

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS,

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES AND THE
TERRITORIAL COURT OF THE YUKON TERRITORY.

THE ONTARIO MINING COMPANY } APPELLANT ;
(PLAINTIFF)..... }

AND

EDWARD SEYBOLD, EDMUND B. }
OSLER, JOHN W. MOYES, ELIZ- }
ABETH JOHNSTON, EDWARD }
H. AMBROSE, JOHN W. BROWN } RESPONDENTS.
AND JOHN S. EWART (DEFEND- }
ANTS)

1901

*April 1.

*June 5.

ON APPEAL FROM A DIVISIONAL COURT OF THE HIGH
COURT OF JUSTICE FOR ONTARIO.

*Indian lands—Treaties with Indians—Surrender of Indian rights—Mines
and minerals—Crown grant—Constitutional law.*

The Supreme Court of Canada, Gwynne J. dissenting, dismissed an
appeal from the judgment of a Divisional Court of the High
Court of Justice for Ontario (32 O. R. 301) which had affirmed
the judgment of the Chancellor (31 O. R. 386).

APPEAL by special leave (1), from the judgment of
a Divisional Court of the High Court of Justice for

*PRESENT :—Sir Henry Strong C J. and Taschereau, Gwynne, King
and Girouard JJ.

NOTE.—This case is published by order of the Department of
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Ontario (1) dismissing the plaintiff's appeal from the judgment of the Honourable, the Chancellor of Ontario (2), dismissing the plaintiff's action with costs.

The action was for a declaration that, under the circumstances stated in the report of the judgment at the trial (2), and by virtue of the letters patent of grant from the Government of the Dominion of Canada to the predecessors in title of the plaintiff, the latter was intitled to the lands in question in the case, forming part of Sultana Island, in the Rainy River District of the Province of Ontario, and also to set aside the letters patent from the Government of the Province of Ontario granting the lands to the defendants and for an injunction and other incidental relief.

At the trial the learned Chancellor dismissed the action (2) and on appeal to the Divisional Court his decision was affirmed by the judgment now under appeal (1).

Laidlaw K.C. and *Bicknell* for the appellant.

Biggs K.C. for the respondent, Johnston.

A. M. Stewart for the respondent, Osler.

R. U. McPherson for the respondent, Seybold.

J. M. Clark K.C. for the other respondents.

The judgment of the majority of the court was pronounced by:

THE CHIEF JUSTICE (Oral).—For the reasons given by the learned Chancellor in this case, and more particularly for the reasons given by the Judicial Committee of the Privy Council in *St. Catherines Milling Co. v. The Queen* (3), by which we are bound, and which governs the decision in this case, the appeal must be dismissed with costs.

(1) 32 O. R. 301.

(2) 31 O. R. 3.

(3) 14 App. Cas. 46.

G-WYNNE J. (dissenting.)—The terms “Indian lands” and “the title” of the Indians to lands in the late Province of Upper Canada and in the late Province of Canada have always from the earliest period been well understood without any doubt or fluctuation of opinion whatever, to consist in this that by the pledge of the Sovereign no sale of lands should be, or ever has been, made by the Crown unless nor until the Indian title has been surrendered by a treaty entered into between the Sovereign and the Indian nations claiming title to the lands and upon surrender the Indian title consists in the honour of the Sovereign being pledged to a faithful observance of the conditions upon the faith of which the Sovereign procured each surrender to be made. This foundation of the Indian title to lands in British North America was originally designed perhaps as a reward for faithful services rendered in the early wars upon this continent by the Indian allies of the British Crown as certainly the tract of country known as the Grand River reservation was set apart for the Six Nations; but whether the concession be regarded as a reward for services rendered, or as proceeding *ex gratiâ et mero motu* of the Sovereign apart from any claim for services rendered all treaties entered into between the Sovereign and the North American Indians have always been regarded by the British Sovereigns and observed by them as inviolable as treaties entered into with foreign civilized nations, and the Indians themselves have always been regarded and treated as wards of the Crown and the management of their affairs was retained by the Imperial Government and was conducted through the Lieutenant Governor of the Province acting under instructions from the Sovereign and through an officer called the Chief Superintendent of Indian Affairs, appointed by the Lieutenant Governor,

