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.

1886
Nov. 19, 20 & 22.
1887
June 20.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Indian Lands—Title to—Right of Occupancy—Lands reserved for Indians—B. N. A. Act sec. 91, subsec. 24—Sec. 92, subsec. 5—Secs. 109, 117.

The lands within the boundary of Ontario in which the claims or rights of occupancy of the Indians were surrendered or became extinguished by the Dominion Treaty of 1873, known as the North West Angle Treaty, No. 3, form part of the public domain of Ontario and are public lands belonging to Ontario by virtue of the provisions of the British North America Act (1).

Only lands specifically set apart and reserved for the use of the Indians are "lands reserved for Indians" within the meaning of

(1) The following sections of the act bear upon the point in question:—

"Sec. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say—

"5. The management and sale of the public lands belonging to the Province and of the timber and wood thereon.

"Sec. 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 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 trusts 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 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."

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* PRESENT—Sir W. J. Ritchie C. J. and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

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sec. 91, item 24 of the British North America Act (1).

The judgment of Boyd C. in the Chancery Division of the High Court of Justice for Ontario (2) and of the Court of Appeal for Ontario (3) affirmed. Strong and Gwynne JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (3), affirming the judgment of the Chancery Division (2), which restrained the defendants from cutting timber on lands in Ontario claimed to be public lands of the Province.

This was an action by Her Majesty on the information of the Attorney General for the Province of Ontario against the St. Catharines Milling and Lumber Co. to prevent them from cutting and carrying away timber on lands in Ontario, lying south of Wabigoon Lake in the District of Algoma. It was claimed by the Attorney General that the lands in question were public lands of the Province, and that the defendants were trespassers and wrongdoers in cutting such timber.

The defendants justified under a license from the Dominion Government and pleaded the following special defence:

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 of Indians who "inhabited that part of the Dominion of Canada, and "that the claims of such tribes of Indians have always

(1) "Sec. 91. It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons, to 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 Legislatures of the Provinces; and for greater certainty, but not so to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

"24. Indians and lands reserved for the Indians."

(2) 10 O. R. 196.

(3) 13 Ont. App. R. 148.

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"been recognized, acknowledged, admitted and acqui-
"esced 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, para-
"mount 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 pay-
"ments 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, inclu-
"ding 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
"of Canada, the Dominion of Canada, and not the Pro-
"vince of Ontario, has the right to deal with the said
"timber lands, and at the time of granting the said leave
"and license had and still have full power and author-
"ity to confer upon the defendants the rights, powers
"and privileges claimed by them, as aforesaid, under
"which the said pine timber was cut."

The lands in question formed a portion of the territory declared, by what is known as the "Boundary Award," to be geographically within the limits of the Province of Ontario, and in the year 1873 they were surrendered by the Indians to the Government of Canada by virtue of a treaty known as the North West Angle Treaty No. 3.

The question to be decided was whether under the provisions of the B. N. A. Act these lands belonged to the Province of Ontario or the Dominion.

The action was tried in the Chancery Division before Boyd C. who decided in favor of the Province, and his decision was affirmed by the Court of Appeal. The

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defendants appealed to the Supreme Court of Canada from the decision of the Court of Appeal.

McCarthy Q C. and *Creelman* for the appellants.

Before discussing this case on the basis of the B. N. A. Act it is proposed to show, historically, that the Indians had a title to this land which never passed to the Province.

All this country was once occupied by Indian tribes. On its discovery by Europeans the discoverers acquired a right of property in the soil provided that discovery was followed by possession. See Sir Travers Twiss Law of Nations ch. headed "Right of Acquisition," (1), as to the contest between England and the United States with reference to the mouth of the Columbia.

In case of conquest the only test as to the title of the conqueror is found in the course of dealing which he himself has prescribed. When he adopts a system that will ripen into law he settles the principle on which the conquered are to be treated.

In Canada, from the earliest times, it has been recognized that the title to the soil was in the Indians, and the title from them has been acquired, not by conquest, but by purchase.

In 1763 a royal proclamation was issued dividing the British possessions in America into separate governments and defining the powers of each. The rights of the Indians are conserved therein as the following extract will show :—

"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

(1) Pp. 196 and 203, secs. 123 *et seq.*

"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 Com-"mander-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 whatever, which not having been "ceded to or purchased by Us as aforesaid, and 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 in-"cluded within the limits of our said three new Govern-"ments, or within the limits of the territory granted to "the Hudson's Bay Company; as also all the land 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 settlements whatsoever, or "taking possession of any of the lands above reserved, "without our especial leave or license for that purpose "first obtained.

"And we do further strictly enjoin and require all "persons whatsoever, who have either wilfully or in-

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"advertently seated themselves upon any lands within "the countries above 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, forth- "with to remove themselves from such settlements.

