REGINA v. ST. CATHARINES MILLING AND LUMBER COMPANY

(1885), 10 O.R. 196 (also reported: 4 Cart.B. N.A. 214)

Ontario Chancery, Boyd C., 10 June 1885

(Appealed to Ontario Court of Appeal, *infra* p. 414)

Indian lands--Indian reserves--Title to Indian lands--Public lands--Constitutional law—B.N.A.Act, sec. 91, item 24, secs. 6, 92, item 5, secs. 109, 117.

The plaintiff sought to restrain the defendants cutting timber on certain lands within the territorial limits of Ontario. The defendant justified under a license from the Dominion Government, alleging that the district in question was until recently claimed by tribes of Indians: that such Indian claims were paramount to the claim of the Province of Ontario; and that the Dominion had by purchase acquired the said Indian title, and that by reason thereof as well as by inherent right the Dominion and not the Province was alone entitled to deal with the said timber limits.

Held, that the Indian title to the lands in question was extinguished by the Dominion treaty in 1873, known as the North-West Angle Treaty No. 3, and the extinction of title procured by and for the Dominion enured to the benefit of the Province as constitutional proprietor by title paramount, and it is not possible for the Dominion to preserve that title or transfer it in such wise as to oust the vested right of the Province to the land, as part of the public domain of Ontario.

The territorial jurisdiction of the Dominion extends only to lands *reserved* for Indians.

Before the appropriation of "reserves," the Indians have no proprietary right to the soil, but have merely a right of occupancy in their tribal character, and have no claim except upon the bounty and benevolence of the Crown. After the appropriation they become invested with a legally recognized tenure of defined lands in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement. It is "lands reserved" in this sense for the Indians, which form the subject of legislation in the British North America Act, *i.e.*, lands upon which or by means of the proceeds of which after being surrendered for sale, the tribes are to be trained for civilization under the auspices of the Dominion. Lands ungranted upon which Indians are living at large in their primitive state within any Province form part of the Public Lands, and are held as before Confederation by that Province under various sections of the British North America Act.

History of the public lands of Ontario from the time of their acquisition by the Crown till they became subject to Provincial legislative control briefly sketched.

The Canadian policy upon Indian questions both before and after Confederation, discussed.

THIS was an action brought by Her Majesty the Queen, on the information of the Attorney General for the Province of Ontario against the St. Catharines Milling and Lumber Company, claiming amongst other things, an injunction restraining the cutting of timber by the defendants upon certain lands lying south of Wabigoon Lake, in the district of Algoma.

In the statement of claim it was set out that during the season of the year 1883, the defendants without permission from the Crown or the Province of Ontario, entered upon certain lands situate in and the property of the Province of Ontario, lying south of Wabigoon Lake, in the district of Algoma, and cut pine timber from the said lands amounting to about 2,000,000 feet: that the Canadian Pacific Railway ran immediately north of the said Wabigoon Lake and adjacent thereto, and the defendants had removed about 500,000 feet of the said logs to the north side of the lake, alongside the railway, and intended to remove the same, with the object of having it cut into timber: that of the balance of 2,000,000 feet of pine, some lay on the north side and west side of Wabigoon Lake, the remainder being in the streams and small lakes south of and running into the said lake: that the lands upon which the timber was cut were lands of the Province of Ontario, and the defendants had no right, or title, or authority whatever entitling them to enter upon the said lands and cut the timber as aforesaid: and the plaintiff claimed a declaration that the defendants had no rights in respect of the timber cut on the said premises, and that the same might be delivered up to the plaintiff: that the defendants might be restrained by the order and injunction of the Court from further trespassing on the said lands, and from cutting timber thereon: that the defendants might be restrained from removing the timber already cut, and might be ordered to pay the damage sustained by the said wrongful acts, and the costs of the action.

By their statement of defence, the defendants alleged that they were a company incorporated under the provisions of the Canada Joint Stock Company Act, 1877, for the purpose

of prosecuting a general lumber and milling business within the Dominion of Canada, and in the prosecution of such business, the defendants, during April, 1883, applied to the Government of the Dominion of Canada, and upon payment of $4,125.52 obtained permission from the Government of Canada to enter upon a certain tract of timber lands situate on the south side of Wabigoon lake, in that portion of the Canadian territory, situated between Lake Superior and Eagle lake, which was the timber land referred to in the statement of claim: that pursuant to the leave and license then obtained during the lumbering season of 1883 and 1884, the defendants did cut about 2,000,000 feet of timber on the said tract of timber lands, intending to remove the same: that the said lands and the timber growing thereon were not the property of the Province of Ontario, but of the Dominion of Canada, and of the Crown as represented by the Dominion of Canada: that the Government of Canada acted within its power, and in pursuance of its rights in granting to them the permission and license to cut and remove the timber, and they, the defendants, had acted within their strict legal rights: that the tract of land in question, together with the growing timber thereon, was with other land 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 had always been recognized, acknowledged, admitted, and acquiesced in by the various Governments of Canada and Ontario, and by the Crown, and that such Indian claims were as to the lands in question herein paramount to the claim of the Province of Ontario or of the Crown, as repre- sented 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 payment made to them from time to time, and for divers other considerations, had acquired the said Indian title to large tracts of lands in the said territory, including the lands in question in this action, and the timber thereon, and by reason of the acquisition of the said Indian title, as well as by reason of the inherent right of the Crown, as represented by the Government of Canada, the Dominion of Canada, and not the Province of Ontario, had the right to deal with the said timber lands, and at the time of the granting of the said leave and license had, and still have full power and authority to confer upon the defendants the rights, powers, and privileges claimed by them as aforesaid: that long prior to the purchase by the defendants of the right to enter on the said lands and cut the timber, and at the time of such purchase, the Government of Canada had been and were exercising control over the said timber lands, and they, the defendants, made the aforesaid payments and incurred the cost of cutting the said timber in good faith, and the belief that they were acquiring a good and valid title thereto: and the defendants submitted that if the Court granted to the plaintiff the relief claimed, payment should be made to the defendants of the moneys so expended by them.

The plaintiff joined issue on the statement of defence.

The action was tried on May 18th, 1885, at Toronto, before Boyd, C.

The Attorney-General for Ontario for the plaintiff. We say that there is no Indian title at law or in equity. The claim of the Indians is simply moral and no more. They have no legal or equitable estate in the lands: *Bown v. West*, 1 O. S. 287; *Church v. Fenton*, 28 C. P. 384, 1 Cart. 831. See also *Kent's* Com., 12th ed., vol. 1, p. 257, as to Indian lands and titles, and *Johnston v. McIntosh*, 8 Wheat. 543. Indians have only a right of occupancy, subject to a right to extinguish the same by conquest or purchase. See *Washburn* on Real Property, vol. 3, p 186. A deed from Indians simply extinguished, but did not transfer their claims. The United States, as a country, have a "right of pre-emption" as to these claims of Indians. That is not so with us. For the nature of Indian title see Appendix E.E.E. of Journals of the Legislative Council of Canada, Vol. 4, (1844-5). The question is to whom do lands pass under the British North America Act in regard to which there was no treaty with Indians till after Confederation? If surrender took place before Confederation they would pass to the Province, and the same is the effect of surrender after Confederation: B. N. A. Act, secs. 108, 109, 117; *Attorney-General of Ontario v. Mercer*, L. R. 8 App. Cas. 767. If there is a trust or an interest in Indians, then by sec. 109 the lands goes subject to the trust or interest. The only provision of a contrary tendency is sec. 91, item 24: "Indians and lands reserved for Indians." But that does not help the defendants, because that relates to the jurisdiction of the Dominion Parliament in making laws; it does not touch ownership. The Dominion has passed no laws on this subject; there is only the executive act, not legislation. Compare the case of British Columbia and its admission into the Union: B. N. A. Act, sec. 146; Order in Council, Stats. of 1872, (D), p. lxxxiv *seq.* All executive action has not been withheld in the other Provinces, until Indian titles have been dealt with. This should be judicially recognized by the Court. Surrenders are not usual in Lower Canada: See App. T. of Journals of the Legislative Assembly of Canada, vol. 6, (1847.) In this Province, Indians are consulted only out of endeavor to satisfy the Indians. This, however, is mere matter of practice. The British Columbia Sessional Papers for 1876 collect Indian papers for British Columbia for a number of years. See at p.11, by which it appears a fee in Indians was never acknowledged; their title is of a possessory nature, satisfied by allocating reserves. See also Revised Statutes of New Brunswick, 1854, ch.