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approved by the Imperial Government, to whom through the Lieutenant Governor the Chief Superintendent reported from time to time. In the case of lands surrendered by the Indians upon condition that they should be sold and the purchase monies invested for their benefit the sale of those lands has invariably been made by the Chief Superintendent of Indian Affairs and not by the Commissioner of Crown Lands, and the purchase moneys accruing from those sales were always received and invested by the Chief Superintendent and accounted for by him to the Lords Commissioners of the Treasury in England.

The distinction between the terms "public lands" and "Indian lands" has always been well understood and recognised in Acts of the Legislature. On the 17th of May, 1838, the royal assent pronounced by proclamation was given to an Act numbered chapter 118, of 7, Wm. 4th, intituled "An Act to provide for the disposal of the *public lands* in this province and for other purposes therein mentioned" which had been reserved by Sir Francis Bond Head, the then Lieutenant Governor of the late Province of Upper Canada for the royal assent. A reference to the several clauses of that Act clearly shews that the term "*public lands*" was applied solely to lands placed under the control of the Commissioner of Crown Lands for sale for the public purposes of the province consisting of Crown Lands, Clergy Reserves and School Lands, in all of which the province had an interest, but nothing in the Act had any relation to lands surrendered by the Indians *upon condition that they should be sold and the proceeds invested for their benefit*, the sale of which as already observed was maintained under the control of the Chief Superintendent of Indian Affairs, who as also already shewn was under the control of the Imperial Government exercised through the Governor as repre-

representative of the Sovereign. The like distinction is maintained in the statutes 2 Vict. c. 14 and 15, passed in 1839, so also in the following statutes of the late Province of Canada, 4 & 5 Vict. ch. 100, intituled "An Act for the disposal of *public lands*," 12 Vict. ch. 200, intituled "An Act to raise an income of one hundred thousand pounds *out of the public lands* of Canada for Common School education," by which it was enacted that all moneys that should arise from the sale of *any of the public lands of the Province* should be set apart for the purpose of creating a capital which should be sufficient to produce a clear sum of one hundred thousand pounds per annum which said capital and the income to be derived therefrom should form a *public fund* to be called the Common School fund. It is clear that Indian lands came not under this Act, 13 & 14 Vict. c. 42 and 74, the former of which is intituled "An Act for the better protection of the *lands and property* of the Indians in Lower Canada", and the latter is intituled "An Act for the protection of the Indians of Upper Canada from imposition and the property occupied and enjoyed by them from trespass and injury;" 14 & 15 Vict. c. 59 and 106, 16 Vict. c. 159 intituled "An Act to amend the law for the sale and settlement of the *public lands*."

The distinction between "the public lands" of the province and "Indian lands," the former of which were under the management of the Commissioner of Crown Lands, and the latter under the management of the Chief Superintendent of Indian Affairs is conspicuously apparent in this Act and also in 22 Vict. ch. 22 of the Consolidated Statutes of Canada, A.D. 1859.

Then in 1860 were passed two statutes which maintain the distinction in a most unequivocal manner. The first was passed on the 23rd of April, intituled

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“An Act respecting the sale and management of the *public lands*,” and the second intituled “An Act respecting the management of *the Indian lands and property*” having passed both houses of the legislature were reserved by the Governor General, Sir Edmund Head, for the signification of Her Majesty’s pleasure. The royal assent thereto was published by proclamation in the *Canada Gazette* of the 13th of October, 1860.

This Act was the outcome of negotiations which had been carried on for some years between the Imperial Government and the Governor General with the view of devising a measure whereby the Imperial Government should be relieved from the expense of maintaining the department for the management of Indian affairs, as it was thought that the Indian property had then reached such a value as to warrant its having imposed upon it the whole cost of the maintenance of the department having charge of its management. Accordingly a bill was prepared under the direction of Sir Edmund Head, and was submitted to, and passed by, both houses of the legislature and reserved for the signification of Her Majesty’s pleasure and the royal assent was given thereto as above said.