"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 In- "dians 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 respec- "tively within which they shall lie; and in case they "shall lie within the limits of any proprietaries con- "formable to such directions and instructions as we or "they think proper to give for that purpose. And we "do, by the advice of our Privy Council, declare and "enjoin, that the trade with the said Indians shall be "free and open to all our subjects whatever, provided "that every person who may incline to trade with the "said Indians do take out a license for carrying on such "trade from the Governor or Commander-in-Chief of any "of our colonies respectively where such person shall "reside, and also give security to observe such regula- "tions as we shall at any time think fit, by ourselves or

"commissaries to be appointed for this purpose, to direct "and appoint for the benefit of the said trade; and we "do hereby authorize, enjoin and require the Governors "and Commanders-in-Chief of all our Colonies respec- "tively, as well as those under our immediate govern- "ment, as those under the government and direction of "proprietaries, to grant such licenses without fee or "reward, taking especial care to insert therein a condi- "tion that such license shall be void, and the security "forfeited. in case the person to whom the same is "granted shall refuse or neglect to observe such regula- "tions as we shall think proper to prescribe as afore- "said."

William Penn was not the first to acquire Indian lands by purchase. He came to America in 1682 and made his treaty in 1683. Long before that settlements had been made in New York, first by the Dutch, next by the English, and then by the Swedes in 1674, and during all that period the right to the land was held to be determined by the earlier acquisition of the Indian title. See Hazard's Annals of Penn. (1).

Penn made his great treaty with the Indians in 1683. There is no written record of it in existence and no evidence as to its exact nature. But there is no doubt that Penn always recognized the Indians as owners of the soil and purchased lands from them.

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 river. And see Hazard (2).

The following extracts and references will show that

(1) Vol. I p. 395. (2) Pp. 581-3.

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the same system was pursued in different States of the Union.

Pennsylvania—Graham's history of the United States (1). 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:—"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 re-"peated by the planters of Maryland, Carolina, New "York and New Jersey, before the province of Pennsyl-"vania had a name."

And see Hepworth Dixon's life of William Penn (2); Memoirs of the Hist. Soc. of Penn. (3); Broadhead's Hist. State N. Y. (4).

In Hazard's An. (5) will be found the documents connected with Penn's dealings with the Indians.

New England—Neal's History of New England, London, 1720 (6):—"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 (7). And see "Palfrey's Hist. New England (8)."

Connecticut—Broadhead's History of the State of New York (9):—"It was therefore thought expedient that to "their existing rights by discovery, and exclusive visi-"tation, should be added the more definite title by pur-

(1) Vol. 2 p. 346.
(2) Pp. 185, 199, 200, 214-6 and 312.
(3) Vol. 1 part 1 pp. 164-6; vol. 3 part 2 pp. 146, 164.
(4) P. 232.
(5) Pp. 488-500.
(6) P. 134.
(7) P. 24.
(8) Vol. 3 p. 137.
(9) P. 234-5.

"chase from the aborigines." And see Conn. Hist. Collection.

New York—Broadhead's History of the State of New York (1):—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 pos- "sessed Manhatten Island only by right of first dis- "covery and occupation. It was now determined to "superadd a higher title by purchase from the abori- "gines." Smith's Hist. N. Y. (2).

New Jersey—Broadhead (3); Hepworth Dixon's Life of Penn (4).

Delaware—Broadhead (5); Hazard An. Penn. (6); Martin Hist. North Carolina (7).

New Haven—Story on the Constitution (8).

Rhode Island—Story (9); Barber Hist. New England (10).

Maryland—Graham Hist. U. S. (11); McSherry Hist. Maryland (12); Bozman Hist. Maryland (13).

Virginia—Notes of Virginia, London, 1782 (14); English in America by Judge Haliburton (15).

Carolina—Martin Hist. N. C. (16); Ramsay Hist. S. C. (17).

Then, coming to the Dominion, we start with the Articles of Capitulation signed at Montreal in 1760, one of which is:

Article 40.—"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

(1) P. 164.
(2) Pp. 266-7.
(3) Pp. 202-3.
(4) Pp. 143, 149.
(5) Pp. 200-1.
(6) P. 47.
(7) P. 93.
(8) 4 Ed. vol. 1 p. 56.
(9) 4 Ed. p. 6.
(10) P. 39.
(11) Pp. 11, 12.
(12) Pp. 24, 30.
(13) Vol. 2 pp. 28-32.
(14) P. 170.
(15) P. 99.
(16) P. 143.
(17) Pp. 12, 13.

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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."

Next is the Treaty of Paris, 1763, in which Canada was ceded to Great Britain, and in the same year the Royal Proclamation to which reference has already been made was issued.

The Six Nation Indians came to this country shortly after the War of Independence For their loyal conduct the crown granted to them certain lands purchased from the Ojibeways. We have not the precise words of this grant but we have all the conditions attached to it (1). After providing against alienation by the Indians, except among themselves, it concludes as follows:

"Provided always, that if at any time the said Chiefs, Warriors, Women and people of the said Six Nations, should be inclined to dispose of and surrender their use and interest in the said district or territory, or any part thereof, the same shall be purchased for us, our heirs and successors, at some public meeting or sasembly of the Chiefs, Warriors, and People of the said Six Nations, to be holden for that purpose by the Governor, Lieutenant-Governor or person administering our Government in our Province of Upper Canada."