85; New Brunswick Journals, 1837-1838; *Ib*. 1857-1858, at p.483; *Ib*. 1868; Quebec Sessional Papers, vol. 1, No. 1, p. 69; Journals of the Legislative Assembly of Canada, vol. 16, appendix No. 21. See also the opinion given over two hundred years ago by English counsel: Documents relating to the Colonial History of the State of New York, vol. 13, p. 486 ([a]) There is a great distinction between the interest of Indians in unsurrendered lands, and in reserves for Indians. In the latter they have an equitable interest, but have no power of alienation. For statutes, etc., mentioning "reserves," see C.S.C. ch.9, secs. 10, 18; C. S. L. C. ch. 14, sec. 3; 27-28 Vic. ch. 68; 10 Geo. IV. ch. 3; Revised Statutes of Nova Scotia, 1851, ch. 28; Statutes of British Columbia, 38 Vic. No. 5, sec. 60; Journals of the House of Assembly of Upper Canada, 1828, p. 107; *Ib*. 1829, p. 47; *Ib*. 1836, p. 156. The Proclamation of 1763 was merely a provisional arrangement. It is expressly repealed by the Quebec Act of 1774, 14 Geo. III. ch. 83. This claim of the defendants is a new one recently set up; the claims of Ontario were recognized during the boundary disputes. See report of the Minister of Justice of June 3rd, 1874. See also Hans., vol. 2, p. 1456.

W. Cassels, Q. C., on the same side. United States Statutes Vol. 7 gives the Indian treaties. Many United States cases refer to reserved lands, and are not in point. Referenee may he made to the treaty of August 9th, 1836: Appendix to the Journal of the House of Assembly of Upper Canada, Session 1837-1838, p. 180; 2 Vic. ch. 15; 31 Vic. ch.42 (D.); 32-33 Vic. ch. 6 (D.); *Kent's* Comm. 12th ed. vol. 1, p. 259; *Fletcher v. Peck*, 6 Cranch S. C. U. S. 87, at p 142; *Meigs v. McClung's Lessee*, 9 ib. 11; *Clark v. Smith*, 13 Pet (S. C. U. S.) 195; Sessional Papers of Dominion of Canada, vol. 9, session 1880-1, paper No. 86.

D. McCarthy, Q.C., for the defendants. The proclamation of the King after the session of Quebec dealt with the question of Indian title: Appendix T. of Sessional Papers, 1847. The proclamation did deal with the territory in question, because it is territory draining into the Atlantic Ocean. The height of land forms the watershed between the two oceans. This has not been repealed so far as Indians are concerned. It is recited in the statute of 1774, and is varied only as to the Roman Catholic population. Nations and tribes of Indians under the protection of the British Crown have well defined and recognized rights. See 10 Geo. IV. ch. 3; 5 Will. IV. ch. 27; 7 Will. IV. ch. 118. The distinction between Indian and public lands is this: Indian lands are those held by Indians, and not yet ceded or surrendered to the Crown: See the Map in Sessional Papers, 1847. When surrendered they become public lands. See 2 Vic. ch. 14; 12 Vic. ch. 9, and ch. 31; 13-14 Vic. ch. 42, ch. 74; 14-15 Vic. ch. l06; 16 Vic. ch. 159; 20 Vic. ch. 26; C. S. C. ch. 9, sec. 10; C. S. U. C. ch. 81, secs. 25, 33, 34; *Worcester v. State of Georgia*, 6 Pet. (S. C. U. S.) 515; *The Cherokee Nation v. The State of Georgia*, 5 ib. 1; *Minter v. Shirley*, 45 Miss. 376. I refer, also, to Professor Ellis's work on The Red Man and the White Man, p. 478 ([b]). England has always recognized the rights of Indians to possession and occupancy to the exclusion of every one, that is all rights except that of alienation. See *The United States v. Clarke*, 5 Pet. 168; *Fegan v. McLean*, 29 U. C. R. 202; *Van Vleck v. Stewart*, 19 U. C. R. 489. At Confederation, the lands known as Indian lands formed no part of the assets of the Province. Indians held them, and might continue to hold for generations. When they parted with any portion of them from time to time, it was on the assumption that sufficient consideration would be paid to them for it. Sec. 91 of B. N. A. Act did not deal with Indian lands any more than with lands of private owners. The Provinces deal with the sale of public lands, but the right to deal with Indians and to accept their surrender is in the Dominion: *Church v. Fenton*, 5 S. C. R. 239. The Parliament of Canada alone has power to deal with the Indians, because they are wards of the Crown of England, represented by the Governor-General. This throws light on sec. 91 of B. N. A. Act. The Province should have the right to legislate about Indian reserves if they are provincial property, but this is not so by the very terms of the B. N. A. Act. Indian lands, when surrendered, cannot pass to the Province. The power to deal with Indians rests with the Dominion authorities, and not the Provincial. The Dominion alone has a right to accept the surrender of Indian lands. The Dominion pays for it, and why should it not have it? In *Church v. Fenton*, the patent was in surrendered Indian lands, and was from the Dominion. See the Dominion Acts 31 Vic. ch. 42, secs. 5, 6; 36 Vic. ch. 4, secs. 1, 3; 39 Vic. ch. 18, secs. 2, 11: and the Hon. Alex. Morris's work on Indian Treaties, p. 299 ([c]).

Creelman, on the same side, referred to United States Statutes at large, vol. 7, p. 1 *seq.*, where the Indian treaties are to be found: *Story* on the Constitution, 4th ed., vol. 1, ch. 1, secs. 6, 7, 37, 38; *Gaines v. Nicholson*, 9 How. S. C. 356; *Fitch v. McCrimmon*, 30 C.P. 183; *Foran v. McIntyre*, 45 U. C. R. 288; *Wheeler v. Me-shing-go-me-sia*, 30 Ind. 402.

The Attorney-General, in reply. The territory now claimed as Indian reserves is practically equivalent to half the whole country. There is no inconsistency in letting the Dominion deal with Indians, and yet give the lands when surrendered to the particular Province. The question is as to "Indian Reserves," that is the term used and to be construed.

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[a]) This opioion is set out *verbatim* in a footnote to the judgement *infra*.

[b]) The Red Man and the White Man in North America, from its Discovery to the Present Time. By George E. Ellis. Little, Brown & Co., Boston.

[c]) The Treaties of Canada with the Indians of Manitoba and the North-West Territories. By the Hon. ALEXANDER MORRIS P.C. late Lieutenant-Governor of Manitoba, the North-West Territories, and Kee-wa-tin. Willing & Williamson, Toronto, 1880.

