4), may be selected as leading cases. The value and importance of these authorities is, not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsundered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognize it as a continuance of the principles of law or policy as to Indian titles then established by the British Government, and therefore identical with those which have also continued to be recognized and applied in British North America. Chancellor Kent, referring to the decision of the Supreme Court of the United States, in *Cherokee Nation v. State of Georgia* (5), says:—

“The court there held that the Indians were domestic, dependent nations, and their relations to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied until that right should be extinguished by a voluntary cession to our government (6).”

On the same page the learned commentator proceeds thus:—

“The Supreme Court in the case of *Worcester* reviewed the whole ground of controversy relative to the character and validity of Indian rights within the territorial dominions of the United States and especially with reference to the Cherokee nation within the limits of Georgia. They declared that the right given by European discovery was the exclusive right to purchase, but this right was not founded on a denial of the Indian possessor to sell. Though the right of the soil was claimed to be in the European governments as a necessary consequence of the right of discovery and assumption of territorial jurisdiction, yet that right was only deemed such in reference to the whites; and in respect to the Indians it was always understood to amount only to the exclusive right of purchasing such lands as the natives were willing to sell. The royal grants and charters asserted a title to the country against Europeans only, and they were considered as blank paper so far as the rights of the natives were concerned. The English, the French and the Spaniards were equal competitors for the friendship and aid of the Indian nations. The Crown of England never attempted to interfere with the national affairs of the Indians further than to keep out the agents of foreign powers who might seduce them into foreign alliances. The English Government purchased the alliance and dependence of the Indian Nations by subsidies, and purchased their lands when they were willing to sell at a price they were willing to take, but they never coerced a surrender of them. The English Government considered them as nations competent to maintain the relations of peace and war and of governing themselves under her protection. The United States who succeeded to the rights of the British Crown in respect of the Indians did the same and no

(1) Kent's Commentaries 12 ed. by Holmes, vol. 3, p. 379 et seq. and in editor's notes.

(2) 8 Wheaton 543.

(3) 6 Peters 515.

(4) 9 Peters 711.

(5) 5 Peters 1.

(6) 3 Kent Comms. 383.

“ more ; and the protection stipulated to be afforded to the Indians and claimed by them was under-  
stood by all parties as only binding the Indians to the United States as dependent allies.”

Again the same learned writer says (1):

“ The original Indian Nations were regarded and dealt with as proprietors of the soil which they  
claimed and occupied, but without the power of alienation, except to the Governments which pro-  
tected them and had thrown over them and beyond them their assumed patented domains. These  
Governments asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed  
within the exterior lines of their jurisdictions, by fair purchase, under the sanction of treaties ; and  
they held all individual purchases from the Indians, whether made with them individually or collec- 10  
tively as tribes, to be absolutely null and void. The only power that could lawfully acquire the  
Indian title was the State, and a government grant was the only lawful source of title admitted in  
the Courts of Justice. The Colonial and State Governments and the government of the United  
States uniformly dealt upon these principles with the Indian Nations dwelling within their terri-  
torial limits.”

Further, Chancellor Kent, in summarising the decision of the Supreme Court in *Mitchell v. United States*, states the whole doctrine in a form still more applicable to the present case. He says (2):

“ The Supreme Court once more declared the same general doctrine, that lands in possession of  
friendly Indians were always under the colonial governments, considered as being owned by the tribe  
or nation as their common property by a perpetual right of possession ; but that the ultimate fee 20  
was in the crown or its grantees, subject to this right of possession, and could be granted by the  
crown upon that condition ; that individuals could not purchase Indian lands without license, or  
under rules prescribed by law ; that possession was considered with reference to Indian habits and  
modes of life, and the hunting grounds of the tribes were as much in their actual occupation as the  
cleared fields of the whites, and this was the tenure of Indian lands by the laws of all the colonies.”

It thus appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is, that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned ; in other words, that the *dominium utile* is recognized as belonging to or reserved for the Indians, 30 though the *dominium directum* is considered to be in the United States. Then if this is so as regards Indian lands in the United States, which have been preserved to the Indians by the constant observance of a particular rule of policy acknowledged by the United States courts to have been originally enforced by the crown of Great Britain, how is it possible to suppose that the law can, or rather could have been, at the date of confederation, in a state any less favorable to the Indians whose lands were situated within the dominion of the British crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments ? Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the crown, I maintain that if there had been an entire absence of 40 any written legislative act ordaining this rule as an express positive law, we ought, just as the United States Courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the Courts were bound to enforce as such, and consequently, that the 24th sub-

(1) P. 385.

(2) P. 386, note (a).

section of section 91, as well as the 109th section and the 5th sub-section of section 92 of the British North America Act, must all be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments.

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The voluminous documentary evidence printed in the case contains numerous instances of official recognition of the doctrine of Indian title to unceded lands as applied to Canada. Without referring at length to this evidence I may just call attention to one document which, as it contains an expression of opinion with reference to the title to the same lands part of which are now in dispute in this cause by a high judicial authority, a former Chief Justice of Upper Canada, is of peculiar value. In the appendix to the case for Ontario laid before the Judicial Committee in the Boundary Case (1) we find a letter dated 1st of May, 1819 from Chief Justice Powell to the Lieutenant Governor, Sir Peregrine Maitland, upon the subject of the conflict then going on between the North West and Hudson's Bay Companies, and of which the territory now in question was the scene. The Chief Justice, writing upon the jurisdiction of the Upper Canada Courts in this territory and of an act of Parliament relating thereto, says:

"The territory which it affects is in the Crown and part of a district, but the soil is in the aborigines and inhabited only by Indians and their lawless followers."

There cannot be a more distinct statement of the rights claimed by the appellants to have existed in the Indians than this, and if the soil, *i. e.* the title to the soil, was in the Indians in 1819 it must have so remained down to the date of the North West Angle Treaty No. 3 made in 1873.

Then it is to be borne in mind that the control of the Indians and of the lands occupied by the Indians had until a comparatively recent period been retained in the hands of the Imperial Government; for some fifteen years after local self government had been accorded to the Province of Canada the management of Indian affairs remained in the hands of an Imperial officer, subject only to the personal direction of the Governor General, and entirely independent of the local government, and it was only about the year 1855, during the administration of Sir Edmund Head, and after the new system of Government had been successfully established, that the direction of Indian affairs was handed over to the Executive authorities of the late Province of Canada. Further, it is to be observed, that by the terms of the 24th sub-section the power to legislate concerning Indians as distinct from lands reserved, is expressly assigned to the Dominion Government, and this legislative power appears, by the tacit acquiescence of all the new Governments called into existence by confederation, to include the burden of providing for the necessities of the Indians which has since been borne exclusively by the Government of the Dominion. At all events, the exclusive right of legislating respecting Indian affairs is thus attributed by this clause to the Parliament of Canada. This must include the right to control the exercise by the Indians of the power of making treaties of surrender, and since, as already shown, it is only by means of formal treaties that the Indian title can be properly surrendered or extinguished, Parliament must necessarily have the power, as incident to the general management of the Indians, of so legislating as to restrain or regulate the making of treaties of surrender which might be deemed improvident dispositions of Indian lands. If this were not so, and Parliament did not possess this power of absolute control over the Indians in respect of their dealings with their lands, the provisions of the 24th sub-section would be most incongruous and unreasonable, for in that case, whilst on the one hand Parliament would have to

(1) At p. 134.

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provide for the necessities of the Indians, on the other hand it would not have the means of restraining these wards of the Dominion Government from wasting the means of self support which their hunting grounds afforded. Then, taking into consideration this wide power of legislation respecting the Indian tribes, and seeing that it must necessarily include a power of control over all Indian treaties dealing with proprietary rights, it is surely a legitimate application of the maxim *noscitur a sociis* to construe the words "Lands reserved for the Indians" as embracing all territorial rights of Indians, as well those in lands actually appropriated for reserves as those in lands which had never been the subject of surrender at all.

To summarize these arguments, which appear to me to possess great force, we find, that at the date of Confederation the Indians, by the constant usage and practice of the Crown, were considered to possess a certain proprietary interest in the unsundered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations; that such property of the Indians was usufructuary only and could not be alienated, except by surrender to the Crown as the ultimate owner of the soil; that these rights of property were not inaptly described by the words "lands reserved for the Indians," whilst they could not, without doing violence to the meaning of language, be comprised in the description of public lands which the Provinces could sell and dispose of at their will. Further, we find from the conjunction of the word "Indians" with the expression "lands reserved for the Indians" in the 24 sub-section of section 91 of the British North America Act, that a construction which would place unsundered lands in the category of "public lands" appropriated to the Provinces would be one which would bring different provisions of the act into direct conflict, since such lands would be subject to the disposition of the local legislature under sub-section 5, and at the same time it would be within the powers of the Dominion Parliament, in the exercise of its general right of legislation regarding the Indians, to restrain surrenders or extinguishments of the Indian title to such lands, and thus to render nugatory the only means open to the Provinces of making the lands available for sale and settlement. Then, there being but two alternative modes of avoiding this conflict, one by treating the British North America Act as by implication abolishing all right and property of the Indians in unsundered lands, thus at one stroke doing away with the traditional policy above noticed, and treating such lands as ordinary Crown lands in which the Indian title has been extinguished, the other by holding that such unsundered lands are to be considered as embraced in the description of "lands reserved for the Indians," it appears to me that the first alternative, which would attribute to the Imperial Parliament the intention of taking away proprietary rights, without express words and without any adequate reason, and of doing away at a most inopportune time with the long cherished and most successful policy originally inaugurated by the British Government for the treatment of the Indian tribes, is totally inadmissible and must be rejected. The inevitable conclusion is, that the mode of interpretation secondly presented is the correct one, and that all lands in possession of Indian tribes not surrendered at the date of Confederation are to be deemed "lands reserved for the Indians," the ultimate title to which must be in the Crown, not as representing the Province, but in right of the Dominion, or otherwise, the Indians having the right of enjoyment and an inalienable possessory title, until such title is extinguished by a treaty of surrender which the Dominion is alone competent to enter into. To these considerations must be added the further and weighty reason, that the construction just indicated is most fair and reasonable, inasmuch as the Dominion, being burdened with the support and maintenance of the

Indians, ought also to have the benefit of any advantage which may be derived from a surrender of their lands.

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To these arguments the respondent opposes others of varying weight and importance, which may, as far as I can see, be all classed under two heads. First, it is attempted to show by reference to a variety of documents consisting of legislative and administrative acts, public correspondence and official reports, all of which I concede are quite admissible for the purpose, that the words "lands reserved for the Indians" had, at the time of Confederation, acquired a well recognized secondary meaning, and that they were synonymous with Indian reserves and were confined to lands appropriated to the Indians by grant from the Crown, or lands which the Indians had themselves reserved by excepting them from treaty surrenders. The answer to this is, in my opinion, very plain. It is true that these documents do show that lands so specifically appropriated to the Indians have always been treated and are to be considered as lands "reserved" for the Indians, and therefore lands comprised in the description given in the 24th sub-section of section 91, but it does not follow from this that the clear and undoubted title of the Indians to their peculiar interest in unsurrendered lands is not also included in the same description. The inference would rather be against a construction which would attribute to the Imperial Parliament the intention of making a purely arbitrary distinction between the two classes of Indian property, for if it is once admitted or established that the Indians have a proprietary interest in lands not surrendered by them, a point on which there can really be no serious doubt, the same reasons which induced Parliament to throw around the minor territorial interests of the Indians in the smaller classes of reserves the powerful protection of the Dominion Government, or rather stronger reasons than these, must also have applied to their more valuable and important territorial rights in unsurrendered lands.

The other principal argument relied upon for the respondent, is one derived from the supposed inconvenience which would result from the proprietary interest in this large tract of territory becoming vested in the Dominion Government. I can see no force in this. I am unable to see that any such result must necessarily, or is even likely, to follow because the proprietorship of the soil in a large tract of land situate within the confines of a particular province is vested in the Dominion, whilst the political rights, legislative and administrative, over the same territory are vested in the provincial government. Instances of such ownership by a federal government within the limits and subject to the jurisdiction of local governments, provinces, or states, are easily to be found, and it has never been suggested that any political inconvenience, or clashing of jurisdiction, has resulted from them. In all the States of the American Union, except the original thirteen and seven others formed out of cessions of territory by original States, viz.: Maine, Vermont, Tennessee, Kentucky, West Virginia, Alabama and Mississippi, and Texas, (which was admitted to the Union as a state already formed out of foreign territory,) the federal government was the original proprietor of the soil, and still remains so as regards ungranted lands. We may, therefore, presume that a system which has prevailed and still prevails in seventeen states of the Union, and which also exists in our own Province of Manitoba, and must likewise apply to all future provinces formed out of the North-West Territory, cannot be so incompatible with the political rights of local governments, or with the material interests of the people, as to require us to depart from the ordinary and well understood rule of statutory construction, and to ascribe to the Imperial Parliament the intention of abolishing by implication Indian titles which the Crown had uniformly recognized for a long course of time, and protection to which had been expressly ordained and guaranteed by a proclamation of the King more than a century old.