In 1796 the Six Nation Indians, then resident in Canada, by treaty with the Government of the United States ceded their lands in New York for valuable consideration. On 1798 the Mohawks and in 1802 the Seneca Nation did the same. In 1838 the Seneca Nation by Indenture conveyed their reserved lands in New York to the Assignees of Massachusetts. The Treaty will be found in the United States Statutes at large (2) Mention may be made in this connection of

(1) App. (E E E) to Journals Ho. Ass., Can. 1844-5, page 24.

(2) Vol. 7 p. 557,

the Lake Superior and Lake Huron Treaties, in 1850, by which Canada purchased from the Ojibbeways for valuable consideration nearly all their lands.

In the Province of Quebec the French appear to have dealt with the Indians as a conquered people, and while they made them large grants their lands do not seem to have been acquired by purchase. The same principle prevailed in the Maritime Provinces. We are not obliged, however, to account for Ontario occupying a position different, in this respect, from that of the other Provinces. The B. N. A. Act simply dealt with the condition of affairs as it found them at the time it was passed.

In Nova Scotia and New Brunswick all questions with regard to Indians were well defined and nothing was supposed to be disturbed by the act of confederation.

The other Provinces not being concerned in the original formation of the Dominion this question cannot, so far as they are concerned, be discussed on the basis of the British North America Act.

The following statutes may be referred to as dealing with the matters in question here: 2 Vic. ch. 15, (U. C.); 12 Vic. ch. 9 (Can.): 13–14 Vic. ch. 74 (Can.); C. S. C. ch. 9; C. S. L. C. ch. 14; 27–28 Vic. ch. 68 (Can.) And the following cases are cited as decisions on the statutes. *The Queen* v. *Strong* (1); *Regina* v. *Baby* (2); *Totten* v. *Watson* (3); *Vanvleck* v. *Stewart* (4); and *Bown* v. *West* (5); and as American authorities on the question of the Indian title see Kent's Com. Title by Discovery (6); *Cherokee Nation* v *State of Georgia* (7); *Worcester* v. *State of Georgia* (8); *Ogden*

(1) 1 Gr. 392.
(2) 12 U. C. Q. B. 346.
(3) 15 U. C. Q. B. 392.
(4) 19 U. C. Q. B. 489.
(5) 1 E. & A. 117.
(6) 13 Ed. p. 259.
(7) 5 Peters 1.
(8) 6 Peters 515.

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v. *Lee* (1); *Godfrey* v. *Beardsley* (2); and *Gaines* v. *Nicholson* (3).

In all the treaties mentioned the word "cede" is used; this is a term usually employed in cases of transfers of land between different States The Indians are dealt with as quasi-independent nations. The reason for this is pointed out in the case of the *Cherokee Nation* v. *Georgia*; see also *Turner* v. *American Baptist Union* (4)..

It is not contended that item 24, section 91, of the British North America Act vests these lands in the Dominion, any more than that item 5 of section 92 vests them in the Province. What is contended is that section 92 must be read in conjunction with section 108 as to public works, section 109 as to lands, &c., in the Provinces, and section 117 as to mines and minerals, in order to get at the meaning of the act with respect to the question in this case.

By the North-West Angle Treaty, in 1873, the Dominion Government granted to the Indians certain hunting and fishing privileges, which would be inoperative if the contention of Ontario in this case is correct

It is claimed that the land always belonged to the Province, but until this treaty was made they could exercise no control over it. Only the Dominion could deal with it and the Governor-General alone could make a treaty for its surrender. And the land was in a peculiar position in other respects. No white man conld go upon it and deal with the Indians. This was made a criminal offence in 1841, and the Dominion Parliament was the only authority by which that law could be repealed. Can it be supposed then, that this territory passed to the Province under the word

(1) 6 Hill (N. Y.) 546; 5 Den. N.Y. 628.
(2) 2 McLean 412.
(3) 9 How. 356.
(4) 5 McLean 344.

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"lands" in the British North America Act?

The lands intended to be under the control of the local authorities are lands which are valuable assets. It might be admitted that if the crown had any estate in these lands it would be in the right of the Province under the authority of *Mercer* v. *Attorney-General for Ontario* (1); but there was no estate. The Indians had a right to occupy the land, to cut the timber and to claim the mines and minerals found on the land, and the land descended to their children; the only restriction upon their title was as to alienation; that might be called a limited or base fee. And was there any thing more vested in the crown than a mere right to the land when the Indian title was extinguished?

As to escheat see Stephens Black. (2); *Burgess* v. *Wheate* (3); 2 Greenleaf's Cruise Digest (4); *Mercer* v. *Attorney General for Ontario* (1).