June 10th, 1885. B**OYD**, C.--The Province of Ontario seeks the intervention of the Court in order that the St. Catharines Milling and Lumber Company may be restrained from trespassing and cutting timber on lands claimed by the Province. The defendants justify under license obtained from the Government of Canada in April, 1883, by virtue of which they assert the right to cut over timber limits on the south side of Wabigoon (or Wabegon) Lake, in that portion of Canada situated between Lake Superior and Eagle Lake. The defendants further plead specially that the place in question forms part of a district till recently claimed by tribes of Indians, who inhabited that part of the Dominion, and that such claims have always been recognized by the various Governments of Canada and Ontario, and by the Crown; that such Indian claims were paramount to the claim of the Province of Ontario, and that the Dominion have by purchase acquired the said Indian title, and by reason thereof, as well as by inherent right, the Dominion and not the Province is alone entitled to deal with the said timber limits.

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

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

In 1791 the old Province of Quebec was divided into Upper Canada and Lower Canada by Imperial Statute 31 George III. ch. 31, which, while enlarging the rights of self government, made provision in section 43[*] for the reservation of all acts, "which shall, in any manner relate to, or affect the King's prerogative touching the granting the waste lands of the Crown within the said Provinces" in order that they might be submitted to the British Parliament before receiving the King's assent. The custody, control, and ownership of all public lands in Upper Canada was transferred to the Provincial Government in 1837 by the Act 7 Will. IV. ch. 118, to which, after being duly reserved, the royal assent was given. In 1840 the Imperial Parliament reunited the Provinces of Upper and Lower Canada as one Province by the name of Canada (see 3-4 Vic. ch. 35) a union which subsisted till superseded by the larger union accomplished by the British North America Act. There being a like reservation as to waste land in section 42 of the Union Act, it was by statute 4-5 Vic. ch. 100 of Canada declared that it was expedient to provide a law applicable to all parts of the Province for the disposal of public lands therein. Such a law was embodied in this enactment which received Her Majesty's assent on May 30th, 1842. The comprehensiveness of this Act is manifested by 12 Vic. ch. 31, which applies it to all lands of which the legal estate is in the Crown whether held by Her Majesty for the public uses of the Province, or in the nature of a trust for some charitable or other purpose (secs. 1 and 2.) Section 4 shews that it covers lands "purchased from the Indians," *e. g.*, the "Huron tract." By another Act of the same year, (12 Vic. ch. 30,) provision is made for granting licenses to cut timber on the ungranted lands of the Province, elsewhere therein referred to as growing on the "public lands of the Province," and by section 7 these are enumerated as "Crown, clergy, school, or other public lands of the Province." This is consolidated in the Consolidated Statutes of Canada, ch. 23.

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

The colonial policy of Great Britain as it regards the claims and treatment of the aboriginal populations in America, has been from the first uniform and well-defined. Indian peoples were found scattered wide-cast over the continent, having, as a characteristic, no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians it was not thought that they had any proprietary title to the soil, nor any such claim thereto as to interfere with the

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[*] *Sic*. Section 42.

plantations, and the general prosecution of colonization. They were treated "justly and graciously," as Lord Bacon advised, but no legal ownership of the land was ever attributed to them. The Attorney-General in his argument called my attention to a joint opinion given by a "multitude of counselors," about 1675, touching land in New York, while yet a province under English rule. [d]

I think it accurately states the constitutional law in these words:

"Though it hath been and still is the usual practice of all proprietors to give their Indians some recompense for their land, and so seem to purchase it of them. yet that is not done for want of sufficient title from the King or Prince who hath the right of Discovery, but out of prudence and Christian charity least otherwise the Indians might have destroyed the first planters (who are usually too few to defend themselves) or refuse all Commerce and Conversation with the planters, and thereby all hopes of converting them to the Christian faith would be lost. In this the Common law of England and the Civil law doth agree. * * * Though some planters have purchased from the Indians yet having done so without the Consent of the Proprietors for the time being, the title is good against the Indians but not against the Proprietors without a confirmation from them upon the usual terms of other Plantations."--Vol. xiii. "Documents relating to Colonial History of the State of New York," p. 486.

Of the six counsel who sign this opinion, one (Richard Wallop) became Cursitor Baron of the Exchequer; another (Henry Pollexfen) became Chief Justice of the Common Pleas, and a third (Holt) was afterwards Chief Justice of England.

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[d]) The opinion referred to was as follows:

Councells opinions concerning Coll. Nicholls pattent and Indian purchases.

The land called N. Yourk & other parts in Amercia now called N. East Jersey, was first descovered by Sebastian Cobbitt a subject of England in King Henery ye 7th time about 180 years since & afterwards further by Sr Walter Raleigh in ye Reign of Queen Elix and after him by Henery Judson in kye Reign of King James and sldo by the Lord Delaware and begun to be planted in ye year 1614 by Dutch & Englis; the Dutch placed a Governour there but upon complaint made by the King of England to ye States of Holland the sd States Disown'd ye Bisness & Declared it was only a private Undertaking of ye West India-Company of Amsterdam So ye King of England Granted a Comison to Sir Edward Layden to plant these parts calling them New Albion & ye Dutch Submitted themselves to ye English Govermt. but in King Charles ye 1st Reign ye troubles in England breaking forth the English not minding to promote these New plantations because of ye troubles ye Dutch pretended to Establish a Gover't there again untill ye year 1660 when afterwards it was reduced under ye English Govermt & included & Ratified in ye peace made between England & Holland then it was granted to ye Duke of York 1664 who ye same year Granted it to ye Ld Barckley & Sr George Cartrett betwixt ye Dukes Grant to ye Ld Barckley & Sr George Cartrett and notice there of in America Several persons took Grants of Land from Coll. Nicholis ye Dukes Gover: Several of ye planters have purchased of ye Indians but Refuse to pay any acknowledgement to ye Kings Grantees.

Q. 1st Wither ye Grants made by Coll. Nicholls are good agt the Assigns of ye Ld Berchkley & Sr. George Cartrett.

Q. 2nd Wither the Grants from ye Indians be sufficient to any planter without a Grant from ye King or his Assignes.

Ans. 1st. To ye first Question the Authority by which Coll. Nicholls Acted Determined by ye Dukes Grant to ye Ld Berckley & Sr George Cartrett & all Grants made by him Afterwards (tho according to ye Comison) are void for ye Delegated power wch Coll. Nicholls had of making Grantes of ye Land could last no Longer then his Master's Interest who gave him yt power & ye having or not having notice of ye Dukes Grant to ye Lord Berckley & Sr George Cartrett makes no difference in ye Law but ye want of Notice makes it Great Equity yt ye present propritrs Should Confirm Such Grants to ye people who will submitt to the Comissions & payments of the present proprietors Quitt rents other wise they may Look Upon them as Desseizers & treat them as such.

Anew. To the 2d Question by ye Law of Nations if any people make Discovery of any Country of Barbarians the Prince of yt people who make ye Discovery hath ye Right of ye Soyle & Govermt of yt place & no people can plant there without ye Consent of ye Prince or of such persons to whom his rights is Devoulved & Conveyed the Practice of all Plantations has been according to this & no people have been Suffered to take up Land but by ye Consent & Lycence of ye Govr or proprietors under ye princes title whose people made ye First Discovery & upon their Submition to ye Laws of ye Place & Contribution to ye Publick Charge of the place & ye payment of Such Rent & other Value for ye Soile as ye Proprietrs for ye time being Require and tho it hath been & Still is ye Usuall Practice of all Proprietrs to give their Indians Some Recompence for their Land & Seem to Purchase it of them yet yt is not done for want of Sufficient title from ye King or Prince who hath ye Right of Discovery but out of Prudence & Christiian Charity Least otherwise the Indians might have destroyed ye first planters (who are usually to few to Defend themselves) or Refuse all Commerce and Conversation With ye planters & thereby all hopes of Converting them to ye Christian faith would be Lost. In this the Common Law of England and ye Civill Law doth agree and if any Planter be Refractory & will insist on hos Indian Purchase and not Submit to this Law of Plantations ye Proprirs who have Ye title Under Ye Prince may deny them ye benefit of Ye Law & Prohibitt Comerce with them as Opposers & Enemys to Ye Public peace. Besides tis Observable Yt no man can goe from England to plant in an English Plantation without leave from Ye Govermt & therefore in all Patents & grants of Plantations from Ye King a Particular Lycence to Carry Over Planters is incerted Wch Power in Prohibitting is now in Ye Propriers As Ye Kings Assigns, and therefore tho some Planters have purchased from Ye Indians yett having done soe without Ye Consent of Ye Proprietrs for Ye time being Ye title is good against the Indians but not against the Prorietrs without a Comfirmation from them upon the usuall terms of Other Plantations.