*Bank*  
*Dale*

The objection, that the interests of the public would be prejudiced by attributing the ultimate crown title in Indian lands to the Dominion instead of to the province, seems to imply that this dispute is to be considered as a continuance of the contest respecting the provincial boundaries of Ontario and Manitoba. I cannot assent to this. The question between the two provinces was one in which the rights of two distinct political communities, each representing separate and distinct portions of the general public of the Dominion, came into conflict. In the present case we are entitled, indeed bound, to assume that in the disposal of these lands for the purpose of settlement in the interests of the public, as well the public of Ontario as of Canada at large, will be as well served by the Dominion as by the province. I have already shown that the ownership by the Dominion of territory included within the limits of the province, is in no way inconsistent 10 with the political rights of the latter as regards government and legislation. The only real question, therefore, can be and is, that as to which government has the better title to the fund to be produced by the sale of these lands, and if, in construing the statute, we are to take into consideration arguments based on the fairness and equity of giving to one government rather than to the other the title to this fund, I have no hesitation in assigning the better right to the Dominion. I see nothing inequitable or inconvenient, but much the reverse, in a construction of the statute which has the effect of attributing the profits arising from the surrender and sale of Indian lands to the Dominion, upon which is cast the burthen of providing for the government and support of the Indian tribes and the management of their property, not only in the Provinces, but throughout the wide domain of the North-West Territories, rather than upon the Provinces, who are not 20 only free from all liabilities respecting the Indians, but are not even empowered to undertake them and cannot legally do so.

So far as arguments derived from expediency, public policy, and convenience are to have weight in removing any ambiguity which may be fairly raised with reference to the meaning of the terms "lands reserved for the Indians," there were some invoked by the learned counsel for the appellants which, in my opinion, far exceed in weight any of the same class put forward on behalf of the respondent. Is it to be presumed that by the 109th and 117th sections of the British North America Act it was intended to abrogate entirely the well understood doctrine, according to which the Indians were recognized as having a title to the lands not surrendered by them, which had been acted upon for at least one hundred years, and which had received the express sanction of the 30 Crown in a royal proclamation, wherein the Indians are assured that, to the end that they might be convinced of the King's justice and determined resolution to remove all reasonable cause of discontent, their lands not ceded to or purchased by the Crown should be reserved to them for their hunting grounds? And is it to be supposed that this was done of the mere motion of the Imperial Parliament, without any suggestion or request from the body of delegates assembled in the conference by which the terms and plan of Confederation were settled, or otherwise from this side of the Atlantic? And can that be considered a reasonable construction which would attribute to Parliament the intention to make this great change, and thus to break faith with the Indian tribes by abrogating the privileges conferred by a proclamation which they had always regarded as the charter of their rights, just as Canada was on the eve of acquiring from the Hudson's Bay Com- 40 pany a large territory which would place in subjection to the new Dominion an Indian population far in excess of the aggregate of that contained in all the old Provinces together, a population which it would be of the utmost importance to conciliate, and which would be sure to be affected by any want of good faith practised towards the Indians of the Provinces? Before we can say that the language of the 24th sub-section of section 91 is to receive the interpretation contended for

by the respondent, we must be prepared to answer these questions in the affirmative. This I cannot bring myself to do, but I am compelled to prefer the plain primary meaning of the words in question contended for by the appellants, according to which lands reserved for the Indians include unsurrendered lands, or, in other words, *all* lands reserved for the Indians, and not merely a particular class of such lands.

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To the objections just mentioned it is, however, answered, that all the obligations of the Crown towards the Indians incidental to their unsurrendered lands, and the right to acquire such lands and to make compensation therefor by providing subsidies and annuities for the Indians, attach to and may be performed by the Provinces as well as by the Dominion. The proper rejoinders to this have been already indicated, but may be more fully stated as follows: First, a construction which, without any adequate reason, would apportion the management of the Indians and their lands between two Governments and two sets of officers, whilst it is obvious that an administration of Indian affairs as a whole by one Government and one set of officers could alone be practicable and beneficial, would be so eccentric and arbitrary that nothing but express words could authorise it. Secondly, the Provinces are Governments of limited capacities, executive as well as legislative, and amongst the powers attributed to the Provincial Governments and Legislatures by the British North America Act none can be found which would authorise such a dealing with Indians in respect to their lands. It cannot be pretended that any such power is conferred in express terms, and none can be implied, since such an implication would be in direct conflict with the only meaning which can be sensibly attached to the word "Indians" as used in the 24th sub-section of section 91, considered apart altogether from the subsequent words "and lands reserved for Indians," by which word "Indians," standing alone, it must have been intended to assign to the Dominion the tutelage or guardianship of the Indians and the right to regulate their relations with the Crown generally, a duty which could not be properly performed by the Dominion if the tribes were liable to be beset by the Provinces seeking surrenders of their lands. On the whole, therefore, the result, is that the construction contended for by the respondent, that unsurrendered Indian lands vested in the Provinces, under the 109th and 117th sections, would practically annul the well recognized doctrine of an Indian title in these lands, and for that reason alone is therefore inadmissible.

It appears to me, therefore, that the contentions of the respondent entirely fail, and that were there nothing more to be said the appellants would be entitled to judgment on this appeal.

So far I have considered and dealt with the case upon the assumption that there were no extrinsic circumstances, documents, or course of conduct, from which we could derive assistance in placing a meaning upon the words of the 24th sub-section, beyond the established usage of the crown, according to which the Indians were considered as possessing the proprietary interest already referred to in their unsurrendered lands. It appears, however, that a much stronger case than this is made in favour of the construction contended for by the appellants, for we find the proclamation of King George the 3rd, already incidentally alluded to, which had the force of a statute and was in the strictest sense a legislative act, and which had never, so far as I can see, been repealed, but remained, as regards so much of it as is now material, in force at the date of confederation, in which Indian lands not ceded to or purchased by the king, *i. e.*, lands not surrendered, are expressly described in terms as lands "reserved to the Indians;" the two expressions, "lands not ceded to or purchased by the king," and "lands reserved to the Indians," being expressly treated as convertible terms. This proclamation was that of the 17th of October, 1763, by which provision was made for the government of certain territories acquired by Great Britain by con-

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quest during the seven years' war, and which had been ceded by the treaty of peace concluded at Paris between France, England, and Spain on the 10th February, 1763. By this proclamation four separate governments were established, viz., those of Grenada, East and West Florida, and Quebec, the limits of each province were defined, those of Quebec not comprising the whole territory of Canada ceded by France and being of much smaller extent than those afterwards ascribed to the second province of the same name by the Quebec Act passed in 1774 (1). The description of the territory included in the government of Quebec erected by the proclamation is as follows :

"First, the government of Quebec, bounded on the Labrador coast by the river St. John, and "from thence by a line drawn from the head of that river through the lake St. John to the south "end of Lake Nipissim, from whence the said line crossing the river St. Lawrence, and the Lake 10  
"Champlain, in 45 degrees of north latitude, passes along the high lands which divide the rivers "that empty themselves into the said river St. Lawrence from those which fall into the sea ; and "also along the north coast of the Bay of Chaleur and the coast of the gulf of St. Lawrence to Cape "Rosieres, and from thence crossing the mouth of the river St. Lawrence by the west end of the "Island of Anticosti, terminates at the aforesaid river of St. John."

This description, manifestly does not include the lands now in question.

The proclamation after declaring that the King had issued Letters Patent to the Governors of these several colonies directing the calling of general assemblies for purposes of legislation and some other provisions immaterial here, proceeds to ordain certain regulations respecting Indians 20  
and Indian lands as follows :—

"And whereas it is just and reasonable and essential to our interests and the security of our "colonies that the several nations or tribes of Indians with whom we are connected and who live "under our protection should not be molested or disturbed in the possession of such parts of our "dominions and territories as, not having been ceded to or purchased by us, are reserved to them or "any of them as their hunting grounds. We do therefore, with the advice of our Privy council, "declare it to be our royal will and pleasure, that no Governor or Commander in chief in any of "our colonies of Quebec, East Florida or West Florida, do presume, upon any pretence whatever, to "grant warrants of survey, or pass any patents for lands, beyond the bounds of their respective "Governments as described in their Commissions ; as also, that no Governor or Commander in Chief "in any of our other colonies or plantations in America do presume for the present and until our 30  
"further pleasure be known, to grant warrants of survey, or pass patents for any lands beyond the "head or sources of any of the rivers which fall into the Atlantic ocean from the west and north "west, or upon any lands whatever which, not having been ceded to or purchased by us as afore- "said, are reserved to the said Indians or any of them.

"And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to "reserve under our sovereignty protection and dominion, for the use of the said Indians, all the land "and territories not included within the limits of our said three new Governments, or within the "limit of the territory granted to the Hudson's Bay Company ; as also all the lands and territories "lying to the westward of the sources of the rivers which fall into the sea from the west and north- 40  
"west as aforesaid ; and we do hereby strictly forbid, on pain of our displeasure, all our living sub- "jects from making any purchases or settlements whatsoever, or taking possession of any of the "lands above reserved, without our special leave or license for that purpose first obtained.

"And we do further strictly enjoin and require all persons whatsoever, who have either wilfully



“or inadvertently seated themselves upon any lands which, not having been ceded to or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.”

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“And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians, in order therefore to prevent such irregularities for the future, and to the end that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, we do, with the advice of our Privy council, strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of our colonies where we have thought proper to allow settlement; but if at any time any of the said Indians should be inclined to dispose of the said lands the same shall be purchased only for us, in our name, in some public meeting or assembly of the said Indians, to be held for that purpose by the Governor or Commander-in-Chief of our colony respectively within which they shall lie.”

This same proclamation was the subject of judicial consideration in the celebrated case of *Campbell v. Hall* (1), and its effect and operation was fully considered by Lord Mansfield in his judgment in that case.

As is well known, it was determined in the case of *Campbell v. Hall*, that the king had power to legislate as regards ceded and conquered colonies, and that this identical proclamation now under consideration had the force of law in the colonies to which it applied, though it was also determined, that the king, having by it ordained the calling of legislative assemblies in the several colonies mentioned, his power of legislation was thereby exhausted, and that a subsequent proclamation with reference to Grenada was of no legislative force. In the present case the importance of this proclamation is paramount, and appears to me to be by itself decisive of the present appeal. In the first place, it gives legislative expression and force to what I have heretofore treated as depending on a regulation of policy, or at most of rules of unwritten law and official practice, namely, the right of the Indians to enjoy, by virtue of a recognized title, their lands not surrendered or ceded to the crown; it prohibits all interference with such lands by private persons by way of purchase or settlement, and limits the right of purchasing or obtaining cessions of Indian lands to the king exclusively. Next, by the words “to lands which not having been ceded to or purchased by us are still reserved to the said Indians as aforesaid,” it indicates that “lands reserved for the Indians” was a description and definition applicable to and indeed convertible with, unsurrendered or non-ceded lands. It thus furnishes us with a key to the meaning of the words “lands reserved for the Indians,” an expression which appears to have originated in this proclamation, and it entitles us, whenever we find the same words used in a statute or public document, without a context indicating that it is used in some restricted sense, to infer that it includes those rights of the Indians in their unsurrendered lands which it was one of the principal purposes of the proclamation to assure to them. If the effect of this proclamation as applicable to the present case stopped here it would, as it seems to me, be conclusive, for being a legislative act having the force of a statute it has never, in my opinion, been repealed, but has, so far as it regulates the rights of the Indians in their unsurrendered lands, remained in force to the present day. It was, therefore, in force at the date of the passage of the British North America Act, and, if I am correct in this, I am warranted in saying, that, in the face of its express provisions that Indian lands not surrendered or ceded to the crown shall be considered “lands

(1) 1 Cowper 204.