W. Cassels Q C. and *Mills* for the respondents.

In considering the argument of the appellants it must be clearly kept in mind that the authorities in the United States relied upon by the appellants are authorities dealing with the rights of the Indians in regard to lands specially reserved to them by treaties ratified and sanctioned by the United States. These authorities deal with the rights of the Indians as vested in them under and by virtue of these treaties.

The various treaties will be found in vol. 7 United States Statutes at Large. I more particularly refer to page 44.

The learned counsel for the appellants lay stress upon the negotiations by the Six Nation Indians with the United States after they came to Canada. These negotiations related to lands set apart to those Indians on

(1) 5 Can. S. C. R. 538; 8 App. Cas. 767.
(2) 9 Ed. p. 178.
(3) 1 Wm. Bl. at p. 162.
(4) P. 192.

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the 11th November, 1794. See *Ogden* v. *Lee* (1). The treaty in question is there set out, and so in regard to the other cases relied upon by the appellants.

There are four cases decided by the Supreme Court of the United States which have a direct bearing upon the question in controversy. Nearly all, if not all other cases, are determined upon the particular terms of the various treaties. These four cases decided by the Supreme Court are very applicable to the case in question, and are directly opposed to the contention of the appellant.

The first case, *Fletcher* v. *Peck* (2), is strongly in point. In that case prior to any surrender by the Indians the State had granted a patent. A surrender was obtained from the Indians in favor of the United States. It was contended that at the time of the patent the title was in the Indians, and that no title passed by the patent granted by the State. The court, however, held that the title to the soil was in the State, the right existing in the Indians being one merely of occupancy—that the surrender merely operated as an extinguishment and for the benefit of the legal estate. This case was decided in 1810.

In 1815 the case of *Meigs* v. *McClung* (3) was decided. The facts in this case were a grant by the State prior to surrender and a subsequent grant from the United States, claiming title by virtue of a surrender from the Indians. The court held that the right in the Indians was merely one of occupancy, and that the surrender merely operated as an extinguishment of this right enuring to the benefit of the fee.

Johnson v. *McIntosh* (4) is a leading case in the United States. In this case all the various treaties and statutes are referred to and the question exhaustively dealt with.

(1) 6 Hill (N. Y.) 546.
(2) 6 Cranch 87.
(3) 9 Cranch 11.
(4) 8 Wheaton 574.

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[The learned counsel read extracts from this case showing that the Indian title, so-called, was merely one of occupancy.]

In *Clarke* v. *Smith* (1), the same views are affirmed.

[The learned counsel then referred to the various cases cited by the appellant's counsel pointing out and contending that each case was decided upon the particular treaty and could have no application to the case in question.]

The cases in our own courts are also against the contention of the appellants. In *Doe d Jackson* v. *Wilkes* (2) it was held that a patent by the crown of an Indian reserve passed to the plaintiff.

In *Bown* v. *West* (3) and *Doe d Sheldon* v. *Ramsay* (4) the court held that the Indians had no title.

Reg. v. *Baby* (5) has been cited in support of the appellants' argument. That case when looked at will be found to be very different from what is contended for. So in *Totten* v. *Watson* (6).

Vanvleck v. *Stewart* (7) had reference to a special reservation set apart for the benefit of the Indians. In this case it was held that the Indians had a beneficial right in the lands reserved, and a right to the timber cut from these lands.

Church v. *Fenton* (8) related to the lands specially reserved for the benefit of the Indians. In November, 1786, a surrender had been obtained and by the terms of the surrender a special reserve was set apart for the benefit of the Indians. By this treaty it was stipulated that in the event of the Indians subsequently desiring to surrender the reserved lands so specially set apart the crown would sell them for the benefit of the Indians. The special reserve was

(1) 13 Peters 195.
(2) 4 O. S. 142.
(3) 1 E. & A. 117.
(4) 9 U. C. Q. B. 105.
(5) 12 U. C. Q. B. 346.
(6) 15 U. C. Q. B. 392.
(7) 19 U. C. Q. B. 489.
(8) 28 U. C. C. P. 384.

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surrendered in 1854, and the contest in *Church* v. *Fenton* arose in regard to these particular lands.

There are no other authorities bearing on the point. Reference to the mode of dealing with the Indians in the United States does not warrant the contention of the appellants. For instance, in 1635 one Roger Williams was banished from Massachusetts for maintaining that the title to Indian lands was not in the King but in the natives. In 1632 the Dutch complained that their lands in New York, which they held by purchase from the Indians, had been taken from them. Counsel's opinion was that the Indians could pass no title to the lands.

The learned counsel for the appellants refers to the Articles of Capitulation and to the Proclamation of 1763. It is said that this proclamation is the charter of the Indians.

Assuming this charter to be the foundation of their title what then becomes of their original title to the lands? If the Indian title is based upon a right acquired from the crown by virtue of this proclamation, then it must be the starting point of their title, and they can have no higher rights than those given to them by the proclamation in question.