This Act maintained the office of Chief Superintendent of Indian Affairs as formerly, but instead of the private secretary of the Governor General who had for some years filled that office it declared in its first section that in future the Commissioner of Crown Lands should be “Chief Superintendent of Indian Affairs.” By the second section it was enacted 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 passage of the Act. By section 3, that all moneys or securities of any kind,

applicable to the support and benefit of the Indians or of any tribe or band of Indians, and all moneys accruing or to accrue from the sale of any lands reserved or held in trust as aforesaid should (subject to the provisions of the Act) be applicable to the same purposes, and be dealt with in the same manner as they might have been applied to, or dealt with before the passing of the Act. Then by section 7 it was enacted that

the Governor in Council might 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 timber and 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 and embodied in this Act.

Now this Act declares the terms upon which Her Majesty the Queen assented to the transfer of the management of Indian affairs from under the direct supervision of the Imperial Government, and it is thus in plain terms declared upon the authority of an Act of the Legislature, that all lands reserved for the Indians, (and the ordinary mode of making such reservations was by treaty with the Indians) should after the passing of the Act be still held as reserved for the benefit of the Indians, as before the passing of the Act they had been by the pledged word of the Sovereign and that lands surrendered upon condition that they should be sold and the proceeds invested for the benefit of the Indians should after the passing of the Act be still held, as they always had been by the Crown, in trust for the benefit of the Indians. The title of the Indians which had been always rested upon the pledge of the Crown while the Imperial Government maintained control of the Indian Department was upon the transfer of that department to the provincial authorities

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made to rest upon an Act of the legislature which without the assent of the Crown could not be repealed. This Act clearly shews that Indian Reserves, or lands held by the Crown in trust for the Indians were never deemed to be "*public lands*" of the province, or land "belonging to the province," or lands in which the province had any beneficial interest or any power of interference, save as regards the legislative authority over the property of the purchaser of any of such lands.

This was the condition of things as existing between the Crown and the Indians in relation to Indian affairs and the Indian title to lands in Canada when the British North American Provinces of Canada, Nova Scotia and New Brunswick had conferred upon them by our Most Gracious Sovereign our late beloved Queen the previously unknown privilege of devising and framing their own constitution which after a thorough consideration and approval of its terms by the legislatures of the respective provinces and after a final agreement upon those terms concluded between delegates appointed by the Provincial Governments and Her late Most Gracious Majesty's Imperial Government was without alteration adopted by the Imperial Parliament and reduced into legislative form in the British North America Act.

In judicially construing a constitution so framed I feel myself bound, upon any question arising, to endeavour to arrive at a construction conformable to my conviction of what, having regard to the previous status and condition of the particular subject under consideration was the intention of the founders and framers of our constitution as expressed in the constitutional charter so framed by them, and with the greatest deference due to those from whom it is my misfortune to differ in the present case, I must say that



I cannot entertain a doubt that when the framers of our constitution provided, among other things, that the subject of "Indians and lands reserved for the Indians" should be within *the exclusive* jurisdiction of the Parliament of the Dominion they meant, and that the legislatures of the provinces, when deliberating upon and taking part in framing the constitutional charter of the Dominion, meant, that the word "exclusive" as there used, should have its precise ordinary meaning and should exclude all ideas of any right of interference direct or indirect being possessed by or vested in the legislatures or governments of any of the provinces of the Dominion in relation to the Indians or to their title to lands reserved for their benefit in any part of the Dominion; and that when in section 91 they provided that the legislative authority of the Parliament of Canada should be exclusive over "Indians and lands reserved for the Indians," and in section 109 that

all lands, mines, minerals," &c., &c., belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union should belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate

their intention was thereby to maintain the distinction between "lands belonging to the several provinces" and "Indian lands," which in the Acts already referred to had always been maintained between the "Public lands" of the province and "Indian lands," and to preserve and maintain the Indian titles as secured, by parliamentary sanction first, in 23 Vict. ch. 151, so as to secure and maintain inviolate in all parts of the Dominion with perfect uniformity the rights of the Indians as had always been conceded in practice by the grace and pledge of the Sovereign and as had been secured by parliamentary sanctions to the Indians in the Province of