WM LECK JO. HOLT
WM WILLIAMS WM THOMSON
JO. HOLLES RICHD WALLOP
JOHN HOYLE HEN. POLLEXFEN

A true Coppy.
GARVIN LAWRIE.
ROBT WEST

The above printed extract is from Bol xiii. of "Documents relating to the Colonial History of the State of New York," p. 486.

In a classical judgment, Marshall, C. J., has concisley stated the same law of the mother-country which the United States inherited and applied with such modifications as were necessitated by the change of government to their dealings with the Indians. I quote passages from *Johnson v. McIntosh*, 8 Wheat, p. 595, &c.:

"According to the theory of the British constitution, all vacant lands are vested in the Crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative. * * This principle was as fully recognized in America as in the island of Great Britain. * * So far as respected the authority of the Crown no distinction was taken between vacant lands and lands occupied by the Indians. * * The title, subject to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title." At p. 588: "All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right." This right of occupancy attached to the Indians in their tribal character. They were incapacitated from transferring it to any stranger, though it was susceptible of being extinguished. The exclusive power to procure its extinguishment was vested in the Crown, a power which as a rule was exercised only on just and equitable terms. If this title was sought to be acquired by others than the Crown, the attempted transfer passed nothing, and could operate only as an extinguishment of the Indian right for the benefit of the title paramount. See judgment of Burns, J., in *Doe d. Sheldon v. Ramsay*, 9 U. C. R. at p. 133.

Many parliamentary recognitions of these principles might be cited, but let one or two suffice. There is to be found an affirmance of the established doctrine, that the ungranted and waste lands of the country are vested in the Crown, for the public, subject to the Indian title which is capable of being dealt with by way of extinguishment only, and not by way of transfer, in the Dominion Statute, 33 Vic. ch. 3, secs. 30, 31 and 32. There is also a very emphatic declaration of the customary Indian lands policy to be found in the address to Her Majesty from the Senate and House of Commons of Canada in December, 1867, praying for the extension of the Dominion to the shores of the Pacific, in which it is represented that upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines. Following this up, the same legislative bodies in May, 1869, resolved that upon the transference above mentioned, "it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer." This being embodied in the address subsequently presented to the Queen, the transfer was consummated by Imperial Order in Council of June 23rd, 1870, Article 14 of which stipulated that "any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government:" 35 Vic. (D.) p. lxiii.

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

But in Upper Canada the native tribes were in an untaught and uncivilized condition, and it became necessary to work out a scheme of settlement which would promote immigration and protect both red and white subjects so that their contact in the interior might not become collision. A *modus vivendi* had to be adjusted. The course of civilized colonization in the North-West at this day presents, in its essential features, a counterpart of what was going on in the now thickly-populated parts of Upper Canada at the beginning of this century. And the manner of dealing with the rude redmen of the North- West, in the way of negotiating treaties for the surrender of their lands, and conciliating them in the presence of an ever-advancing tide of European and Canadian civilization, is but a reproduction, or rather a continuation and an expansion of the system which had commended itself as the most efficient in Old Canada. The inevitable problem in view of the necessary territorial constriction of the Indian occupants of those vast expanses over which they and their forefathers have fished and hunted and trapped from time immemorial was and is this: how best to subserve the welfare of the whole community and the state, how best to protect and encourage the individual settler, and how best to train and restrain the Indian so that being delivered by degrees from dependency and pupilage, he may be deemed worthy to possess all the rights and immunities and responsibilities of complete citizenship. These three considerations, mainly, have shaped the policy of the Government in the past as in the present. For an admirable *resumé* of what has been done in the earlier history of Canada. I will avail myself of some passages to be found in a joint report of Messrs. Rawson, Davidson & Hepburn, on Indian affairs prepared in 1844, and printed among the Journals of the Legislative Council of Canada, vol. 4, as

appendix EEE of the session 1844-1845, and the Journals of the Legislative Assembly of Canada, appendix to vol. 6, as appendix T of the session of 1847. I may, at this point also mention how greatly I have been indebted to another joint report of Vice-Chancellor Jameson, Mr. Justice Macaulay, and this same Mr. Hepburn, of 1840, which is printed as a supplement to the later report of 1844: Journals of the Legislative Assembly of Canada, appendix to vol. 6, appendix No. 1 to appendix T. These two papers form a compendium of valuable knowledge and research not readily accessible elsewhere.

> "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. * * If the Government had not made arrangements for the voluntary surrender of the lands, the white settlers would gradually have taken possession of them, without offering any compensation whatever; it would at that time have been as impossible to resist the natural laws of society and to guard the Indian territory against encroachment of the whites, as it would have been impolitic to have attempted to check the tide of emigration. The Government therefore adopted the most humane and most just course in inducing the Indians, by offers of compensation to remove quietly to more distant hunting grounds, or to confine themselves within more limited reserves, instead of leaving them and the white settlers exposed to the horrors of a protracted struggle for ownership. * * In every case the Indians had either the opportunity of retreating to more distant hunting grounds, or they were left on part of their wild possessions with a reserve supposed at the time to be adequate to all their wants, and greatly exceeding their requirements as cultivators of the soil at the present day, to which were added the range of their old haunts, until they became actually occupied by settlers, and, in many cases, an annuity to themselves and their descendants forever, which was equivalent at least to any benefit they derived from the possession of the lands:" Journals of the Legislative Council of Canada, vol. 4, appendix EEE.
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> "In Upper Canada where at the time of the conquest the Indians were the chief occupants of the territory where they were all pagans and uncivilized, it became necessary as the settlement of the country advanced to make successive agreements with them for the peaceable surrender of portions of their hunting grounds. The terms were sometimes for a certain quantity of presents, once delivered, or for an annual payment in perpetuity. * * These agreements * * sometimes contain reservations of a part of the laud surrendered for the future occupation of the tribe. In other cases separate agreements for such reservations have been made, or the reservations have been established by their being omitted from the surrender, and in those instances consequently the Indians hold upon their original title of occupancy:" Journals of the Legislative Assembly of Canada, appendix to vol. 6, appendix T.

I may just notice in passing that this last clause is not expressed with sufficient fullness or precision; where the reserve is omitted from the surrender the title (so called) by occupancy to that no doubt continues: but, coupled with the exclusive and legally recognized rights thereto which attach to a reserve. Some of these rights the report proceeds to point out in these words:

"Among the consequences of the peculiar title under which the Indians hold their lands, are their exclusion from the political franchise, and their immunity from statutory labour, the exemption of their lands from taxation, from seizure from debt, and the exclusion of the white settlers from their reserves:" *Ib*. The reserves were held and occupied in common by the tribe as general property, but any member or family, by arrangement with the Chief, could mark off and cultivate a particular plot. These Indian lands could not be alienated or dealt with in the way of transfer, except by being surrendered to the Crown. This was frequently done for the purpose of having parts they did not desire to retain sold for the benefit of the tribes concerned. Such reserves and the proceeds of such reserves, when surrendered and sold, were held by the Crown as a Royal Trustee for the Indians. (*Bastien v. Hoffman*, 17 L. C. R. 238, Drummond, J.)