The proclamation assumes the title to be in the crown and not in the Indians. By this proclamation the crown gives power to the Governors to grant lands east of a certain line. If the Indian title existed, how could they exercise this right? What becomes of the titles granted east of the line in question? The crown reserves for the present the lands west of the line. If the Indians accept title under this proclamation, then they accept a reservation during the pleasure of the crown. Subsequently by the statute, passed in 1774, the boundaries of the Province of Quebec are extended so as to embrace the lands in controversy, and the pro-

clamation is annulled by the very terms of the act. If, therefore, this proclamation is the foundation of the Indian title, they accept it merely as an act of bounty from the crown, with the right to the crown to alter or annul it.

The effect of this proclamation is fully referred to in the case of *Fletcher* v. *Peck* (1) hereinbefore referred to, and in that particular case it was held that the extension of the territory forming the State of Georgia withdrew it from the operation of the proclamation of 1763.

If the Supreme Court of the United States is correct in holding that the effect of extending the jurisdiction of the Governor of Georgia to grant patents for lands reserved by the proclamation of 1763 was an annulling of that proclamation, so far as the extended area is concerned, surely an express statute has a similar effect. It is, therefore, submitted that the contention of the appellants is erroneous.

There is no instance on record where the courts have recognized the Indian title, or gone behind a grant from the crown to inquire whether or not an Indian title was well founded.

We next come to the effect of the confederation act. The learned counsel for the appellants have striven to argue that under the statute the lands in question are vested in the Dominion.

In order to arrive at the true meaning of the British North America Act the constitution of each of the provinces at the time of confederation must be considered. In the Province of Quebec no surrenders have ever been obtained from the Indians. If the contention of the appellants is correct, then the grants for nearly the whole of that province are of no effect. Such contention, however, has never been put forward.

Section 91 item 24 of the British North America Act

(1) 6 Cranch 87.

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clearly refers to lands which have been specially reserved. Take the case of surrender of lands in Upper and Lower Canada prior to confederation. At the time of confederation would not the title to these lands be vested in the old provinces of Upper and Lower Canada? What becomes of these lands after confederation? Surely under the British North America Act they would be vested in the provinces of Ontario and Quebec respectively.

Section 108 of the B. N. A. Act refers to the 3rd schedule; that schedule says nothing about the Indian reserves.

[The learned counsel here referred to the various statutes of the different Provinces prior to confederation, contending that the confederation act plainly referred to reserves specially set apart under the various statutes.]

Then, since confederation the Dominion Parliament has clearly recognized such to be the case. For instance, in the statute of 1868, again in the statute of 1869, and so in the statute relating to British Columbia.

[Here counsel refer to various statutes since confederation relating to the admittance of British Columbia into the Union, and the various statutes of the Dominion relating to Indians.]

It is submitted that the extent of the Indian title is a mere right of occupancy, a mere right of hunting, &c., which can only be dealt with for the purpose of extinction. The utmost that can be contended is, that the fee is vested in the Province subject to the right of occupancy in the Indians.

[Counsel read extracts from the judgments of the Chancellor and the judges in the Court of Appeal in support of their contention.]

There are lands in Ontario which have never been

surrendered and which are dealt with by the Crown Lands Department.

A further point relied upon by the respondents is, that the contention now put forward by the appellants could not be put forward on the part of the Dominion without operating as a fraud on the rights of the Province of Ontario.

In the year 1871 the Dominion approached the Province of Ontario with the view to arranging for a provisional boundary pending the assignment of the true boundary. Negotiations between the Dominion and the Province of Ontario lay in abeyance until the Dominion obtained a surrender of the Indian title. Subsequently the Dominion renewed negotiations, pointing out that by virtue of this surrender the Indian title had become extinguished. An agreement was then entered into whereby the Dominion were to have a full right to grant patents to the lands west of the Provincial boundary, and the Province to have the right to grant patents to the lands east of this boundary, and by the agreement the Dominion and the Province respectively agreed to ratify each others acts and to confirm the patents in the event of the true boundary being determined to be east or west of the provisional line.

Proceedings were taken to have the true boundary ascertained and after eight years the contention was determined in favor of the Province.

Notwithstanding this agreement, and the fact that for eight years the Province and the Dominion have been endeavouring to have the boundary settled, it is contended by the present appellants that all the time, no matter what the courts might hold in regard to the true boundary, the lands were vested in the Dominion.

It is said that by the treaty in question of 1873 the Dominion obtained a title to the lands in dispute.

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The Dominion, however, treated this as operating as na extinguishment of the Indian title for the benefit of the Province in the event of its appearing the boundary of the Province was west of the lands in question, and it is submitted the Dominion could not now successfully contend that this surrender had other or further effect after the agreement entered into by the Province of Ontario.

Another point to be considered is, supposing the Indians had said to Governor Morris "We will not make a treaty with you," if the appellants' contentions are correct for all time to come these vast territories would have been withdrawn from settlement.