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reserved to the Indians," it is impossible to reject the equivalent interpretation that lands reserved for the Indians mean lands not ceded by the Indians, which is all the appellants contend for. But this proclamation has, as it appears to me, an application far beyond that already mentioned. It not only gives us a clue to the meaning of the term "lands reserved for or to the Indians," but it applies directly and in terms to the present lands. By the first clause of the extract from the proclamation which I have read the King declares it to be his will and pleasure to reserve under his sovereignty protection and dominion, for the use of the said Indians, all land and territory not included (1) within the limits of "our said three Governments," (2) or within the limits of the territory granted to the Hudson's Bay Company, (3) also all lands westward of the sources of the rivers which fall into the Atlantic ocean from the west and north west. Now this territory of which the lands in question form part, and one controversy as to which was determined by the Order-in-Council of August, 1884, was clearly not comprised within the limits of the first Province of Quebec, as those limits were defined by this proclamation of October, 1763, nor was it included within the territory granted to the Hudson's Bay Company, nor did it lie to the west or north-west of the sources of the rivers falling into the Atlantic ocean. Then, what were the lands not included within the three Governments, nor within the Hudson's Bay territory, to which the proclamation refers as being thereby reserved for the Indians? Clearly it has reference to the residue of the territories mentioned at the outset of the proclamation, viz., the "countries and islands ceded and confirmed to us by the said treaty." And if this is correct, and I fail to see how it can be otherwise, this identical tract of territory now in question was, by this proclamation, which in *Campbell v. Hall* was adjudged to have legislative force, reserved to and set apart for the use of the Indians, and this provision of the proclamation, never having been repealed, or in any way derogated from by any subsequent legislation, it remained in full force as a subsisting enactment up to the passing of the Confederation act. In other words, it is a legislative act, applying directly to the lands now in question, assuring to the Indians the right and title to possess and enjoy these lands until they thought fit of their own free will to cede or surrender them to the Crown, and declaring that, until surrender, the lands should be reserved to them as their hunting grounds, which, being still in full force and vigor when the British North America Act was passed, operated at that time as an express legislative appropriation of the land now in dispute for the use and benefit of the Indians by the designation of "lands reserved to the Indians." Therefore the effect of the 24th sub-section of section 91 of the British North America Act upon these lands, as lands "reserved to the Indians" by the proclamation, must be precisely the same as if, by an act of Parliament passed the day before the British North America Act, it had been declared that these same lands, designated by some appropriate description, should be "reserved to the Indians," in which case it could hardly be pretended that they were not lands "reserved for the Indians" within sub section 24 of section 91, but public lands belonging to the Province under sections 109 and 117 and subject to the exclusive legislature of the Province under sub-section 5 of section 92.

I now proceed to consider the objections which have been made on behalf of the respondent to the arguments based on the Proclamation of 1763. First, it is said that the proclamation was wholly repealed by the Quebec Act passed in 1774 (1.) To this proposition I cannot assent. The proclamation had made provision for the civil government of the Province of Quebec, which was created by it, and it had defined the boundaries of that Province; and it was these provisions, and

(1) 14 G. 3, c. 83.

these only, which were repealed, altered, or in any way affected by the Act of 1774. The repealing section, which is the fourth, is as follows:

“ And whereas the provisions made by the said proclamation in respect of the civil government of the said Province of Quebec and the powers and authority given to the Governor and other civil officers of the said Province, by the grants and commissions issued in consequence thereof, have been found by experience to be inapplicable to the state and circumstances of the said Province, the inhabitants whereof amounted at the conquest to above 65,000 persons professing the religion of the Church of Rome and enjoying an established form of constitution and system of laws by which their persons and property had been protected, governed and ordered for a long series of years, from the first establishment of the said Province of Canada. Be it therefore further enacted : That the said proclamation, so far as the same relates to the said Province of Quebec and the commission under the authority whereof the Government of the said Province is at present administered, and all and every the ordinance and ordinances made by the Governor and Council of Quebec for the time being relative to the civil government and administration of justice in the said Province, and all commissions to judges and other officers thereof, be and the same are hereby revoked, annulled and made void from and after the 1st day of May, 1775.”

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From the wording of this section, as well that portion of it which consists of preamble as the enacting clause itself, it is plain that the intention was only to revoke so much of the proclamation as had relation to the civil government, the powers given to the governor, and other civil officers, and to the administration of justice in the Province. By the proclamation the law of England had been introduced into the new Province erected by the King out of the territory ceded by France. This had proved a cause of great dissatisfaction to the French-Canadian population, and had, as the fourth section recites, “ been founded upon experience to be inapplicable to the state and circumstances of the Province.” One principal object of the Act was to remedy this grievance by providing (as it did) that in controversies as to property and civil rights the laws of Canada should be the rule of decision. The proclamation had also provided for the calling of legislative assemblies; such assemblies being considered unsuited to the state of the Province, this provision was also superseded by enacting that the legislative power should be vested in a council composed of members appointed by the Crown.

Further, the Act greatly enlarged the boundaries of the Province, extending them westward to the Mississippi (as I may now venture to say) and southward to the junction of the Ohio and Mississippi. It was this last provision which principally attracted attention to the measure in England, and led to great debates in Parliament, and particularly to the vigorous opposition of Mr. Burke, then the agent of the Province of New York (1). This extension of the limits of the Province was, as is well known, induced by considerations of policy connected with the discontent then prevailing in the adjoining English Provinces, whose people greatly objected to the Act and considered themselves much aggrieved by its passage.

It is nowhere suggested that anything connected with the questions of Indians or Indian rights led to this enactment. None of the changes in the terms of the proclamation which were introduced by the Act have the most remote bearing on Indian land rights or Indian affairs. Neither the establishment of French instead of English law, nor the substitution of a council for an assembly, nor the enlargement of the Provincial boundaries, can by implication have any such effect, and the Act does not contain a word expressly referring to the Indians. Further, the third

(1) See printed papers in arbitration case 371, 373, and Ontario appendix to same 137.

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section of the Act contains an express saving of titles to land, in words sufficiently comprehensive to include the Indian title recognized by the proclamation. Its words are:—

“Nothing in this Act contained shall extend, or be construed to extend, to make void, or to vary, or alter, any right, title or possession derived under any grant, conveyance or otherwise howsoever, of or to any lands within the said Province or the Provinces thereto adjoining; but that the same shall remain and be in force and have effect as if this Act had never been made.”

The words “right,” “title” and “possession,” are all applicable to the rights which the Crown had conceded to the Indians by the proclamation, and, without absolutely disregarding this 3rd section, it would be impossible to hold that these vested rights of property or possession had all been abolished and swept away by the statute. I must therefore hold, that the Quebec Act had no more effect in revoking the five concluding paragraphs of the proclamation of 1763 which relate to the Indians and their rights to possess and enjoy their lands until they voluntarily surrendered or ceded them to the Crown, than it had in repealing it as a royal ordinance for the government of the Floridas and Granada. 10

Then it is said, that the proclamation was, as regards the Indians, merely a temporary measure, and that its character is as such is evidenced by the introductory words to the clauses now material: “and we do further declare it to be our Royal will and pleasure for the present.” There is no force in this point unless it can be shown that the proclamation was revoked in a regular and constitutional manner. A statute which makes provision “for the present,” without any express limit in point of time, or other indication by which its duration can be ascertained, remains in force until it is repealed. As I have already said, we are bound to regard this proclamation as having all the force of a statute, and as such it must be subject to the established rules of statutory construction. No Act of Parliament, Order in Council, or Colonial statute or ordinance can be produced repealing, or assuming to repeal, so much of its terms as are applicable to the present question. We are therefore bound to conclude that, to the extent just indicated, it remained in full force and operation and had all the effect of an Act of Parliament up to the passing of the British North America Act in 1867.

That the proclamation was not considered by the government and its officers to have been superseded by the Quebec Act, or otherwise, is shown by the strict observance of its terms in all dealings with the Indians respecting their lands. The Indians themselves have been allowed to consider it as still of binding force, and to look upon it as the charter of their rights. In the report of the Indian Commissioners appointed by the Government of Canada, dated the 22nd January, 1844, and therefore made whilst the Indians were still under the protection of the Imperial Government, it is said:

“The subsequent proclamation of His Majesty George Third, issued in 1763, furnished them with a fresh guarantee for the possession of their hunting grounds and the protection of the Crown. This document the Indians look upon as their charter. They have preserved a copy of it to the present time, and have referred to it on several occasions in their representations to the Government.

“Since 1763 the Government, adhering to the royal proclamation of that year, have not considered themselves entitled to dispossess the Indians of their lands without entering into an agreement with them and rendering them some compensation. For a considerable time after the conquest of Canada the whole of the western part of the Upper Province, with the exception of a few military posts on the frontier, and a great extent of the eastern part, was in their occupation. As the settlement of the country advanced and the land was required for new occupants, or the predatory 40

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“and revengeful habits of the Indians rendered their removal desirable, the British Government made successive agreements with them for the surrender of portions of their lands.”

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It is not suggested that between 1844 and the passage of the British North America Act any thing occurred to detract from the Indian rights. This constant usage for upwards of a century by itself raises a strong presumption in favor of the construction of the Quebec Act which I maintain, namely, that it had not the repealing effect contended for by the respondent. Further, in the case of *Johnson v. McIntosh* (1), decided in 1823, the Supreme Court of the United States had to deal directly with this identical point of the binding effect as a legislative ordinance of the proclamation of 1763, and with its operation at a date subsequent to the Act of 1774 upon Indian Lands  
10 included within the boundaries of the second Province of Quebec created by that Act. The lands there in question were within the territory which by the Treaty of Versailles (1783), settling the boundaries between Canada and the United States, became part of the United States and was known as the Territory of Illinois, and these lands had been purchased from the Indians in 1775 and 1778, in contravention of the terms of the proclamation. It was objected that the title so acquired was thereby rendered void. Chief Justice Marshall, in giving the judgment of the Court, says :

“The proclamation issued by the King of Great Britain in 1763 has been considered, and we think with reason, as constituting an additional objection to the title of the plaintiff.”

The Chief Justice then proceeds to consider the constitutional validity of the proclamation,  
20 which he recognises to have been well established by *Campbell v. Hall*, and upon that, as well as upon other grounds, he gives judgment against the title. Now, if the Quebec Act, which, as it was a statute preceding in date the Declaration of Independence (1776), would have been considered in this respect binding by the American Courts, had repealed the proclamation, the Supreme Court would have been wrong in its conclusion that it applied to the case before them. It is out of the question to suppose that the Judges of the Supreme Court of the United States, several of whom were contemporaries of the Revolution and actors in it (notably the Chief Justice himself), were not perfectly familiar with a statute so notorious throughout the old colonies as the Quebec Act, which had been one of the pretended grievances set forth in the Declaration of Independence by way of justifying the revolution. We must therefore conclude that it was considered by the  
30 Court not to repeal or in any way affect the provisions of the proclamation relating to the Indians. Lastly, the learned Chancellor himself, in his judgment in this case, conceded that “the proclamation has frequently been referred to by the Indians themselves as the charter of their rights;” and, speaking of the clause “relating to the manner of dealing with them in respect of lands they occupy at large or as a reserve,” he says it “has always been scrupulously observed in such transactions,” but still he adds that it had been repealed by the Quebec Act and had become obsolete. That so much of it as is now material was not repealed by the Quebec Act, according to the proper construction of that statute, I have, I think, sufficiently established: and that it could otherwise have become legally obsolete was impossible, since, if *Campbell v. Hall* is to be considered sound law, it was a legislative ordinance of equivalent force with a statute, and consequently could only have  
40 been repealed by an Act emanating from some competent legislative authority: but no such Act can be referred to. That the proclamation ever in fact became practically obsolete from desuetude, is so far from having been the case that it is admitted to have remained since the Act of 1774 “operative as a declaration of sound principles which then and thereafter guided the executive in disposing of Indian claims.”

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STRONG, J.

*Bahr*

But even if I am wrong in my view, that the statute of 1774 had not the effect contended for, but that the proclamation was in point of law wholly revoked by it, there still remains the argument that its terms furnish a key to the meaning of the words used in the 24th sub-section of section 91 of the British North America Act, upon the construction of which the decision of this appeal must wholly depend. Thus using the text of the proclamation as a glossary, we find that in 1763 lands reserved for the Indians meant lands not ceded or surrendered by them to the Crown. Then, as we find it generally admitted, that this proclamation, even if superseded, has down to the present time been regarded by ~~the Indians~~ as the charter of their rights, that it has remained operative as a declaration of sound principles, and that its terms have always been scrupulously observed in dealings with the Indians in respect of their lands (all of which are very nearly the learned 10 Chancellor's own words), the result is inevitable, that the expression "lands reserved for the Indians" employed in the proclamation retained its original significance as an equivalent for lands not ceded to or purchased by the Crown down to 1867 when the British North America Act was passed, and that, consequently, when the same words were made use of in the 91st section of that Act, it was with the intention that they should receive the same definition and well understood meaning as had always been thus attached to them.