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Canada by 23 Vict. c. 151; thus maintaining the Indians in the enjoyment of the benefit and conditions of all treaties already entered into between them and the Sovereign or which should thereafter be entered into between them through the Governor General as representing the Sovereign.

That such was beyond all doubt the understanding of all parties concerned appears from an Act of the Parliament of Canada which has never been called in question passed in its first session, 31 Vict. ch. 42, intituled "An Act providing for the organization of the Department of the Secretary of State of Canada and for the management of Indian and Ordnance lands." In the fifth section of this Act it is enacted that:

The Secretary of State shall be the Superintendent General of Indian Affairs and shall as such have the control and management of the *lands and property of the Indians in Canada.*

The sixth and seventh sections are identical with sections 2 and 3 of 23 Vict. ch. 151, as applied to this Act of 31 Vict. ch. 42.

Sections. 8, 9, 10 & 11 introduce into 31 Vict. ch. 42 the provisions of sections. 4, 5, 6, 7 and 8 of 23 Vict. ch. 151. In 1869, was passed by the Parliament of Canada 32 & 33 Vict. ch. 6, by the thirteen section of which the Governor General in council is authorised, on the report of the Superintendent General of Indian Affairs, to order the issue of letters patent granting life estates to Indians in certain cases in land allotted to them within a reserve.

On the 3rd May, 1873, was passed by the Parliament of Canada an Act intituled "An Act to provide for the establishment of the Department of the Interior." By the third section of that Act, 36 Vict. ch. 4, it was enacted that the Minister of the Interior shall be the Superintendent General of Indian Affairs, and, by sec-

tion eight, that the several clauses of 31 Vict. ch. 42 relating to the management of Indian affairs and lands, shall govern the Minister of the Interior in the matters to which they relate, and that wherever the words "Secretary of State," or "Department of the Secretary of State" occur in those clauses the words "Minister of the Interior," and "Department of the Interior" shall be deemed to be substituted therefor.

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Now in October, 1873, a treaty, called the North-west Angle Treaty, was entered into between the Saulteaux Tribe of the Ojibbeway Indians and all other Indians inhabiting the country therein described, and Her Majesty the late Queen acting through the intervention of three gentlemen (of whom the Lieutenant Governor of the province of Manitoba and the North-west Territories was one) who were specially appointed as commissioners for that purpose by the Governor General in accordance with the practice which had always prevailed in making upon behalf of Her Majesty a treaty with the Indians; and, by that treaty, the Indians surrendered to Her Majesty a vast tract of country comprising about fifty-five thousand (55,000) square miles more or less. The treaty contains the following undertaking upon behalf of Her Majesty :

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 a 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 or bands of Indians, by the officers of the said Government appointed for that purpose, and such selection shall be made after conference with the Indians : Provided, however, that such reserve whether for farming or other purposes shall in no wise exceed in all 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 dur-

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ing 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 land 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 had and obtained.

The lands designated in the treaty as reserves have been marked out and set apart for the use and benefit of the Indians as provided in the treaty.

By a despatch from the Chief Commissioner the then Lt. Governor of the Province of Manitoba and the North-west Territories addressed to the Governor General accompanying the treaty, it appears that it was made a special condition upon the faith of the fulfilment of which the treaty was agreed to by the Indians that the Indians should enjoy the benefit of all minerals, if any should be found upon any portion of the tract reserved for their benefit.