On this footing, then, have been negotiated all the treaties between commissioners for the Government and the respective tribes or nations of Indians found existing upon the different tracts covered by the treaties. As characteristic of all, the particular treaty which embraces the land now in dispute may be epitomized. It is called the "North- West Angle Treaty, No. 3," (see Sessional Papers of the Dominion, 1875, Vol. 8, No. 7, paper No. 8, at p. 19,) from having been entered into at a meeting convened at the north-west angle of the lake of the Woods (which is a notable point on the international boundary between Canada and the States), and because of the series of treaties affecting lands between the great lakes and the Rocky Mountains made since Confederation it is third in chronological order. It purports to be between Her Most Gracious Majesty by her commissioners, the Hon. Alexander Morris, Lieutenant- Governor of the Province of Manitoba, and the North- West Territories, Joseph Albert Norbert Provencher, and Simon James Dawson, of the one part, and the Saulteaux tribe of Ojibewa Indians inhabiting the country defined

in the body of the treaty, by their chiefs, of the other part.

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

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

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

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

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

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

If any portion of the reserves is required for public works due compensation is to made therefor.

Provision is then made for the taking of a census of the Indians inhabiting the tract, and an agreement to pay to each Indian the sum of $5 per head yearly.

Then follow further agreements that $1,500 yearly shall be expended by the Queen for the purchase of twine and nets for the Indians, and for the supply of tools and agricultural implements, cattle, and seed, &c., &c., the particulars of which need not now be given.

The liberal treatment of the Indians, and the solicitude for their well-being everywhere manifested throughout this treaty, are the outgrowth of that benevolent policy which before Confederation attained its highest excellence in Upper Canada. In Nova Scotia and New Brunswick the Micmacs and other tribes appear to have been comparatively neglected, so that we find that Hon. Joseph Howe (a competent witness), in submitting the report for Indian affairs in 1873, (Sess. Papers Dom., 1873, vol. 6, No. 5, Paper No. 23,) when referring to the manner of dealing with the Indians in the Maritime Provinces, gives a decided preference to the system pursued in Ontario and Quebec, and proceeds, enthusiastically, to declare that the crowning glory of "Canadian policy in all times, and under all administrations, has been the treatment of Indians." In the report of the Hon. D. Laird for 1876, (Sess. Papers Dom., 1876, vol. 9, No. 7, Paper 9,) he thus adverts to this point: "In some of the Provinces the Indian policy may have been partially shaped before they came under the British Crown, but as there was sufficient opportunity after the cession to have adopted a more liberal policy, it is not very apparent why the Indians were more liberally treated in Upper Canada than in any of the other old Provinces. It is a matter of granulation that a policy so liberal as that adopted in Ontario is being pursued in the North-West territories, and that the Indians there, provided they turn to the cultivation of their extensive resources, or the raising of stock, may become prosperous and contented."

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

In 1801 an Act was passed in Upper Canada, 41 Geo. III. ch. 8, making it unlawful to sell liquors to Moravian Indians inhabiting a tract of land on each side of the river Thames. In 1829 the Upper Canada Act, 10 Geo. IV. ch. 3, recited the sale and surrender by the Mississauga Indians to His Majesty of large tracts of land, reserving for themselves and their posterity a certain parcel on the river Credit, containing 4000 acres, and restrained any one from hunting or fishing thereon without the consent of the Indians. By section 2 it was declared that nothing therein

contained should diminish their common law rights of having their lands protected from trespass or waste in the same manner as other subjects of His Majesty. In 1839, an Act was introduced by Hagerman, A. G., 2 Vic. ch. 15, which contained this recital "whereas the lands appropriated for the residence of certain Indian tribes in this Province, as well as the unsurveyed lands and lands of the Crown ungranted," and not under location, have been trespassed upon from time to time. It then directed the appointment of commissioners to enquire into complaints against any person who illegally possesses himself of any of the aforesaid lands "for the cession of which, to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto." This statute is referred to in the report of 1840, ([e]) (the joint production of Vice-Chancellor Jameson, Mr. Justice Macaulay, and Mr. Robert Hepburn,) as "an Act for the protection of the Indian reserves." I have not noticed an earlier employment of this term in the public acts and documents of Upper Canada, though it must have been long in colloquial use. As thus used "Reserves" meant lands appropriated for the residence of Indian tribes for the cession of which, to the Crown, no agreement had been made with the Indians who occupied the same.

This statute was amended so as to be of more comprehensive scope in pursuance of a suggestion to that effect in the subsequent report by Messrs. Rawson, Davidson, and Hepburn already mentioned.[f] The amending statute is l2 Vic. ch 9, (1849,) and extends the Act of 1839 to all lands in that part of the Province called Upper Canada, whether such lands be surveyed or unsurveyed, for which no grant, &c., has issued from the proper department of the Provincial Government, and "whether such land be part of those usually known as Crown reserves, clergy reserves, school lands, or Indian lands, or by or under any other denomination whatsoever, and whether the same be held in trust or in the nature of a trust for the use of the Indians or of any other parties whomsoever." (These two Acts are consolidated in C. S. U. C., ch. 81.)

At this time Upper and Lower Canada had been reunited and the control of the public and waste lands of the Crown had passed to the Provincial Government. The Act of 12 Vic., read in connection with the report on which it was based, shews that the expression "Indian lands" is used as synonymous with "Indian reserves," and that the Act was intended to deal with and protect such "reserves," whether held by the tribes or by them surrendered to the Crown for sale or other purposes.

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

Section 1 of this Act was, no doubt, suggested by a case of *Bown v. West*, which came before Jameson, V. C., in 1845, 1 O. S. 288. That was a bill to rescind a contract for the sale of Indian lands. The Court dismissed the bill because, among other reasons, the whole title, legal and equitable, was in the Crown. This decision was affirmed in appeal, the judgment of the Court being pronounced by Robinson, C. J., 1 E. & A. 117. The Vice-Chancellor stated that the bill presented this state of facts only: that one party sells and the other purchases the right to the possession of Indian, that is of Crown lands, such right of possession never having been out of the Crown, but specially appropriated to the use of the Six Nation Indians, under the proclamation of Governor Haldimand. The nature of this tenure, he says, by the Indians and their incapacity, either collectively or individually, to alienate or confer title to any portion of such lands might have been sufficiently plain, even though not decided in *Doe ex dem. Jackson v. Wilkes*, 4 O. S. 142, (E. T. 5 Wm. IV.) The whole tenour of this decision shews that "Indian lands" or "the Indian title" were expressions used in reference to Crown lands which had been specifically set apart and reserved for the exclusive use of the Indians. Such, indeed, is the express language of the Chief Justice in Appeal, 1 E. & A., at p.118.

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

The next advance in legislation was by 20 Vic. ch. 26 (1857), an Act to encourage the gradual civilization of the Indian tribes of Canada, the preamble of which declared that it was

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[e]) Printed as Appl 1 to App. T. In App. to vol. 6 of the Journals of the Legislative Assembly of Canada.