Some stress has been laid on the legislation of the Dominion since Confederation, as indicating that the Parliament of Canada has adopted the construction of the British North America Act, contended for by the respondent. Even if this had been so, I am not aware of any principle upon which what may be considered an erroneous view adopted by Parliament of this question of the 20 meaning of sub-section 24 of section 91 could bind this Court to adopt the same construction in a judicial decision, although, if there was room for doubt and there had in fact been any legislation, it would, as embodying the opinion of Parliament as to the proper interpretation of the Imperial Act, be entitled to some, though not conclusive, weight and influence. It does not appear, however, that any such construction as is contended for by the respondent has, in fact, been placed by Parliament on the 24th sub-section of section 91. Three Acts relating to the Indians and Indian lands have been passed by the Parliament of Canada since Confederation, in 1868, 1876 and 1880 respectively. In the first of these statutes, (31 Vic. ch. 42), an Act organizing the Department of the Secretary of State, by section 6, all lands reserved for Indians, or for any tribe, band or body of Indians, are declared "to be deemed reserved for the same purposes as before the Act," and by 30 section 8 it was provided, that lands reserved for the use of the Indians should only be ceded to the Crown by a formal treaty of surrender made in the manner prescribed by the Act, and that until surrender no sale or lease of Indian lands should be valid. In the subsequent Acts of 1876 and 1880 (1), the same provisions were repeated except that the word "reserves" was used instead of "lands reserved for the Indians," and by an interpretation clause it was declared that the term "reserve" meant "any tract of land set apart by treaty or otherwise for the use or benefit, or granted to a particular band of Indians, of which the legal title is in the Crown but which is unsurrendered." With regard to these Acts it is to be observed that in the first Act the identical expression calling for interpretation, "lands reserved for the Indians," is used. In the second and third the word "reserves" has been substituted, and what I understand to be contended is, that 40 this word "reserves," with the meaning affixed to it by the interpretation clause, has a narrower signification than one which includes all unsurrendered lands. I am not prepared so to understand the word "reserves" as defined by the interpretation clause, for I cannot admit that it has a less comprehensive signification than the words "lands reserved for the Indians" in the Act of 1868,

(1) 39 Vic. ch. 18, 43 Vic. ch. 28.

and these latter words must receive the same construction as is to be attributed to precisely the same words as used in the British North America Act. But, conceding that the word "reserves" did apply to Indian lands of a different class from those referred to as "lands reserved for the Indians," what possible effect could that have on the present question, which is confined to the construction of an Imperial statute—the Confederation Act? That Parliament has no power to divest the Dominion in favor of the Provinces of a legislative power conferred on it by the British North America Act is, I think, clear. But, assuming that it had, it has neither assumed to put forth any authoritative declaration of the proper construction of the clause in question in the British North America Act, or to relinquish in favor of the Provinces any right of property or power of legislation vested in the Dominion by its provisions. At most, if my construction of the word "reserves" is erroneous, it could be said, that, having the power to legislate for all lands occupied by and not surrendered by Indians, Parliament had only seen fit to exercise this power in relation to the class of lands comprised in the description of "reserves" as defined by the interpretation clause, but on no principle that I ever heard or read of could this be said either to imply an authoritative declaration of the construction of the British North America Act binding on the Courts, or a relinquishment in favor of the Provinces of the exclusive right of legislation regarding lands reserved for the Indians, or a cession to the Provinces of the rights of the Crown in such lands. These statutes have, therefore, no application to the question the Court is called upon to decide on this appeal.

20 On the whole my conclusion must be, that the lands included in the description of "lands reserved for the Indians," in sub-section 24 of section 91, were not vested in the Provinces as public lands or property by sections 109 and 117, and that all lands occupied by Indians and not ceded by them to the Crown are comprehended in the exclusive powers of legislation conferred on the Dominion, and that the ultimate property in such lands, subject to the Indian title, is vested in the Crown for the use of the Dominion; that consequently the North-West Angle Treaty No. 3 conferred an absolute title to the lands in question in this cause on Her Majesty in right of the Dominion of Canada; and that this appeal must be allowed and the information dismissed in the Court below with costs in all the Courts.

FOURNIER J., concurred with RITCHIE, C. J.

30 HENRY, J.

I have not considered it necessary, in the view I entertain of this case, to prepare a written judgment, but may say, in starting, that I entirely approve of the judgment of the learned Chancellor, which, I think, embraces all the important points in the case.

I think that after the conquest of this country all wild lands, including those held by nomadic tribes of Indians, were the property of the crown and were transferred to those who applied for them only by the crown. It was never asserted that any title to them could be given by the Indians. In 1783, after the conquest, the crown issued a proclamation by which all persons were prohibited from trading with the Indians in regard to purchase of lands, and it was declared that all such transactions should be void. The Indians were not permitted to transfer any of their rights as to the land to any individual, and no such transfers were valid unless made by the crown. These were restrictions on the rights of the Indians following the conquest of the country, and I refer to them with reference to the question whether or not the Indians could convey a title in fee simple of the lands in question to the Dominion Government, as contended for, or to any one else.

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If the Province of Ontario owned these lands, subject to such rights, then arises another question, whether the purchase from the Indians by the treaty spoken of operated to give a title in them to the Dominion Government, or as an extinguishment of the rights of the Indians in favor of the Province of Ontario.

In the first place, I suppose nobody will assert that if a private individual entered upon any of the lands at any time the Indians could legally object, as the law does not permit them by any legal means to recover possession of the land, or recover damages for any trespass committed thereon. I mention this to show that the Indians were never regarded as having a title.

In 1873 the crown, in its wisdom, decided to hold these lands as a hunting ground for the Indians. In the first settlement of the country to assert sovereignty and to put that assertion into operation would have caused war, and it was necessary to treat with the Indians from time to time in order to facilitate settlement. They were, therefore, dealt with in such a manner that they were not asked to give up their lands without some compensation. The treaty in question was made when the Dominion Government claimed that the lands in question were not a part of Ontario, and many years before the Privy Council decided that they were. The Dominion Government, asserting that it was a portion of the territory of Manitoba over which they had jurisdiction (for, by arrangement, all the crown lands and timber in Manitoba were reserved to the Dominion), entered into negotiations with the Indians for the extinguishment of their title. That being done we have to inquire what was the operation, in law, of that extinguishment. 10

Now, suppose an individual had purchased from the Indians a part of this territory the crown would have the right to ignore the transfer. The Indians might have no further claim, but the extinguishment of the Indian rights would enure to the benefit of the crown. If the Indian claim had been extinguished by private persons it would, without doubt, have operated in favor of the crown. Apply that principle to this case and we will see that the extinguishment, if Ontario was the owner at the time, would in the same way operate in favor of the Province of Ontario. 20

This document signed by certain Indians is not evidence of a purchase. The conveyance itself shows that the title was in the crown, and the treaty is simply a cession of all the Indian rights, titles, and privileges whatever they were, and the consideration is stated to have emanated from Her Majesty's bounty, &c. The consideration was, therefore, on the face of the treaty, an act of bounty on the part of Her Majesty. It is not an acknowledgment of any title in fee simple in the Indians. The Indians were not in possession of any particular portion of the land; for years and years they might never be on certain portions of it; they could not be said to have yielded possession, for that they cannot be assumed to have had, but virtually only relinquished their claim to the lands as hunting grounds. 30

A question of importance arises under the Confederation Act. By one of the sections of that act all lands reserved for the Indians were placed under the control of the Dominion Parliament. We must then inquire what was reserved for them. There are many ways of reserving real estate. It may be reserved by will, by deed, by proclamation, and so on, but it requires an act of some description. As regards the wild lands inhabited by nomadic tribes of Indians, by what process is it shown that they were ever reserved by anybody? They are in the same state as they were at the conquest. We find that several large tracts of land were at different times specially reserved for the use of Indian tribes, and have been held in trust for them by the Government. When the Indians did not require them they were sold and the money held for their use. There was another class. In many of the treaties by which the Indians gave up their right to portions of the country certain portions of the territory they were about to transfer were reserved for them 40



in the treaties themselves. When, therefore, the Imperial Act was passed there was sufficient material for the operation of the clauses relating to lands "reserved for the Indians."

But, I would ask, how can it be said that the lands in question in this suit were ever reserved? They were always the property of the crown. The Indians had the right to use them for hunting purposes, but not as property the title of which was in them. Thus, then, we have these words in the statute explained by the knowledge we have of certain lands being expressly reserved for the Indians.

Reservation cannot be effected by implication; there must be some act.

The words in the Imperial statute refer only to lands expressly reserved, and the other 10 wild lands in the country are not affected by the provision referred to.

These very lands belonged to the Province before confederation, but the right to them was contested by the Dominion Government. A mere dispute does not alter the question of title. And when the matter came before the Privy Council it was decided that the lands were part of the Province of Ontario. The result of that decision reverted back to the time of the passing of the Imperial Act. It was just as much the property of the Province all along as it would have been had no dispute arisen.

We have the Imperial Act which settles the whole question. All the lands, except those reserved in the Act itself, shall belong to the several Provinces. How, then, could the Dominion get a title to these lands? If the transfer from the Indians had ever taken place no such question 20 could or would have arisen, and the right of Ontario to the lands now contested would no doubt have been admitted. The mere transfer by the Indians to the Dominion Government of their rights cannot affect the title of Ontario.

I think, therefore, the right to grant licenses to cut timber on these lands was in no way given to the Dominion Government. If the lands are situate in Ontario they belong to Ontario, under the British North America Act. So that all we have to enquire is: Was the land a part of Ontario at the time of confederation? If it was, it is in the same position as any other wild lands in Quebec, Nova Scotia, or New Brunswick. The Dominion does not claim the lands in those other Provinces, and the mere surrender by the Indians could not give a title to those lands in Ontario.

As I stated before, I fully concur in the judgment of the learned Chancellor. If the lands in 30 question belong to Ontario, and the Indian claims had not been extinguished, I maintain that it would be highly unconstitutional for the Dominion to interfere with them, as suggested, by the passage of an act to prohibit the Indians from dealing with the Government of Ontario therefor.

For the reasons given, I am of opinion that the appeal herein should be dismissed with costs.

TASCHEREAU, J.

I am also of opinion that the appeal should be dismissed.

The question involved has been so thoroughly reviewed by the learned Chancellor in the court of first instance, and by the learned judges of the Ontario Court of Appeal, that I feel unable to 40 add to their observations almost anything but useless repetition.

There is no doubt of the correctness of the proposition laid down by the Supreme Court of Louisiana, in *Breaux v. Johns* (1), citing *Fletcher v. Peck*, and *Johnson v. McIntosh*, "that on the 40 discovery of the American continent the principle was asserted or acknowledged by all European nations, that discovery followed by actual possession gave title to the soil to the Government by

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whose subjects, or by whose authority, it was made, not only against other European Governments but against the natives themselves. While the different nations of Europe respected the rights (I would say the claims) of the natives as occupants, they all asserted the ultimate dominion and title to the soil to be in themselves." I refer also to *Brooks v. Norris* (1), *Martin v. Johnston* (2), and *De Armas v. New Orleans* (3), in the same court.

That such was the case with the French Government in Canada, during its occupancy thereof, is an incontrovertible fact. The King was vested with the ownership of all the ungranted lands in the colony as part of the crown domain, and a royal grant conveyed the full estate and entitled the grantee to possession. The contention, that the royal grants and charters merely asserted a title in the grantees against Europeans or white men, but that they were nothing but blank papers so far as the rights of the natives were concerned, was certainly not then thought of, either in France or in Canada. Neither in the commission or letters patent to the Marquis de la Roche in 1578 and 1598, nor in the charter to the Cent Associés in 1627, nor in the retrocession of the same in 1663, nor in the charter to the West Indies Company in 1664, nor in the retrocession of the same in 1674, by which proprietary Government in Canada came to an end, nor in the six hundred concessions of seigniories extending from the Atlantic to Lake Superior, made by these companies, or by the Kings themselves, nor in any grant of land whatever during the 225 years of the French domination, can be found even an allusion to, or a mention of, the Indian title.

On the contrary, in express terms, de la Roche was authorized to take possession of, and hold as his own property, all lands whatsoever that he might conquer from any one but the allies and confederates of the crown, and, likewise, the charter of the West Indies Company granted them the full ownership of all lands whatsoever, in Canada, which they would conquer, or from which they would drive away the Indians by force of arms. Such was the spirit of all the royal grants of the period. The King granted lands, seigniories, territories, with the understanding that if any of these lands, seigniories, or territories proved to be occupied by aborigines, on the grantees rested the onus to get rid of them, either by chasing them away by force, or by a more conciliatory policy, as they would think proper. In many instances, no doubt, the grantees, or the King himself, deemed it cheaper or wiser to buy them than to fight them, but that was never construed as a recognition of their right to any legal title whatsoever. The fee and the legal possession were in the King or his grantees.

Now when by the treaty of 1763, France ceded to Great Britain all her rights of sovereignty, property and possession over Canada, and its islands, lands, places and coasts, including, as admitted at the argument, the lands now in controversy, it is unquestionable that the full title to the territory ceded became vested in the new sovereign, and that he thereafter owned it in allodium as part of the crown domain, in as full and ample a manner as the King of France had previously owned it. That it should be otherwise for the lands now in dispute, I cannot see on what principle. To exclude from the full operation of the cession by France all the lands then occupied by the Indians, would be to declare that not an inch of land thereby passed to the King of England, as, at that time, the whole of the unpatented lands of Canada were in their possession in as full and ample a manner as the 57,000 square miles of the territory in dispute can be said to be in possession of the 26,000 Indians who roam over it.