It was, as appears by the despatch and papers containing a report of the proceedings at the negotiations with the Indians for the treaty, that it was upon the Indians' undoubting faith in the fulfilment of this pledge, promise or condition, whichever it may be called, that about thirty-four millions of acres of land were surrendered *unaffected by any trust or condition in favour of the Indians*. The Indians have, it is true, in the treaty the pledge of the Crown for the payment of certain annuities and other benefits annually to the Indians, but the pledge for the payment of these annuities and other benefits stands upon precisely the same foundation as the pledge as to the Indians retaining the benefit to accrue from all minerals, if any should be found in the lands reserved for them by the treaty.

As to those lands surrendered to the Crown unaffected by any trust or condition in favour of the Indians, it has been held by the Privy Council in the *St. Catharines Milling & Lumber Company v. The Queen* (1) that the Province of Ontario is bound to indemnify the Crown and the Dominion from all obligations assumed by Her Majesty in the treaty containing the surrender. That these lands so surrendered to the Crown unaffected by any trust or condition in favour of the Indians became vested in the Crown in trust for the public purposes of the Province of Ontario in so far as such lands were within the Province of Ontario is not a matter in dispute in the present action.

In view of the never violated pledge of the Crown that no lands should be sold until a surrender of the Indian title should be made by the Indians to the Crown, the Province of Ontario cannot be said to have acquired any usufructuary interest in these lands until the surrender, and a beneficial interest so acquired must more properly be said, I think, to rest upon the treaty of surrender than upon anything in the British North America Act, and for the benefit so obtained by the province by the treaty of surrender the province alone should in justice bear the burthen of the obligations assumed by Her Majesty and the Dominion to obtain the surrender of those lands as was held in the *St. Catharines Milling & Lumber Co. v. The Queen* (1) but as to the lands reserved for the Indians, the retaining of which, together with all the minerals therein, by Her Majesty for the use and benefit of the Indians, having been a condition upon the faith of the fulfillment of which the thirty-four million acres of land, unaffected by any trust or benefit in favour of the Indians, were surrendered, those lands, and it is with a

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portion of them we are now dealing (unless the entering into a treaty with the Indians by Her Majesty through Her representative the Governor General in the serious, grave and earnest manner appearing in the report of the Lieutenant-Governor of Manitoba to the Governor General accompanying the treaty, is a delusive mockery), should be regarded, as all lands in like circumstances have always been regarded ever since the proclamation of 1763, namely as lands vested in Her Majesty in trust for the sole use and benefit of the Indians upon the terms and conditions agreed upon as those upon which the trust was accepted by Her Majesty; and, as I have already said it was, in my opinion, for the purpose of maintaining unimpaired a continuance of that condition of things that the subject "Indians and lands reserved for the Indians" was placed under the exclusive legislative authority of the Dominion Parliament.

In 1880 that parliament, in exercise of the authority thus vested in it, passed the Act 43 Vict. ch. 28, intituled "An Act to amend and consolidate the laws respecting the Indians," and in 1882, the Act 45 Vict. ch. 30, intituled "An Act to further amend the Indian Act, 1880," and in 1884 an Act 47 Vict. ch. 27, intituled "An Act further to amend the Indian Act of 1880," and on the 2nd of June, 1886, an Act intituled "An Act to expedite the issue of Letters Patent for Indian Lands," all of which Acts are consolidated in ch. 43 of the Revised Statutes of Canada of 1886 intituled "An Act respecting Indians."

Now by these Acts so consolidated it was among other things enacted, that there should be a Department of the Civil Service of Canada called the Department of Indian Affairs, which should have the management, charge and direction of Indian affairs, presided over by a Chief Superintendent of Indian Affairs who

should be the Minister of the Interior or the head of any other department appointed for that purpose by the Governor in Council—that the expression “reserves” in the Act 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 title is in the Crown and which remains a portion of the said reserve *and includes all the trees, woods, timber, soil, stone, minerals, metals and other valuables thereon or therein*—that the Governor General might appoint a Deputy Governor who should have the power in the absence of or under instructions of the Governor General to sign Letters Patent for Indian Lands, and that the signature of such Deputy Governor should have the same force and virtue as if such Letters Patent were signed by the Governor General; sec. 8, s.s. 4. That all reserves for Indians or for any band of Indians, or held in trust for their benefit should be deemed to be reserved and held as before the passing of the Act 43 Vict. ch. 28, but should be subject to the provisions of the Act; sec. 14.