[f]) Printed in part as App. E.E.E. in Journals of Legislative Council of Canada, vol. 4: and in part as App. T. In App. to vol. 6 of the Journals of the Legislative Assembly of Canada.

desirable to encourage the progress of civilization among the Indian tribes, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian subjects, and to facilitate the acquisition of property, and of the rights accompanying it by such individual members of the said tribes as shall be found to desire such encouragement, and to have deserved it. That and the other Acts are consolidated in C. S. C. ch. 9, sec. 1 of which defines "Indian" to mean only 'Indians or persons of Indian blood, or intermarried with Indians acknowledged as members of Indian tribes or bands residing upon lands which have never been surrendered to the Crown (or which having been so surrendered have been set apart or are then reserved for the use of any tribe or band of Indians in common), and who themselves reside upon such land.' Section 18 of the consolidated Act borrowing from 20 Vic. ch. 26, sec 15, provides that "Indian reserves" may be attached by any municipal council, on application of the Superintendent General of Indian affairs, to a neighbouring school section.

In the Act of 1860, 23 Vic. ch. 2, respecting sale and management of public lands, it is declared by sec. 38 that the term public lands shall be held to apply to lands theretofore designated as Crown lands, school lands, clergy lands, and ordnance lands, and by section 9, it is provided that the Governor in Council may declare the provisions of that Act to apply to "Indian lands" under the management of the Chief Superintendent of Indian Affairs. As to all ungranted lands, the title to which is in the Crown, this Act applies the designation "public lands," with the sole exception of "Indian lands," which are unique and subject to the special supervision of an officer who represents the guardianship of the Crown. The Legislature of Canada, in the Statute 27-28 Vic. ch. 68, has interpreted "Indian lands" to mean an "Indian reservation." Act 69 of the same session refers to the reserve of the Huron Indians at Lorette, commonly known as the "*Quarante Arpents.*"

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

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

Chapter 10 of the Revised Statutes of Prince Edward Island (1856) is an Act relating to the Indians in which it is declared that it is found necessary and expedient to protect the Indians in the possession of any lands now belonging to them, or which may hereafter be granted or given to them. Section 3 provides that commissioners shall take the supervision and management of all lands that may have been, are now, or may hereafter be set apart as Indian reservations, or for the use of Indians, and shall protect such lands from encroachment and alienation, and shall preserve them for the use of the Indians.

From the sessional papers I learn that nearly all the reserves in this island have been provided for the Indians by the liberality of private persons, and through the medium of the Aborigines Protection Society of London.

In the Revised Statutes of Nova Scotia (1851), ch. 28 relates to Crown lands of which section 5 reads, "The Governor may reserve for the use of the Indians of this Province such portions of the lands as may be deemed advisable, and make a free grant thereof for the purposes for which they were reserved." Opposite this the marginal compendium is "Indian reserves and free grants." Chapter 58 is entitled "of Indians," and section 3 provides that the commissioners shall take the supervision and management of all lands that are now, or may hereafter be set apart as Indian reservations for the use of Indians; they shall ascertain and define their boundaries and report to the Governor all cases of intrusion, or of the transfer or sale of such lands, or of the use or possession thereof by the Indians, and generally shall protect such lands from encroachment and alienation, and shall preserve them for the use of the Indians. Section 5 provides for prosecution by information in the name of Her Majesty in case of encroachment, notwithstanding the legal title may not be vested in the Crown.

In the Revised Statutes of New Brunswick (1854), Title xiii. relates to "Indian reserves." Section 1 authorizes surveys of these reserves. Section 3 is as to the appointment of commissioners to protect the interests of the Indians. Section 7 provides that proceeds of all sales and leases of the reserve shall be applied for the exclusive benefit of the Indians. Section 10 provides for laying off any tract of such reserves into villages or town plots for the exclusive profit of the Indians of that country.

In the Consolidated Statutes of Lower Canada (1861) ch. 14 is headed "an Act respecting Indians and Indian lands." Section 3, "No person shall settle in any Indian village, or in any Indian country in Lower Canada, without a license in writing from the Governor, &c." Section 7, "The Governor may from time to time appoint a commissioner of Indian lands for Lower Canada in whom * all lands or property in Lower Canada appropriated for the use of any tribe or body of Indians shall be vested in trust for such tribe or body," &c.

Section 7 extends to any lands in Lower Canada held by the Crown in trust for, or for the benefit of any such tribe or body of Indians, but shall not extend to any lands vested in any

corporation or community legally established, &c., although held in trust for or for the benefit of any such tribe or body.

By section 12, tracts of land in Lower Canada not exceeding in the whole 230,000 acres may be described, surveyed, and set out by the Commissioner of Crown Lands, and such tracts of land shall be respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada, as directed by Order-in- Council.

[This provision is taken from 14-15 Vic. ch. 106, sec. 1, and is probably intended to remedy the condition of many tribes whose occupation of lands had been disturbed, without compensation being made therefor, and to provide them a means of living in return for what they had thus been deprived of.]

Consolidated Statutes Lower Canada, ch. 24, sec. 54, is headed "roads through Indian reserves," and provides that municipal councils may cause roads to be opened through any part of an Indian reserve, and the compensation there- for shall be paid to the Superintendent-General of Indian affairs for the use of the tribe of Indians for which such land is held in trust.

The legislation of Canada, since Confederation, also reflects very clear light upon what was understood by the Indian reserves. For instance, in 1868 it is declared that "all lands reserved for Indians, * * or held in trust for their benefit shall be deemed to be reserved and held for the same purposes as before the passing of this Act, * * and no such lands shall be sold, alienated, or leased until they have been released or surrendered to the Crown," &c. (See sec. 6 of 31 Vic. ch. 42.) By section 10, "No release or surrender of any such lands" (reserved for the use of the Indians) "to any party other than the Crown, shall be valid." Section 15 refers to land appropriated to the use of the Indians in which the Indians are interested. Section 37 provides for protection and management of Indian lands in Canada, whether surrendered for sale or reserved, or set apart for the Indians. Again, in 1869, 32-33 Vic. ch. 6, provides for the locating of lots to Indians or reserves which have been sub-divided by survey with a view to their ultimate proprietorship, and consequent enfranchisement of the owner. And in 1876, 39 Vict. ch. 18, sec. 3, we find a valuable set of definitions in which occurs for the first time a differentiation in meaning between the theretofore equivalent terms: "Indian Reserves" and "Indian Lands." (See *Totten v. Watson*, 15 U.C.R. at p. 395.) By that Act "Reserve" is declared to mean "any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees," &c., whereas "Indian Lands" is to mean "any reserve or portion of a reserve which has been surrendered to the Crown."

"Special Reserves" includes lands set apart for the Indians, the legal estate to which is outstanding in trustees other than the Crown, (as *e. g.*, in Prince Edward Island and Quebec.) These definitions are all repeated in the last statute of 1880, 43 Vic. ch. 28 (D.)

The words "lands reserved for the Indians" in the British North America Act have been the subject of judicial consideration in *Church v. Fenton*, 28 C.P. 384, in which the judgment of the Court was delivered by Mr. Justice Gwynne. It is on this account of great value, because he was charged with the duty of reporting upon various matters of difficulty and importance in connection with the Indian department at the time of the union of the Provinces in 1840. A reference to his name and services frequently appears in the reports of the commissioners from which I have so largely drawn. To understand some expressions in his judgment, it is essential to remember that the land then in dispute formed part of an original Indian reserve situate in the Saugeen Peninsula, which had been surrendered in 1854 for the purposes of sale in the usual way, out of which larger reserve surrendered, the Indians retained three smaller reserves for their special occupation. That decision was in 1878, and the learned Judge adopts the definitions given in the Act of 1876, whereby "Indian lands" were distinguished as well from "public lands," as from "Indian reserves." Referring to the 24th item of the 91st section of the Constitutional Act for Canada "lands reserved for the Indians," he thus proceeds, at p. 399: "That is an expression appropriate to the unsurrendered lands reserved for the use of the Indians described in different Acts of Parliament as "Indian reserves," and not to lands, in which, as here, the Indian title has been wholly extinguished." *Church v. Fenton* was affirmed in Appeal, 4 A. R., 159, and by the Supreme Court, 5 S. C. R. 239, though not on this precise point. If "lands reserved for Indians," and "Indian reserves" are of coextensive import, it is plain that the territory now in dispute cannot be called "land reserved for Indians."