To maintain their position the appellants must assume that the Indians have a regular form of government, whereas nothing is more clear than that they have no government and no organization, and cannot be regarded as a nation capable of holding lands (1).

Washburn on Real Property (2), and Story on The Constitution (3) were also referred to.

It is also contended that the crown had never recognized the aboriginal inhabitants of a country who were without any settled government as the proprietors of the soil. This was not only the rule uniformly acted upon by the Sovereigns of England, but it was a part of the common law of Europe. Answers of James I. and his Lords of Trade to the States' General (4); Chalmer's Annals of the Colonies (5); Vattel's Law of Nations (6); see also various charters of Government and grants of land made by the Sovereign of England from 1585 to 1758 without reference to Indian occupation.

At the time of the discovery of America, and long after, it was an accepted rule that heathen and infidel

(1) Wheaton's International Law. Note 24.
(2) 5 Ed. Bk. 3 ch. 3 ss. 4, 5 & 6.
(3) Ss. 152-8.
(4) N. Y. Hist. Doc. Vol. 1. pp. 56-58.
(5) P. 623.
(6) Bk. 1 Ch. 7 Sec. 81—Ch. 18 ss. 205-209.

nations were perpetual enemies, and that the Christian prince or people first discovering and taking possession of the country became its absolute proprietor, and could deal with the lands as such.

Calvin's Case (1); *Butts* v. *Penny* (2); *Gelly* v. *Cleve* cited in *Chamberlain* v. *Harvey* (3); *East India Co.* v. *Sandy's* (4); *The Slave Grace* (5).

It is a rule of the common law that property is the creature of the law and only continues to exist while the law that creates and regulates it subsists. The Indians had no rules or regulations which could be considered laws.

St. John's argument on this subject and the authorities cited in *The King* v. *John Hampden* (6).

Parkman's War of Pontiac vol. 1; Paley's Moral Philosophy (7); Bentham's Theory of Legislation (8); Locke on Government (9).

No title beyond that of occupancy was ever recognized by the crown as being in the Indians, and this recognition was based upon public policy and not upon any legal right in the aboriginal inhabitants.

Opinion of John Holt and others. N. Y. Hist. Doc. (10); N. Y. Hist. Doc. (11); New Haven Col Records 1639 (12); Connecticut Col. Rec. 1680 (13); Ibid 1717 (14); Ibid 1722 (15); Douglas' Hist. Summary (16); *Arnold* v. *Mundy* (17).

The King had no power to prevent the sale of lands by any proprietor. The reservation by the proclamation of 1763, for the present, of the lands west of a

(1) 4 Coke's Rep. 1.
(2) 2 Lev. 201.
(3) 1 Ld. Raymond, p. 147.
(4) 7 Har. St. Tr. 493.
(5) 2 Hagg. Ad. R. 104.
(6) 1 Har. St. Tr. 535
(7) Bk. 3 ch. 4.
(8) Part 1 ch. 8.
(9) Bk. 2 ch. 5 secs. 28, 32, 42.
(10) Vol. 13 p. 463.
(11) Vol. 8 pp. 373–374. pp. 441, 442.
(12) P. 57.
(13) Pp. 56–57.
(14) P. 13.
(15) Pp. 355, 356.
(16) Vol. 2. pp. 275–280.
(17) 1 Hals. 1.

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certain line, rests upon the King's ownership of the lands. It was an act arising out of his proprietary rights. And in no case did he undertake to deal with the Indians when he had parted with the fee. Penn dealt with the Indians of Pennsylvania, and so did the proprietors and corporators in other proprietary and charter governments.

Entick's Hist. of Late War (1).

Young's Chronicles of New England (2); Proud's History of Pennsylvania; Murdock's History of Nova Scotia.

McCarthy Q.C. in reply.

The decision of the Privy Council in the boundary case has never been adopted by act of Parliament and has not the force of law. It is claimed that it estops us from claiming this land, but even if it is binding it only decided that the land was, territorially, a part of Ontario. The question of title was not raised in that case.

The question to be decided in this case is: Had the Indians any title, and if they had was it of so limited a character that the crown had an estate in the land consistent therewith.

[The learned counsel took up the American cases referred to by the counsel for the respondent, showing how in his opinion they failed to support the argument founded on them.]

The case of *Mitchell* v. *The United States* (3) brings up the questions involved in this appeal more nearly than any I have found. In that case it was said that purchases from the Indians have universally been held good. Before Mitchell died the Indians had ceded to the crown of Great Britain, and the land was afterwards transferred to the crown of Spain, and finally to the United States. The court said if these facts were true

(1) Vol 1. pp. 109–111. (2) P. 176.
(3) 9 Peters 711.

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the prior title must prevail.

It cannot be said that the Quebec Act of 1784 annulled the proclamation of 1763. The object of that act was to do away with the British, and restore the French, law, but it did not attempt to change the mode of dealing with the Indians.