That if any railway, road, or public work should pass through or cause injury to any reserve belonging to, or in possession of any band of Indians or of any act occasioning damage to any reserve should be done under the authority of an Act of Parliament or of the legislature of any province compensation should be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons and that the Superintendent General should, in any case in which an arbitration should be had, name the arbitrator on behalf of the Indians and should act for them in any matter relating to the settlement of such compensation, and that the amount awarded in any case should be paid to the Minister of Finance and Receiver General *for the use of the band of Indians for*

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*whose benefit the reserve is held and for the benefit of any Indian who has improvements thereon; (sec. 35).*

That no *reserve* or *portion of a reserve* should be sold, alienated or leased until released or *surrendered to the Crown for the purposes of the Act* (sec. 38), and no release or surrender of a reserve held for the use of the Indians of any band should be valid or binding except on condition ;

1st. That it should be assented to by a majority of the male members of the band at a meeting or council of the band summoned for that purpose according to the rules of the band and held in the presence of the Superintendent General, or of an officer authorised to attend such council by the Governor General in Council or by the Superintendent General.

2ndly. That such release or surrender should be submitted to the Governor in Council for acceptance or refusal, (sec. 39).

That all Indian lands which are reserves or portions of reserves surrendered or to be surrendered to Her Majesty shall be deemed to be held for the same purposes as before the passing of the Act and should be managed, leased and *sold* as the Governor in Council should direct *subject to the conditions of the surrender and the provisions of the Act* (sec. 41).

That every patent for Indian lands should be prepared in the Department for Indian Affairs and should be signed by the Governor General or the Deputy Governor appointed under the Act for that purpose and should have the great seal of Canada thereto affixed as provided in sec. 45.

That the proceeds arising from the sale or lease of any Indian lands or from the timber, hay, stone, *minerals or other valuables thereon* or on a reserve shall be paid to the Minister of Finance and Receiver General to the credit of the Indian fund, (sec. 71).



There are many other sections of the Act which, clearly I think, show the title of the Indians to lands reserved for their use by treaty or otherwise, or surrendered by them to the Crown for the purpose of being sold for their benefit, to be real and substantial and not purely illusory, but the above sections seem to me to be sufficient for the purpose of the present appeal.

Now in the month of October, 1886, a band of the Indians who had signed the above north-west angle treaty in 1873 called the "Rat Portage Band of Indians" who were in possession of a portion of the reserves in the treaty mentioned as their allotment being desirous of surrendering the same to the Crown for sale for their use and benefit in accordance with the terms of the treaty in that behalf and with the special condition as above mentioned as to any minerals therein, and with the promise made in that behalf upon the faith of the fulfilment of which the treaty was made, by a deed duly executed in accordance with the above provisions of the statute in that behalf surrendered their said portion of said reserves to Her Majesty the then Queen, her heirs and successors

*in trust to sell the same to such person or persons and upon such terms as the Government of the Dominion of Canada may deem most conducive to the welfare of our people, and upon the further condition that all moneys received from the sale thereof shall, after deducting the usual proportion for expenses of management be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever.*

This surrender was duly accepted by the Governor General upon the terms thereof in accordance with the above statutory provisions in that behalf.