Now, when did the Sovereign of Great Britain ever divest himself of the ownership of these lands to vest it in the Indians? When did the title pass from the Sovereign to the Indians? Not by any letters patent. The appellants do not contend that any exist, but they contend that such was

(1) 6 Rob. La. 175,

(2) 5 Mart. La. (O.S.) 655.

(3) 3 La. (O.S.) 86.

the effect of the royal proclamation of the 7th October, 1763. They fail, however, to establish that proposition. I cannot find in that document a single word that can be construed as a grant or to have the operation of a grant. The general provisions of this proclamation, it must not be lost sight of, did not apply to the territory now in controversy, for the Province of Quebec, thereby constituted, was bounded west at Lake Nipissing. But it is argued by the appellants that the following clauses support their contention:

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“ And whereas it is just and reasonable and essential to our interests and the security of our colonies that the several nations or tribes of Indians with whom we are connected and who live under our protection, should not be molested or disturbed in the possession of such parts of our Dominion and Territories, as not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds, we do therefore, with the advice of our Privy Council, declare it to be our royal will and pleasure that no governor or commander-in-chief in any of our colonies of Quebec, East Florida or West Florida, do presume, upon any pretence whatever, to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments as described in their commissions; as also that no governor or commander-in-chief in any of our other colonies or plantations in America do presume, for the present, and until our further pleasure be known, to grant warrants of survey or pass patents for any lands beyond the head or sources of any of the rivers which fall into the Atlantic ocean from the west and north-west, or upon any lands whatever which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any of them.

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

Now, as I read these clauses, they, it seems to me, far from supporting the appellants' case, are entirely adverse to them. First, rather superfluously and unnecessarily, the governors are forbidden to issue any patents for lands beyond the bounds of their respective governments. This applies to crown lands of course. Then the governors are prohibited, for the present, from granting patents for any lands in the territory of the North-West, or for any lands whatever which, not having been ceded to, or purchased by the crown, are reserved to the Indians or any of them. Now, all this clause necessarily refers to, is crown lands not previously conceded or granted; the Governors never have been presumed to even grant patents for lands that had previously passed from the crown. It is to crown lands, to lands owned by the crown but occupied by the Indians, that the proclamation refers. The words “for the present,” in this and the next clause, are equivalent to a reservation by the King of his right, thereafter or at any time, to grant these lands when he would think it proper to do so. He reserves for the present for the use of the Indians all the lands in Canada outside of the limits of the Province of Quebec as then constituted. Is that, in law, granting to these Indians a full title to the soil, a title to these lands? Did the sovereign thereby divest himself of the ownership of this territory? I cannot adopt that conclusion, nor can I see anything in that proclamation that gives to the Indians forever the right in law to the possession of any lands as against the crown. Their occupancy under that document

has been one by sufferance only. Their possession has been, in law, the possession of the crown. At any time before confederation the crown could have granted these lands, or any of them, by letters patent, and the grant would have transferred to the grantee the *plenum et utile dominium*, with the right to maintain trespass, without entry, against the Indians. A grant of land by the crown is tantamount to conveyance with livery of seisin (1). This proclamation of 1763 has not, consequently, in my opinion, created a legal Indian title.

From this result of my interpretation of it it is unnecessary, for my determination of this case, to consider how far the sections of the proclamation to which I have alluded, have been affected by the Act of 1774 (2). I may, nevertheless, remark, that any right the Indians might have previously had could not, it seems, have been affected by this Act, as by its 3rd section it is specially provided and enacted that "nothing in this Act contained shall extend, or be construed to extend, to make void, or to vary, or alter, any right, title, or possession derived under any grant, conveyance, or otherwise howsoever, of or to any lands within the said Province, or the Provinces thereto adjoining."

It was further argued for the appellants that the principles which have always guided the crown since the cession in its dealing with the Indians amount to a recognition of their title to a beneficiary interest in the soil. There is, in my opinion, no foundation for this contention. For obvious political reasons, and motives of humanity and benevolence, it has, no doubt, been the general policy of the crown, as it had been at the times of the French authorities, to respect the claims of the Indians. But this, though it unquestionably gives them a title to the favorable consideration of the Government, does not give them any title in law, any title that a court of justice can recognize as against the crown. If the numerous quotations on the subject furnished to us by the appellants from philosophers, publicists, economists and historians, and from official reports and despatches, must be interpreted as recognizing a legal Indian title against the crown, all I can say of these opinions is, that a careful consideration of the question has led me to a different conclusion.

The necessary deduction from such a doctrine would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some of the writers cited by the appellants, influenced by sentimental and philanthropic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.

The appellants' contentions, I may here remark, would appear to be supported by some extracts from the judgment of the Supreme Court of New Zealand, in the case of the *Queen v. Symonds* (June 1847), which are to be found in the Imperial Parliamentary papers, 1860, vol. XLVII., p. 47, (Colonies New Zealand). But the nature of the Indian title in New Zealand is a peculiar one. Art. 2 of a treaty with the Indians, known as the treaty of Waitangi guaranteed to them the full exclusive possession of all the lands occupied by them so long as they would desire to retain these lands, and by the interpretation put upon that treaty by the Home Government, it was considered that the Indians had a right of proprietorship over their lands.

On the interpretation of the words "lands reserved for the Indians," in section 91, par. 24 of

(1) *Doe Fitzgerald v. Finn*, 1 U. C. Q. B. 70; *Greenlaw v. Fraser*, 24 U. C. C. P. 230; *Rex v. Lelievre*, 1 Rev. de Jurisp. 506.

(2) 14 Geo. 3 ch. 83 sec. 4.

the British North America Act, I adopt the reasoning of the Chancellor and of Chief Justice Hagarty. Even if such lands be specially reserved for the Indians, the title is in the Crown (1).

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The Territory in dispute is not "reserved for the Indians" in the sense of these words as contained in that section. And even if the Indians had any interest in it, that would not affect the Province of Ontario's claim to it, as then the Province would, under the very words of section 109 of the British North America Act, hold it subject to that interest.

TASCHEREAU,  
J.

As regards the question considered by Mr. Justice Burton, whether or not the Lieutenant-Governor in each Province is, as Her Majesty's representative under the British North America Act, the only party who could extinguish the so called Indian title, if any there be, I refrain from expressing any opinion, for the reason that the point does not come up for our determination, and consequently that anything I might say about it would be entirely *obiter*.

Were these lands at confederation crown lands, or the private property of the Indians, is the abstract question to be determined. I am of opinion that they were crown lands, and consequently that under sections 109 and 117 of the British North America Act they belong, as before confederation, to the Province of Ontario and form part of its public domain by title paramount.

GWYNNE, J.

In 1763 the Board of Trade made a report to His then Majesty King George the 3rd, wherein they suggested a plan for the future management of Indian affairs in His Majesty's possessions in North America.

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The plan suggested in this report was approved by His Majesty, and to give effect to it the proclamation of the 7th October, 1763, was issued, wherein is contained a declaration of His Majesty's Royal intentions towards the tribes of Indians in His Majesty's North American possessions. In that proclamation are contained the following passages :

" And whereas it is Just and Reasonable and Essential to Our Interests and the Security of Our Colonies that the several Nations or Tribes of Indians with whom we are connected and who live under Our protection *should not be molested or disturbed in the possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us are reserved to them or any of them as their hunting grounds.* We do therefore with the Advice of Our Privy Council declare it to be Our Royal Will and Pleasure that no Governor or Commander-in-Chief in any of Our Colonies of Quebec, East Florida or West Florida, do presume upon any pretence whatsoever to grants warrants of Survey, or pass any Patents for Lands beyond the bounds of their respective Governments as described in their Commissions; as also that no Governor or Commander-in-Chief of any of Our other Colonies or Plantations in America do presume for the present, and until Our further pleasure be known, to grant warrants of Survey, or pass Patents for any Lands beyond the head or sources of any of the Rivers which fall into the Atlantic Ocean from the West and North-West, or upon any lands whatesoever, which not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians or any of them.

" And whereas great frauds and abuses have been committed in the purchasing lands of the Indians to the great prejudice of our interests, and to the great dissatisfaction of the said Indians,

(1) *Boulton v. Jeffreys*, 1 E. & A. (Ont.) 111; *Jackson v. Wilkes*, 4 Q. B. (O. S.) 142; *Bown v. West*, 1 E. & A. 117; *Totten v. Watson*, 15 U. C. Q. B. 292; *Bastien v. Hoffman*, 17 L. C. R. 238; *The Commissioner of Indian Lands v. Payzant*, 3 L. C. J. 313.

“in order therefore to prevent such irregularities for the future, and to the end that the Indians  
 “may be convinced of our Justice and determined resolutions to remove all reasonable cause of  
 “discontent, we do, with the advice of our Privy Council, strictly enjoin and require, that no  
 “private person do presume to make any purchase from the said Indians of any lands reserved to  
 “the said Indians within those parts of our colonies where we have thought proper to allow  
 “settlement; but if at any time any of the said Indians should be inclined to dispose of the said  
 “lands, the same shall be purchased only for us, in our name, in some public meeting or assembly  
 “of the said Indians to be held for that purpose by the Governor or Commander-in-Chief of our  
 “colony respectively within which they shall lie; and in case they shall lie within the limits of  
 “any proprietaries conformable to such directions and instructions as we or they think proper to  
 “give for that purpose.” 10

It has been argued that the above passages extracted from the proclamation, had no effect within the limits of the then Province of Quebec, although that Province is specially mentioned in the proclamation. This argument was founded upon the contention, that the Indians were never recognized by the French Kings as having any estate, right, or title in the lands situate within the limits of the French possessions in North America, and that the English title to those lands being derived from the treaty of Paris of 1763, the title of the Crown of England to the lands ceded by the French King by that treaty is the same as the title which the Kings of France formerly had.

It may be admitted that the Kings of France recognised no title in the Indians in any part of 20 the territory in the possession of the Kings of France, whose mode of dealing with the Indians was to make, *ex gratia*, crown grants of land for their conversion, instruction, and subsistence, but the fact that the Kings of France so dealt with the Indians presented no obstacle to the Sovereign of Great Britain, upon acquiring the French title, placing the Indians upon a more just and equitable footing, and recognising their having a certain title, estate and interest in the lands so acquired by the Crown of Great Britain; and in point of fact this proclamation, ever since its issue, has been faithfully observed in its integrity, as well within the limits of the then Province of Quebec, as in all other the British possessions in North America. At the time of the cession by the French the greater part of that portion of French Canada which now constitutes the Province of Quebec had been already granted by the French Kings. To lands so granted the proclamation, of course, 30 had no application, but outside of those granted lands, if there were any Indians claiming title their rights, as declared in the proclamation, were respected.

By the Haldimand papers in the Canadian Archives it appears that in December, 1766, one Philibot, having an order of his Majesty in Council, dated the 18th June, 1766, directed to the Governor and Commander-in-Chief of the Province of Quebec, for a grant of 20,000 acres in that Province, petitioned the Governor, praying that the grant might be assigned to him, on the Restigouche at a place indicated by him, and the Committee of Council at Quebec having taken the matter of the petition into consideration reported that the lands so prayed to be granted to the petitioner “were or were claimed to be the property of the Indians, “and as such, by His Majesty’s express command as set forth in his proclamation of 40 1763, not within their power to grant. It is with that part of French Canada which now constitutes the Province of Ontario that we are at present concerned, and so inviolably has the proclamation been observed therein that it, together with the Royal instructions given to the Governors as to its strict enforcement, may not inaptly be termed the Indian Bill of Rights. By an order of His Majesty and Council, dated at St. James’, May 4th, 1768, transmitted to the Honorable Thomas

Gage, Major-General and Commander-in-Chief of all His Majesty's Forces in North America, he was ordered to

"Put Lieut. George McDougal, late of the 60th Regt., in possession of Hogg Island situate in Detroit River, three miles above the Fort of Detroit *provided that it can be done without umbrage to the Indians*, and upon consideration that the Improvements projected by McDougal be directed to the more easy and effectual supply of His Majesty's Fort and Garrison maintained at Detroit."

The mode adopted on this occasion to extinguish the Indian title was, that General Gage forwarded the order to Capt. Turnbull, commanding at Detroit, with the following instructions as  
10 to the execution of it :—

"As Mr. McDougal's occupying these lands depends on the sufferance of the Indians who have claims thereto, it will be necessary that those Indians should be collected by the friends of Mr. McDougal and publicly signify to you, or rather give a written acknowledgment of, their consenting to the cession of these lands in favor of Mr. McDougal.

"This must be a solemn act, performed in your presence by Indians concerned in the property of these lands, to which they must sign the mark of their tribes, and you will certify the same to be done by you, under my authority and in your presence; their permission at the same time must be had to people the Islands for cultivation, for every necessary particular should be mentioned in the writing for the cession of these lands, and the whole fully and distinctly explained to the  
20 "Indians to prevent future claim or disputes."