The following cases may be referred to as dealing with this proclamation. *Campbell* v. *Hall* (1) referred to in *Mitchell* v. *The United States*; *Sims* v. *Irvine* (2); *Johnson* v. *McIntosh* (3); and *Worcester* v. *State of Georgia* (4).

Now, the question remains whether, the Indians having had the enjoyment of the lands without a right of interference in any body, there was any right or title in the crown. If so, what is the estate of the crown? Does it depend on the Indians becoming extinct? It is laid down by the Privy Council that an escheat is not an estate, and if not, how could it pass under the British North America Act?

If this property is under the control of the Dominion they alone can deal with it. But what duty rests on the Dominion to buy the land for the benefit of Ontario?

Sir W. J. RITCHIE 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

(1) Cowp. 204.
(2) 3 Dallas 425.
(3) 8 Wheaton at p. 596.
(4) 6 Peters 515.

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either by conquest or by purchase; that, as was said by Mr. 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. See 31 Vic. ch. 42; 33 Vic. ch. 3; 43 Vic. ch. 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 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, and they are consequently public lands belonging to Ontario, and as such pass under

(1) Story on the Constitution 4th Ed. ss. 687.

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 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 authorize the cutting of timber on these lands cannot be supported, and the Province has a right to interfere and prevent their spoliation.

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 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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STRONG J.—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 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,

> 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 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

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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 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" 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 subsection 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

(1) See, as to conjoint effect of s. 109 and s. 92, subs. 5, *Attorney General* v. *Mercer*, 8 App. Cas. at p. 776.

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preserved are manifestly of a different order from anything connected with lands reserved for Indians, for instance, those trusts subsisting in favour 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 the *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 the 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 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

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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 land 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 Provinces 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 attributable 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 subsection 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 subjected 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

(1) 8 App. Cas. at p. 774.

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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 unsurrendered lands generally, or whether it was intended to use the term in its restricted sense, as the respondent contends, as indicating only lands which had been expressly granted and appropriated 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

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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 unsurrendered 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

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being shown to have been well established and acted upon, and the title of the Indians to their unsurrendered 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 unsurrendered by them, and to the

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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.

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 unsurrendered 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 recognise 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

(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.

cession to our government (1).

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 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.

Again the same learned writer says (2);

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 individually or collectively as

(1) 3 Kent Comms. 383. (2) P. 385.

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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 territorial 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 (1):

> 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 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, 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

(1) P. 386, note (*a*).

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 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-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.

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

(1) At p. 134.

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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 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 unsurrendered lands which they occupied as hunting grounds; that this

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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; and 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 subsection of section 91 of the British North America Act, that a construction which would place unsurrendered 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-sec. 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 unsurrendered 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 unsurrendered 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, 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.

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 recognised secondary meaning, and that they were

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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 subsection 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 Misissipi, 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.

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

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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 purposes of settlement 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 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 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 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 Company 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

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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.

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 B. N. A. Act none can be found which would authorise such a dealing with Indians in respect of 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 that in 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, Indian lands not ceded to or purchased by the king, *i.e.*, lands not surrendered, are expressly des-

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cribed 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 7th October, 1763, by which provision was made for the government of certain territories acquired by Great Britain by conquest 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, and 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 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 Chaleurs 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

(1) 14 G. 3 c. 83.

regulations respecting Indians and Indian lands as follows :—

And whereas it is just and reasonable and essential to our interest 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 further pleasure be known, to grant warrants of survey, or pass patents for any lands, beyond the heads 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.

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-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 especial leave or licence 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.

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

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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* (1), 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 on 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

(1) 1 Cowp. 204.

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"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 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

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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, nor in any way derogated from by any subsequent legislation, 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, and being still in full force and vigor when the British North America Act was passed, it 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 legislation 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 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

(1) 14 G. 3 c. 83.

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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.

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 "found 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 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

(1) See printed papers in arbitration case 371-373 and Ontario appendix to same 137.

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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.

Then it is said that the proclamation was, as regards the Indians, merely a temporary measure, and that its character 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 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.

It is not suggested that between 1844 and the passage of the British North America Act anything occurred to detract from Indian rights. This constant usage for upwards of a century by itself raises a strong presumption in favour 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 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

(1) 8 Wheaton 545.

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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, which he recognises to have been well established by *Campbell* v. *Hall* (1), 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 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, concedes 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

(1) 1 Cowp. 204.

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 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."

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 subsection of section 91 of the British North America Act, upon the construction of which the decision to 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 Chancellor's own words), the result is inevitable, that

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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 definite 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 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 subsection 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 section 8 it was provided, that lands reserved for the use of the Indians should only be ceded to the crown by a

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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 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, 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 favour 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

(1) 39 Vic. ch. 18; 43 Vic. ch. 28.

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forth any authoritative declaration of the proper construction of the clause in question in the British North Americea Act, or to relinquish in favour 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 favour 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.