But it is argued for the defendants that the key to unlock the meaning of the Act of 1867 must he sought in the Royal Proclamation of 1763.

The scope and object of that instrument, therefore, require to be considered. The primary intent of the proclamation was to provide, temporarily, for the orderly conduct of affairs in the settled parts of all the territory newly acquired in America, which was for that purpose subdivided into the four Governments of Quebec, East Florida, West Florida, and Grenada, and to encourage further settlement by the promise of the immediate enjoyment of English law. Power was conferred upon the governors and councils of the three colonies on the continent to grant such lands as were then or thereafter should be in the power of the Crown to dispose of, on such terms and conditions as might be necessary and expedient for the advantage of the grantees, and the

improvement and settlement of the colonies. So far as lands lay without the limits of these colonies, the governors were forbidden to grant patents, or to deal with them, and this chiefly on account of the several nations or tribes of Indians who were living under British protection. That prohibition was to last only "for the present, and till the King's further pleasure" should be known, and it is preceded by a recital that it is just, and reasonable, and essential to our interest, and the security of our colonies, that such 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 for them or any of them, as their hunting-grounds.

The proclamation next proceeds to deal with that part of the country which would then embrace the land now in question as follows: "And we do further declare it to be our Royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection, and dominion for the use of the said Indians all the lands and territories not included * * 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 and license for that purpose first obtained; and we do further strictly enjoin and require all persons whatsoever, who have either willfully or inadvertently 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, forthwith, to remove themselves from such settlements."

The proclamation then forbids private persons from presuming to make any purchases from the Indians of any lands reserved to the said Indians "within those parts of our colonies where we have thought proper to allow settlement," and directs that if at any time the Indians shall be inclined to dispose of the said lands, the same shall be purchased for us at some public meeting of the Indians to be held for that purpose by the Governor of the colony within which they shall lie. This proclamation has frequently been referred to, and by the Indians themselves, as the charter of their rights, and the last clause I have condensed relating to the manner of dealing with them in respect to lands they occupy at large, or as a reserve, has always been scrupulously observed in such transactions.

This provisional arrangement for the government of the country was superseded by the Quebec Act. The effect of that Act upon the proclamation was two-fold; by the enlargement of the boundaries of Quebec, the district now in litigation was brought within colonial limits and subjected to the control and jurisdiction of the Governor: it was taken out of the vague region called "The Indian Territories" in 43 Geo. III. ch. 138 (Imp. Stat. 1803) and was made part and parcel of the Province of Quebec. The next effect was, that inasmuch as the governmental arrangements made for Quebec by the proclamation were declared inapplicable to its state and circumstances, all its provisions, so far as related to that Province, were revoked, annulled, and made void: (Sec. 4 of 14 Geo. III. ch. 83.) New machinery of civil government was provided which, however, was not to interfere with the tenure of land as by the laws of England or the King's prerogative. (See secs. 4, 8, 9, and *Doe ex dem. Jackson v. Wilkes*, 4 O. S. at p. 147.) The proclamation, no doubt, remained operative as a declaration of sound principles which then and thereafter guided the Executive in disposing of Indian claims, but as indicating for this century the scope of the Indian reservations, or the intent with which they have been created under provincial rule, it must be regarded as obsolete. If the proclamation of 1763 and the Constitutional Act of 1887 are to be read as *in pari materiâ*, and all the intervening years of progress, material, legislative and political, overlooked, then the 40,000 square miles claimed by Ontario being part of what is covered by the North-West Angle Treaty is an "Indian Reserve." But in order to emphasize this *reductio ad absurdum* aspect of the case, let what little is known of the people in this remote region be recalled: when the treaty was made, the land it deals with formed the traditional hunting and fishing ground of scattered bands of Ojibbeways, most of them presenting a more than usually degraded Indian type. They belonged to the Saulteaux (*i. e.*, Fallsmen) tribe of the Ojibewa branch of the great and widespread Algonquin stock. Divided into thirty bands, they numbered, all told, some 2,600 or 2,700 souls. These only remained as representatives of the primitive possessors of the whole 55,000 square miles of territory, whose claim of occupancy thereon was extinguished by the treaty. If the whole is to be accounted a reserve this would represent an average of over 9,200 acres to each individual, as against 92 acres which was actually reserved by the treaty--the difference being one thousand fold. If the whole is a "reserve " then what was surrendered should be sold for the benefit of the Indians, according to the well understood practice in old Canada, but this was never contemplated. So far from this land being held as reserved for the Indians the parliamentary as well as the popular view in modern days is well illustrated by the C. S. U. C., ch. 128, which relates to unorganized tracts of country bordering on and adjacent to Lakes Superior and Huron which belong to this Province, and they are thus denominated, though section 104 speaks of Indians and half-breeds as frequenting and residing in the same.

There is an essential difference in meaning between the "reservations" spoken of in the Royal Proclamation, and the like term in the B.N.A. Act. The proclamation views the Indians in their wild state, and leaves them there in undisturbed and unlimited possession of all their hunting ranges, whereas the Act, though giving jurisdiction to the Dominion over all Indians, wild or settled, does not transfer to that government all public or waste lands of the Provinces on which they may be found at large.

The territorial jurisdiction of the Dominion extends only to lands *reserved* for them. Now it is evident from the history of "the reserves," that the Indians there are regarded no longer as in a wild and primitive state, but as in a condition of transition from barbarism to civilization. The object of the system is to segregate the red from the white population, in order that the former may be trained up to a level with the latter. The keynote of the whole movement was struck unmistakably in 1838, by Lord Glenelg, in his instructions to Sir Francis Bond Head: (Appendix to Journals of Assembly, 1837-8, p. 180.) He wrote thus: "The first step to the real improvement of the Indians is to gain them over from a wandering to a settled life, and for this purpose it is essential that they should have a sense of permanency in the locations assigned to them; that they should be attached to the soil by being taught to regard it as reserved for them and their children by the strongest securities." The distinctive feature of the system in Canada was the grouping of the separate tribes for the purposes of exclusive and permanent residence within circumscribed limits. Those limits were almost invariably allocated at their usual centres of settlement, and within the ambit of their respective hunting ranges as recognized among themselves. Contrasted with this is the plan chiefly followed in the United States, where the main object has been to mass all the Indian nations and tribes in one vast district called "The Indian Territory," which comprises an area of about 70,000 square miles. But in Canada, the bounds of the separate reserves being ascertained by survey or otherwise, the various communities betake themselves thereto as their "local habitation." Here they are furnished with appliances and opportunities to make themselves independent of the precarious subsistence procured from the chase; they are encouraged to advance from a nomadic to an agricultural or pastoral life, and thus to acquire ideas of separate property, and of the value of individual rights to which, in their erratic tribal condition, they are utter strangers, so that, ultimately, they may be led to settle down into the industrious and peaceful habits of a civilized people.