Now by letters patent issued under the great seal of the Dominion of Canada in accordance with the provisions of the statute in that behalf above cited and bearing date the 29th day of March, 1889, thirty-five

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acres of the portion of reserve so surrendered by the "Rat Portage Band of Indians" to Her Majesty in trust for sale, together with all minerals, precious or base, which should be found therein, were in consideration of the sum \$175.75 paid in hand to the Chief Superintendent of Indian Affairs by one Albert C. McMicken, and the reservation of a royalty of four per cent to be paid upon all minerals produced therefrom granted to the said Albert C. McMicken, his heirs and assigns forever; and by like letters patent bearing date the 30th April, 1889, thirty five other acres, other portion of the said reserve so surrendered by the "Rat Portage Band of Indians" to Her Majesty in trust for sale together with all minerals therein were in consideration of \$175 paid in hand to the Chief Superintendent of Indian Affairs by one George Heenan, and of a like reservation of a royalty of four per cent to be paid upon all minerals produced therefrom, granted to the said George Heenan, his heirs and assigns forever; and by like letters patent bearing date respectively the 2nd day of September, 1889, and 23rd day of July, 1890, forty other acres, other part of the said portion of reserve so surrendered by the said "Rat Portage Band of Indians" to Her Majesty in trust for sale together with all minerals therein were, in consideration of the sum of \$200 paid in cash to the Chief Superintendent of Indian Affairs by one Hamilton G. McMicken, and of the like reservation of a royalty of four per cent on all minerals produced therefrom, granted to the said Hamilton G. McMicken his heirs and assigns forever; and these several parcels of land were subsequently sold and conveyed by the said Albert C. McMicken, George Heenan, and Hamilton G. McMicken, respectively, to the appellants in fee simple.

The Government of the Province of Ontario on the 9th of January, 1899, assumed to grant by letters patent issued under the great seal of the Province of Ontario the said several parcels together with other lands and the minerals therein to the respondents as tenants in common in fee simple subject however to the condition following :

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This grant is made and is accepted by the grantees subject to the rights, if any, of the Government of the Dominion of Canada in respect of the lands or the minerals, ore or metals thereon or therein contained, it being hereby declared that the said grantees, their heirs, executors, administrators and assigns *shall* have no recourse against us or our successors or against the Province of Ontario or the Government thereof *should our title* to the said lands, mines or minerals be found to be defective, or should these presents be found to be ineffectual to pass such title.

The respondents having asserted title under the said letters patent so issued to them, this action was instituted by the appellants in assertion of title under the letters patent so as aforesaid issued by the Dominion Government, which letters patent the courts below have held to be null and void—hence our present appeal.

Now unless the proclamation of 1763 and the pledge of the Crown therein that no lands in any of the colonies or plantations in America should be sold until they should be ceded by the Indians to, or purchased from them by, the Crown, are to be considered now to be a dead letter having no force or effect whatever; and unless the grave and solemn proceedings which ever since the issue of the proclamation until the present time have been pursued in practice upon the Crown entering into treaties with the Indians for the cession or purchase of their lands are to be regarded now as a delusive mockery; and unless the provision in the constitutional charter of the Dominion that the Parliament of the Dominion of Canada shall have

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exclusive legislative authority over all matters coming within the subject "Indians and lands reserved for the Indians" is quite illusory and devoid of all significance; it does appear to me to be free from doubt that all the provisions of the statutes of the Dominion Parliament above cited in relation to the Indians and their property, the management of all their affairs, the maintenance of their revenues for their sole use and benefit, and the sale by the Crown of their reserves or of such parts thereof as should be surrendered to the Crown upon trust to be sold for their benefit are within the exclusive legislative authority of the Dominion Parliament.

The Province of Canada at the time of the Union had no property in any "lands reserved for the Indians." Neither the Canadian statute, 9 Vict. ch. 114, to which the royal assent was given in virtue of the Imperial statute, 10 & 11 Vict. ch. 71, nor the Imperial statute 15 & 16 Vict. ch. 39, intituled "An Act to remove doubts as to lands and casual revenues of the Crown in the Colonies and Foreign Possessions of Her Majesty" had the effect of vesting in the Province of Canada any property "in lands reserved for the Indians" so as to constitute them to be within section 109 of the British North America Act "lands belonging to Canada at the time of the Union."