In pursuance of the above instructions an indenture *inter partes* was made and executed by and between those chiefs of the Ottawa and Chippewa nations of Indians, of the one part, and George McDougal, of the other part, whereby it was witnessed that the said chiefs, for themselves and by the consent of the whole of the said nations of Indians, for and in consideration of property to the value of £194 10s., thereby acknowledged to have been received, did grant, bargain, sell, alien and confirm unto the said George McDougal, his heirs and assigns for ever, the said island in the Detroit river, about three miles above the fort, that he might settle, cultivate and otherwise employ it to his and his Majesty's advantage, together with the houses, out-houses and appurtenances whatsoever to the said island, messuage or tenement and premises  
30 belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents and services of the said premises and every part thereof, *and all the estate, right, title, claim and demand* whatsoever of them the said Indians of, in and to the said messuage, tenement and premises and every part thereof, to have and to hold the said messuage, and all and singular the said premises above mentioned, and every part and parcel thereof, with the appurtenances, unto the said George McDougal, his heirs and assigns for ever, and the said chiefs did thereby engage themselves, their heirs, *their nations &c.*, forever to warrant and defend the property of the said island unto the said George McDougal, his heirs, executors, administrators and assigns for ever. In 1784 Governor Haldimand purchased from the Mississagas what is known as the Grand River tract and settled thereon the Six Nations Indians who, shortly after the close of  
40 the revolutionary war, removed from their settlements in the State of New York into Canada.

In a letter dated at Quebec, the 26th April, 1784, addressed by Governor Haldimand to Lieut.-Governor Hay, on his departure from Quebec to enter upon his government, is the following paragraph defining his duty in relation to the Indians and their lands :

"The mode of acquiring lands by what is called Deeds of Gift is to be entirely discontinued, for, by the King's instructions, no Private Person, Society, Corporation or Colony is capable of

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“acquiring any property in lands belonging to the Indians, either by purchase, or grant or conveyance from the Indians, excepting only where the lands lie within the limits of any colony the soil of which has been vested in Proprietaries or Corporations by grants from the Crown; in which cases such Proprietaries or Corporations only shall be capable of acquiring such property by purchase or grants from the Indians. It is also necessary to observe to you that, *by the King's instructions*, no purchase of lands belonging to the Indians, whether in the name of or for the use of the Crown, be made, but at some general meeting, at which the Principal Chiefs of each Tribe claiming a property in such lands shall be present.”

In 1781 the form adopted for the surrender of the Island of Michilimakinak was a deed poll whereby four chiefs of the Chippawa nation, on behalf of themselves and all others of their nation the Chippewas “who have or can lay claim to the said Island,” surrendered and yielded up the said Island into the hands of Lieutenant-Governor Sinclair for the behalf and use of His Majesty George the third, &c., &c., and his heirs for ever, and they did thereby make for themselves and posterity a renunciation of all claims in future to said Island. The deed contains the following clause:

“And we have signed two deeds of this tenor and date in the presence of (naming seven persons), one of which deeds is to remain with the Government of Canada and the other to remain at this post to certify the same, and we promise to preserve in our village a Belt of Wampum of seven feet in length to perpetuate, secure, and be a lasting memorial of the said transaction to our nation forever hereafter, and that no defect in this deed for want of law forms, or any other, shall invalidate the same.”

This deed is signed by the Chiefs with their totems, according to Indian custom, and by the Lieutenant-Governor and a Captain, Lieutenant and Ensign of the 8th regiment. The last clause in the deed seems to have been inserted with the design of shewing on the face of the deed that the transaction had been authorised in a council of the nation. The obtaining such authority in the first place was the invariable custom, and then a deed was executed for the purpose of evidencing the transaction which the nation had authorised in council.

By the deed of surrender of about two million (2,000,000) acres along the shore of Lake Erie, executed on the 19th May, 1790, it appears to have been executed in a full Council of the Ottawa, Chippawa, Pottawatamie and Huron Nations, which was attended by the Commanding Officer at Detroit, with a large staff of his officers as representing the crown, and in their presence as subscribing witnesses the deed is executed in the Indian manner by eight Chiefs of the Ottawa, eight of the Chippewa, six of the Pottawatamie and thirteen of the Huron Nations.

The deed is in the form of a deed-poll, commencing:

“Know all men by these presents that we, the principal Village and War Chiefs of the Ottawa, Chippewa, Pottawatamie and Huron Nations, for and in consideration, &c. Have, by and with the consent of the whole of our said Nations, Given, granted, enfeoffed, alienated and confirmed, and by these presents do give, grant, enfeoff, alien and confirm unto His Majesty George III., King, &c., &c., a certain tract of land (describing it), to have and to hold to the only proper use and behoof of His said Majesty, his Heirs and Successors for ever.”

The deed contained a covenant for quiet enjoyment as follows:—

“And we the said Chiefs for ourselves and the whole of our said Nations, and their Heirs, do covenant, promise and agree to and with his said Majesty (for quiet enjoyment by his Majesty, his heirs and successors).”



And then concludes :

“ And by these presents do make this our Act and deed irrevocable under any pretence what-  
 “ ever, and have put his said Majesty in full possession and seizin by allowing houses to be built  
 “ upon the premises.”

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The deed appears to have been recorded in the office of the clerk of the crown, in the district of Hesse, on the 22nd day of June, 1790.

On the 7th of December, 1792, a deed was executed which purports to be an indenture made between five Chiefs of the Mississaga Indian Nation, of the one part, and our Sovereign Lord George the 3rd, King, &c., &c., of the other part, which recites an indenture, bearing date the 22nd day of May, 1784, made between the ten persons (naming them and describing them as Sachems, War Chiefs and principal Women of the Mississaga Indian Nation), of the one part, and our said Sovereign Lord George the third, King, &c., &c., of the other part, whereby the said Sachems, principal Chiefs and Women, in consideration of £1180 7s. 4d., lawful money of Great Britain, did grant, bargain, sell, alien, release and confirm unto his said Majesty, his Heirs and Successors (certain lands therein particularly described); it then recites that there was found to be a certain error in that description, and that it was necessary and expedient that the boundary lines of the said parcel of land should be accurately laid down and described, the said chiefs, therefore, parties to the said deed of December, 1792, did thereby acknowledge and declare “ That the true and real  
 “ description of the said tract or parcel of land so bargained, sold, aliened and transferred by and to  
 “ the parties aforesaid is all that tract or parcel of land lying and being, &c., (describing it by a  
 “ corrected description), and therefore the said five chiefs (naming them) in consideration of the  
 “ aforesaid sum of £1180 7s. 4d., so paid as therein aforesaid, and of the further sum of five shillings  
 “ to them in hand paid and for the better ratifying and confirming the thereinbefore recited  
 “ indenture, did grant, bargain, sell and confirm unto his Majesty, his heirs and successors, all that  
 “ tract of land (describing it by the corrected description), to have and to hold to His Majesty, his  
 “ Heirs and successors for ever.”

The deed then contains the clause following :

“ And whereas at a conference held by John Collins and William R. Crawford, Esquires, with  
 “ the principal chiefs of the Mississaga nation (Mr. John Rousseau as interpreter) it was unanimously  
 “ agreed that the king shall have a right to make roads through the Mississaga country; that the  
 “ navigation of the said rivers and lakes shall be open and free for his vessels and those of his  
 “ subjects; that the king's subjects should carry on a free trade, unmolested, in and through the  
 “ country, now this indenture doth hereby ratify and confirm the said conference and agreement so  
 “ had between the parties aforesaid, giving and granting to his said Majesty power and right to  
 “ make roads through the said Mississaga country, together with the navigation of the said rivers  
 “ and lakes for his vessels and those of his subjects trading thereon free and unmolested. In witness  
 “ whereof the chiefs, on the part of the Mississaga nation, and His Excellency John Graves Simcoe,  
 “ Lieutenant-Governor of the said Province, &c., on the part of His Brittanic Majesty, have hereunto  
 “ set their hands and seals, &c., &c.”

40 The deed is executed by the four chiefs and the Lieutenant-Governor.

In the interval between the years 1792 and 1836 many instruments similar in character, some in the form of deeds poll by way of grant and surrender, and others in form of deeds of bargain and sale, were from time to time executed by the Indians in the customary Indian manner, whereby divers large tracts of country situate within the Province of Upper Canada were granted and surrendered and sold and transferred to the reigning sovereign for the time being in

pursuance of resolutions passed in solemn councils of the respective nations of Indians occupying and claiming title to the Island so granted and surrendered. One of those deeds, which was executed by the Mississagas of the Bay of Quinté in 1835, when we reflect that the form of those surrenders has been in every case devised by officials acting on behalf of the crown, and not by the Indians themselves, is very instructive as to the light in which the Indian title has always been regarded by the crown. It is as follows :

“ Know all men by these presents that we (here follow the names of five Indians), sachems and chief warriors of the Mississaga tribe of Indians of the Bay of Quinté, in the Province of Upper Canada, *in consideration of the trust and confidence by us reposed in His Most Gracious Majesty King William the Fourth*, and in order that His said Most Gracious Majesty, his Heirs and Successors, may grant and dispose of the lands and tenements hereinafter comprised and described for the benefit of the said Indians, in such manner and form, and at such price or prices, as to His Majesty His Heirs and Successors shall seem best, do remise, release, surrender, quit claim and yield up unto His Majesty King William the Fourth, his Heirs and Successors, all and singular those certain parcels of land, (&c., &c., &c., describing them) to the end, intent, and purpose that the said lands and premises shall and may be granted and disposed of by His said Majesty, his Heirs and Successors, in trust, for the benefit of the said Indians and upon and for no other use, trust and intent or purpose whatsoever. In witness whereof we the said Sachems and Chief Warriors of the said Indians have hereunto set our hands and seals at Grape Island, in the Province aforesaid, the 15th December, 1835.”

The deed is executed by the five Chiefs in the presence of J. B. Clench, then Superintendent of Indian Affairs, and two others.

In the month of August, 1836, Sir Francis Head, then Lieutenant Governor of Upper Canada, deeming the resolution of the Indians in council assembled to be the material element in effectuating the extinction of the Indian title, dispensed with the subsequent execution of any deed, and obtained the surrender to the crown of several large tracts of country by submitting certain propositions in writing (containing terms of surrender) to the Indians, to be considered by them in council, which, upon being approved and signed by the Chiefs in council assembled, constituted the surrenders. In his reports communicating the surrenders to Lord Glenelg, then Colonial Secretary, the Lieutenant Governor, after enumerating the tracts of land so acquired, says :—

“ *I have thus obtained for his Majesty's Government from the Indians, an immense portion of most valuable land.*”

Although the opinion entertained by Sir Francis Head that the act of the Indians in Council was all that was necessary to effectuate the surrenders may be admitted to be correct, still in point of fact this would seem to have been the only occasion upon which deeds were dispensed with—unless the surrender by the Saugeen and Owen Sound Indians in 1854 can be considered another. The resolution in council in that case seems to have been prepared with the view of serving both as the resolution in council and a deed of surrender, for it is framed in the form of a deed—and, indeed, all the resolutions of the Indians in their councils, being signed by the Chiefs with their totems according to Indian custom, may be regarded as deeds. The surrender of 1854 above referred to is in the following form —

“ We, the Chiefs, Sachems and Principal men of the Indian tribes resident at Saugeen and Owen Sound confiding in the wisdom and protecting care of our Great Mother across the Big Lake, and believing that our good Father, His Excellency the Earl of Elgin and Kincardine, Governor General of Canada, is anxiously desirous to promote those interests which will most largely conduce

“to the welfare of his Red children, have now, being in full Council assembled, in presence of the Superintendent General of Indian affairs and of the young men of both tribes, agreed that it will be highly desirable for us to make a full and complete surrender to the Crown of that Peninsula known as the Saugeen and Owen Sound Indian Reserve subject to certain restrictions and Reservations, to be hereinafter set forth.”

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“We have therefore set our marks to the document, after having heard the same read to us, and do hereby surrender the whole of the above named tract of country, bounded &c., with the following reservations, to wit—”

then followed three paragraphs, describing those several blocks of land out of the tract, one for the occupation of the Saugeen Indians, another for the occupation of the Owen Sound Indians and the third for the occupation of the Colpoy's Bay Indians.

The instrument then proceeded :

“*All which reserves we hereby retain to ourselves and our children in perpetuity.* And it is agreed that the interest out of the principal sum arising out of the sale of our lands be regularly paid, so long as there are Indians left to represent our tribe, without diminution, at half yearly periods. And we hereby request the sanction of our Great Father, the Governor General, to this surrender, which we consider highly conducive to our general interests. It is understood that no islands are included in this surrender.”

This instrument was executed under the respective hands and seals of the Chief Superintendent of Indian Affairs and of the several chiefs, sachems, and principal men of the tribe.