Again: The relations between the Government and the Indians change upon the establishment of reserves. While in the nomadic state they may or may not choose to treat with the Crown for the extinction of their primitive right of occupancy. If they refuse the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so, sooner or later, to displace them. If, however, they elect to treat they then become, in a special sense, wards of the State, are surrounded by its protection while under pupilage, and have their rights assured in perpetuity to the usual land reserve. In regard to this reserve the tribe enjoy practically all the advantages and safeguards of private resident proprietors: *Bastien v. Hoffman*, 17 L. C. R. 238. Before the appropriation of reserves the Indians have no claim except upon the bounty and benevolence of the Crown. After the appropriation, they become invested with a legally recognized tenure of defined lands; in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement. It is "lands reserved" in this sense for the Indians which form the subject of legislation in the B.N.A. Act, *i. e.*, lands upon which or by means of the proceeds of which, after being surrendered for sale, the tribes are to be trained for civilization under the auspices of the Dominion. It follows that lands ungranted upon which Indians are living at large in their primitive state within any Province form part of the public lands, and are held as before Confederation by that Province under various sections of the B.N.A. Act. [See secs. 92 (item 5), also secs. 6, 109 and 117.] Such a class of public lands are appropriately alluded to in section 109 as lands belonging to the Province in which the Indians have an interest, *i. e.*, their possessory interest. When this interest is dealt with by being extinguished, and by way of compensation in part, reserves are allocated then the jurisdiction of the Dominion attaches to those reserves. But the rest of the land in which "the Indian title" so called has not been extinguished remains with its character unchanged as the public property of the Province.

The Indian title was, in this case extinguished by the Dominion treaty in 1873, during a dispute with the Province as to the true western boundary of Ontario. (See Dom. Sess. Papers, 1875, vol. 8, No. 7, Paper 8, p. 19.) It was proposed in 1872, on behalf of the Dominion, that both Governments should agree upon some provisional arrangement and boundary in order that both might proceed with the granting of land, and the issuing of licenses in distinct parts of this disputed territory, pending the definite settlement of the true line. (See Sess. Papers, Ont., 1873, vol. 5, part 3, Paper 44, pp. 6-20) This arrangement was not carried out till 1874, at which time a provisional boundary line was adopted. The delay arose from the desire of the Dominion to effectuate this treaty. The Minister of the Interior, in his official report of June, 1874, (see Dom. Sess. Papers, 1875, vol. 8, No. 7, Paper 8,) states that as the Indian title to a considerable part of the territory in dispute had not been extinguished in 1872, it was thought desirable to postpone the negotiations for a conventional arrangement under which the territory might be opened for sale or

settlement, until a treaty was concluded with the Indians[g]

The boundary dispute having been referred to arbitration, an award was made in favour of Ontario in August, 1878, after which, in December, 1879, the Provincial Government notified the other Government that the provisional arrangement was at an end. (See Sess. Papers Ont., 1880, No. 46, p.2.) This appears to have been acceded to by the Dominion in January, 1882, (see Dom. Sess. Papers, 1883, vol. 16, No. 12, Paper 95, p. 3,) and both were then understood to be left to assert their respective rights in reference to all questions involved. A declaration of right to this territory was made in March, 1882, by the Legislature of Ontario, (see Journals of Legislative Assembly Ont., 1882, vol. 15, pp. 154-161,) and after this the defendants procured the license to cut timber, which is now the subject of litigation. It appears to me that the diplomatic attitude of both Governments during this transaction, favours the view that both understood the British North America Act to mean that which I now decide it does mean, as to "Public Lands" and "Reserves" and "Indian Title."

So also the inter-state, dealings which took place upon and after the admission of British Columbia into the Confederation, cast a light upon the whole subject I have been discussing, which is favorable to the conclusions at which I have otherwise arrived. Provision is made in sec. 146 of the "British North America Act" for the reception of other colonies into the Canadian union, "subject to the provisions of that Act," and based upon that the negotiations I am about to mention proceeded.

British Columbia, when a Crown colony pursued a policy, more or less definite with reference to the comparatively settled Indian population there resident, the object of which was to distribute the Indians to a greater extent among the white inhabitants than was deemed desirable by the Government of old Canada. That policy however, involved the setting apart of tracts of land as reserves for the use of most of the tribes, and these, as an invariable rule, embraced the village sites, settlements, and cultivated lands of the Indians, and of late years it was considered that a reservation in the proportion of ten acres for each family, (five being regarded as the family unit,) to be held as the joint and common property of the several tribes for their exclusive use and benefit, was a sufficient provision by way of compensation for all their claims upon the rest of the Crown lands. After this colony joined the Canadian union, discontent arose among the Indians, and it was deemed necessary to devise a scheme for the readjustment of the system of Indian land reserves so as to conform, as far as possible, to the customary policy and practice of the older Provinces which had been adopted by the Dominion. The thirteenth article of the terms of union of 1871[h] provided as follows: "The charge of the Indians and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the union. To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall, from time to time, be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government," and in case of disagreement respecting the quantity, the matter was to be referred to the Secretary of State for the Colonies.

The policy and practice of old Canada being to concentrate the Indians upon reserves, and to allot land for such purpose in the proportion of at least eighty acres for each family of five, it was contended on the part of the Pacific Province that such a policy should not be extended to the granting of future reserves, and that the previously existing reserves should not be disturbed. It was alleged that this policy of extensive land reserves however suitable to the Plain and Mountain Indians of the North-West, was not adapted to the wants and habits of the Maritime Indians. The Provincial and Dominion Governments at last agreed upon a scheme for the settlement of the matters in difference, and for the adjustment of the reserves upon these among other terms:

Three commissioners were to be appointed who, after enquiry on the spot, should fix and determine for each nation separately, the number, extent, and locality of the reserve or reserves to he allotted to it; no basis of acreage was to be fixed, but each nation should be dealt with separately.

In the event of any material increase or decrease thereafter of the numbers of a nation occupying a reserve, such reserve was to be enlarged or diminished as the case might be. "The extra land required by any reserve shall be allotted from Crown lands, and any land taken off a reserve shall revert to the Province."

In a large part of the unsettled domain of British Columbia, as I gather from the blue books,

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[g] All papers, treaties, &c., relating to this boundary dispute may be found either in kthe volume entitled "Ontario Boundaries before Privy Council," contained in Osgoode Hall Library, or in the volume entitled. Correspondence, Papers, and Documents of dates from 1856 to 1882, inclusive, relating to the Northerly and Westerly Boundaries of the Province of Ontario, printed by order of the Legislative Assembly, by C. Blackett Robinson, Toronto, 1882.

[h] See Statutes of 1872, D.

the Indian title had not been extinguished. The last provision I have above quoted, was inserted in consequence of the contention of the Dominion that the quantity of land proposed to be assigned by the Local Government was inadequate even for the present necessities of the tribes, and that when land matters were involved the claims of the redmen were entirely subordinated to those of the whites.

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

As the Dominion claimed this territory at the time of the North-West angle treaty, that treaty was concluded *ex parte* so far as Ontario is concerned. But as in the case of British Columbia, when the Province is the owner of the public lands, and for the purposes of settlement it is needful to extinguish the Indian title and allot reserves, it may well require the co-operation of both the General and the Local Governments in order properly to adjust the terms and details. It would seem unreasonable that the Dominion Government should be burdened with large annual payments to the tribes without having a sufficiency of land to answer, presently or prospectively, the expenditure, and it would also seem unreasonable to allot reserves in the absence of the Province, whose schemes for opening up the country might be prejudiced by the reserves being unsuitably placed. However that may be, in the present case, my judgment is, that the extinction of title procured by and for the Dominion, enures to the benefit of the Province as constitutional proprietor by title paramount, and that it is not possible to preserve that title or transfer it in such wise as to oust the vested right of the Province to this as part of the public domain of Ontario.

Whatever equities--I use this word for want of a more suitable--may exist between the two Governments in regard to the consideration given and to be given to the tribes, that is n matter not agitated on this record.

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

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