On the whole my conclusion must be, that the lands included in the description of "lands reserved for the Indians," in subsection 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 case 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.

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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 1763, 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.

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 favour 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.

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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.

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.

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,

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&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.

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 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

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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 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 never taken place no such question 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 con-

federation? 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.

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As I stated before, I fully concur in the judgment of the learned Chancellor. If the lands in 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 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. *Pecks*, and *Johnson* v. *McIntosh*, "that on the 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 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

(1) 4 La. An. 141.

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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 *Johnson* (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

(1) 6 Rob. La. 175. (2) 5 Mart. La. (O. S.) 655.
(3) 3 La. (O. S.) 86.

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

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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 the effect of the royal proclamation of the 7th October, 1763. They failed, 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 appellant that the following clauses support their contention:

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.

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.

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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 suffer ance only. Their possession has been, in law, the

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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

(1) *Doe Fitzgerald* v. *Finn*, 1 U. 24 U. C. C. P. 230; *Rex* v. *Lelievre*, C. Q. B. 70; *Greenlaw* v. *Fraser*, 1 Rev. de Jurisp. 506.

(2) 14 Geo. 3 ch. 83 sec. 4.

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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 appellants from philosophers, publicists, economists and historians, and from official reports and despatches, must be interpreted as recognizing a legal Indian title as 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 philanthrophic 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 a 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

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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 the B. N. A. 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).

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 B. N. A. Act, hold it subject to that interest.

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 B. N. A 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 B. N. A. 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,

(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. 392; *Bastien* v. *Hoffman*, 17 L. C. R. 238; *The Commissioner of Indian Lands* v. *Payzant*, 3 L. C. J. 313.

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wherein they suggested a plan for the future management of Indian Affairs in His Majesty's possessions in North America.

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 (1):

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 recognised 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 the territory in the possession of the Kings of France, whose mode of dealing with the Indians was to make, *ex gratiâ*, 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 recognizing their having a certain title, estate and interest in the lands so acquired by the Crown of Great Britain; and in

(1) See p. 625.

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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, 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 com- "mand as set forth in his proclamation of 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 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 Indians to prevent future claims 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-

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houses and appurtenances whatsoever to the said island, messuage or tenement and premises 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 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 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, Chippewa, Pottowatani and Huron Nations, which was attended by

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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 Pottowatani 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, Pottowatani 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 whatever, and have put his said Majesty in full possession and seizin by allowing houses to be built upon the premises.

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 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

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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 Britannic Majesty, have hereunto set their hands and seals, &c., &c.

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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 lands 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 follows 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 is in the following form :—

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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.

We have therefore set our marks to this 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 those paragraphs describing three 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 of the principal sum arising out of the sale of our lands shall 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 monies 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, 7 Wm. 4 ch. 118, was passed by the Legislature of the Province of Upper Canada, entituled "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 super-

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vision of the Lieutenant Governor for the time being as representing Her Majesty, and who was accountable to 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,, 4 and 5 Vic. ch. 100, 16 Vic ch. 159, Consolidated Statutes of Canada ch. 22, 23 Vic. ch. 2, and 23 Vic. ch. 151. By this last 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 authorised 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 recognised 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 Government.

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 recognised 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 the 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

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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."

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 lands 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 particu-

lar bands, 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."

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.

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 B. N. A. 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

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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 the proceeds for the benefit of the Indians themselves, so that the public might never acquire any interest whatever in the monies 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 B. N. A. 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 B. N. A. Act did not contemplate making, and has not made, any alteration in the relations existing of old between the Indians and his 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 legislalature 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, 23 Vic. ch. 151, which became null, and of no further validity. The B. N. A. Act having removed the Indians and their affairs wholly from under the management of a provincial Commissioner of Crown

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Lands, such an officer could no longer be Chief Superintendent of Affairs. The authorities of the Province of Ontario are invested by the B.N.A. 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 B. N. A. 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 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 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 Gracious Majesty the Queen of Great

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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 Saulteaux 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 :—

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, 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 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 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.

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 intoxicating 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 the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of the 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 duly authorised 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

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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 theIndians, 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 amunition 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 thus co-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 B. N. A. Act, has jurisdiction in relation to the Indians and their affairs, at least until a sum shall be realized 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

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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 B. N. A. 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 purposes 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 B. N. A. 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 B. N. A. 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 B. N. A. 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

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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 the 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 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 for 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 lands in which the Indian title had been extinguished.

Lands for the cession of which to Her Majesty

(1) 28 U. C. C. P. 399.

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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; 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 lands belong-"ing 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

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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 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 there- "in," applies, in my opinion, only to lands beneficially

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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 trusts imposed on them, unless and until some agreement shall be entered into between the Provincial government and them. In fine, I am of opinion, that at the time of the 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 or claim must be dismissed with costs, and that this appeal be allowed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *McCarthy, Osler, Hoskin & Creelman.*

Solicitor for respondent: *The Attorney General for Ontario.*