In the interval between 1836 and the passing of the British North America Act, several surrenders of large tracts of land were made by the Indians to the crown by deeds executed by the chiefs and principal men of the tribes of Indians occupying and claiming title to such lands. In some of the instruments so executed the Indians specially reserved to their own use and occupation, from the operation of the deeds of surrender, certain specified tracts within the limits of the tracts as described in the instruments. In some cases the surrenders were made, as in that of 1854 above set out, upon the express condition and trust that the moneys to be realized from sale of the lands surrendered should be applied by the crown for the benefit of the Indians.

Now, in 1837, an act, 7th Wm. 4th ch. 118, was passed by the Legislature of the Province of Upper Canada, intituled “An Act to provide for the disposal of the *Public lands* in this Province and other purposes therein mentioned.”

The Act was passed for regulating the issue of Letters Patent granting lands known as and designated “crown lands,” “clergy reserves” and “school lands,” all of which lands were placed under the control of an officer styled the commissioner of crown lands, and the proceeds arising from the sale thereof were to be accounted for by him to the Receiver General, as forming part of the public revenue of the Province. The Act did not affect any lands for the cession of which to His Majesty no agreement had been made with the Indian tribes occupying and claiming title to the same, nor any lands which, although surrendered by the Indians to the crown, were so surrendered for the purpose of being sold and the proceeds applied for the maintenance of and benefit of the Indians themselves. These lands were all designated Indian lands, and the sale of those surrendered to be sold for the benefit of the Indians themselves and the management and investment of the proceeds arising from their sale, were placed by the crown under the management of a special officer called the Chief Superintendent of Indian Affairs, who was under the direct supervision of the Lieutenant-Governor for the time being as representing Her Majesty, and who was accountable to

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the Imperial Treasury Department. The term "public lands," as used in the Act in relation to lands known as "crown lands," "clergy reserves" and "school lands," as distinguished from those known as "Indian lands," has been maintained in several Acts of the legislature of the Province of Upper Canada, viz., 4th and 5th Vic. ch. 100, 16th Vic. ch. 159, Consolidated Statutes of Canada ch. 22, 23rd Vic. ch. 2, and 23rd Vic. ch. 154. By this latter Act it was enacted, that from and after the 1st day of July, 1861, the Commissioner of Crown lands for the time being should be Chief Superintendent of Indian Affairs, and that all lands reserved for the Indians, or for any tribe or band of Indians, or held in trust for their benefit, should be deemed to be reserved and held for the same purposes as before the passing of the Act, but subject to its provisions, and that no release or surrender of lands reserved for the use of the Indians, or of any tribe or band of Indians, should be valid except upon condition that such release or surrender should be assented to by the chief or, if more than one chief, by a majority of the chiefs of the tribe or band of Indians assembled at a meeting or council of the tribe or band summoned for that purpose *according to their rules* and entitled to vote thereat, and held in the presence of an officer duly authorized to attend such council by the Commissioner of Crown Lands, and that nothing in the Act contained should render valid any release or surrender other than to the crown; and it was further enacted that

"The Governor in Council may, from time to time, declare the provisions of the Act respecting the sale and management of "the public lands" passed in the present session, or of the twenty-third chapter of the Consolidated Statutes of Canada intituled "*An Act respecting the sale and management of the timber on public lands,*" or any of such provisions, to apply to Indian lands, or to the *timber on Indian lands,* and the same shall thereupon apply and have effect as if they were expressly recited or embodied in this Act."

The inviolable manner in which the Indian title as declared by the Proclamation of 1763 has been recognized amply justifies the language of the commissioners appointed by the crown to report upon Indian affairs in the Province of Upper Canada in 1842 and 1856. The former commissioners in their report say :—

"The Proclamation of His Majesty George the third issued in 1763 furnished the Indians with a fresh guarantee for the possession of their hunting grounds and the protection of the crown. This document the Indians look upon as their charter. They have preserved a copy of it to the present time, and have referred to it on several occasions in their representations to the Govern- ment."

And again :—

"Since 1763 the Government, adhering to the Royal Proclamation of that year, *have not considered themselves entitled* to dispossess the Indians of their lands without entering into an agreement with them and rendering them some compensation."

The commissioners of 1856 in their report say :—

"By the Proclamation of 1763 territorial rights, akin to those asserted by Sovereign Princes, are recognized as belonging to the Indians, that is to say, that none of their land can be alienated save by treaty made publicly between the crown and them. Later, however, as this was found insufficient to check the whites from entering into bargains with the Indians for portions of their lands or for the timber growing thereon, it has been found necessary to pass stringent enactments for the protection of the Indian Reserves.

After this most explicit recognition by the crown of the Indian title for upwards of a century in the most solemn manner—by treaties entered into between the crown and the Indian nations in council assembled according to their national custom—and by deeds of cession to the crown

and of purchase by the crown, prepared by officers of the crown for execution by the Indians, it cannot, in my opinion, admit of a doubt that at the time of the passing of the British North America Act the Indians in Upper Canada were acknowledged by the crown to have, and that they had, an estate, title and interest in all lands in that part of the Province of Canada formerly constituting Upper Canada for the cession of which to the crown no agreement had been made with the nations or tribes occupying the same as their hunting grounds, or claiming title thereto, which estate, title and interest could be divested or extinguished in no other manner than by cession made in the most solemn manner to the crown. These cessions were made sometimes upon purchases made by the crown for the use of the public, in which case the lands so acquired became "*Public lands*," because the revenue to be derived from their sale was appropriated for the benefit of the public and was paid into the Provincial Treasury. Sometimes the cessions were made to the crown upon trust for sale and investment of the proceeds for the benefit of the Indians themselves, and sometimes upon trust to grant to some person upon whom the Indians desired to confer a benefit for special services rendered to them; but all such lands, until the cession thereof should be made by the Indians to the crown, constituted what were known as and designated "*Indian Reserves*," "*Lands reserved for the Indians*," or "*Indian lands*." It is the lands *not ceded to or purchased by* the crown which are spoken of in the proclamation of 1763 as the *lands reserved to* the Indians for their hunting ground—and the unceded lands have ever since been known by the designation "*Lands reserved for the Indians*" or "*Indian Reserves*."

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20 When the Indians in the deeds or treaties by way of cession of land to the crown reserved from out of the general description of the bands given in the instruments of cession, as they often did, certain particularly described portions of the lands so generally described, for the special uses, occupation or residence of particular lands, the parts so reserved did not come under the operation of the deed or treaty of cession, but were reserved and excepted out of it and so continued to be just as they were before, lands not ceded to, or purchased by the crown, and therefore remained still within the designation of "*Lands reserved for the Indians*," or "*Indian Reserves*."

30 It was not the *exception* of the particular parcels from the operation of the instrument of cession which *made* such parts come within designation of "*Lands reserved for Indians*" or "*Indian Reserves*," but because being so excepted, they remained in the position they were before, namely, lands not yet ceded to or purchased by the Crown.

40 Now the lands upon which the timber which is the subject of this suit was cut, although admitted to have been within the limits of the old Province of Upper Canada, were, at the time of the passing of the British North America Act, lands for the cession of which to Her Majesty no agreement had been made with the Indian Nations or Tribes occupying the same as their hunting ground and claiming title thereto; the lands had not been ceded to or purchased by the Crown; they were not therefore "*Public Lands*" within the meaning of the statutes above referred to, viz. :—4 and 5 Vic. ch. 100, 16 Vic. ch. 159, C. S. C. ch. 22, or 23 Vic. ch. 2. It was not competent for the Provincial Government to have sold the lands or any part thereof, for the lands, not having been yet ceded to or purchased by the Crown, did not come under the designation of "*Crown Lands*" within the meaning of the above Acts. No revenue could have been derived from the land which could have passed to the Province of Canada under the statute of 1846—9 Vic., ch. 114—by which the Crown surrendered to the Provincial Legislature in exchange for a civil list all the casual and territorial revenue of the Crown. The Indians, whenever they should cede those lands to the Crown might cede them only upon trust for sale and investment of

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the proceeds for the benefit of the Indians themselves, so that the public might never acquire any interest whatever in the moneys arising from the sale of the lands.

From these considerations it follows, in my opinion, as an incontrovertible proposition, that in lands situate as those lands were at the time of the passing of the British North America Act, namely, lands which had not been ceded by the Indians to the Crown, the Province or Government of Ontario did not acquire by that Act any vested interest. The lands did not come within item No. 5 of section 92, nor within section 109 of the Act, but did, in my opinion, come within item 24 of section 91, which placed "Indians" and "lands reserved for the Indians" under the legislative control of the Dominion Parliament. The British North America Act did not contem-  
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plate making, and has not made, any alteration in the relations existing of old between the Indians and Her Majesty, either in respect of the estate, title, and interest of the former in their lands not yet ceded to the Crown, or indeed in respect of any other matter, further than to place all matters affecting the Indians under the control and administration of Her Majesty's Government of the Dominion of Canada and the Parliament of the Dominion. The Provincial Government or Legisla-  
15  
ture having been given no control whatever over Indian affairs, the power of entering into a treaty or agreement with the Indians for obtaining from them a cession of the lands in question became vested in Her Majesty, freed from the operation of the Canada statute, 23rd Vic., ch. 151, which became null and of no further validity. The British North America Act having removed the Indians and their affairs wholly from under the management of a Provincial Commissioner of  
20  
Crown Lands, such an officer could no longer be Chief Superintendent of affairs. The authorities of the Province of Ontario are invested by the British North America Act with no jurisdiction whatever over the Indians, their lands or their affairs. All these matters are by the Act placed under the exclusive jurisdiction of the Dominion authorities. The power, therefore, of entering into a treaty between Her Majesty and the Indians for the cession to Her Majesty of their acknowledged title to any territory within the limits of the Province not yet ceded to the Crown can, since the passing of the British North America Act, be exercised only either under the authority of an Act of the Dominion Parliament or, in the absence of such an act, by Her Majesty acting through the instrumentality of the Governor-General of the Dominion as her representative and the Dominion Government, in whom and in the Indians claiming title to the land to be ceded  
25  
must be vested the right of arranging the terms of the treaty of cession. It was in this manner that Her Majesty did enter into the treaty with the Indians for the cession of the lands upon  
30  
which the timber grew, the right to which is in question now.

In the year 1873 a commission was issued by the Dominion Government to the Honorable Alexander Morris, then Lieutenant-Governor of Manitoba, Lieut.-Colonel Provencher, then Commissioner of Indian Affairs, and S. J. Dawson, Esq., then a member of the Dominion House of Commons, appointing them commissioners upon behalf of her Majesty to treat with the Indians for the surrender to the crown of the lands now under consideration, and at a council of the Indians held in the month of October, 1873, after three days spent in negotiating the terms of the cession, a treaty was concluded in the following terms :

" Articles of treaty made and concluded this third day of October, 1873, between Her Most Gra-  
40  
" cious Majesty the Queen of Great Britain and Ireland by her commissioners, the Honorable Alexander  
" Morris, Lieutenant-Governor of the Province of Manitoba and the North-West Territories, Joseph  
" Albert Herbert Provencher and Simon James Dawson, of the one part, and the Sauteaux tribe of  
" Ojibbeway Indians, inhabitants of the country hereinafter defined and described by their chiefs  
" chosen and named as hereinafter mentioned, of the other part."

The treaty then recites the assembling in council of the Indians inhabiting the territory, and the appointment by them in council of twenty-four chiefs and head men (naming them) to conduct on their behalf negotiations for a treaty with Her Majesty's commissioners, and to sign any treaty to be founded upon such negotiations, and that the said commissioners and the said Indians had finally agreed upon and concluded a treaty as follows:—

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10 "The Saulteaux tribe of the Ojibbeway Indians and all other the Indians inhabiting the  
"district hereinafter described and defined do hereby cede, release, surrender, and yield up to the  
"government of the Dominion of Canada, for Her Majesty the Queen and her successors forever all  
"their rights, title and privileges whatsoever to the lands included within the following limits,  
10 "that is to say:

(Here follows a description of the lands).

"To have and to hold the same to Her Majesty the Queen and her successors for ever. And  
"Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due  
"respect being had to lands at present cultivated by the said Indians, and also to lay aside and  
"reserve for the benefit of the said Indians, to be administered and dealt with for them by Her  
"Majesty's Government of the Dominion of Canada, in such manner as shall seem best, other  
"reserves of land in the said territory hereby ceded, which said reserves shall be selected and set  
"aside where it shall be deemed most convenient and advantageous for each band of Indians by the  
"officers of the said government appointed for that purpose, and such selection shall be so made  
20 "after conference with the Indians. Provided, however, that such reserve, whether for farming or  
"other purposes, shall in nowise exceed one square mile for each family of five, or in that proportion  
"for larger or smaller families, and such selection shall be made if possible during the course of  
"next summer, or as soon thereafter as may be found practicable, it being understood, however,  
"that if, at the time of any such selection of any reserves as aforesaid, there are any settlers within  
"the bounds of the lands reserved by any Band, Her Majesty reserves the right to deal with such  
"settlers as she shall deem just, so as not to diminish the extent of land allotted to the Indians,  
"and provided also, that the aforesaid reserves of lands, or any interest or right therein or  
"appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for  
"the use and benefit of the said Indians with the consent of the Indians entitled thereto first  
30 "had and obtained.