The words in 9 Vict. ch. 114 for transferring the Crown revenues to the province are :

All territorial and other revenues *now at the disposal of the Crown arising in the province.*

The words in the Imperial Act, 15 & 16 Vict. ch. 39, are contained in the first section of that Act as follows :

1. The provisions of the said recited Acts in relation to the hereditary casual revenue of the Crown shall not extend, or be deemed to have extended, *to the moneys arising from the sale or other disposition of the lands of the Crown in any of Her Majesty's colonies or foreign posses-*

sions, or in anywise invalidate or affect any sale or other disposition already made, or hereafter to be made of such lands, or any appropriations of the moneys arising from any such sales or other dispositions which might have been made if such Acts or either of them had not been passed.

Now as, by force of the proclamation of 1763, no sale could be made of any lands of the Crown in Canada until a cession or surrender of the Indian title therein should be made by the Indians to the Crown, it seems to follow that until such cession or surrender the Crown could have no territorial casual revenue arising out of such lands which, by force of either of the said acts, could have passed to the province so as to have become property belonging to the province at the union. It is for this reason that I have said that the title of the Province of Ontario to the lands surrendered by the North-west Angle Treaty of 1873 which are not subjected to any right or interest reserved and retained in the Crown for and on behalf of the Indians, seems to me to be due rather to the surrender than to any thing in the British North America Act.

But as to the lands in question in the present suit which are lands specially reserved by the treaty and retained by the Crown as lands reserved for the sole use and benefit of the Indians to be dealt with by the pledge of the Crown in accordance with the terms agreed upon, and upon the Indians implicit faith in the fulfilment of which, the thirty-four million acres, or thereabouts, of lands unaffected by the reservation of any charge in favour of the Indians were surrendered, it appears to me to be free from doubt, that in the distribution of legislative jurisdiction between the Dominion Parliament and the Provincial Legislatures there is nothing whatever in the constitutional charter of the Dominion, which is also the charter of its provinces, which qualifies the exclusive legislative authority vested in the Dominion Parliament over "*lands reserved*

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*for the Indians,"* which the lands under consideration in the present case undoubtedly are.

It has been contended that the judgment of the Lords of the Privy Council in the *St. Catharines Milling Company v. The Queen* (1) is conclusive upon the question now under consideration, but I have shewn, I think, that lands reserved by treaty with the Indians and retained by the Crown as the lands in question here were upon a trust accepted by the Crown for the exclusive benefit of the Indians in accordance with a practice instituted by the Crown from which there never had been any deviation are in a wholly different position from the lands under consideration in the *St. Catharines Milling Company's Case* (1) which were lands forming part of the thirty-four million acres surrendered by the Northwest Angle Treaty unaffected by any trust or interest therein reserved for the Indians.

Under these circumstances I can see no ground whatever for the contention that the judgment in the *St. Catharines Milling Company's Case* (1) governs the present case and I must say that I can see nothing in the judgment of the Privy Council in that case which would justify, much less which calls for, the withholding of the expression of my firm conviction that the maintaining of the judgment now under consideration in this appeal would be subversive of the scheme of Confederation as designed by the founders and framers of the constitution of the Dominion of Canada and of their clear intention, as expressed in sec. 91, item 24 of the British North America Act, the provision of which would thereby, in my opinion, be rendered wholly illusory and absolutely devoid of all significance.

The contention therefore of the appellants should, in my opinion, prevail and the appeal should be allo-

(1) 14 App. Cas. 46.

wed with costs. The letters patent under which the appellants claim should be declared to be valid, and the letters patent under which the respondents claim should be declared to be null and void in so far as they purport to affect the said several lands and the minerals therein which are claimed by the appellants.

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*Appeal dismissed with costs.*

Solicitors for the appellants: *Laidlaw, Kappelle & Bicknell.*

Solicitor for the respondent, Johnston: *S. C. Biggs.*

Solicitors for the respondent, Osler: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for the other respondents: *McPherson, Clark, Campbell & Jarvis.*