"And with a view to shew the satisfaction of Her Majesty with the behaviour and good  
"conduct of her Indians, she hereby, through her commissioners, makes them a present of twelve  
"dollars for each man, woman and child belonging to the bands here represented, in extinguishment  
"of all claims heretofore preferred.

"And further Her Majesty agrees to maintain Schools for instruction in such reserves hereby  
"made as to Her Government of her Dominion of Canada may seem advisable, whenever the Indians  
"of the reserve shall desire it.

40 "Her Majesty further agrees with her said Indians, that within the boundary of Indian  
"Reserves, until otherwise determined by the Government of the Dominion of Canada, no intoxi-  
"cating liquor shall be allowed to be introduced or sold, and all laws now in force, or hereafter to be  
"enacted, to preserve her Indian subjects inhabiting the reserves, or living elsewhere within Her  
"North-West territories, from the evil use of intoxicating liquors, shall be strictly enforced.

"Her Majesty further agrees with her said Indians that they the said Indians shall have  
"right to pursue their avocations of hunting and fishing throughout the tract surrendered as here-  
"inbefore described, subject to such regulations as may from time to time be made by her

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“Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof authorised duly therefor by the said Government.

“It is further agreed between Her Majesty and her said Indians that such sections of the reserves above indicated as may at any time be required for public works or building of what nature soever, may be appropriated for that purpose by Her Majesty’s Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.

“And further, that Her Majesty’s Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tracts above described, distributing them in families, and shall in every year ensuing the date hereof, at some period in each year to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of Five Dollars per head yearly.

“It is further agreed between Her Majesty and the said Indians that the sum of fifteen hundred dollars per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians.

“It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any Band of the said Indians who are now actually cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say (here follows the enumeration of several agricultural implements).

“All the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians.

“It is further agreed between Her Majesty and the said Indians that each Chief duly recognized as such shall receive an annual salary of twenty-five dollars per annum, and each subordinate officer not exceeding three for each Band shall receive fifteen dollars per annum, and each such Chief and subordinate officer as aforesaid shall also receive once in every three years a suitable suit of clothing; and each Chief shall receive, in recognition of the closing of this treaty, a suitable flag and medal.

“And the undersigned chiefs, on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will in all respects obey and abide by the law; that they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and other subjects of Her Majesty, whether Indians or Whites, now inhabiting or hereafter to inhabit any part of the said ceded tract; and that they will not molest the person or property of any inhabitant of such ceded tract, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tract or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

“In witness whereof Her Majesty’s said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands at the North-west angle of the Lake of the Woods the day and year first herein above mentioned.”



The treaty is then executed by the three Commissioners and the twenty-four Indian chiefs in the presence of seventeen persons who subscribe their names as witnesses to the signatures of the several parties, and to the fact of the treaty having been first read over and explained by the Honorable James McKay. Now it is to be observed that the faith of Her Majesty is solemnly pledged to the faithful observance of this treaty, and the Government of the Dominion of Canada is made the instrument by which the obligations contained in it, which are incurred by and on behalf of Her Majesty, are to be fulfilled. The land ceded supplies the primary, and indeed, the only source from which the funds required to maintain the schools contemplated by the treaty, and to meet all the other pecuniary payments and obligations incurred, can be raised. The benefits received and to be received by the Indians under the treaty are in effect so many fruits issuing from their own acknowledged estate and interest in the lands ceded. The administration and management of the estate constituting the source from which the funds required to meet the obligations incurred by the treaty must remain under the control of the Dominion of Canada, which alone, by the British North America Act, has jurisdiction in relation to the Indians and their affairs, at least until a sum shall be realised which, in the judgment of Her Majesty's Government of the Dominion having the obligations of the treaty imposed upon them, shall be deemed sufficient to supply for all time to come the necessary funds. That portion of the ceded territory which shall be composed of the contemplated reserves, equal in extent to one square mile for every family of five, if sold, being to be sold for the benefit of the Indians themselves, must be sold by the Dominion Government, upon whom is imposed the duty of investing and administering the proceeds for the benefit of the Indians interested in each particular parcel; but if the contention of the Province of Ontario is to prevail the whole ceded tract, which constitutes the source from which alone the obligations incurred by the Dominion Government by the treaty can be fulfilled, becomes upon the passing of the British North America Act and by force of that Act absolutely and exclusively the property of the Province of Ontario, and therefore the Dominion of Canada have not and cannot have any control over these lands either for the purpose of the treaty or any other purpose. The Dominion, therefore, can have no control over, nor can the Indians have any interest in, the reserves contemplated in the treaty of one square mile for every family of five. If any part of the ceded tract became by the British North America Act the property of the Province of Ontario, as is contended, these reserves did equally with all other parts, for all of it was then in the same condition, and the contention of the Province in substance and effect is, that by force of the British North America Act the whole territory, upon the passing of that Act, became the property of the Province of Ontario, and that therefore, no part of it, not even the contemplated reserves, can be affected by the terms of the treaty, which cannot affect the rights acquired by the Province under the British North America Act. To obtain a judicial decision to the above effect, by what appears to me a strange procedure, Her Majesty's name is used by the Province for the purpose of having the treaty which has been solemnly entered into by Her Majesty with the Indians, and for the faithful observance of which Her Majesty is solemnly pledged to the Indians, declared to be void and of none effect.

The learned Chancellor of Ontario, in his judgment pronounced in this case, draws from certain language of mine in *Church v. Fenton* (1) the conclusion that the lands now under consideration cannot come within item 24 of sec. 91 of the British North America Act as "*lands reserved for Indians*," but that language, read in the sense which was intended by me, leads to the contrary conclusion. The contention of the plaintiff in that case was, that the land in question there, which

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was part of the tract ceded by the Saugeen and Owen Sound Indians by the above recited treaty of 1854, did come within that item, and that therefore it was not liable to be sold for mere payment of taxes. The point adjudged was, that from the time that a contract of sale of the lot in question to a purchaser was entered into, by the chief superintendent of Indian affairs, after the cession by the Indians of the land for sale for their benefit, the interest of the purchaser became liable to taxation precisely as the interest of a purchaser of crown lands would be, and that the patent of the lands in question having been issued to the purchaser before the sale for taxes under which the defendant claimed took place, the title of the defendant under that sale must prevail. In the course of my judgment I expressed the opinion that lands surrendered by the Indians, as the tract under consideration there was, for the purpose of being sold, although when sold the proceeds arising from the sale were to be applied for the benefit of the Indians, did not come within the designation of "lands reserved for the Indians" within item 24 of sec. 91 of the British North America Act, that expression being as, I thought, more appropriate in relation to "*unsurrendered lands*" than to the lands in which the Indian title had been extinguished. 10

Lands for the cession of which to Her Majesty no agreement had been made with the tribes occupying and claiming title to the same, and which were situate within the limits of the old Province of Upper Canada, have always been, in my opinion, considered to come within the designation of "lands reserved for the Indians," or "Indian reserves," or "Indian lands." These lands have always been regarded as Indian hunting grounds. My object was to draw a distinction between lands not ceded by the Indians to the crown and those which had been ceded by them ; 20 lands coming within the latter class, not being in my opinion, within the item 24 of section 91, while those of the former class, to which the lands now under consideration did belong at the time of the passing of the British North America Act, do come within that item.

The Proclamation of 1763, which may be called the Indians' Bill of Rights, treats these unceded lands as being "lands reserved for the Indians as their hunting grounds," and as such they have always been regarded in that part of Her Majesty's dominions which formerly constituted the Province of Upper Canada, within the limits of which old province it is admitted that at the time of the passing of the British North America Act the tract under consideration was situate.

Upon the whole, therefore, I am of opinion that the tract in question did not become "public 30 "lands belonging to the Province of Ontario" by force of the British North America Act ; that the right to sell the said tract, or any part thereof, and to issue Letters Patent therefor, or the right to sell the timber growing thereon, did not pass to the Province of Ontario by force of the act ; that the Indian title in the tract remained the same after the passing of the act as it had been before ; that the Indians had an estate, title, and interest in the tract as their hunting ground, declared and acknowledged in the most solemn manner by all the sovereigns of Great Britain since the proclamation of 1763, which precluded the Provincial Government from interfering therewith in any manner, and which title, estate, and interest could only be divested and extinguished by a cession made in solemn manner by the Indians to Her Majesty ; that the British North America Act did not invest the provincial authorities of Ontario with power or right to enter into any 40 treaty with the Indians for the cession of such their estate, title and interest to Her Majesty ; that such power and right remained in Her Majesty to be exercised by her through the instrumentality of her Government of the Dominion of Canada and her representative the Governor General ; that the treaty of October, 1873, entered into with Indians for the cession of the tract in question is obligatory upon the Dominion Government, who are bound to fulfil the obligations

therein contained upon the part of Her Majesty to be fulfilled, and for such purpose are entitled to deal with the lands and the timber growing thereon, unless and until some contract be entered into between the Government of the Province of Ontario and the Dominion Government for the acquisition by the Province of a beneficial interest in any revenue to be derived from the sale of the said lands or of the timber growing thereon.

The Province of Ontario not having acquired such beneficial interest by the British North America Act nor by the terms of the treaty, such beneficial interest can, in my opinion, be acquired only by contract with the Government of the Dominion.

The latter part of sec. 109 of the British North America Act, viz: "Subject to any trusts existing in respect thereof and to any interest other than that of the Province therein," applies, in my opinion, only to lands beneficially belonging to the Province at the time of the Union, that is to say "public lands," the revenues arising from the sale of which (the lands having been already ceded by the Indians to the crown) formed part of the public revenue of the Province, and has no application to lands which at the time of the passing of the British North America Act had not been ceded by the Indians to the crown. But, assuming that part of section 109 to have any application in the present case, then, as it appears to me, the "trusts" and "interest" in the sentence referred to must be held to be the "purposes" mentioned in the treaty, in consideration of which the cession was made, and the interest which the Indians have in the due fulfilment of the terms of the treaty, of which the Dominion Government are the trustees, and are, therefore, entitled to hold the property ceded in the terms of the treaty of cession as their security and means of executing the trust imposed on them, unless and until some agreement shall be entered between the Provincial Government and them. In fine, I am of opinion, that at the time of commencement of this suit the Provincial Government had not, and that they have not now, any vested interest in the timber which is the subject of this suit, and that, therefore, their suit must be dismissed with costs, and that this appeal be allowed with costs.

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OF CAN.  
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# JUDGMENT OF THE SUPREME COURT OF CANADA.

OF  
CANADA,  
DATED 20TH  
JUNE, 1887.

## In the Supreme Court of Canada.

MONDAY, THE 20TH DAY OF JUNE, A.D. 1887.

PRESENT :

THE HONOURABLE SIR WILLIAM JOHNSTONE RITCHIE, Knight, Chief Justice.

“ MR. JUSTICE STRONG.

“ FOURNIER.

“ HENRY.

“ GWYNNE.

The Honourable Mr. JUSTICE TASCHEREAU being absent, his judgment was announced by 10 The Honourable The Chief Justice, pursuant to the Statute in that behalf.

BETWEEN

THE ST. CATHARINES MILLING AND LUMBER COMPANY,

*(Defendants) Appellants*

AND

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO

*(Plaintiff) Respondent*

The appeal of the above-named Appellants from the judgment of the Court of Appeal for Ontario, dated the 20th day of April, 1886, dismissing the appeal of the said Appellants from the judgment of the Honourable John Alexander Boyd, President of the Chancery Division of the High Court of Justice for Ontario, pronounced on the 10th day of June, 1885, having come on for hearing on the 19th, 20th, 22nd and 23rd days of November, A.D. 1886, before this Court in the presence of Counsel, as well for the Appellants as for the Respondent, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said Appeal should stand over for judgment, and the same coming on this day for judgment, this Court did order and adjudge that the said judgment of the Court of Appeal for Ontario should be affirmed, and that the said appeal should be and the same was dismissed with costs to be paid by the said Appellants to the said Respondent forthwith after taxation thereof.

(Signed),

ROBT. CASSELS,

*Registrar.*



In the Privy Council.

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ON APPEAL  
FROM THE SUPREME COURT OF CANADA

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BETWEEN

THE ST. CATHARINES MILLING AND  
LUMBER COMPANY,  
*(Defendants) Appellants*

AND

THE QUEEN, ON THE INFORMATION OF THE  
ATTORNEY-GENERAL FOR THE PROVINCE  
OF ONTARIO,  
*(Plaintiff) Respondent*

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JOINT APPENDIX.

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JOHNSTON, HARRISON & POWELL  
*For Appellants*

FRESHFIELDS & WILLIAMS,  
*For Respondent*